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² Appointed October 1, 1909, to succeed Denson, J.

³ Resigned April 16, 1910.

⁴ Became Chief Justice April 16, 1910.

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THE
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BEDSOLE v. STATE.

(Supreme Court of Florida. March 22, 1910.
Headnotes Filed April 27, 1910.)

(Syllabus by the Court.)

1. PERJURY (§§ 22, 23*)—INDICTMENT—OATH.

It is an essential allegation in an indictment for perjury that the party charged was duly sworn, and that the oath was administered to him by some one authorized by law to administer such oath.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 76-80; Dec. Dig. §§ 22, 23.*]

2. PERJURY (§ 22*)—INDICTMENT—JURISDICTION OF COURT.

In an indictment for perjury alleged to have been committed during the trial of a cause in a court, it should be alleged that such court had jurisdiction to hear, try, and determine such cause.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 76; Dec. Dig. § 22.*]

In Banc. Error to Criminal Court of Record, Walton County; D. S. Gillis, Judge.

W. T. Bedsole was convicted of perjury, and brings error. Reversed.

C. O. Andrews, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

TAYLOR, J. By writ of error the plaintiff in error brings here for review a judgment of conviction of the crime of perjury in the criminal court of record for Walton county. The information upon which he was tried was as follows:

"Be it remembered that A. G. Campbell, county solicitor for the county of Walton, prosecuting for the state of Florida in said county, under oath information makes: That one Will Bedsole, alias W. T. Bedsole, late of the county of Walton, in the state aforesaid, on the 29th day of April in the year of our Lord one thousand nine hundred and nine, at and in the county of Walton aforesaid, did then and there, being lawfully required and sworn to depose the truth in a certain proceeding in the justice of the peace court of justice district No. 6, in Walton county, state of Florida, in a certain proceeding therein being tried wherein the state of Florida was plaintiff and the said Will Bedsole was defendant, he, the said Will Bedsole,

alias W. T. Bedsole, being then and there charged with cruelty to animals in overdriving and depriving of feed and other attention two horses, the property of one R. L. Burnham, and then and there being sworn at said trial as a witness in his own behalf, did then and there willfully and corruptly swear falsely of and concerning certain matters material to the issue therein tried; that is to say, that in the said trial of said cause aforesaid in the said justice court aforesaid a certain material element and matter to be considered was the distance he, the said Will Bedsole, alias W. T. Bedsole, had driven the said horses, and whether or not he had fed the said team at the noon hour, and when he had so fed them, and he, the said Will Bedsole, being then and there sworn as aforesaid, did then and there knowingly, corruptly, and falsely swear that he had driven the team no further than to a certain negro house between the house of one W. L. Owens and Rocky Bayou, and that he had at the said negro's house in said county aforesaid purchased feed for said horses and fed said team at the house of the said negro, and that he then returned to Freeport, Florida. That the said testimony so given by the said Bedsole was as to a matter material to the issue then being tried as aforesaid, and that the same was false; he, the said Will Bedsole, not having purchased the said feed from the said negro as aforesaid, and not having fed the said team as he thus swore that he had done, and he having further driven the said team beyond the house of the said negro some distance to the log camp of one John Riley Wright—against the form of the statute in such case," etc.

After verdict the defendant moved in arrest of judgment, among others, on the grounds: The information does not state before whom the defendant was sworn, or that it was before any one authorized to administer an oath; because the information does not state that the Sixth justice district had jurisdiction to try said case before him in which perjury is alleged to have been committed. This motion should have been granted.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
52 80.—1

In *Craft v. State*, 42 Fla. 567, 29 South. 418, it was held that in an indictment for perjury it is an essential allegation that the party charged was duly sworn, and that the oath was administered to him by some one authorized by law to administer such oath. *Markey v. State*, 47 Fla. 38, 37 South. 53; *Adkinson v. State* (decided here at the present term) 51 South. 818. The information here fails to state that the defendant was sworn by any one authorized by law to administer an oath. The information fails also to allege that the justice of the peace who tried the alleged cause in which the alleged perjury was committed had jurisdiction to hear and determine said cause.

The judgment of the court below is hereby reversed, and the cause remanded, with directions to quash the information upon which the defendant was tried. All concur, except SHACKLEFORD, J., absent.

SAPP v. STATE.

(Supreme Court of Florida. Division A.
March 21, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1091*)—TRIAL—OBJECTIONS TO EVIDENCE.

Where the bill of exceptions does not disclose the particular testimony objected to as immaterial, and on the whole record it does not appear that error was committed, an exception to a ruling permitting a witness "to testify relative to said matter" is not well taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2832; Dec. Dig. § 1091.*]

2. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS.

Instructions in a criminal prosecution that the "evidence need not be positive or expressed," and that the jury "should not be prejudiced against this charge because it is an information" as distinguished from an indictment, held not to be reversible errors in this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8154; Dec. Dig. § 1172.*]

3. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—HARMLESS ERROR.

An instruction that the jury is "to determine whether a man who is innocent will remain silent when he is accused of committing a crime" should not be given; but where the verdict is clearly warranted by the evidence, and, considering the whole record, no harm could reasonably have resulted to the defendant, the charge may be harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. § 1172.*]

Error to Circuit Court, Columbia County; W. S. Bullock, Judge.

Alex Sapp was convicted of a sale of intoxicating liquors, and brings error. Affirmed.

J. B. Hodges and F. P. Cone, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiff in error was convicted of selling alcoholic liquors

in Columbia county, where such sale is forbidden by law. On writ of error it is contended that improper testimony was admitted, that erroneous charges were given to the jury, and that the verdict is contrary to the law and to the evidence.

At the trial the state "offered to prove" by a witness "where one Jerry Crowley was found dead in Columbia county," to which the defendant objected on the ground that it was immaterial. The witness was permitted "to testify relative to said matter," and the defendant excepted. It is the duty of the plaintiff in error to make the errors assigned clearly appear. All presumptions are in favor of the correctness of the rulings of the trial court. The bill of exceptions does not disclose what particular testimony was objected to, and, in view of the entire record, it does not affirmatively appear that the court erred in permitting evidence to be given relative to where Crowley was found dead. The same may be said of the ruling of the court in permitting another witness to testify "to the matter" "that there was whisky found near the person of Jerry Crowley when he was found dead."

The defendant called a witness to impeach the "reputation" of a state witness "for truth and veracity," and upon cross-examination the state "endeavored to elicit from the said witness some matters relative to the selling of whisky by the defendant." On objection by defendant because it was not proper on cross-examination, the court held "that the said matter ought to be permitted and received in evidence"; but it is not stated that the said matter was in fact admitted in evidence. It appears that on cross-examination that the witness did testify that he believed a named person "did get the whisky from Alex Sapp"; but it does not appear that this was the particular testimony objected to. The inquiry on the direct examination was apparently not confined to the "general reputation" of the witness.

In instructing the jury as to their duty when they believe from the evidence beyond a reasonable doubt that the defendant sold whisky as alleged in the information, the court added: "This evidence need not be positive or expressed." The evidence was positive and express as to the acts alleged, and the portion of the charge complained of was harmless, even if erroneous. By including in an instruction a statement that the jury "should not be prejudiced against this charge because it is an information," as distinguished from an indictment, the court did not commit a reversible error, but made an apparently unnecessary suggestion to the jury. The portion of the charge that the jury is "to determine whether a man who is innocent will remain silent when he is accused of committing a crime" should not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have been given; but the verdict is clearly warranted by the evidence, and, considering the whole record, no harm could reasonably have resulted to the defendant by the charges complained of. The verdict does not appear to be contrary to the evidence or to the charge of the court or to the law.

The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, P. J., and HOCKER and PARK-HILL, JJ., concur in the opinion.

TATUM v. PRICE-WILLIAMS.

(Supreme Court of Florida. March 21, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1135*)—DETERMINATION OF CAUSE.

Where there is evidence to support the findings of fact and a decree thereon, and no error is made to appear, the decree will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4454; Dec. Dig. § 1135.*]

2. TENANCY IN COMMON (§ 28*)—RIGHTS OF CO-TENANT—EXCLUSION FROM PROPERTY.

Where one of the owners of property wrongfully excluded another owner from participation in the operation and benefits of the property, a decree that losses incurred in the operation of the property during such exclusion should not fall upon the excluded part owner, and that the excluded part owner was entitled to a rental value of his interest in the property while so excluded, will not be reversed where no error appears upon a consideration of the whole case.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 78; Dec. Dig. § 28.*]

In Banc. Appeal from Circuit Court, Dade County; M. S. Jones, Judge.

Bill by Vernon Price-Williams against J. H. Tatum. Decree for complainant, and defendant appeals. Affirmed.

Mitchell D. Price, for appellant. Hudson & Boggs, for appellee.

WHITFIELD, C. J. Vernon Price-Williams filed a suit in equity against J. H. Tatum and L. V. Dixon in the circuit court for Dade county. The bill of complaint alleges that on August 4, 1906, the appellee, complainant below, purchased of R. C. McGahey an undivided half interest in a sawmill, and as copartners they owned and operated the same; that without the knowledge or consent of complainant, J. H. Tatum, one of the defendants below, purchased the half interest of McGahey in the property; that Tatum sold to Dixon an interest in the sawmill, the extent of which is unknown to complainant; that Tatum and Dixon have operated and continued to operate said sawmill as R. C. McGahey & Co., "but have denied and refused complainant an accounting for the

conduct and profits thereof and have refused and denied complainant access to the books of said business and have failed and refused to pay to complainant any part of the profits thereof." The prayer is for an accounting, partition, restraining orders, and for a receiver. By answer Tatum averred facts to show that McGahey did not have a half interest in the business, and that Price-Williams did not have a half interest therein. L. V. Dixon was appointed receiver. Testimony was taken by a master, who found that about July 1, 1906, McGahey and Tatum entered into a partnership agreement to own and operate a sawmill; that about November 19, 1906, Vernon Price-Williams acquired the interest of McGahey; that the interest of said Vernon Price-Williams in said business on November 19, 1906, was \$1,419.72, and the interest of Tatum was \$778.29; that the business ceased to be a partnership on said date; that Tatum and Albert Ogle are not entitled to salary credits affecting the interest of Price-Williams; that Tatum after November 19, 1906, excluded Price-Williams from any participation whatever in the management of said business and refused him access to the books, etc.; that Price-Williams is entitled to interest on the value of his part of the sawmill business from November 19, 1906, to March 15, 1907; that the business was operated by the receiver at a loss of \$835.09; that certain stated liabilities existed against the property, against the receiver, and against Tatum.

Exceptions by the defendant to the findings of fact were overruled by the court, and an exception by the complainant to the finding that interest was due complainant for the use of his share of the sawmill was sustained.

The court decreed that on November 19, 1906, Tatum and Price-Williams were equal owners in common of the property and business; that Tatum owed the business \$641.42; that after said Tatum had excluded complainant from his rightful participation in the management of the business and had operated the same for his own use and benefit, whereby Tatum further owed the business \$63.60; that partition be had; that certain claims be paid interveners; that Tatum pay appellee \$300, as rental value of complainant's part of business while he was excluded. Tatum appealed, and errors are assigned on the exceptions overruled, on the exception sustained, and on the portions of the decree, that Tatum owes the business \$641.42, that Tatum pay appellee \$300, as rent, and that Tatum excluded appellee from participation in the business.

The evidence in the transcript has been considered, and there appear to be no material errors in the findings of fact and the rulings thereon of which the appellant may here rightfully complain.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contention that the amount of appellant's interest in the business on November 19, 1908, when the share of appellant's partner in the partnership was sold to appellee, was erroneously ascertained and decreed, has not been affirmatively sustained, as there is evidence to support the findings and the rulings thereon. That appellant excluded the appellee from participation in the operation and benefits of the property is supported by the evidence, and the features of the decree that the losses incurred by the operation of the property while appellee was excluded from its management and benefit should not fall upon appellee, and that a rental indebtedness was due appellee by appellant, who had the sole use and benefit of the property, do not appear upon a consideration of all the evidence to be erroneous.

The decree is affirmed.

All concur.

STATE ex rel. BURR et al., Railroad Com'rs,
v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida. Feb. 1, 1910.
Headnotes Filed April 20, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 12*) — REGULATION — RULE OF RAILROAD COMMISSIONERS—CONSTRUCTION.

Rule 15A of the Railroad Commissioners of this state merely fixes a rate for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state to any planing mill in the Jacksonville yards, and thence, after lumber is dressed, to any point in said yards. This rule does not seek to compel a service.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

2. CARRIERS (§ 11*)—STOPPING LUMBER IN TRANSIT FOR TREATMENT — NATURE OF RIGHT.

The service contemplated by rule 15A of the Railroad Commissioners of this state, the stopping of a commodity in transit for the purpose of treatment, is in the nature of a special privilege, which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 11.*]

3. CARRIERS (§ 188*) — STOPPING LUMBER IN TRANSIT FOR TREATMENT—COMPENSATION.

The carrier is entitled to compensation, a reasonable profit beyond the mere costs for the extra service rendered, and the privilege extended of stopping cars loaded with lumber at planing mills for treatment and then transporting and delivering them to the place of destination.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 188.*]

4. CARRIERS (§ 13*) — GRANTING MILLING PRIVILEGE IN TRANSIT—DISCRIMINATION.

Carriers may not discriminate between markets nor between individuals in the granting of the privilege of milling in transit, and Railroad Commissioners likewise, in regulating such privileges, may not unjustly discriminate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-905; Dec. Dig. § 13.*]

5. CARRIERS (§ 12*)—REGULATION—RATES FOR ALLOWING MILLING OF LUMBER IN TRANSIT.

It is not essential to the validity of rule 15A of the Railroad Commissioners that it should prescribe or fix one rate for the service of milling in transit to be rendered in all markets and localities of the state. The circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

6. CARRIERS (§ 12*)—REGULATION OF RATES—MILLING PRIVILEGE IN TRANSIT.

Whether the service of milling in transit as contemplated by rule 15A may or may not be enforced as a duty, yet, when voluntarily entered upon, it may be regulated and the charges therefor prescribed by the Railroad Commissioners.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

7. CARRIERS (§ 77*) — DUTIES ARISING FROM USAGE.

It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and, when once established, the obligation of such carriers to perform them is as binding in the one case as in the other.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 77.*]

8. DEDICATION (§ 60*)—PUBLIC USE.

Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large, and, when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 60.*]

9. MANDAMUS (§ 162*)—MOTION TO QUASH—MATTERS NOT FOUND IN ALTERNATIVE WRIT.

Matters stated in a motion to quash or in respondent's brief cannot be considered if not found in the alternative writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. § 162.*]

In Banc. Mandamus by the State, at the relation of R. Hudson Burr and others, Railroad Commissioners, against the Atlantic Coast Line Railroad Company. Motion to quash alternative writ overruled, and respondent required to answer.

An alternative writ of mandamus was issued here, as follows:

"In the Supreme Court of the State of Florida.

"The State of Florida, to Atlantic Coast Line Railroad Company—Greeting:

"Whereas by a petition filed by our Railroad Commissioners in our Supreme Court in the name of the state of Florida, through Louis C. Massey, as special counsel for our said Railroad Commissioners designated by them, it has been made to appear:

"(1) That the Atlantic Coast Line Railroad Company is a railroad corporation existing under the laws of the state of Virginia, which on the first day of July, 1902, became the

owner of divers lines of railway in the state of Florida by purchase from the Savannah, Florida & Western Railway Company, which lines, with others since acquired in this state, particularly the Jacksonville Southwestern Railway extending from Jacksonville to Newberry, it operates as a common carrier of persons and property, including rough and dressed lumber, from points in this state to other points therein.

"(2) That the city of Jacksonville is an important station on some of the said lines of the Atlantic Coast Line Railroad Company, where it maintains and operates by virtue of ownership or of right by lease, contract or otherwise, extensive terminals, railroad yards and switching facilities for the reception, handling, transportation and delivery of property transported by it to and from the city of Jacksonville from and to other points in this state, and that such terminals, railroad yards and switching facilities, or some portion thereof, were maintained and operated by the Savannah, Florida & Western Railway Company, the predecessor in the title of the Atlantic Coast Line Railroad Company, since about the year 1884 to the time of the sale thereof as aforesaid, on July 1, 1902. That other railroad companies whose lines enter the city of Jacksonville also maintain and operate like terminals, railroad yards and switching facilities for like purposes, as they or their predecessors have done for many years, and the said terminals and railroad yards, including those of the Atlantic Coast Line Railroad Company, are all connected together by transfer tracks and switches, so that the terminal tracks and railroad yards of the city of Jacksonville cover a vast extent of territory in and around said city.

"(3) That as hereinbefore set forth, the said railroad yards in the city of Jacksonville or a portion thereof have been maintained and operated for many years past by the railroads entering that city, and as far back at least as the year 1891 planing mills have been established within the said yard limits and accessible to the tracks therein, to which it was and is usual and customary for the railroad companies to switch upon order of the consignees, cars of rough lumber shipped to and arriving at the city of Jacksonville from other points in this state, for the purpose of dressing the same, and after dressing to switch the said cars of lumber to some other point in the yards designated by the said consignees.

"(4) That in the year 1891 and from thence continuously until the year 1907 the said railroad companies entering the city of Jacksonville aforesaid, including the Savannah, Florida & Western Railway Company and its successor the Atlantic Coast Line Railroad Company, made a charge of two dollars per car for switching cars of rough lumber shipped to the said city, to a mill within the yards as aforesaid, and thence, after the dressing of the lumber, to some other point in the said

yards for delivery, and this charge was the same, whether the switching movement of the car was over the tracks of one or more railroads; but about the autumn of the year 1907, the said railroad companies maintaining and operating the railroad yards at the said city increased the charge for the said service to five dollars per car if the switching was over the tracks of one railroad company only, and to seven dollars per car if it was over the tracks of two railroad companies.

"(5) That upon the complaints of citizens of Jacksonville and of other parts of this state that the charges exacted as aforesaid by the railroad companies were exorbitant and unreasonable, your petitioners gave due notice of their intended action and of the time and place of hearing, to all the railroad companies and to the persons interested, and pursuant to said notice held a session in the city of Jacksonville on December 8, 1908, at which a very full and exhaustive hearing of all the parties interested was had, and thereupon on December 19, 1908, your petitioners prescribed a rate for the said services in a new rule to take effect January 1, 1909, and to be known as rule 15A of the 'Rules Governing the Transportation of Freight,' which is as follows:

"'15A. The charge for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state to any planing mill in the Jacksonville yards, and thence, after lumber is dressed, to any point in the same yards, shall not be more than \$2.00 per car; provided, that when the said switching movement is over the tracks of more than one railroad, a charge of not more than \$3.00 may be made. This rule shall not be interpreted as rescinding or modifying rule 15 except as herein specifically provided.'

"(6) That rule 15 of the 'Rules Governing the Transportation of Freight,' referred to in said rule 15A, is, and was at the time of making the order last aforesaid, as follows:

"'15. A charge of not more than \$2.00 per car, without regard to its weight or contents, will be allowed for transporting, switching or transferring a loaded car from any point on any railroad to any connecting railroad, or to any warehouse, side track or other point of delivery that may be designated by the consignee, within a distance of three miles from the point of starting, and no railroad company shall decline or refuse to transport, switch or transfer any car as above, or, to receive it from any connecting railroad for such purposes. When in the transfer, switching or transportation of a car between such points, it is necessary to pass over the track or tracks of any intermediate railroad or railroads, said maximum charge of two dollars shall be equitably divided between the railroads at interest. When a charge is made for the transfer, switching or transportation of a loaded car between such points, no additional charge

shall be made for the accompanying movement of the empty car in the opposite direction. Provided, that this rule shall not interfere with any prevailing legal rate for the transportation of freight between different stations: and shall not apply to any freight that does not pay a direct freight transportation charge in connection with a switching charge.'

"(7) That the Atlantic Coast Line Railroad Company has entirely ignored and refused to charge and put into effect the rate prescribed in and by said rule 15A, but has charged and received since January 1, 1909, and is still charging and receiving the sum of five dollars for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to a planing mill in the Jacksonville yards and thence, after the lumber is dressed, to a point in the same yards when the said switching movement is over its own tracks only, for which service under the said rule 15A it is entitled to charge and receive the sum of two dollars.

"(8) That your petitioners, as the Railroad Commissioners of this state, and the people of this state are entirely without adequate remedy in the premises unless it be afforded them by the interposition of this honorable court through a writ of mandamus.

"Now therefore: We being willing that full and speedy justice be done in the premises, do command you, the Atlantic Coast Line Railroad Company, forthwith to observe the rate prescribed in rule 15A of the 'Rules Governing the Transportation of Freight' by our Railroad Commissioners for switching cars of lumber over your own tracks only in the Jacksonville yards; that is to say, to charge and receive no more than the sum of two dollars per car for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards and thence, after lumber dressed to any point in the same yards, when the said switching movement is over your own tracks only; or that you appear before the justices of our Supreme Court, sitting within and for the state of Florida at the Courtroom in the city of Tallahassee on the twenty-second day of June, A. D. 1909, at 10 o'clock a. m. of that day, and show cause why you refuse so to do, and have you then and there this writ.

"Witness the Honorable James B. Whitfield, Chief Justice of the Supreme Court of the state of Florida, and the seal of the said Supreme Court, at Tallahassee, the Capital, this eighth day of June, A. D. 1909.

"[Seal] M. H. Mabry,

"Clerk Supreme Court, State of Florida."

The respondent filed a motion to quash the alternative writ of mandamus upon the following grounds:

"First. No power is conferred by law up-

on the Florida Railroad Commissioners to make and enforce the rule set forth in said alternative writ as 'rule 15A,' of the Rules Governing the Transportation of Freight.

"Second. That the effect of the enforcement of rule 15A set out in the alternative writ would be to deprive the defendant of its property without due process of law, and therefore, in contravention of the fourteenth amendment of the Constitution of the United States.

"Third. The alternative writ shows the movement covered by said rule 15A is not a switching movement, and does not make provision for compensation for a switching movement or service, but shows that the movement covered by it is a transportation movement or service, and makes provision for a transportation service.

"Fourth. By order No. 248 set out in the alternative writ, whereby rules No. 15 and No. 15A are a part of one regulation, the said two rules taken together are so inconsistent and uncertain as to be incapable of enforcement.

"Fifth. The alternative writ shows that the movement covered by said rule 15A is not a switching movement, and does not make provision for compensation for a switching movement, or service, but shows that the movement covered by it is a transportation movement, or service, and makes provision for a transportation service, which provision is discriminatory against, and unreasonable, arbitrary, and illegal as to the respondent, and other like railroad companies and common carriers, at Jacksonville, Fla., as against and in the case of like railroad companies and common carriers at other points in the state of Florida.

"Sixth. Rule 15A produces an unjust and illegal discrimination in that it provides a particular and lesser rate for a particular class of manufacturers, shippers, and consignees, to wit, manufacturers of dressed lumber, at a particular point in Florida, to wit, Jacksonville, Fla., as against other manufacturers, shippers, and consignees of other products at the same point, Jacksonville, and as against manufacturers, shippers, and consignees of the same and other products at other points in the state of Florida.

"Seventh. Rule 15A shows upon the part of the Railroad Commissioners an arbitrary intent to discriminate, not only against manufacturers, shippers, and consignees, other than manufacturers, shippers, and consignees of dressed lumber, at Jacksonville, Fla., but also the same intent as against all shippers, manufacturers, and consignees at other points than at Jacksonville, Fla., and a disposition to arbitrarily control the transportation, at Jacksonville, of dressed lumber, to the benefit of manufacturers, shippers, and consignees of dressed lumber at Jacksonville, regardless of law and the rules condemning irregularity and discrimination.

"Seventh (a). That this rule sought to be enforced is unreasonable and unjust.

"Eighth. And for other grounds apparent upon the face of said writ. Wherefore, respondent prays that said writ be quashed."

W. E. Kay and Doggett & Smith (Geo. P. Raney and E. J. L'Engle, of counsel), for the motion. L. O. Massey, opposed.

PARKHILL, J. (after stating the facts as above). As interesting and important as it is, the question whether the effect of the enforcement of rule 15A would be to deprive the respondent of its property without due process of law, and therefore in contravention of the fourteenth amendment of the Constitution of the United States, because it requires, as argued, that railroads shall part with their cars or make connections with other railroads without due process of law, does not confront us. This rule does not seek to compel a service, but merely to fix a rate therefor. "The charge for switching cars of rough lumber * * * to any planing mill in the Jacksonville yards and thence, if the lumber is dressed, to any point in the same yards, shall not be more than two dollars per car. * * *" It is true that the rule further provides "that when the said switching movement is over the tracks of more than one railroad a charge of not more than three dollars may be made," but such rule nowhere requires or compels the service over more than one railroad, and the alternative writ herein complains that the respondent only "has * * * refused to charge and put into effect the rate prescribed in and by said rule 15A, but has charged and received * * * and is still charging and receiving the sum of five dollars for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to a planing mill in the Jacksonville yards and thence, after the lumber is dressed, to a point in the same yards when the said switching movement is over its own tracks only, for which service under the said rule 15A it is entitled to charge and receive the sum of two dollars." And the command of the writ is that the respondent forthwith "observe the rate prescribed in rule 15A of the 'Rules Governing the Transportation of Freight' by our Railroad Commissioners for switching cars of lumber over your own tracks only in the Jacksonville yards; that is to say, to charge and receive no more than the sum of two dollars per car for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards and thence, after lumber is dressed, to any points in the same yards, when the switching movement is over your own tracks only."

It is also true that rule 15, in prescribing a rate for transporting, switching, or transferring a loaded car from any point on any

railroad to any connecting railroad, or to any warehouse, side track, or any other point of delivery that may be designated by the consignee within a distance of three miles from the point of starting, provides that no railroad company shall decline or refuse to so transport, switch, or transfer any car, or to receive it from any connecting railroad for such purpose; but the service here contemplated is entirely distinct from that of switching cars of rough lumber to a planing mill and thence if the lumber is dressed to any point in the same yards, as provided by rule 15A.

The service contemplated by rule 15A, the stopping of a commodity in transit for the purpose of treatment, is said to be in the nature of a special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. *Diamond Mills v. Boston & M. R. R. Co.*, 9 Interst. Com. R. 311. Whether the carrier is or is not under obligations to permit the interruption of the transit, the rule merely seeks to regulate the charge for such service when rendered. Whether intentionally or not, rule 15A seems not to have determined that question as far as the Commission may determine it, for it fails to contain the provision that no railroad company shall decline or refuse to transport, switch, or transfer any such car, or the further provision that no railroad shall refuse to receive such car from any connecting railroad for such purposes, while these provisions are made a part of rule 15, which provides a rate for transporting, switching, or transferring a loaded car from any point on a railroad to any connecting railroad or to any warehouse, side track, etc., not stopping the commodity for the purpose of treatment.

As the rule plainly avoids the difficulties that have been suggested in the second ground of the motion to quash, we will not undertake to consider them. So understanding the two rules, 15 and 15A, and taking them together, we do not think them so inconsistent and uncertain as to be incapable of enforcement, as is suggested in the fourth ground of the motion to quash.

We cannot see, from anything in the alternative writ, wherein rule 15A is discriminatory against Jacksonville, or against localities other than that city, or against commodities and dealers therein, other than rough lumber, or against the respondent and other railroad companies and common carriers at Jacksonville and at other points in this state, as is contended for in the fifth, sixth, and seventh grounds of the motion to quash. In regard to these matters and contentions we must confine ourselves to the allegations of the alternative writ. Matters stated in the motion to quash or in respondent's brief cannot be considered, if not found in the alternative writ. *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990.

There is nothing in the alternative writ to show that there are any planing mills within railroad yards in localities or lumber markets other than Jacksonville, or that railroad companies in these other localities either do not, or are compelled, to render the service of transfer to or from the mill if there be one, or that other commodities are shipped to Jacksonville or other localities for stoppage at mills of any kind for treatment, or that the charge made by other railroads for like service at other places is unreasonable or excessive. In fact, there is nothing on the face of the alternative writ to sustain the charge of unjust discrimination made in the motion to quash. We cannot see in the allegations of the alternative writ that rule 15A provides a lesser rate for manufacturers of dressed lumber at Jacksonville than it does for other manufacturers and shippers of other products at Jacksonville, and manufacturers, shippers, and consignees of the same and other products at other points in this state. Undoubtedly carriers may not discriminate between markets nor between individuals in the granting of such privileges as are contemplated by rule 15A (*Southern Railway Company v. St. Louis Hay & Grain Company*, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004), and the Commissioners likewise in regulating such privileges may not unjustly discriminate; but such discrimination, if it exists, should be set up by a return to the alternative writ. It cannot be made so to appear by motion to quash or in the form of a speaking demurrer, where there is nothing in the record as made by the alternative writ to evidence any such discrimination.

The alternative writ does not show that the rate fixed by the Commission in rule 15A is unreasonable, unjust, or exorbitant or unjustly discriminatory in amount against any other locality or person. If the rate is so illegal and unjust, it may be made to appear by return to the alternative writ; but for aught that appears the same rate may prevail for other markets, by virtue of other rules. There may be subdivisions of rule 15 for every letter of the alphabet dealing with other places, markets, and commodities. It is not essential to the validity of rule 15A that it should prescribe or fix one rate for the service to be rendered in all markets and localities of the state. A uniform rate is not essential to its legality. The circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service. The carrier is entitled to receive some compensation beyond mere cost of this service, and the cost thereof may be greater or less in one city than in another. The fact that the rate fixed in rule 15A for Jacksonville is different from the uniform rate fixed by rule 15 does not show an unreasonable discrimination, for the service contemplated by the two rules is entirely different. There is a sphere

of operation for both rules, and the rate prescribed for the service by one rule may be different from the rate fixed by the other rule, and yet both rates may be reasonable and just. *Cincinnati, N. O. & T. P. R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

In *State ex rel. Attorney General v. Atlantic Coast Line Ry.*, 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506, this court held that the rules and regulations made by the Railroad Commissioners to prevent unjust discriminations or other abuses by railroad companies are by law deemed and held to be prima facie reasonable and just, and, in the absence of a showing of unreasonableness, the enforcement of such rules and regulations against a railroad company will not, of itself, be a taking of property without due process of law, or deprive such railroad company of the equal protection of the laws. Whether the rate is in fact an unreasonable and unjust one must be determined upon answer or return and proof. See the note to *City of Madison et al. v. Madison G. & E. Co.* et al., 129 Wis. 249, 108 N. W. 65, 9 Am. & Eng. Ann. Cas. 819, 823.

We come now to the first contention made by the motion to quash: "No power is conferred by law upon the Florida Railroad Commissioners to make and enforce the rule set forth in said alternative writ as 'rule 15A,' of the Rules Governing the Transportation of Freight."

Section 30 of article 16 of the Constitution invests the Legislature with "full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature." The Legislature, by section 2893 of the General Statutes, authorized and required the Railroad Commissioners to make reasonable and just rates of freight tariffs to be observed by all railroads, railroad companies, and common carriers doing business in this state over their respective lines or connecting lines, and to make reasonable and just regulations for the observance of the same as to charges at any and all points for the necessary handling and delivery of all kinds of freight, and for the prevention of any unjust discrimination in connection therewith; also to regulate charges for storage, wharfage, and demurrage, refrigerator cars, fruit boxes, icing, etc., in transit, and to direct and control all other matters pertaining to railroads that shall be for the good of the public. *Matter of Tr. Village of Saratoga Springs v. Saratoga G. E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18

L. R. A. (N. S.) 713, 14 Am. & Eng. Ann. Cas. 606, 614.

Section 2896 of the General Statutes gives the Commissioners full power and authority to require any railroad, railroad company, or common carrier to properly operate its road or transportation line, and to furnish all the necessary facilities for the convenient and prompt handling, transportation, and delivery of all freight offered along its line for transportation, and requires the Commissioners to provide and prescribe all such rules and regulations as may be necessary to secure such operation and the furnishing of such facilities and the prompt handling and delivery of all freights offered; and, by section 2891, the term "railroad," as used in the provisions already stated, is defined to include all the road in use by any corporation or other person operating a railroad. In section 2921 of the General Statutes the Commissioners are given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of the chapter dealing with this subject.

Whether the Railroad Commissioners have express statutory authority to require the performance of the duties or the granting of the privileges contemplated by rule 15A or not, it is made to appear by the allegations of the alternative writ that, long before and at the time of the adoption of rule 15A by the Railroad Commissioners, "the said railroad yards in the city of Jacksonville or a portion thereof have been maintained and operated for many years past by the railroads entering that city, and as far back at least as the year 1891 planing mills have been established within the said yard limits and accessible to the tracks therein, to which it was and is usual and customary for the railroad companies to switch, upon order of the consignees, cars of rough lumber shipped to and arriving at the city of Jacksonville from other points in this state, for the purpose of dressing the same, and after dressing to switch the said cars of lumber to some other point in the yards designated by the said consignees."

In performing this service the railroad companies were "doing business over their respective lines or connecting lines," and section 2893 of the General Statutes authorized and required the Commissioners "to make reasonable and just rates of freight tariffs to be observed by such railroads and common carriers, and to make reasonable and just regulations for the observance of the same as to charges at any and all points for the necessary handling and delivery of freight and for the prevention of unjust discrimination in connection therewith."

This was a service, too, or matters pertaining to railroads for the good of the public, or, as the Constitution expressed it, "services of a public nature," and the statute author-

izes the Commissioners to direct and control all such matters.

It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of such carriers to perform them is as binding in the one case as in the other. *State ex rel. Attorney General v. Atlantic Coast Line R. R. Co.*, 51 Fla. 543, 41 South. 529; *State ex rel. Attorney General v. Atlantic Coast Line R. R. Co.*, 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506; *Norfolk & P. Belt Line R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39. In other words, whenever a duty has been imposed either by usage or by statute the courts may be called on to give it effect. *Memphis & L. R. R. Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791.

If this may be said to be a drayage service, it is not a private drayage service, as suggested by respondent, but a public drayage business. Where does the company get authority to do a private drayage business? As the court said, in *Munn v. Ill.*, 94 U. S. 113, text 125 (24 L. Ed. 77): "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created." See, also, *Southern Indiana Ry. Co. et al. v. Railroad Commission of Indiana (Ind.)*, 87 N. E. 966; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368; *Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358; *State v. Wabash, St. Louis & Pac. Ry. Co.*, 83 Mo. 144; *Allnutt v. Inglis*, 12 East. 527.

We think it may be also said that the service in question is cognate to and so intimately connected with the public service involved in the carriage and delivery of freight by the railroad company as to constitute a part of such service, and consequently subject to governmental control.

The allegations of the writ show that the respondent maintains and operates extensive terminals, railroad yards, and switching facilities for the reception, handling, transportation, and delivery of freight or property transported by it, and these terminal and switching facilities are all connected together by transfer tracks and switches. The respondent has connected these spur tracks or switches with and made them a part of its railway system and devoted them to the purposes of traffic. That is a public use. Such being the case, they are not private tracks. While the respondent is entitled to compensation, a reasonable profit, for the extra service rendered and the privilege extended of

stopping cars loaded with lumber at the planing mills for treatment and then transporting and delivering them to the place of destination, it is subject to the same obligation and public control as to these switches and spur tracks and the service over them as to its main line. State ex rel. Railroad & Warehouse Commission v. Willmar & S. F. R. Co., 88 Minn. 448, 93 N. W. 112; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Barre R. Co. v. Montpelier & W. R. R. Co., 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877.

By section 2891 of the General Statutes, the term "railroad" is defined to mean "all the road in use by any corporation," etc. As was said by the court in Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899, "a railroad transporting a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight train." See, also, Louisville & Nashville R. Co. v. Central Stock Yards Co., 30 Ky. Law Rep. 18, 97 S. W. 778.

These tracks in the railroad yards in Jacksonville, then, are not mere private ways, outside of the principal road. They connect with it, are used as a part of it, conferring the same rights upon the company and imposing the same obligations as the main line. The people who have occasion for the transportation of rough lumber over them are interested in them. The public enjoy a beneficial use of them.

We conclude, therefore, that, whether the service contemplated by rule 15A may or may not be enforced as a duty, yet when voluntarily entered upon, as the writ shows is the case here, it may be regulated, and the charges therefore supervised by the Railroad Commissioners.

The motion to quash the alternative writ is overruled, and the respondent is required to answer within 20 days from the filing of this opinion. All concur, except TAYLOR, J., absent on account of illness.

MCRATNEY v. JARRELL et al.

(Supreme Court of Florida. March 21, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 612*)—TRANSCRIPT OF RECORD—SUFFICIENCY OF CERTIFICATE.

A certificate of the clerk of the circuit court to a transcript of record on appeal, stating simply that certain numbered pages contained "a correct transcript of the record of the judgment" in the above-entitled cause, "and true and correct recitals of all such papers and proceedings in said cause, as appear upon the records and files" of his office, "that have been directed to be included in said transcript by the written demands of the said parties," is fatally defective, because of the omission of the words

"and copy" immediately after the word "recital."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2698-2700; Dec. Dig. § 612.*]

In Banc. Appeal from Circuit Court, Sumter County; W. S. Bullock, Judge.

Suit between Wade H. McRatney and W. D. Jarrell and others. From the decree, McRatney appeals. Dismissed.

H. M. Hampton and H. L. Anderson, for appellant. Hocker & Duval, for appellees.

PER OURIAM. On reaching this case for final disposition, we find that the clerk's certificate to the transcript certifies that certain numbered pages contain "a correct transcript of the record of the judgment" in the above-entitled cause, "and true and correct recitals of all such papers and proceedings in said cause, as appears upon the records and files" of his office "that have been directed to be included in said transcript by the written demands of the said parties," without stating that it contains correct copies of such papers and proceedings. Under the settled practice of this court, this appeal must be dismissed because of such defective certificate. See Dees v. Cassels, 54 Fla. 485, 44 South. 1013, and authorities there cited, and Globe & Rutgers Fire Ins. Co. v. Lewallen, 56 Fla. 306, 47 South. 795.

Appeal dismissed. All concur.

PARKHILL, J. (concurring). For the reasons pointed out in my dissenting opinions in Porter v. Ewing, 51 Fla. 265, 39 South. 993, and Dees v. Cassels, 54 Fla. 485, 44 South. 1013, I think that, instead of dismissing the writ of error herein absolutely because of the defect in the clerk's certificate to the transcript of the record, an order should be made that the submission of this case be set aside, and that the plaintiff in error be permitted to append to the transcript a certificate in the form prescribed by the rules, serving a copy thereof upon defendant in error within a reasonable time named, and that upon failure to comply with the order the writ of error be then dismissed.

Since the dissenting opinions were written in the above cases, it seems that the Governor of this state, without my knowledge or suggestion, called this matter to the attention of the Legislature, with the result that chapter 5898, Acts 1909, was enacted, whereby it is provided "that whenever any case has been taken to the Supreme Court of the state of Florida, either by appeal or writ of error, and the same is dismissed from the docket of said Supreme Court on account of a defective certificate of the clerk of the circuit court to the transcript of the record, the same shall be reinstated upon the said docket upon motion, if made within thirty days from date of notice of such dismissal, accom-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

panied by a proper certificate to be affixed to such transcript of the record."

As this provision of law will furnish a proper remedy in the premises, and when carried out will be practically what I have aimed at, I concur herein.

FLOWERS et al. v. STATE

(Supreme Court of Florida. March 22, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR.

An objection that evidence was hearsay will not avail, when the party making the remark was immediately placed upon the stand and testified thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

2. WITNESSES (§ 362*)—IMPEACHMENT—EFFECT.

Upon trial of two jointly indicted, the impeachment of one testifying affects his evidence as to both.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1176; Dec. Dig. § 362.*]

3. CRIMINAL LAW (§ 1172*)—APPEAL—REVIEW—INSTRUCTIONS—HARMLESS ERROR.

A charge defining larceny as a "taking and carrying," omitting the word "away," is harmless when the asportation is admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3154; Dec. Dig. § 1172.*]

4. LARCENY (§ 30*)—INFORMATION—VALIDITY.

A judgment on an information for larceny of a mortgage will not be arrested for failure to allege an acknowledgment, when an acknowledgment is not necessary to the validity of the mortgage.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 71; Dec. Dig. § 30.*]

5. INDICTMENT AND INFORMATION (§ 75*)—REQUISITES.

The omission of the word "dollars" in stating the value of a mortgage stolen should not arrest the judgment, where the identical figures with the word added are given in the information as the consideration for the mortgage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 202; Dec. Dig. § 75.*]

6. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

The evidence supports the verdict.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 164; Dec. Dig. § 55.*]

In Banc. Error to Criminal Court, Walton County; D. S. Gillis, Judge.

Esom Flowers and Albert Flowers were convicted of grand larceny, and bring error. Affirmed.

J. Walter Kehoe and W. T. Bludworth, for plaintiffs in error. Park Trammell, Atty. Gen., for the State.

COCKRELL, J. Esom and Albert Flowers were jointly convicted of grand larceny in the criminal court of record for Walton county; the property taken being a mort-

gage for \$271.12 belonging to P. G. Woodruff.

From the evidence it appears that Esom Flowers approached W. T. Davis, the mortgagor, with a view of buying property covered by the mortgage that he could get it for \$50 if he would take up the mortgage. Subsequently the two brothers entered into an arrangement with Woodruff, whereby the latter was to turn over to Esom Flowers the Davis mortgage for certain additional securities and deeds to lands owned separately by the two Flowers. They met in Woodruff's store to consummate the agreements, and Woodruff indorsed the mortgage to Esom Flowers, and Esom signed the deed he was to make, but under the guise of wanting to read the mortgage took up both papers, quietly slipped out of the door, and boarded a train just passing. As he passed out he "hunched" his brother, and, when the latter was asked to sign his deed, remarking he must go for a witness, went out of the store and began running, and neither returned and were not heard from in several weeks.

Esom Flowers took the mortgage to Davis, and indorsed it over to him; getting in exchange a deed to part of the land.

Upon cross-examination of Woodruff it was elicited, we do not know how, that Mrs. Woodruff exclaimed, "Just look at that man running," speaking of Albert Flowers, and the defense asked to have this stricken. It is urged that the remark was hearsay. We do not know what the previous question may have been, the evidence being in narrative form; but the specific objection cannot avail, as immediately thereafter Mrs. Woodruff took the stand and testified that she saw Albert running away from the store.

Esom Flowers testified for the defense and was asked if he had ever been convicted of crime. It is argued that the question was not relevant as to Albert. Esom was a witness for both defendants, and the answer properly went to the jury as affecting his credibility.

Upon the charges two assignments are presented. In the general definition of the crime of larceny the court used the term "took and carried," omitting after the latter the word "away." We need indulge in no discussion of the nice distinction as the asportation is admitted.

The court charged that "all persons are principals who are guilty of acting together in the commission of an offense, when an offense has been actually committed by one or more persons." No objection is made to the form of the charge, but it is insisted that there was no evidence upon which it could be applied to Albert Flowers. We have stated some of the evidence, and we think it might have been argued to the jury

that there was a scheme between the two brothers whereby the one was to escape secretly with the property; the other remaining in pawn, as it were, and thus lulling suspicion until that escape was made effective, then himself through another ruse also escaping.

There was a motion in arrest of judgment upon most general grounds. It is argued here that the information, while alleging that the mortgage was "made, executed, and delivered by W. T. Davis and his wife," does not allege that it was acknowledged by either. A sufficient answer to this objection is that the mortgage may have been valid as to W. T. Davis even though there was no acknowledgment for record, and the information does not disclose that the property was the wife's separate estate, or that it was a homestead, requiring for its validity the joinder of the wife and her separate acknowledgment. *Platt v. Rowand*, 54 Fla. 237, 45 South. 32. Moreover, this objection was interposed after verdict when the mortgage had been before the court, showing proper acknowledgment.

There was a misprision in the information in that part stating the value of the property, wherein it is alleged: "The said mortgage then and there being the property of the said P. G. Woodruff and of the value of two hundred seventy-one & $\frac{12}{100}$ against the form," etc.—the word "dollars" being omitted. Had a motion to quash been made and the defect pointed out, the information would have been readily amended by the solicitor who drafted it without the intervention of a grand jury, and the defendants make no point at all upon the value of the property. Again in the same information, in describing the consideration for the mortgage, this identical amount is named totidem verbis with "dollars" added, showing clearly that dollars and nothing else was intended; no other denomination being used in this country. It was not a total failure to state a crime, nor were the defendants in any wise misled or embarrassed thereby.

The only point remaining is the sufficiency of the evidence to support the verdict. There is no difficulty in sustaining the verdict as to Esom Flowers, but as to the codefendant we would hesitate long before returning a verdict of guilty upon it, but we are not prepared to say it will not sustain the finding of the jury, supported by the action of the trial judge in refusing to disturb it.

Judgment affirmed.

WHITFIELD, C. J., and TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

SHACKLEFORD, J., absent, concurred in the opinion as prepared.

SLORAH et al. v. WILCOX.

(Supreme Court of Florida, Division B. March 16, 1910. Headnotes Filed April 19, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1009*)—REVIEW—CONFLICTING EVIDENCE.

When, on the issues made by answers to a bill to foreclose two mortgages, the evidence is conflicting, and of such a character that it cannot be said to preponderate against the conclusions of the chancellor, the final decree will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by Cecil Wilcox against J. C. Slorah and others. Decree for plaintiff, and defendants appeal. Affirmed.

Kay, Doggett & Smith, for appellants. Bryan & Bryan, for appellee.

HOCKER, J. On the 23d April, 1908, the appellee, Wilcox, filed a bill in the circuit court of Duval county to foreclose, first, a mortgage to secure \$7,000, dated 5th April, 1905, embracing lots 2, 3, 4, and 5, in block 28, Springfield, Jacksonville, executed to him by J. C. Slorah and Clara B. Slorah; second, a mortgage to secure \$1,000, dated May 30, 1906, executed by the same parties, and conveying the same lots; and, third, a mortgage for \$2,000, dated 25th February, 1907, executed by J. C. Slorah and his wife, Clara B. Slorah, to the Guaranty Trust & Savings Company, covering the same property. It is alleged that on September 3, 1907, the name of the Guaranty Trust & Savings Company was changed to the Guaranty Trust & Savings Bank, and that on the 27th March, 1908, the said savings bank for a valuable consideration assigned the last-mentioned mortgage to the complainant Wilcox. Notes for the several amounts mentioned in these mortgages were executed and delivered with the mortgages, and the note for \$2,000 was assigned to Wilcox with the mortgage. It is alleged that Samuel T. Shaylor claims some interest in lots 2 and 3 described in said mortgage, the exact nature of which is to the complainant unknown; but it is averred that any interest he may have is inferior and subject to the liens of the complainant. The notes are attached to the mortgage as exhibits.

Defendant Shaylor answered the bill, alleging in substance that on the 23d February, 1907, defendants J. C. Slorah and Clara, his wife, conveyed to him by warranty deed lots 2 and 3 described in the bill for a consideration of \$8,500, of which sum \$500 was paid in cash, and the rest evidenced by his note for \$8,000, payable six years from date, and secured by a mortgage on said lots;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that before the execution of said deed and mortgage, and the payment of the \$500 in cash, it was mutually agreed between himself, Wilcox, and Slorah that complainant, Wilcox, would release said lots 2 and 3 from the first two mortgages mentioned in the bill, and in lieu thereof would accept the note and mortgage executed to Slorah and wife by himself; that he was immediately put into possession of said lots, and has remained in possession ever since, claiming said lots in fee simple; that Wilcox has since refused to release said lots, although Slorah has frequently offered to assign said note and mortgage to him. Shaylor also alleges in his answer that he has paid the first interest coupon on his said note, but has refused to pay for the interest on account of the failure of Wilcox to release said lots from said mortgages. The answer further alleges that he was in open and notorious possession of said lots 2 and 3 as owner at the time and before the execution of the last mortgage mentioned in the bill.

J. C. Slorah and Clara B. Slorah answered the bill, setting up in substance as a defense to the foreclosure on lots 2 and 3 the sale thereof to Shaylor and the possession and agreement of Wilcox, as set forth in Shaylor's answer, to satisfy his two mortgages on said lots, and accept Shaylor's note for \$8,000, and his mortgage to Slorah and wife, of said lots to secure said note; that, acting on this agreement, Shaylor paid \$500 to them in cash, and executed the note for \$8,000 and the mortgage to secure the same on said lots; that said note and mortgage was tendered to Wilcox, but he refused to accept the same, and continues so to do. The answer alleges that no foreclosure of these mortgages should be had, because of said agreement of Wilcox to satisfy them.

Replications were filed to these answers, and the testimony of the parties taken. On a final hearing the circuit judge made a final decree of foreclosure in favor of Wilcox on the 15th September, 1909, which upon an application for rehearing on the part of J. C. Slorah and his wife, Clara B., was on the same day reformed, so as to require the special master to pay anything remaining of the proceeds of the sale of said lots 2 and 3 into the registry of the court, instead of to the defendant Shaylor or his solicitors of record.

From these decrees an appeal was taken to this court.

There is no dispute about the law applicable to the facts as they are set forth in the answers of the defendants; it being admitted that the defense set forth was a good one, if sustained by the testimony. But it is contended by the appellants that the circuit judge erred in his judgment of the testimony. We have read and considered the evidence submitted in the light of the surrounding circumstances as shown therein, and we are un-

able to say that the circuit judge erred. The evidence was conflicting.

We can see no good result from setting it out in this opinion, or from presenting herein a critical analysis of it.

Our conclusion is that the decrees appealed from be affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

OCALA COOPERAGE CO. v. FLORIDA COOPERAGE CO.

(Supreme Court of Florida. March 16, 1910.
On Rehearing, April 2, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 106*)—SUFFICIENCY OF MEMORANDUM.

A letter alleged to contain an agreement for the sale of personal property should be considered as an entirety, and if it fairly appears from the whole document that it does not as a distinct proposition sufficiently describe the elements of the contract as alleged, and does not contain a contract actually entered into, but merely evidences a proposal that was apparently not fully understood and not finally agreed on by the parties, it does not satisfy the statute of frauds, requiring a note or memorandum of the contract to be in writing duly signed.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 210, 211; Dec. Dig. § 106.*]

On Rehearing.

2. CONTRACTS (§ 15*)—WHAT CONSTITUTES.

Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of the minds, and consequently no contract, while the agreement is incomplete.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 61-66; Dec. Dig. § 15.*]

3. CONTRACTS (§ 32*)—BINDING EFFECT.

Where parties intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.*]

4. CONTRACTS (§ 32*)—PAROL AGREEMENT—SUBSEQUENT WRITTEN INSTRUMENT.

While it is true that where parties orally agree upon the terms of a contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put the agreement in writing at a subsequent time is not, of itself, sufficient to show that the parties did not intend the parol contract to be regarded as complete and binding without being put in writing; but where it appears that the parties, or either of them, intended that the contract should be reduced to writing, so that its terms would be fully understood and definitely stated in the writing, the contract will not be regarded as complete or binding until it is reduced to writing and acquiesced in by both parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.*]

In Banc. Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by the Ocala Cooperage Company against the Florida Cooperage Company. Judgment for defendant, and plaintiff brings error. Affirmed.

G. M. Powell, for plaintiff in error.

WHITFIELD, C. J. The Ocala Cooperage Company brought an action against the Florida Cooperage Company, the declaration alleging a contract whereby the defendant agreed to purchase from the plaintiff 30,000 spirit barrels at \$2.15 each f. o. b. cars at Ocala; that "thereafter the said defendant made, executed, and delivered to the said plaintiff its written memorandum of the said contract, which said memorandum was then and there signed by the duly authorized agent of the said defendant"; that plaintiff was ready, able, and willing to perform its part, but defendant, without fault or breach by plaintiff, "wrongfully and without just cause repudiated the said contract and agreement, and informed the said plaintiff that it * * * would not carry out or perform the said contract, and refused to perform the same," whereby just and lawful gains and profits were totally lost of the plaintiff, to its damage, etc. Two pleas were filed—one of no promise as alleged, and the other that the defendant had not accepted or received any part of the goods, had given nothing in earnest to bind the bargain or in part payment, "and that there was not nor is any note or memorandum in writing of the said contract made or signed by the defendant or its agent or agents thereunto lawfully authorized." Section 2518, Gen. St. Issue was joined on these pleas. At the trial, the plaintiff offered evidence which was excluded by the court, and a nonsuit was taken, with bill of exceptions, as allowed by the statutes. On writ of error to the final judgment entered thereon the plaintiff contends that error was committed in excluding evidence and in the judgment entered. The instrument attached to the declaration as a copy of the cause of action, and also offered in evidence and excluded by the court, is as follows:

"Florida Cooperage Company (Incorporated),
"Manufacturers of Turpentine, Cotton Seed
Oil, Syrup, and Dip Barrels.

"Jacksonville, Fla., Feb. 28, 1908.

"Mr. E. H. Mote, Prest. Ocala Cooperage
Co., Ocala, Fla.

"Dear Sir: We submitted to Mr. Wilson a contract between this company and your company, whereby we agreed to purchase from your company 30,000 spirit barrels at a price of \$2.15 each f. o. b. Ocala, and we are to maintain this price during the season ending March 1, 1909, if possible, and not to reduce the price below \$2.05 net Ocala at any time during the season, and we have the privilege of marketing all in excess of this

30,000 barrels and the 30,000 bought of Operators' Cooperage Co. that there should be a demand for in those territories. The writer was under the impression that this was what Mr. Wilson was willing to agree to, but it seems that he was mistaken. We quote you from Wilson's letter what he says he was willing to agree to:

"What I agreed to was to take 55,000 barrels, or rather to let them market 55,000 barrels, and we maintain the price in that territory. They to have the privilege of selling direct. In that event they assume the responsibility for the collection of the accounts, or selling through the factors and letting us bill the same for them and collect and remit them. We guaranteeing the responsibility of the factor only. If it becomes necessary to reduce the price from \$2.25 to \$2.15, we would immediately put them in a position to protect themselves before taking any action.

"I am unwilling to buy their output on any better basis than at \$1.95 each f. o. b. Ocala and Leesburg; but I am willing, as I stated, to protect that territory in the way outlined."

"These conclusions were based upon the assurance that he, Mr. Wilson, could buy from the Columbus Barrel Mfg. Co. and the Atlantic Cooperage Co. the number of barrels which they expected to market in this territory during this season, and thereby prevent these parties from cutting the price here or elsewhere. Having been unsuccessful in our efforts to do this, we are not willing to obligate ourselves to market any number of barrels at any given price, or to maintain prices for any specified time. Consequently it becomes necessary for us to ask you to consider all negotiations looking to an agreement or contract as closed for the present.

"In this connection, we beg to assure you that we propose to maintain our present prices at Jacksonville as long as possible, and not to cut the same until it is absolutely necessary to meet the prices of our competitors.

"We regret very much that matters have taken the turn that they have, as we feel sure it would have been to every one's benefit to work in harmony along the lines proposed, but it seems that others do not agree with us and prefer to go it alone.

"Trusting this season may prove a prosperous one to you, we are,

"Yours truly, [Signed] G. J. Scovel,
"Gen. Mgr."

The business of the defendant company is by its articles of incorporation "to be conducted by a board of directors." Under its by-laws the general manager of the company was authorized to "manage the business of the company, buy and contract for material, and have charge of the manufacture and sale of all products manufactured by said company"; and the by-laws also provide that

"the president shall preside over all meetings of the directors and of the stockholders." It does not clearly appear, from these provisions of the charter and by-laws and the entire record, that the general manager had authority to make the alleged contract, independent of action by other officials of the company, even if the above-quoted letter of February 28, 1908, from G. J. Scovel, "Gen. Mgr." of the defendant company, to the president of the plaintiff company, is a sufficient memorandum in writing of the contract as alleged.

The letter of February 28, 1908, must be considered as an entirety, and it asks the president of the plaintiff company "to consider all negotiations looking to an agreement or contract as closed for the present." The proffered testimony of the president of the plaintiff company that "a proposition was made * * * to him" by the president and the general manager of the defendant company "to purchase the output of the plaintiff's plant, to wit, thirty thousand barrels," and that "the deal was consummated, closed" with the general manager alone, is not admissible to supply defects in the letter as a memorandum of the contract. *Eckman v. Brash*, 20 Fla. 763; 20 Cyc. 258. The letter of February 27th from the general manager of the defendant company, stating that he had "submitted contract," does not give its terms or assert that the contract was consummated.

The reference in the letter of February 28th to "a contract between this company and your company, whereby we agreed to purchase," etc., when taken with other parts of the letter, does not as a distinct proposition sufficiently describe the elements of the precise contract alleged; nor does the letter, when considered as a whole, contain the elements of a contract actually entered into, but it only evidences a proposal that was apparently not fully understood and not finally agreed on by the two companies.

The judgment is affirmed. All concur.

On Rehearing.

PER CURIAM. A petition for rehearing has been filed herein. The statement in the opinion that it does not "clearly appear" that the general manager of the defendant corporation had authority to bind the company in the manner claimed is justified by a consideration of all the evidence and the law of agency. But the point decided in the case is that Mr. Scovel's letter of February 28th, referred to as the basis of the action and set out at length in the opinion, when considered as an entirety, is not a sufficient memorandum of an actual contract, in that it does not contain a distinct and complete statement of the agreement as alleged, but it evidences negotiations not fully understood and not finally agreed on. This determination renders not pertinent the proposition that a letter re-

mediating a contract may satisfy the requirement of the statute of frauds that a memorandum of the contract shall be in writing duly signed.

The president and general manager of the plaintiff company, Mr. E. H. Mote, testified that during February, 1908, "he met Mr. Wilson and Mr. Scovel, president and general manager and secretary, respectively, of defendant, Florida Cooperage Company; that a proposition was made by them to him to purchase the output of the plaintiff's plant, to wit, 30,000 spirit barrels; that he took this proposition under advisement for the night; that the next day Mr. Scovel called around to the hotel and the deal was consummated, closed; that Mr. Wilson was present on the occasion of the first conference, and that the negotiations were discussed in his presence; that he said he had to go to Savannah in a short time; that all the details were arranged, and finally and fully agreed upon, upon that occasion; that when he left Mr. Scovel he went home to Ocala for the purpose of lining up the business and getting ready to deliver these barrels." The other testimony does not appear to be material here.

The following letters from this witness, who was the president and general manager of the plaintiff company, were offered in evidence:

"Ocala, Florida, Feb. 21, 1908.

"Mr. G. J. Scovel, Gen. Mgr., Jacksonville, Fla.

"Dear Sir: In sending memorandum contract, please make it full and explicit, so that there may be no possible chance for misunderstanding. Anything that should not go into the contract, please write me fully about in person, as I wish to be in touch with the entire situation, so as to act intelligently.

"[Signed] E. H. Mote, G. M."

"Ocala, Florida, Feb. 25, 1908.

"Mr. G. J. Scovel, Jacksonville, Fla.

"Dear Sir: I had hoped to have heard from you in reference to letters written you. I will be pleased to hear from you by return mail. Kindly send contract, as we understand you would like it to go into effect March 1st.

"Yours very truly, [Signed] E. H. Mote."

"Ocala, Florida, Feb. 27, 1908.

"Florida Cooperage Co., Jacksonville, Fla.

"Gentlemen: How about the contract. Have not heard from you. Please let us hear by next mail.

"Yours truly, [Signed] E. H. Mote."

"Ocala, Fla., Feb. 28, 1908.

"Messrs. Florida Cooperage Company, Jacksonville, Fla.

"Contract.

"Gentlemen: Yours of the 27th received and carefully noted. Please send the con-

tract at the earliest possible moment as we understand same is to go into effect on March 2nd, and we would like to have time to look it over in the meantime.

"Yours very truly,

"Ocala Cooperage Company,

"By E. H. Mote,

"President and General Manager."

The letter of February 27th from the general manager of the defendant company to the president and general manager of the plaintiff company, referred to in the opinion, is as follows:

"Jacksonville, Fla. Feb. 27, 1908.

"Mr. E. H. Mote, Prest. Ocala Cooperage Co.,
Ocala, Fla.

"Dear Sir: We have your favor of the 25th inst. We would have replied to this yesterday, but hoped to hear from Mr. Wilson to-day. We submitted contract between our company and yours to Mr. Wilson for his approval, and he has not yet returned same. We expect to hear from him certainly tomorrow, and we will forward the same to you at once.

"Yours truly, [Signed] G. J. Scovel,
"General Manager."

This letter clearly indicates that negotiations between the parties were pending, and that the agreement between them was to be in writing. Mr. Scovel's letter of February 28th, set out in the main opinion, upon which this action is brought, shows that the negotiations were broken off, and that an actual agreement of the parties was never reached or reduced to writing. Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of the minds, and consequently no contract, while the agreement is incomplete. And where parties intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed. *McCrimmon v. Brundage*, 53 Fla. 478, 43 South. 431; 9 Cyc. 280, and cases cited.

While it is true that where parties orally agree upon the terms of a contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put the agreement in writing at a subsequent time is not, of itself, sufficient to show that the parties did not intend the oral contract to be regarded as complete and binding without being put in writing; but where it appears that the parties, or either of them, intended that the contract should be reduced to writing, so that its terms would be fully understood and definitely stated in the writing, the contract will not be regarded as complete or binding until it is reduced to writing and acquiesced in by both parties.

From the letters of Mr. Mote, the general manager of the plaintiff company, it plainly appears that the terms of the proposed contract were not fully agreed on, if understood, and also that the agreement was to be reduced to a "memorandum contract." The testimony of Mr. Mote above quoted is not wholly inconsistent with this conclusion.

The evidence in this record discloses no agreement upon which this action can be maintained, independent of the insufficiency of Mr. Scovel's letter of February 28th, as a memorandum of writing under the statute of frauds, which was the issue made in the trial court and disposed of in the main opinion.

The assertion in Mr. Scovel's letter of February 27th that "we submitted contract between our company and yours to Mr. Wilson for his approval," and the statement in Mr. Scovel's letter of February 28th that "we submitted to Mr. Wilson a contract between this company and your company, whereby we agreed to purchase," etc., taken in connection with other portions of the letters, and read in the light of the circumstances under which they were written, clearly mean the proposed contract and not an actual completed agreement.

The letter of the defendant's general manager, dated February 28th, and set out in the main opinion as a copy of the cause of action, read by itself as an entirety, or taken in connection with the other letters copied herein, does not contain a statement of the completed contract alleged in the declaration, but evidences the pendency of negotiations that were terminated by the letter. There being no completed agreement between the parties, there is no cause of action as alleged; and the letter relied on to supply the necessary evidence of the agreement under the statute of frauds is merely evidence of negotiations that did not result in the meeting of the minds of the parties. Consequently there is in fact no contract of which the letter sued on could be a note or memorandum in writing.

A rehearing is denied. All concur.

SAVAGE et al. v. ROSS.

(Supreme Court of Florida. March 15, 1910.
Headnotes Filed April 19, 1910.)

(Syllabus by the Court.)

PLEADING (§ 430*)—VARIANCE—DEMURRER.

In an action at law on a written lease to recover rent in one count of the declaration, and for a breach of covenant in a second count, when the written lease is made a part of each count, the question of a variance between the terms and conditions of the lease itself and the claims set up in the declaration cannot properly be raised on the trial by objecting to the introduction in evidence of the written lease under the plea of non est factum. This question

should be presented by demurrer to the declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430; Trial, Cent. Dig. §§ 219, 286.]

In Banc. Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by Herbert W. Savage and Thomas P. Denham against Roderick G. Ross. Judgment for defendant, and plaintiffs bring error. Reversed.

Robert A. Baker, for plaintiffs in error. Bisbee & Bedell, for defendant in error.

HOCKER, J. The plaintiffs in error brought a suit at law against the defendant in error in the circuit court of Duval County. The declaration contains two counts; the first, in substance, declaring upon a lease for rent alleged to be due under the terms and conditions of an instrument under seal, called a "lease," and the second as upon a breach of covenant contained in said instrument. This lease is made a part of each count of the declaration. The defendant pleaded three pleas: First, that the alleged indenture is not his deed; second, that there was in and upon the land mentioned in the declaration no mineral for which the defendant covenanted to pay 50 cents per gross ton as in said declaration mentioned; and, third, that there was in and upon the land mentioned in the declaration no mineral for which the defendant covenanted to pay 50 cents per gross ton, suitable or practicable to be mined. Issue was joined on the first plea, and a demurrer was interposed to the second and third pleas, which was sustained. On the trial the plaintiff offered in evidence the lease set out in the declaration, to the introduction of which the defendant, after admitting in open court that the signature and seals to said paper were all genuine, objected to its being read in evidence. The objections cover five pages of the typewritten copy of the record. The contention, sifted down, is, as we understand it, that the true meaning of the lease is that the defendant was not required to pay royalties or ground rent on rock not shipped from the land, and it is not alleged that rock was moved and shipped; second, that the declaration alleges the defendant covenanted to pay for the rock shipped at the residence of the plaintiff, whereas the lease provides payment shall be made to the Atlantic National Bank, of Jacksonville; and, third, that the declaration demands money in any lawful tender, and the lease provides for payment in gold coin. This contention was sustained by the circuit judge. The plaintiff took a nonsuit, suffered a final judgment against himself, and has brought to this court the correctness of this ruling of the trial judge on writ of error. This brings us face to face with the question whether, under the plea of non est factum in this particular case, the objections which were made

could properly be made. The practice of making the cause of action, such as a deed or other instrument, a part of the declaration, or of literally copying it in the declaration as a part of it, is hardly consistent with the rule which requires that such instruments, except in cases of libel, should be pleaded according to their legal effect. Shipman's Common-Law Pleading (2d Ed.) 459, 460; 1 Chitty on Pl. (16th Ed.) bottom page 483.

If there is a doubt as to the legal effect of an instrument, it seems to have been permitted. 1 Saunders on Pl. & Ev. (5th Am. Ed.) 194; 1 Chitty, supra.

It has occurred in a number of cases which have come to this court, and as the parties have consented to this method of pleading in the courts below, this court has treated the records as it found them. First Nat. Bank of Florida v. Savannah, F. & W. Ry. Co., 30 Fla. 183, text 193, 18 South. 345. See, also, the exhaustive discussion of this question in the case of State v. Seaboard Air Line Ry., 56 Fla. 670, text 679, 47 South. 986, and cases cited.

In the instant case we are required to construe the effect and scope of a plea of non est factum to a declaration in which the lease which is the foundation of the suit is made a part of the declaration. The record is in practically the same condition as if at common law oyer of the lease had been craved and granted, and the lease had thereby been made a part of the declaration. In this situation it is said in 1 Chitty on Pleading (7th Eng. Ed., by Greening) bottom page 561: "The tenor of the deed, as it appears upon oyer, is considered as forming part of the precedent pleading, and therefore, if the breach laid in the declaration be not supported by the deed—in other words, if the deed thus set out in the plea be found to contain in itself matter of objection or answer to the plaintiff's case as stated in the declaration—the defendant's course (after setting out the deed on oyer) is to demur, not to make the objection the subject-matter of a plea. The defendant may demur after setting out the deed on oyer, if in the declaration any part of the deed, which qualifies the contract as shown in the declaration, or which renders it dissimilar to that described in the declaration, be omitted or misstated by the plaintiff therein." It is further stated: "Should the true effect and meaning of the deed be misstated in the declaration, the variance is cured and becomes immaterial, if the deed be set out in the plea on oyer, and non est factum be pleaded; for on that issue the only question at the trial is whether the deed as set out in the plea was executed by the defendant or not, and the jury are not competent to decide what is the legal effect of the deed. In such case the defendant had better plead non est factum, without craving oyer; and then the question would be whether the deed as described in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the declaration was executed by the defendant." The common-law rule seems to have been this: If a deed is made part of the declaration by being set out on oyer, and there is a variance between the deed and the declaration, not going to the foundation of the cause of action, the variance is not reached by demurrer; but if, upon comparing the deed with the construction of it relied on in the declaration, it appears that the declaration states no cause of action, then a demurrer does lie. See the remarks of Lord Abinger in the case of *Paine and Others, Executors, v. Emery*, 2 C. M. & R. Exch. 304. In the case of *Snell v. Snell*, 4 Barn. & C. (10 Eng. C. L.) 782, it is held that "where, in covenant, a defendant craves oyer of the deed, sets it out, and pleads non est factum, the deed so set out becomes a part of the declaration, and the only question at the trial upon that issue is whether the deed set out was executed by the defendant." In this case a deed was set out on oyer, and under the plea of non est factum the court was asked to construe the deed to determine whether certain words in the deed amounted to "a covenant on the part of the lessor, or only a condition or qualification of the lessee's covenant to repair." Abbott, C. J., said: "The deed so set out becomes a part of the declaration. The defendants, in order to raise that question, should have demurred." He further said: "I abstain from giving any opinion upon the question of law as to the construction of the deed; that is, whether it contains a covenant on the part of the lessor to find timber for the repairs of the demised premises. The course of pleading which has been adopted precludes the court from entering into or deciding that question. The plaintiff by his declaration surmises that there is such a covenant in the lease; the defendant prays oyer, and, having set it out, pleads non est factum. When that has been done, it appears by all the authorities that the only question is whether the party did or did not execute the deed so set out and transcribed into the record, whereby it is rendered a part of the declaration."

Rule 67 of the Rules of Circuit Court in Common-Law Actions is as follows: "In actions on specialties and covenants, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defenses shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." This is an exact copy of the tenth rule of the Trinity term, 1853. See *Day's Common-Law Proc. Acts*, p. 493. We have been unable to discover any English decision upon this rule giving a broader construction to the plea of non est factum than that already given.

The defendant below seems to have acted on the theory that our statute (section 1429, Gen. St. 1906), doing away with the necessity of proffert and the right of the opposite party

to crave oyer, made nugatory that part of the declaration in the instant case by which the lease was made a part of the same. It is true that by virtue of the statute the defendant could not crave oyer and thereby have made the lease a part of the declaration. But the plaintiff of his own motion and without oyer made the lease a part of his declaration. The statute does not render this act of the plaintiff nugatory. It may, under our system of pleading, be embarrassing to the defendant for him to do so. But the defendant did not object and request a compulsory amendment under section 1433, Gen. St. 1906. The record is in this shape with the defendant's consent.

Under such circumstances this court has heretofore dealt with the record as it found it, and we have held that, where a demurrer is filed to such a declaration, it is addressed to the entire declaration, including the cause of action which is made a part of it, and if, when so considered, the statements of the cause of action are repugnant or inconsistent with the allegations of the declaration, it will be held bad on demurrer. *State v. Seaboard Air Line Ry.*, supra. At the present term in the case of *Capital City Bank v. Hilson*, 51 South. 853, we held that a demurrer to pleas reaches back to the declaration, and if the legal effect of a contract, which was made a part of the declaration in *ipsisimis verbis* and was the foundation of the suit, was not that which was relied on by the plaintiff, no cause of action was stated.

In such a case the matter is one of law, and not one of fact, and a demurrer is the proper method by which a question of law is raised. If the lease had not been made a part of the declaration, but it had been simply sued upon according to its legal effect as construed by the plaintiff, then under plea of non est factum the defendant might have properly made the objections he insisted on at the trial. He might well have contended: I executed a lease, it is true; but the lease I executed does not bear the construction which you place on the one upon which you sue, and therefore is not the lease which I executed. In other words, I made no such lease as you sue on. *Stephens on Pl.* (Tyler) 171, 172, 253. It is said by *Williams, J.*, in *Smith v. Scott*, 95 E. C. L. *771 (decided in 1859, while the above-cited rule fixing the scope of the plea of non est factum was in force): "The proper mode of taking advantage of a variance between the alleged and the real effect of a deed is by a plea of non est factum." In this case the deed was not made a part of the declaration, by oyer or otherwise.

It seems to us that the circuit judge erred in sustaining the objections of the defendant to the introduction of the lease in evidence. We would be glad, for the convenience of the parties, if we could do so without violating the well-established rules of procedure, to construe the lease and to determine whether

the contention of the defendant is correct. But we do not feel we are permitted to go farther than to say that such an examination of the declaration as we have made does not disclose to us that it fails to state a cause of action. We cannot say what our judgment would be upon a critical examination of the declaration and the authorities.

The judgment of the circuit court is reversed.

TAYLOR, SHACKLEFORD, and COCKRELL, JJ., concur. WHITEFIELD, C. J., and PARKHILL, J., disqualified.

YOUNG et ux. v. SOUTHERN RY. CO.
(No. 14,532.)

(Supreme Court of Mississippi. April 18, 1910.)
RAILROADS (§ 358*)—INJURIES TO PERSON ON TRACK—LIABILITY.

A railroad maintained at a station residences fronting on the roadbed for the occupancy of its employes and their families. The usual way of ingress to and egress from the residences was over the track, and the railroad knew and permitted it. It was the custom of the children of the employes to play on the track in front of the residences, and this was known to the railroad. *Held*, that a child of an employe was, when on the track, more than a mere licensee, and the railroad was liable for injuries occasioned by simple negligence in the operation of its trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.

Action by J. E. Young and wife against the Southern Railway Company in Mississippi. From a judgment sustaining a demurrer to the amended declaration, and dismissing the action, plaintiffs appeal. Reversed and remanded.

The amended declaration reads as follows:

"First Count. Comes James Young and Viney Young, plaintiffs, and complain of the Southern Railway Company in Mississippi, a corporation under the laws of the state of Mississippi, owning and operating a line of railroad through the county aforesaid, with stations, depots, and depot agents therein, defendant, in action on the case, for that heretofore, to wit, long before and at the time of the committing of the wrongs and injuries herein complained of said defendant owned and operated said line of railroad through said county as aforesaid extending by and through a station or town therein known as Elizabeth; that on or about the 4th day of March, 1908, and while said defendant was owning and operating said line of railroad near and at the station aforesaid, it did then and there carelessly and negligently, by and through its employes, run its engine and cars over and against and upon one Jimmie Young, the infant child of plaintiffs, who then was the age of two and a half

years of age, and who was on the said track, and thereby injured, bruised, and maimed said child, so that it afterwards died from such injuries, to plaintiffs' damage in the sum of \$15,000. Wherefore they bring their suit.

"Second Count. Plaintiff further complains of the defendant in this action, for that he says that at the time of the committing of the wrongs and injuries herein complained of, wherefore, that on the 4th day of March, 1908, and for a long time prior thereto, defendant was and had been operating its said railway to and across the tracks of the Yazoo & Mississippi Valley Railway Company at the station of Elizabeth, in the county and state aforesaid, at which a union depot of said two railway companies is situated; that for a long time prior to said date defendant had maintained at said station, and a short distance west thereof, and on the south side of defendant's tracks; and immediately adjacent thereto, some four or more places of residence facing to and fronting on and touching the roadbed of defendant's track, and for the use and occupation of its employes engaged in the maintenance of its roadbed and track, one of whom was James Young, plaintiff, together for the use and occupation of themselves and their families and children, one of which said employes was plaintiff, who had three children, all of whom, with Viney Young, wife of James Young, and one of the plaintiffs, resided in one of said places of residence so kept and maintained by said defendant as aforesaid; that one of the main and usual ways of ingress to and egress from the premises occupied by plaintiffs and their children was over and along the track of said defendant, all of which was well known to defendant, and by it permitted unto plaintiffs and their children as tenants and employes of defendant as aforesaid, and all of which existed at the time of the committing of the wrongs and injuries herein complained of, and was known to defendant; that at the time and on account of the facts herein stated the defendant and its employes operating its engines and trains along said road became and was in duty bound to plaintiffs and their said children, and owed to them a duty of ordinary care, then to keep a reasonable safe lookout or watch for plaintiffs and their children as they might pass over and along said tracks, as aforesaid, so that defendant would not run plaintiffs and their children down, injure or kill them, or any of them; that in violation of its duties aforesaid, at the place aforesaid, to plaintiffs and their children as aforesaid, owing by the defendant as aforesaid, to them as aforesaid, the defendant, through its employes, at the place aforesaid, on the date aforesaid, negligently and without the exercise of ordinary care ran one of defendant's engines and trains over

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiffs' infant child, Jimmie Young, of the age of two and a half years of age, who was at that time passing over and on said track of said defendant, and was upon said track or immediately there against, greatly injuring said child, from which said injuries it died, to plaintiffs' damage in the sum of \$15,000. Wherefore they sue.

"Third Count. Plaintiff further complains of defendant in this action for at the time of the commission of the wrongs and injuries herein complained of, while it was operating its said line of railway through the county aforesaid, and through the town and station aforesaid, said railway so operated was the main line of defendant; that it crossed the main line of the Yazoo & Mississippi Valley Railroad Company at said station of Elizabeth; that around said station at said time had been and was existing a considerable town; that at the time of the commission of the wrongs and injuries herein complained of plaintiff lived in a box car furnished by said company to James Young, plaintiff, as a residence for himself and his wife and children; that said box car was situated on the south side of the railroad track of said defendant, and 200 feet west of said junction of said two railroads, and a few feet from said track of the main line of defendant; that nearly at the same place and on the same side of said railway track were situated four or five other cabins and box cars, which were used by the employes of said railway company in the same manner and way as that one used by James Young, plaintiff; that at the time the said James Young was employed by said railroad company as a section hand, by said railroad company provided with said box car as a house to live in; that long before and at the time of the commission of the wrongs and injuries herein complained of it had been the custom of the children of plaintiff and the children of other employes of said defendant living in said other cabins and box cars to at times escape from the custody of their parents, including plaintiff, and go upon said railway tracks of said defendant in front of said cabins and box cars, and eastward as far as defendant's depot, situated at the crossing of said two railroads aforesaid, and go to and fro upon said track and play thereon, all of which was well known to the defendant; that under the foregoing state of case then existing it became and was the duty of the defendant, owing to said children and to plaintiff while operating its train to and fro over and along its track at the place aforesaid, to exercise reasonable care in keeping a lookout for such children, including those of plaintiff, so as not to run them down and kill them, or injure or maim them; that, notwithstanding said duty as aforesaid, the defendant negligently and carelessly, without exercising reasonable care in keeping a lookout, or a reasonably safe lookout, for such children, including plaintiff's, did on or about the 4th day of March, 1908, run one

of its trains, composed of an engine and cars, against, upon, and run down one of plaintiff's said children, to wit, Jimmie Young, an infant of two and one half years of age, which had escaped from those entrusted with the custody of it, and gone upon the edge of said track, thereby greatly maiming and bruising said infant, from which injuries it died, to the damage of plaintiffs, who are the father and mother of said child, in the sum of fifteen thousand dollars. Wherefore they bring this suit.

"Fourth Count. Plaintiff further complains of defendant in this action for that heretofore, to wit, at the time of the commissions of the wrongs and injuries herein complained of, and for a long time theretofore, the defendant was operating its said line of railway through the county and state aforesaid, and through the town or station of Elizabeth, at which place the defendant's main line of railway crosses the main line of the Yazoo & Mississippi Valley Railway; that at the time of the committing of the said wrongs and injuries, and for a long time prior thereto, there was a considerable town built up around said station of Elizabeth, and on either side of the railway track of defendant west of said crossing, with streets and roads laid out therein, some of which crossed said track of said road on the west side of said crossing; that about three hundred feet west of said crossing, and on the south side of said defendant's said track, was situated some four or five or more cabins or box cars used as cabins for the occupancy of the section hands then employed by the defendant in the maintenance of its roadbed, one of which was occupied by the plaintiffs, James Young and Viney Young, his wife, same having been furnished to the said James Young and Viney Young by said defendant as such residence or living house; that with plaintiffs in said house lived their three children, one of which was named Jimmie Young, a girl then two and a half years of age; that for a long time before and at the time of the committing of said wrongs and injuries it was the habit of the people living around and immediately at said station of Elizabeth to gather upon, stand around and on, and walk over the track of the said defendant extending from said crossing westward to and past the cabin or box car occupied by plaintiffs; that it was also the habit at that time and for a long time prior thereto of the people living in said box cars and cabins of defendant's company, including their children, and including the children of plaintiffs, to also go upon said tracks, to walk up, over and along the same, to play upon the same at the place aforesaid, from said crossing westward to and past said box car or house occupied by plaintiffs, all of which foregoing facts and conditions were well known to the defendant at the time of the committing of said wrongs and injuries, and

for a long time prior thereto. That by reason of the premises aforesaid, facts aforesaid, condition aforesaid, the habits and customs of the people aforesaid, and the habits of the children aforesaid, including the infant child of plaintiffs, Jimmie Young, aforesaid, known to said defendant as aforesaid, it became and was the duty of defendant, in operating its trains aforesaid over and along its said track at the place aforesaid, to use ordinary care in keeping a lookout at the place aforesaid, to use ordinary care in keeping a lookout for said people, said children including said infant child of plaintiffs, so as not to run them down, injure or destroy them, or to run any of them down, injure or destroy them, including said infant, Jimmie Young, which duty was also owing plaintiffs as the father and mother of said child. Plaintiffs aver that, notwithstanding the duty or duties owing to the plaintiff as aforesaid, the defendant did, on the 4th day of March, 1908, carelessly and negligently, and without the exercise of ordinary care, run one of its trains against and over said infant of plaintiffs, Jimmie Young, of the age of two and a half years, and so bruised, crushed, and maimed it that it died soon thereafter from said injuries, to plaintiff's damage in the sum of fifteen thousand dollars. Wherefore they bring this suit."

Defendant filed this demurrer to the amended declaration:

"Now comes the defendant in the above-styled cause, by its attorneys, and demurs to the amended declaration filed herein, and prays the judgment of this court whether it shall make further answer thereto, and for grounds of demurrer would show: (1) The said amended declaration states no cause of action against this defendant. (2) The amended declaration shows that the person for whose death suit was brought was a trespasser or licensee upon the track of this defendant, and does not allege that she was wantonly or willfully injured by defendant. (3) The said amended declaration of plaintiffs shows that the person for whose death suit was brought was a trespasser or licensee upon the track of this defendant, and does not allege that the employees of the company failed in their duty towards said person after discovering her peril. (4) The suit is brought for the death of Jimmie Young, and the allegations of the amended declaration show that Jimmie Young was a licensee or trespasser upon the track of the defendant company, and the failure of duty complained of was failure of defendant to keep a reasonably safe lookout or watch for said Jimmie Young, and defendant alleges that no duty was required of it to keep a lookout or watch for said Jimmie Young. (5) And for other causes to be assigned on the hearing of this demurrer."

Lamar Watson and Hugh C. Watson, for appellants. Catchings & Catchings, for appellee.

MAYES, J. The demurrer to the amended declaration filed in this case ought to have been overruled. The declaration contains much that is unnecessary for the purpose of stating a cause of action; but, taking into consideration the whole declaration, a case of negligence is sufficiently stated, making the railway company liable if the facts stated are sustained by the proof. Under the allegations the infant was more than a mere licensee, and the case of Railroad Company v. Arnola, 78 Miss. 788, 29 South. 768, 84 Am. St. Rep. 645, does not settle the law of this case.

Reversed and remanded.

BISHOP v. STATE. (No. 14,271.)

(Supreme Court of Mississippi. April 18, 1910.)

1. CRIMINAL LAW (§ 531*)—EVIDENCE—CONFESSION—ADMISSIBILITY—PRELIMINARY SHOWING.

All that was said and done in a room wherein an alleged confession was made was plainly competent, as going to show whether the confession was free and voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1214; Dec. Dig. § 531.*]

2. CRIMINAL LAW (§ 354*)—EVIDENCE—INSANITY—ADMISSIBILITY.

It was also plainly competent to show whether accused was sane or insane; the defense being based on insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

3. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINION—EVIDENCE—INSANITY.

In a case wherein insanity was the defense, a witness who stated that he had known accused while he was young, and had seen him every day or so, and had known him intimately for 27 or 28 years, should be allowed to give his opinion as to whether he was sane or insane.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1054; Dec. Dig. § 452.*]

4. CRIMINAL LAW (§ 48*)—INSANITY AS DEFENSE.

However horrible the crime, there would be no responsibility for it if the evidence shows accused was insane at the time of its commission, or even raises a reasonable doubt as to his sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 53; Dec. Dig. § 48.*]

5. CRIMINAL LAW (§ 682*)—TRIAL—INSANITY AS SOLE DEFENSE—RULE AS TO ADMITTING TESTIMONY.

In a prosecution for a peculiarly horrible offense, wherein defendant relies solely on insanity, the trial court should give defendant all the latitude the law allows, rather than restrict him unduly in the introduction of testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1614; Dec. Dig. § 682.*]

Appeal from Circuit Court, Sunflower County; J. M. Cashin, Judge.

"To be officially reported."

G. T. Bishop was convicted of murder, and he appeals. Reversed.

One Hutchinson was shot and killed while sitting in his house; the shot being fired through the window by some one from the outside. Suspicion pointed to the appellant, and he was arrested and carried by the officer to a room over the depot, where he is alleged to have confessed to the killing. The conviction rested entirely upon circumstances and the alleged confession, which was made to one Riddle, a deputy sheriff.

W. D. Watts and Vernon D. Rowe, for appellant. Franklin & Wiley and J. B. Stirling, Atty. Gen., for the State.

WHITFIELD, C. J. In the examination of the witness Riddle it was asked, "Didn't you, or some one present there [that is, when the confession was made in the upstairs room at the depot], at the time say it would be worse for him if he didn't come out with the clean thing and tell all about it?" to which the witness answered, "Some one might have told him; I don't remember telling him, and I don't remember any one telling him that. Some one might have done it; but I don't remember them. Q. You are not prepared to say it wasn't told him at the time? A. No, sir; I wouldn't swear about it." Now, there were in the upstairs room at the time of the alleged confession F. C. Felder, Riddle, Bishop, and Travis. Felder, on his examination, was asked the following question: "I will get you to state what took place—the conversation between you and Riddle and Bishop and Travis—up in that room at the depot at that time?" This question was objected to by the state, the objection sustained, and the ruling excepted to at the time by the defendant. This was manifestly error. All that was said and done in that room at the depot at the time of that confession was plainly competent as going to show, not only whether the confession was free and voluntary, but also to show whether the defendant was sane or insane. It might have been, we cannot tell, that Felder might have stated that some one, in that conversation, did tell the defendant that it would be worse for him if he did not make a clean breast of it all, and it might have been that the conduct and declarations of the defendant at that time might have shed material light on the question of his sanity or insanity.

When the witness R. E. McBee was examined, he stated that he had known the subject of inquiry, the defendant, Bishop, for 27 or 28 years, and that he had seen him every day or so while he was young. He was then asked, after having thus stated that he had known him 27 or 28 years intimately, and had seen him every day or so while he was young, what he could say of Bishop's mental condition. This was objected to, the objection sustained, and the ruling excepted to. He was then asked if he had ever seen anything in the defendant to denote idiocy or

insanity. This was objected to, the objection sustained, and the ruling excepted to. He was then asked this question, "I will ask you this, if from any conversations you have ever had with him, or his actions coming under your observation, they have formed any impression on you?" and this was objected to, the objection sustained, and the ruling excepted to by the defendant. The witness was allowed to answer that he thought time and again that the defendant was not bright. These questions were then asked: "Well, what led you to believe that he was in that condition?" This was objected to, the objection sustained, and the ruling excepted to by the defendant. He was then asked, finally, in an effort to get from this witness, who had known the subject of inquiry intimately for 27 or 28 years, and must, of course, from that long acquaintanceship, have many times observed his conduct and noted his declarations: "What do you mean by his not being bright? You say you have always thought that he wasn't bright. What do you mean by that?" And this was objected to, and the objection sustained, and the ruling of the court excepted to. It must be borne in mind that insanity was the defense offered. These rulings of the court were all erroneous. They restricted the right of the defendant to show, if he could show, that he was insane, within far too narrow limits. Surely a witness who states that he had known the subject of inquiry while he was young, and had seen him while he was young every day or so, and had known him intimately for 27 or 28 years, would be pre-eminently qualified to testify, from the observations he must necessarily have made of the conduct and declarations of the defendant, whether from such acts and declarations the defendant was, in his opinion, sane or insane.

The crime here is a peculiarly horrible one. Whoever committed the deed should be hung, if convicted after a fair trial according to the law of the land. But if the evidence in the case should show that the defendant was insane at the time of the commission of the alleged offense, or should even raise a reasonable doubt as to his sanity at that time, all the law everywhere is, however horrible the crime, there would, in such case, be no responsibility for it. There is very little danger, in cases of plain, cold-blooded assassination, such as this was, that there will be any miscarriage of justice in the court, if the court should allow the defendant the full latitude he is clearly entitled to under the law in making competent proof as to his sanity or insanity. The state of the public mind in such cases of such horrible assassinations is warrant that the defendant would be duly convicted, even when allowed the largest latitude which the law allows him. It is far wiser, therefore, on the part of the circuit judges, in cases so peculiarly horrible, to give the defendant all latitude the law allows, rather than to restrict him unduly

and too narrowly in the introduction of competent testimony.

For the errors indicated, the judgment is reversed, and the cause remanded.

ANDERSON-TULLY CO. v. REMBERT.

(No. 14,463.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Chancery Court, Bolivar County; M. E. Denton, Chancellor.

Action between the Anderson-Tully Company and Samuel Rembert. From the judgment, the Company appeals. Affirmed.

Brown & Anderson, for appellant. St. John Waddell, for appellee.

PER CURIAM. Affirmed.

SADLER et al. v. KENTUCKY REFINING CO. et al. (No. 13,909.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.

Action by Sam Sadler and others, by their next friend, against the Kentucky Refining Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Bryson & Dabney, for appellants. Catchings & Catchings and Dabney & Dabney, for appellees.

PER CURIAM. Affirmed.

ILLINOIS CENT. R. CO. v. SIMS.

(No. 13,973.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Action by Eugene Sims against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. B. Chrisman and Mayes & Longstreet, for appellant. Pratt & Reid and Potter & Thomson, for appellee.

PER CURIAM. Affirmed.

CITY OF GRENADA et al. v. AUSTIN.

(No. 14,480.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Chancery Court, Grenada County; I. T. Blount, Chancellor.

Action between the City of Grenada and others and E. L. Austin. From the judgment, the City and others appeal. Affirmed.

S. A. Morrison, for appellants. Wm. C. McLean, for appellee.

PER CURIAM. Affirmed.

TOWN OF FLORA v. RICHARDS.

(No. 14,498.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Action between the Town of Flora and Charity Richards. From the judgment, the town appeals. Affirmed.

PER CURIAM. Affirmed.

MAX J. WINKLER BROKERAGE CO. v. DARBY.

(Supreme Court of Alabama. Jan. 20, 1910. Rehearing Denied Feb. 23, 1910.)

FRAUD (§ 64*)—SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT.

Plaintiff sued defendant for inducing it by means of fraudulent representations to purchase the salary earned by defendant for two months, and introduced evidence that plaintiff is not a money broker, but that its business was that of buying salaries or wages, and that it bought defendant's salary, and the written transfer was introduced, showing a sale of the salary. Defendant did not introduce any testimony. Held that, under the evidence, the act of March 9, 1901 (Loc. Laws 1900-01, p. 2685), "to regulate the business of money brokers and persons who lend money for themselves or others on bills of sale, notes or mortgages on personal property for their personal security," has no application, that the court erred in giving a general affirmative charge in favor of defendant, and that plaintiff would have been entitled to such a charge if it had been requested.

[Ed. Note.—For other cases, see Fraud; Dec. Dig. § 64.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by the Max J. Winkler Brokerage Company against R. E. Darby. The court gave an affirmative charge in favor of defendant, and plaintiff appeals. Reversed and remanded.

M. M. Ullman, for appellant. F. S. Ferguson, for appellee.

MAYFIELD, J. This action was brought by the appellant against the appellee; the substance of the complaint being that the plaintiff was induced to purchase the salary earned by the defendant, as an employé of the St. Louis & San Francisco Railroad Company, for the months of November and December, 1905, by false and fraudulent representations made by the defendant to the effect that there were "no judgments, garnishments, liens, attachments, transfers of, or orders against his salary, and that his present indebtedness did not exceed the sum of \$40; that, relying upon said representations, plaintiff paid \$72 for the assignment of said salary; and that by reason of said false and fraudulent representations, plaintiff lost the money which it paid for said assignment of said salary.

The testimony of the plaintiff is that it is not a money broker, or one who lends money, but that its business is that of "buying salaries or workmen's wages"; that it did not lend any money to the defendant, but bought his salary. The written transfer was introduced in evidence, showing a sale of the salary. The defendant did not introduce any testimony to controvert that of the plaintiff. On this state of facts, the act of March 9, 1901, "to regulate the business of money brokers, and persons who lend money for themselves or others, on bill of sales, notes or

mortgages on personal property, or their personal security," in certain counties (Acts 1901, p. 2685), has no application to this case.

It results that the court erred in giving the general affirmative charge in favor of the defendant; but, on the contrary, the plaintiff would have been entitled to the general affirmative charge, if it had been asked. Consequently it is unnecessary to notice assignments of error as to pleadings. The judgment of the court is reversed, and the cause remanded.

This opinion was prepared by Justice HAR-ALSON, and is now adopted by the court. Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

WOODWARD IRON CO. v. SHEEHAN.

(Supreme Court of Alabama. Dec. 16, 1909. Rehearing Denied Feb. 26, 1910.)

1. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—OPERATION OF RAILROAD—EMPLOYER'S LIABILITY ACT—"IN AND ABOUT THE OPERATION OF A RAILWAY."

A servant, injured while engaged in removing by means of a cable and a locomotive on a railway large chunks of iron, the result of a "boil" at a furnace, was engaged "in and about the operation of a railway," within the employer's liability act (Code 1907, § 3910).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 4, p. 346G.]

2. TRIAL (§ 143*)—AFFIRMATIVE CHARGE—WHEN AUTHORIZED.

Where the evidence on the material issues was in conflict, the affirmative charge was correctly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

3. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

Where the evidence tended to show that a servant was injured while engaged in or about the operation of a railway, as alleged in the complaint, an instruction precluding a recovery on the theory that the servant was not injured when so engaged was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction, in an action for injuries to a servant while engaged in removing by means of a cable and a locomotive on a railway large chunks of iron, the result of a "boil" at a furnace, caused by the locomotive pulling the mass on the servant, that if the servant gave a stop signal with a torch, and then walked from a position directly behind the pieces of iron from the direction of the locomotive over several pieces of iron with the torch swinging slightly in his left hand, that it was common knowledge that at that distance in the dark the light would appear to go up and down, and that the engineer might have mistaken this for an up and down motion, and thus a go-ahead signal, the engineer was not guilty of negligence in starting the engine, was prop-

erly refused, because invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACT.

The instruction was properly refused, because it assumed to declare common knowledge in respect to a matter of which there could be no common knowledge.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

6. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a servant, an instruction on contributory negligence, which failed to hypothesize that the servant's negligence proximately contributed to the injury, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

7. TRIAL (§ 240*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

In an action for injuries to a servant, an instruction that the burden of proof is on plaintiff, and that, if the jury found that there was a disputed fact left in doubt, they should find the fact for defendant, was properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

The instruction was properly refused, because it pretermitted an hypothesis that the disputed fact was material.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

9. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A motion for a new trial on the ground of newly discovered evidence is properly refused, where there is an entire absence of requisite diligence, and positive evidence that the diligence exercised was after the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

10. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A person's foot, ankle, and leg below the knee were permanently injured. His ankle was stiff. He endured for a long time severe physical pain. A part of the foot ever since the injury had been abnormally cold, indicating impaired circulation, and he could not step down on the ankle. He suffered from soreness after a day's work, and the limb was marked with wounds. *Held*, that a verdict of \$3,000, approved by the trial court, would not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

11. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

The issues on conflicting evidence are for the jury, and a verdict supported by evidence, if credited by the jury, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3965-3987; Dec. Dig. § 1002.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by William T. Sheehan against the Woodward Iron Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Count 1 is as follows: "Plaintiff claims of the defendant \$5,000 as damages, for that heretofore, to wit, on the 12th day of December, 1906, while plaintiff was in the service or employment of the defendant, and engaged in or about the business of the defendant at or near Woodward, in Jefferson county, Alabama, to wit, in or about moving a mass of matter, to wit, iron or slag, by means of a cable or rope, and a steam locomotive engine upon a railway, said mass was pulled or projected upon or against plaintiff by said engine by means of said cable or rope, and as a proximate consequence thereof plaintiff's feet, ankle, and legs were bruised, cut, and mashed. [Here follows catalogue of his injuries.] Plaintiff alleges that he suffered said injuries and damages as aforesaid by reason and as a proximate consequence of the negligence of the person in the service or employment of defendant who had charge or control of said locomotive engine upon said railroad, viz., said person, to wit, Will Stewart, negligently caused or allowed said mass, or part thereof, to be pulled or projected upon plaintiff by means of said engine as aforesaid."

The demurrers were that the count showed on its face that the defendant was a furnace company, and engaged at the time of the injury complained of, with its locomotive engine, railway, and other appliances, in moving a mass of iron or slag by means of a cable or rope, and said engine and railway are not contemplated under the fifth subdivision of the employer's liability act (Code, § 3910) as a locomotive engine on a railway, so as to charge the defendant with the negligence of the said engineer. Said count shows on its face that defendant was not at the time in the capacity of a railroad employé under the fifth subdivision of the employer's liability act. The count shows on its face that the plaintiff was not engaged in the business of railroading at the time of his alleged injury. The defense was contributory negligence and the general issue.

The following charges were refused to the defendant: (2) "I charge you, gentlemen, that under the uncontradicted testimony in this case defendant was engaged in the manufacture of iron at its furnace plant; that in connection therewith it operated a railway to haul coal and ore to its furnace; that plaintiff was engaged in the duties of a rigger at the time of this accident and was not engaged in the business of railroading; and that he is accordingly not entitled to recover under counts 1, 2, 3, and 4." (3) "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the plaintiff gave the stop signal with the torch, and then walked from a position directly behind the piece of iron from the direction of the engine over several pieces of iron with the torch swinging slightly in his left hand, as he described to the jury; that it is com-

mon knowledge that at that distance in the dark this light would appear to go up and down, and the engineer might have mistaken this for an up and down motion of the torch; and as, under the uncontradicted evidence, this was the go-ahead signal, the engineer was not guilty of negligence in the starting up of the engine at said time, and your verdict must be for the defendant under the first count." (5) "The law does not undertake to measure the negligence of the plaintiff by that of the defendant, and if you believe from the evidence that plaintiff was negligent in any degree he cannot recover, even if you believe the defendant to be negligent under counts 1, 2, 3, 4, and 5 of the complaint." (7) "If you believe from the evidence that plaintiff was employed as a rigger about defendant's plant, and that he was engaged in said duties at the time of his alleged injury, you must find for the defendant under counts 1, 2, 3, and 4 of the complaint." (11) "The burden of proof is on the plaintiff, and if the jury find that there is a disputed fact in this case left in doubt and uncertainty to your minds, you will find said facts in favor of the defendant."

Charles A. Calhoun and Cabaniss & Bowie, for appellant. Bowman, Harsh & Beddow, for appellee.

McCLELLAN, J. Action by employé against the employer for personal injuries suffered. Count 1 was the only count submitted to the jury. The court, in overruling the demurrers to this count, followed the ruling made in Alabama Steel & Wire Co. v. Griffin, 149 Ala. 423, 42 South. 1034, with respect to counts 5 and 6 therein. Counsel for appellee strongly assailed the soundness of the Griffin Case, wherein it was held that, to bring a cause of action within the fifth subdivision of the employer's liability act (Code, § 3910), the injured servant must have been engaged when injured, in or about the operation of a railway.

In expression of the writer's view only: Pear v. Cedar Creek Mill Co., 156 Ala. 263, 266, 47 South. 110, was the first occasion requiring the writer's consideration of the proposition decided in the Griffin Case; and his views, in opposition to the soundness of the Griffin Case, were there set down without elaboration, though after a full and careful consideration. The announcement made, as indicated, in Griffin's Case, is, in my opinion, such a radical departure from the statute, that I am not yet willing to accept it as a settled interpretation of the statute in the respect involved.

However, count 1 does not present the question. Therein it affirmatively appears that plaintiff was engaged, when injured, in removing large chunks of iron, the result of a "boll" at a furnace, by means of a cable and a locomotive on a railway. He was en-

gaged, when injured, in or about the operation of a railway. The demurrer to count 1 was properly overruled. In brief of appellant's counsel it is conceded—and the concession is the fact—that the evidence on the material issues in the cause was in conflict. Obviously the affirmative charge was correctly refused to defendant.

The only other assignments insisted on in brief are those predicated on the refusal of charges 2, 5, 7, and 11, requested by the defendant, and on the denial of a new trial.

Charge 2 sought to preclude a recovery on the first count, on the theory that plaintiff was not, when injured, engaged in or about the operation of a railway. The evidence tended to support the averments of the count in this particular, and hence the charge was well refused.

Charge 3 invaded the jury's province. It also assumed to declare common knowledge in respect of a matter of which there could not be, nor was, common knowledge.

Charge 5 was well refused because, if not for other reasons, it failed to hypothesize that plaintiff's negligence proximately contributed to his injury.

Charge 7 was misleading, if not otherwise faulty. While plaintiff may have been a "rigger," and was injured when so engaged, yet the performance of his duties as a rigger, in this instance, comprehended the employment of a locomotive on a railway, as affording the motive power to remove the chunks of iron produced by the "boll" at the furnace.

Charge 11 stated no legal proposition, was argumentative, and pretermitted in hypothesis that the "disputed fact" was material. It probably had other infirmities.

The motion for a new trial, on the ground of newly discovered evidence, could not have been sustained. Not only was there an entire absence of evidence of requisite diligence on the defendant's behalf in the premises, but from the affidavit of defendant's attorney it appears that the diligence exercised was "since the verdict was rendered." *K. C. M. & B. R. R. Co. v. Phillips*, 98 Ala. 159, 13 South. 65; *Simpson v. Golden*, 114 Ala. 336, 21 South. 990; among others.

The other ground of the motion, which, it is contended, the court erroneously overruled, rested on the excessiveness of the verdict, viz., \$3,000. The evidence bearing on the extent of the injury suffered was conflicting. It was reasonably open to the jury to find that plaintiff's foot, ankle, and leg below the knee were permanently injured, that his ankle was stiff, that he endured for a long time severe physical pain, that a part of his foot has ever since the injury been abnormally cold, indicating impaired circulation, that he could not stoop down on that ankle, that he suffers from soreness after a

day's work, and that the limb is marked with wounds. The defendant's physician, who attended plaintiff, testified to a very much less serious state of injury than did the plaintiff and his witnesses. In addition to the testimony indicated, the jury had a view of the leg, ankle, and foot. It being open to the jury to reasonably find the extent of the injury to have been as serious, permanent, and painful as plaintiff's testimony tended to show, and since the trial court declined to disturb the verdict on the ground of excessiveness, we are not so convinced of the unreasonableness of the sum ascertained by the jury as to warrant us in pronouncing erroneous the overruling of the motion for a new trial on the ground indicated.

The evidence bearing on the material issues in the case was, as before stated, conflicting. If the evidence in plaintiff's favor was credited by the jury, the verdict could not be said to have been contrary to the weight of the evidence. The issues were for the jury to decide, and to them it was properly committed to determine the truth from the evidence.

There is no merit in the errors assigned and argued, and the judgment must be affirmed.

Affirmed.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

BENDER v. BARTON.

(Supreme Court of Alabama. Feb. 3, 1910.

Rehearing Denied Feb. 28, 1910.)

DEEDS (§ 56*) — DELIVERY — SUFFICIENCY OF DELIVERY.

Where defendant's father executes a deed for the purpose of delivering it to defendant at such future time as he may determine, and never voluntarily parts with the control of the instrument, but it is taken from the drawer in which it was placed by the grantee without his father's consent, the title to the property does not pass to the grantee, and he has no equity in the land that can be subjected to complainant's contract of purchase of the land from defendant.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 117-125; Dec. Dig. § 56.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Judge.

Bill by Fred J. Bender against Geo. W. Barton, Jr., for specific performance. Judgment for defendant, and plaintiff appeals. **Affirmed.**

The bill alleges a sale by Geo. W. Barton, Jr., to Fred J. Bender, of a certain tract of land for a certain consideration, expressed in the option, the payment by Bender of \$100 on the same, and the refusal by Barton to accept the other cash payments and notes, and to execute the deed. The defense set up was that Geo. W. Barton, Jr., did not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have the title to the land when he agreed to sell it, and that, although his father had made a deed to the lands, naming him as the vendee, the deed had not been delivered to him, and it has not yet been delivered to him, but that the same was executed to be delivered to him at some future day, when the grantor saw fit to do so.

Arthur L. Brown, for appellant. W. T. Stewart and W. K. Terry, for appellee.

ANDERSON, J. The main question involved in this appeal is whether or not a certain deed from Geo. W. Barton, Sr., and wife, to Geo. W. Barton, Jr., was delivered before the contract of sale between Barton, Jr., and the appellant, Bender, was made. The proof shows that there was no actual delivery at the time of the signing and acknowledgment of same, and negatives all idea of any intention of a present delivery. It appears that the grantor prepared and executed the deed for the purpose of delivering it at such future time as he might determine, and that he had never parted with the control of the instrument, and that it was taken from the drawer by the grantee without his father's consent. There is a conflict as to whether Barton, Sr., put it in the drawer, or had his wife to do so, or whether or not he gave it to her to keep; but in either event the evidence shows that the control was reserved to the grantor, and that it was not intended as a delivery to the grantee.

There is no merit in the contention that Barton, Jr., has an equity in the land that can be subjected to complainant's contract of purchase. He had paid nothing on the land, and had no claim thereto until a delivery of the deed by his father, who merely intended to give him the land at some future day.

The decree of the chancery court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

SIBLEY & SIBLEY v. SMITH.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied Feb. 26, 1910.)

1. STIPULATIONS (§ 14*)—USE IN SUBSEQUENT CAUSE.

An agreement between counsel to a cause that a successor to a justice of the peace would testify that the docket kept by the former justice was his docket, etc., made for the purpose of excusing the successor from attendance at court in that cause, cannot be used in a subsequent cause between the parties to prove the authenticity of the docket of the former justice.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 32; Dec. Dig. § 14.*]

2. EVIDENCE (§ 317*)—HEARSAY—DOCUMENTARY EVIDENCE.

The secondary statement of what the successor of a justice of the peace said about the authenticity of the docket of the former justice is no proof that the docket was that of the former justice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1177; Dec. Dig. § 317.*]

3. EVIDENCE (§ 183*)—BEST AND SECONDARY EVIDENCE—PREDICATE.

Papers left with a justice of the peace in the trial of a cause cannot be proved after his death by secondary evidence in a subsequent suit, where no search was shown to have been made through his papers or no showing that they were lost.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 605; Dec. Dig. § 183.*]

4. TRIAL (§ 46*)—RECEPTION OF EVIDENCE.

It is not error to disallow a question to a witness where the question on its face did not indicate the relevancy, materiality, or pertinency of the matter inquired about, and no information was given the court as to the purpose of the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 116; Dec. Dig. § 46.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Mrs. M. A. Smith against Sibley & Sibley. From a judgment for plaintiff, defendants appeal. Affirmed.

J. H. Perdue, for appellants. W. K. Terry, for appellee.

MCOLLELLAN, J. The complaint charges, respectively, trespass de bonis asportatis and trover. The counts, as last amended, were good, and the amendment of the pleas cast no additional burden of proof upon defendant. The defense was that the goods described in the complaint, and none other, were taken under and by virtue of a writ of possession issuing in consequence of a judgment for appellants, rendered by a justice of the peace, in an action between these parties. The court gave the general affirmative charge requested by plaintiff (appellee). The plaintiff's case, *prima facie*, was made out. As appears from the evidence of value of the goods taken, no exemplary damages were awarded in the city court. The evidence was plenary that Allen acted for and as the agent of appellants in taking the goods. Unless the defense indicated was sustained by the production of admissible evidence, the affirmative charge was due plaintiff.

The judgment relied on was said to have been rendered by Weaver, a justice of the peace. He had died before the trial. In order to identify the docket as that of Weaver an agreement, between former counsel for appellee and counsel for appellant, reciting that Judge Lacy, Weaver's successor, would testify to a state of fact showing his succession to the possession of Weaver's docket, etc., was entered into. The book was then

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

offered and was denied admission in evidence. The agreement, as readily appears, was with the view to excusing further attendance of the witness Lacy, on that previous trial, whereat the pleadings were dealt with, and evidence was not taken, though the witness was in attendance. It does not purport to be an agreement to obviate Lacy's attendance throughout the litigation. Its only office was to release Lacy on that occasion, and it was not, obviously, an agreed statement of facts, as was the case in *Prestwood v. Watson*, 111 Ala. 604, 20 South. 600, cited for appellants. The docket was properly excluded, not being identified as that of Weaver. The evidence of the witness Perdue, as to his reception of the book from Lacy, was proper as far as it went; but clearly the secondary statement of what Lacy said about the docket's being Weaver's did not identify the docket as that of Weaver.

Sundry evidence, offered by defendants, of papers left with Weaver at the time of the trial of the detainee suit, was well disallowed. There was no evidence tending to show search among Weaver's papers or effects for the papers alleged to have been lost. Indeed, the testimony was that the widow of Weaver only deferred that search. She was not brought as a witness, nor was there any other or further effort by defendants shown looking to the discovery, among Weaver's effects, of the papers sought to be secondarily proven.

The question propounded to A. C. Smith on cross-examination was not erroneously disallowed. No information was given the court as to the purpose of the question. No mention of "consignment papers" had been before made in the examination or testimony of the witnesses. No suggestion was made that such papers were lost, nor that a predicate for the introduction of secondary evidence of their contents was desired to be laid. The question, on its face, did not indicate the relevancy, materiality, or pertinency of the matter inquired about. The court cannot be put in error for disallowing such a question. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31; *Ross v. State*, 139 Ala. 144, 36 South. 718.

With the alleged docket of Weaver not in evidence and secondary evidence of the consignment papers inadmissible, the defense necessarily failed, in material particulars, of support in the evidence. So failing, the *prima facie* case made by the plaintiff was rebutted.

There is no prejudicial error in the record. The judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

LOUISVILLE & N. R. CO. v. ELLIOTT.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied Feb. 28, 1910.)

1. EVIDENCE (§ 545*)—EXPERT WITNESSES—EVIDENCE AS TO COMPETENCY.

It is not error to exclude a question to a physician, who testified in a personal injury action that a competent surgeon who examined plaintiff at the time of injury would be better able to tell what the injury to plaintiff was, whether that surgeon was a competent surgeon, where that surgeon was afterwards examined by the court, since it was for the court to decide his competency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.*]

2. EVIDENCE (§ 505*)—EXAMINATION OF EXPERTS.

A question to an expert witness in a personal injury action, whether plaintiff was able at a certain time to walk, calls for a fact, and is properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2306; Dec. Dig. § 505.*]

3. DAMAGES (§ 216*)—INSTRUCTIONS.

Where, in a personal injury action, the averment of earnings actually lost by plaintiff is capable of exact proof, an instruction on that phase, omitting the word "reasonably" before "compensate," is not error.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

4. DAMAGES (§ 216*)—INSTRUCTIONS—"COMPENSATE."

An instruction on damages in a personal injury action is not erroneous, because failing to use the word "reasonably" before "compensate," since the word "compensate" means equal remuneration, and could not carry with it authority to award more damages than were actually proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1352-1357.]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO BRAKEMAN—EVIDENCE—QUESTION FOR JURY.

Where the negligence alleged by a brakeman was the allowing of a car to be placed so close to another track that an injury resulted, and there was proof that it was the duty of the yardmaster to see that a car was not left in a dangerous position, an affirmative charge for defendant could not be based on an absence of evidence as to who placed the car in its dangerous position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

6. MASTER AND SERVANT (§ 291*)—INJURIES TO BRAKEMAN—INSTRUCTIONS.

Where the negligence alleged by a brakeman was the allowing of a car to be placed so close to another track that he was injured, and there was proof that it was the duty of the yardmaster to see that cars were not placed in a dangerous position, instructions based on liability for acts of others in placing the car there are properly refused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

7. MASTER AND SERVANT (§ 291*)—INJURIES TO BRAKEMAN—INSTRUCTIONS.

A charge, in an action for injuries to a brakeman, failing to hypothesize that the negligence alleged on the part of plaintiff was the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proximate cause of the injury, is properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1145; Dec. Dig. § 291.*]

8. MASTER AND SERVANT (§ 296*)—INJURIES TO BRAKEMAN—DUTY TO AVOID OBSTRUCTIONS—INSTRUCTIONS.

An instruction, in an action for injuries to a brakeman by being struck by a car placed in dangerous proximity to the track on which he was riding, that if plaintiff negligently failed to look out for and to discover the car that struck him, etc., is properly refused, as placing too high a degree of care on him to look out for obstructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

9. MASTER AND SERVANT (§ 296*)—INJURIES TO BRAKEMAN—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

An instruction, in an action for injuries to a brakeman by being struck by a car placed in dangerous proximity to the track on which he was riding, that if the plaintiff by reasonable diligence could have seen the car which struck him in time to have avoided being struck, and failed to do so, the jury should find for defendant, is properly refused, since, although plaintiff might have been able to see the car, yet, unless he could have discovered that it was so near as to be dangerous, he would not be negligent in not avoiding it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

10. MASTER AND SERVANT (§ 296*)—INJURIES TO BRAKEMAN—INSTRUCTIONS—SELECTION OF SAFE PLACE TO RIDE.

In an action for injuries to a brakeman by being struck by a car placed in dangerous proximity to the track on which he was riding, instructions presenting the question as to the duty of plaintiff to select a safe place to ride, which failed to state that the danger of occupying the place chosen, was either known to plaintiff or so obvious as to charge him with notice, were properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

Appeal from Circuit Court, Jefferson County: A. O. Lane, Judge.

Action by Steve Elliott against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The case made by the complaint is that plaintiff was an employé of the Louisville & Nashville Railroad Company as brakeman on a freight train, and that while the train was passing through the yards another car or obstruction had been left so close to the track that the car on which plaintiff was engaged in his employment "sidewiped" or struck the car or other obstruction, causing the injuries complained of. The allegations of the fifth count as to negligence are that his injuries were proximately caused by negligence of some person in the service or employment of defendant, who had charge or control of the car upon a railway of the defendant; that said negligence consisted in this: That said person negligently allowed

said car to be or remain so close to the track of the railway over which the train was running upon which plaintiff was riding that it would not admit of the passage of his body between said car and said train while he was riding as aforesaid without coming in contact therewith, and because thereof, while he was riding as aforesaid, his body did come in contact with said standing car, proximately causing his injuries as aforesaid. It is also alleged that the person in the service or employment of defendant who had charge or control of the car was unknown to plaintiff.

The defenses were contributory negligence; the second count alleging it to be that plaintiff negligently rode in an improper position on the side of the car, without necessity therefor, when he passed the car which struck him. The third plea alleged that he negligently failed to see that the car that struck him as he was passing it was too close to clear him as he was riding on the side of another car. The fourth plea alleges the negligence to be that he negligently failed to escape or avoid contact with the car that struck him after he became aware, or after he would by the exercise of reasonable diligence have been aware, of the proximity of the car that struck him to the car he was riding on.

The following charges were given at the request of the plaintiff: (1) "The court charges the jury that, if they find for the plaintiff, they should give him such damages as will compensate him for all the earnings which the evidence shows he has lost by his injuries, as well as all the earnings which the evidence reasonably shows he will lose on account of his injuries in the future, if the jury are reasonably satisfied that he will lose earnings in the future on account of his injuries." (2) "The court charges the jury that, if they find for the plaintiff they should award him such damages as will compensate him for the pain and suffering which he has undergone, and will in future undergo, on account of his injuries, if the jury are reasonably satisfied from the evidence that he has been caused suffering, and will in future be caused to suffer pain, on account of his injuries."

The following charges were refused to the defendant: (1) and (2) General affirmative charge. (3) "Unless the jury believe from the evidence with reasonable certainty that the car was placed where it was when plaintiff was injured by some one who had charge or control of a car on defendant's railway, the jury cannot find for the plaintiff under the fifth count of the complaint." (4) "If the jury believe from the evidence that the plaintiff would by the exercise of reasonable diligence have discovered that the car which struck him would not clear him as he passed

it in time by the exercise of ordinary diligence to have escaped being struck by it, the jury must find for the defendant." (5) "If the jury believe from the evidence that the plaintiff by reasonable diligence could have seen the car which struck him in time to have avoided being struck by it, and failed to see and avoid being struck by it, the jury must find for the defendant." (8) "If the jury believe from the evidence that the plaintiff negligently failed to look out for and to discover the car that struck him, and that such negligent failure on his part proximately contributed to his injury, the jury must find for the defendant." (9) "If the jury are unable to determine from the evidence with reasonable certainty who left the car where it was when plaintiff was struck by it, the jury can find for the defendant upon neither the fourth nor the fifth counts." (10) Same as 9, except requiring the finding for the defendant. (11) "If the evidence as to whether the car that struck plaintiff was left where it was when plaintiff was struck by it by a person in defendant's service entrusted with superintendence, whilst in the exercise of superintendence, or by a person in defendant's service in charge or control of the car on its railway, or by a mere fellow servant of the plaintiff, is in equipoise, and the jury are unable to determine from it with reasonable certainty which one of the three so left the car where it struck the plaintiff, the jury must find for the defendant." (12) "If the jury believe from the evidence that the plaintiff at the time he was injured was riding on the side of a moving car, when he could just as well have performed his duty while riding on top of the car, instead of on the side of it, and if the jury believe from the evidence that it was safer to ride on the top than on the side of the car, the jury must find for the defendant." (13) "The plaintiff was required by the law to select a safer way of riding the cars, if there was a safer way than riding on the side of the car, provided the plaintiff could reasonably have performed the duties he was required to perform while riding in such safer way." (15) "If the jury believe from the evidence that the plaintiff at the time he was injured was riding on the side of a moving car without necessity therefor, and that he should have ridden in a safer place, and reasonably have performed his duties in such safer place, the jury must find for the defendant."

Judgment was for the sum of \$5,000.

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant for damages on account of a personal injury received by the plaintiff while an employé of the defendant. All of the counts of the complaint were eliminated, except the fifth count of the

amended complaint, on which the case was submitted to the jury.

During the examination of the witness Dr. Lowery, he testified that a competent surgeon who examined the plaintiff at the time he was hurt would be in a better situation to tell whether the plaintiff had a fractured pelvis than the witness, and that he knew Dr. Pressley. Defendant's counsel asked this witness, "Is he a competent surgeon?" to which question the plaintiff objected, and the court sustained the objection. There is no error in this. Without the testimony of Dr. Pressley, it would be immaterial whether he was competent, or not. He was subsequently examined, and testified as to his medical education and his experience in the practice. It was for the jury to determine what weight to give to his testimony (*Birmingham Ry. & Elec. Co. v. Ellard*, 135 Ala. 435, 447, 33 South. 276), while it was the province of the court to determine his competency to testify as an expert, which the court did, by admitting his testimony (*Encyc. Ev.* 549; *Coasting Co. v. Tolson*, 139 U. S. 559, 11 Sup. Ct. 653, 35 L. Ed. 270; *R. R. Co. v. Warren*, 137 U. S. 343, 11 Sup. Ct. 96, 34 L. Ed. 681; *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121, 125).

The court holds that there was no error in sustaining the objection to the question to the witness Dr. Pressley, "Was he, at that time, able to walk without a stick?" as it called for a fact, and not for the opinion of the expert witness. The question suggested by the court was the proper one to be asked.

There was no error in giving charges 1 and 2, requested by the plaintiff. The amount of earnings actually lost by the plaintiff was capable of exact proof, and the charges were not defective by the omission of the word "reasonably" before "compensate." As to the other damages authorized by the first charge, it provides only for earnings which the evidence "reasonably shows," etc., and in the second it is only for pain and suffering which the "jury are reasonably satisfied from the evidence" has been, or will be caused, etc. Moreover, the word "compensate" denotes equal remuneration, and could not carry with it an authority to award more damages than were actually proved.

The appellant claims that the general charge should have been given in favor of the defendant, because there was no proof as to who placed the car in the position of proximity to the track on which plaintiff was moving, and also because the complaint alleges that the person in charge of said car is not known, and that fact is not proved. While it is true that the burden rests on the plaintiff to prove the allegations of his complaint, and while it is true that there is no definite proof as to who placed the car where it was, yet the negligence alleged is in allowing "said standing car to be or remain so close to the track," etc., and there is evidence tending to show that it is the duty of

the yardmaster to see that no car is left in such position as to be dangerous to a person on duty on another car moving on the nearby track. It was therefore a matter for the jury to find whether said car had been allowed to remain there as a result of the negligence of the yardmaster. *Tenn. Coal, Iron & R. R. Co. v. Hayes*, 97 Ala. 201, 206, 12 South. 98; *K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 240, 252, 12 South. 88; *Jones v. K. C., Ft. S. & M. R. R.*, 178 Mo. 523, 77 S. W. 890, 101 Am. St. Rep. 434.

The case of *Tuck, Adm'r, v. L. & N. R. R.*, 98 Ala. 150, 12 South. 168, is not analogous to this case. In that case it was shown that it was not an unusual occurrence for a tail bolt to draw out, and that it was one of the usual accidents which might happen, without negligence. In the present case the car could not be placed or left where it was without negligence by some one, and if it was the duty of the yardmaster to see that the cars were not left in such position, the burden rested on the defendant to negative the presumption, by facts showing how the car did happen to be there.

As to the question of knowledge as to who was yardmaster, the case of *Ala. Great So. Ry. v. Davis*, 119 Ala. 575, 588, 24 South. 862, held that the general charge should have been given, because a similar averment was disproved. In the present case the averment was not disproved; but, on the contrary, the plaintiff testified that "they had been changing yardmasters at the time I [he] got hurt. I do not know who it was at that time."

There was no error in the refusal to give charges 3, 9, 10, and 11, requested by the defendant. These charges relate only to the fact as to who placed the car in the position, while, as before stated, the negligence complained of is allowing the car to be and remain in such position, and, if it was the duty of the yardmaster to see that no car was allowed to remain in a position of danger, it matters not who placed it there.

There was no error in the refusal to give charge 4, as it failed to hypothesize that the negligence alleged was the proximate cause of the injury.

There was no error in the refusal to give charge 8, requested by the defendant, as it placed a higher degree of care on the plaintiff in the matter of looking out for obstructions than the law or the evidence justifies.

There was no error in the refusal to give the fifth charge requested by the defendant. Although the plaintiff might have been able to "see the car," yet, unless he could have also discovered that it was so near as to be dangerous, he would not be guilty of contributory negligence in not avoiding it.

There was no error in the refusal to give charges 12, 13, and 15, requested by the defendant, "presenting the question as to the

duty of plaintiff to select the safer place to ride." Said charges failed to state that the danger of occupying the place chosen was either known to the plaintiff, or so obvious as to charge him with notice. In addition, Justice McCLELLAN thinks that plea 2 does not cover the negligent selection charged.

We cannot say that the amount of the verdict is so excessive as to justify this court in setting aside the judgment.

The judgment of the court is affirmed.

Affirmed.

MCCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

CRAIN v. STATE.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied Feb. 26, 1910.)

1. WITNESSES (§ 267*)—CROSS-EXAMINATION—SCOPE—DISCRETION OF COURT.

While much latitude is permissible on the cross-examination of a witness touching his sincerity, memory, etc., even to the asking of irrelevant questions, the matter rests largely in the discretion of the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 923; Dec. Dig. § 267.*]

2. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR — EXAMINATION OF WITNESS.

Where accused did not dispute that he shot and killed deceased on the date mentioned, so that the hour of the day was not material, he was not prejudiced by the court's refusal to permit a witness, who had testified that he looked at the clock just before the shooting and it was then 10 minutes past 11 o'clock, to answer where the hands of the clock were pointing at the time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3129; Dec. Dig. § 1170½.*]

3. CRIMINAL LAW (§ 531*)—EVIDENCE—CONFESSIONS—PREDICATE.

In laying a predicate for the admission of confessions, a question whether any promises, threats, or inducements were made to defendant, before he made the statements sought to be proved, was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1214; Dec. Dig. § 531.*]

4. HOMICIDE (§ 156*)—EVIDENCE—MALICE.

Where accused, after shooting deceased, came back in a short time to where deceased was lying, ordered witness away, and shot several times at witness as he ran away, questions as to whether defendant came back, and what he said or did, were admissible as tending to show malice.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.*]

5. CRIMINAL LAW (§ 756*)—INSTRUCTIONS—EVIDENCE.

It is not error for the court in its general charge to state the tendencies of the evidence for the state and defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1763; Dec. Dig. § 756.*]

6. CRIMINAL LAW (§ 798*) -- INSTRUCTIONS — REASONABLE DOUBT.

Instructions requiring a verdict of acquittal in case any one of the jury entertained a

reasonable doubt of defendant's guilt were properly refused, since that situation called only for a mistrial, and not an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. § 798.*]

7. STATUTES (§ 13*)—FORM OF PASSAGE—RETURN FROM COMMITTEES.

Act Feb. 26, 1907 (Loc. Acts 1907, p. 238), providing for the drawing of juries in capital cases in Jefferson county, is unconstitutional, because reported back from a different standing committee from that to which it was referred in the House, in violation of Const. 1901, § 62, declaring that no bill shall become a law until it shall have been referred to a standing committee of each House, acted on by such committee in session, and returned therefrom.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 10; Dec. Dig. § 13.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

George Crain was convicted of murder, and he appeals. Reversed and remanded.

The jury law referred to can be found in Acts 1907, p. 238, and the record shows that the jury was drawn under said act, and not under the previous act relative to the drawing of the juries.

The following charges were refused to the defendant:

"(1) The court charges the jury that the law presumes the defendant to be innocent of the commission of any crime, and this presumption continues to grow in his favor step by step until you are satisfied beyond all reasonable doubt of his guilt, and you cannot find the defendant guilty of a crime within the indictment until the evidence within the case satisfies you beyond all reasonable doubt of his guilt; and so long as you, or any one of you, have a reasonable doubt as to the existence of any of the elements necessary to constitute any of the crime or crimes within the indictment, you should find the defendant not guilty." "(8) I charge you, gentlemen of the jury, that if either one of your minds has a reasonable doubt from all the evidence in this case of the guilt of the defendant, then it is your duty to render a verdict of not guilty."

Frank S. Andress, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. While it is true that much latitude is permissible upon the cross-examination of a witness touching his sincerity, memory, etc., even to the asking of questions irrelevant to the issues in the case, yet it is a matter that must of necessity rest largely in the wise discretion of the trial court.

In the present case there was no dispute that the defendant shot and killed the deceased on the mentioned date, and consequently it was immaterial at what hour of the day it was done. The witness Merri-

wether testified on his direct examination that he looked at the clock just before the shooting, and it was 10 minutes past 11 o'clock. On his cross-examination he was asked where the hands of the clock were pointing, to which question the solicitor objected, and the objection was sustained. While the question was not an improper one as touching the knowledge and accuracy of the witness as to the precise time of the shooting, and might well have been permitted, we are unable to see that the defendant was prejudiced by its refusal, in view of the fact that the defendant did not deny the shooting of the deceased. We are satisfied that no injury resulted therefrom to the defendant, and, such being the case, the ruling, if erroneous, should not constitute reversible error. Code 1907, § 6264.

In the laying of a predicate for the introduction of evidence of confessions made by the defendant, the question, "Were there any promises, threats, or inducements made to the defendant before the statements were made by him?" is not open to the objection that it called for a conclusion of the witness, and was properly allowed by the court.

When taken in connection with the declaration, made by the defendant after the shooting, that, if the deceased was not dead, he (defendant) would go back and finish him, the questions by the solicitor, "Did he come back?" and "What did the defendant then say or do?" were properly allowed as against the objections stated. The bill of exceptions recites: "The court overruled the objection, and allowed the witness to testify what the defendant said and did at that time. To which overruling the defendant then and there duly excepted." The evidence showed that the defendant came back in a short time to where the deceased was shot and was lying, and ordered the witness away, and shot several times at witness as he ran away. This evidence was admissible as tending to show malice.

The court in its general charge to the jury, in submitting the issues, stated the tendencies of the evidence for the state and defendant without an invasion of the province of the jury. In the admission of evidence the court necessarily passes upon its tendency as proof as matter of law.

Written charges numbered 1 and 8, refused to the defendant, were palpably and inherently bad. Each of said charges required a verdict of not guilty if any one of the jury entertained a reasonable doubt of the defendant's guilt. This is not the law. So long as any one of the jury has a reasonable doubt of the defendant's guilt, there can be no conviction; but such a state of the case does not authorize an acquittal, the result would be a mistrial.

Since writing the foregoing part of this opinion a supplemental brief for counsel for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appellant has come into our hands, wherein it is urged that the special act which provides for the drawing of juries in capital cases in Jefferson county, and under which the jury in the present case was drawn, approved February 26, 1907 (Loc. Acts 1907, p. 238), is unconstitutional and void. An inspection of the journals of the Legislature discloses that in the passage of said act, which originated in the House, the bill upon its introduction was referred to the standing committee on local legislation, and was never reported back by that committee, but, instead thereof, was reported back to the House by a different standing committee, to wit, the judiciary committee. This was a palpable violation of section 62 of the Constitution of 1901, which is as follows: "No bill shall become a law until it shall have been referred to a standing committee of each House, acted upon by such committee in session and returned therefrom, which facts shall affirmatively appear upon the journal of each House." See *Tyler v. State*, 48 South. 672; *Walker v. City of Montgomery*, 139 Ala. 468, 36 South. 23. The act in question must be declared void.

It affirmatively appears from the record in this case that the special jurors, 45 in number, drawn for the special venire, and from which the jury that tried the defendant were selected and impaneled, were drawn under said void statute. The jury, therefore, that tried the defendant, was unauthorized by law. The conviction and sentence was illegal. It follows that the judgment appealed from must be reversed, and the cause remanded for another trial according to law.

Reversed and remanded.

ANDERSON, SAYRE, and EVANS, JJ., concur.

ROGERS v. STATE.

(Supreme Court of Alabama. Feb. 3, 1910.
On Rehearing, Feb. 28, 1910.)

1. CRIMINAL LAW (§ 622*)—TRIAL—SEVERANCE—TIME FOR MOTION.

Under court rule 31 (Code 1907, p. 1525), providing that a severance in a capital case shall be deemed waived unless claimed at or before arraignment, a motion for severance, not made until defendant had been arraigned and pleaded not guilty, was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1386; Dec. Dig. § 622.*]

2. INDICTMENT AND INFORMATION (§ 139*)—CRIMINAL LAW (§ 279*)—PLEA IN ABATEMENT—MOTION TO QUASH.

It is within the discretion of the trial court to decline to receive a plea in abatement to the indictment and to overrule a motion to quash, not presented until after plea of not guilty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139; * Criminal Law, Cent. Dig. § 643; Dec. Dig. § 279.*]

On Rehearing.

3. CRIMINAL LAW (§ 1160½*)—APPEAL—HARMLESS ERROR—DRAWING OF JURY.

A conviction for a capital crime will not be reversed because the jury was drawn under the invalid jury act of 1907 (Loc. Acts 1907, p. 238), where the record shows a compliance with the pre-existing law, both as to the drawing of the jury, the ordering of the venire, and the return of the sheriff.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3114; Dec. Dig. § 1166½.*]

4. JURY (§ 66*)—DRAWING JURY—"COURT."

Where a minute entry, reciting the drawing of a jury in a capital case, stated that the "court" proceeded to publicly draw from the jury box as provided by law, etc., and it appeared that the court consisted of two judges, the word "court," as there used, must be held to mean the presiding judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 284; Dec. Dig. § 66.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1672-1682; vol. 8, p. 7622.]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Joseph Rogers was convicted of murder, and he appeals. Affirmed.

The record shows that the defendant was arraigned on April 15, 1909, and pleaded not guilty, when a day was set for his trial, and juries ordered drawn. The arraignment was of Joseph Rogers and Jim Powell, charged in the same indictment with the crime of murder. On April 27th the defendant filed the motion to quash the indictment, and also demanded a severance upon the continuance of the cause to May 18, 1909. On that day the defendant renewed his demand for a severance, and also called attention to the motion to quash the indictment, and filed a plea in abatement, which the court denied. The defendant then moved the court to allow him to substitute the indictment and his plea in abatement, which was denied. The defendant then requested to hear him on his motion to quash the indictment, which was also denied; he reserving exceptions at the time to each action.

Allen & Bell, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The record shows that the motion for a severance was not made until some days after the defendant was arraigned and pleaded not guilty. The action of the trial court in refusing said motion will not, therefore, be revised upon this appeal. Rule 31, p. 1525, vol. 2, Code 1907; *Hudson v. State*, 137 Ala. 60, 34 South. 854; *Miller v. State*, 130 Ala. 1, 30 South. 379; *Austin v. State*, 139 Ala. 14, 35 South. 879. Nor will the action of the trial court be revised for declining to receive the plea in abatement to the indictment and in overruling the motion to quash same, as they both came after the defendant had pleaded "not guilty" to the indictment. *Crawford v.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

State, 112 Ala. 1, 21 South. 214; Moorer v. State, 115 Ala. 119, 22 South. 592.

The judgment of the criminal court is affirmed.

Affirmed.

McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

On Rehearing.

ANDERSON, J. It has been suggested for the first time upon this application that the jury that tried this case was drawn and organized under the act of 1907 (Loc. Acts 1907, p. 238), which was declared unconstitutional in the case of *Crain v. State*, 52 South. 31. It is true that said act has been condemned; but the record in the present case shows a compliance with the law as it existed before the attempted enactment of 1907, both as to the drawing and ordering of the venire and the return of the sheriff.

It is insisted, however, that the minute recital shows that the special jury was drawn by the court, instead of the judge, and falls within the influence of the case of *Scott v. State*, 141 Ala. 39, 37 South. 366. The minute entry does recite that the jury was drawn by the court; but it also recites that "the court proceeds to publicly draw from the jury box as provided by law," etc., which differentiates it from the *Scott* Case, supra, and brings it within the influence of the case of *Gray v. State*, 39 South. 621.

Counsel for appellant suggest that the *Gray* Case must not control the one at bar, for the reason that there are two judges of the court, and that "the court," as used in the minute entry, did not mean the presiding judge. We think that, if the court proceeded as provided by law to draw the jury, the word "court" necessarily means the presiding judge, and not the other judge of said court.

There is nothing in this record to show that the law was not complied with as to the drawing, service of copy of venire, and organization of the jury.

The application must be overruled.

GRAVES et al. v. STATE.

(Supreme Court of Alabama. Feb. 26, 1910.)
STATUTES (§ 13*)—FORM OF PASSAGE—RETURN FROM COMMITTEES.

Act Feb. 26, 1907 (Loc. Acts 1907, p. 238), providing for the drawing of juries in capital cases in Jefferson county, is unconstitutional, because reported back from a different standing committee from that to which it was referred in the House, in violation of Const. 1901, § 62, declaring that no bill shall become a law until it shall have been referred to a standing committee of each House, acted upon by such committee in session, and returned therefrom.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 10; Dec. Dig. § 13.*]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Will Graves and others were convicted of crime, and appeal. Rehearing granted, judgment reversed, and cause remanded.

Frank S. Address, for appellants. Alexander M. Garber, Atty. Gen., for the State.

EVANS, J. On application for rehearing, the constitutionality of the act under which the special venire was drawn in this case is raised. No brief for the defendants came into the hands of the court upon the first hearing. The question of the constitutionality of this act was raised for the first time in this court in the case of *George Crain v. State of Alabama* (decided at the present term) 52 South. 31, after the first opinion in this case was handed down. It was there decided that the act in question was unconstitutional by reason of the fact that it was referred to one standing committee in the House of Representatives and reported back by another standing committee, which was in violation of section 62 of the Constitution of 1901. Upon the authority, therefore, of the case of *Crain v. State*, supra, the application for rehearing is granted, the judgment of affirmance set aside, judgment of reversal entered, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

THOMAS v. STATE.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied Feb. 26, 1910.)

1. CRIMINAL LAW (§ 1125*)—APPEAL—MOTION IN ARREST—RECORD.

A motion in arrest of judgment and the ruling thereon must be shown in the record proper, and cannot be reviewed when shown only in the bill of exceptions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2949; Dec. Dig. § 1125.*]

2. ANIMALS (§ 45*)—MALICIOUS INJURY—AFFIDAVITS—VALIDITY—APPEAL.

Where an affidavit in a prosecution for maliciously disabling stock is void, it will not support a conviction, and the court on appeal would have to take the point on its own motion.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 45.*]

3. ANIMALS (§ 45*)—MALICIOUS INJURY—AFFIDAVIT—SUFFICIENCY.

Code 1907, § 6230, provides for the punishment of persons wantonly and maliciously injuring animals. Section 7161, subd. 71, provides the form of the indictment for malicious injury to animals. Sections 7132 and 7161 make the Code form as to indictment sufficient. Held, that an affidavit in a prosecution for maliciously disabling stock, which complies with the form provided by section 7161, subd. 71, is not void, since the affidavit need be no more extensive or particular than an indictment.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 130; Dec. Dig. § 45.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

John Thomas was convicted of wantonly or maliciously disabling or injuring stock, and he appeals. Affirmed.

The affidavit was as follows (omitting the formal charging part): "That John Thomas, within 12 months before making this affidavit, in said county, unlawfully, wantonly, or maliciously disabled, disfigured, or injured a mule, the property of affiant, against the peace and dignity of the state of Alabama." After verdict, the defendant moved in arrest of judgment; but this is shown by the bill of exceptions, and is not shown otherwise in the record.

C. D. Comstock and Vassar L. Allen, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The motion in arrest of judgment and the ruling thereon must be shown in the record proper, and cannot be reviewed when shown only in the bill of exceptions. *Hampton v. State*, 133 Ala. 180, 32 South. 230.

It is insisted, however, that the failure of the affidavit to aver the value of the animal killed or injured, or the amount of the injury, rendered it void, inasmuch as the fine is fixed according to the value, and that, if the affidavit is void, it will not support a conviction. If the affidavit is void, it will not support a conviction, and this court would have to take the point *ex mero motu*. *Dunklin v. State*, 134 Ala. 195, 32 South. 666; *Hornsby v. State*, 94 Ala. 63, 10 South. 522; *Francois v. State*, 20 Ala. 83. But this affidavit is not void, as it complies with form No. 71 in section 6230 of the Code of 1907, the section under which it was made. Sections 7132 and 7161 make the Code form as to indictments sufficient, and the lawmakers did not intend that an affidavit should be more extensive or particular than an indictment.

We are aware of the fact that an indictment premitting an averment of value was condemned in the *Dunklin Case*, supra; but there was no form in the Code of 1896 for the wrongful or wanton killing or injury of an animal covered by section 5091 of the Code of 1896. There was a form for malicious injury, under section 5090 of the Code of 1896, but none for section 5091. These two sections now constitute section 6230 of the Code of 1907, and as to which a form of indictment is given; and as the affidavit in the present case was made subsequent to the Code of 1907, it was sufficient.

The judgment of the city court is affirmed. Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

GRASSELLI CHEMICAL CO. v. DAVIS.

(Supreme Court of Alabama. June 30, 1909. Rehearing Denied Feb. 26, 1910.)

1. MASTER AND SERVANT (§ 116*)—LIABILITY FOR INJURIES—DEFECTS IN "PLANT."

Under Employer's Liability Act (Code 1907, § 3910) subd. 1, making a master liable for a defect in the ways, works, machinery, and plant, a ladder used in doing the master's work is a part of the "plant," and the master is liable for injuries caused by a defect in it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5400, 5401; vol. 8, p. 7755.]

2. EVIDENCE (§ 128*)—RES GESTÆ—COMPLAINTS AS TO SUFFERING.

In an action for injuries to a servant, testimony by the physician attending plaintiff as to whether he complained of any suffering or pain is admissible, as it related to the expressions of plaintiff at the time he was being treated, and was not subject to the objection that it was a mere narrative of a past suffering.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387; Dec. Dig. § 128.*]

3. MASTER AND SERVANT (§ 270*)—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a servant caused by a fall from a ladder, an objection to a question as to the position of the ladder when witness went to the place after the accident was properly sustained, in the absence of evidence that the ladder was in the same position as when plaintiff fell.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917; Dec. Dig. § 270.*]

4. EVIDENCE (§ 553*)—EXPERT EVIDENCE—HYPOTHETICAL QUESTION.

It is not error to permit a physician, testifying in an action for injuries to a servant, to be asked whether, if the plaintiff lived to be about 40 years old and never had any trouble with the injured limb, and that it developed as well as the other limb, whether that would indicate there was not likely to be tubercular trouble there, where the doctor had testified that the shortening of the limb was due to tubercular trouble, and there was evidence tending to show the facts hypothesized, as each party may take the opinion of the expert on his theory of the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2371; Dec. Dig. § 553.*]

5. WITNESSES (§ 387*)—CROSS-EXAMINATION—IMPEACHING WITNESS.

It is error, in an action for injuries to a servant, to sustain objections to a question to plaintiff on cross-examination whether he had not made statements, when he was examined under the statute, contradictory to what he had just testified to, and if at the time a person named was present, as it is always permissible on cross-examination to test the accuracy of the statements of the witness, by asking him if he has not on a particular occasion made a certain statement contradictory to his present testimony; and the rule is not changed by the fact that the previous testimony is in writing, and it is not allowable to introduce the writing in the first instance, but the witness, on request to see the writing, may have it shown to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1230; Dec. Dig. § 387.*]

6. WITNESSES (§ 324*)—RIGHT OF PARTY TO IMPEACH HIS WITNESS.

A party, introducing the deposition of the opposing party, taken on interrogatories, makes

him his witness, and cannot impeach him; but under Code 1907, §§ 4053, 4056, making answers to interrogatories evidence in the cause when offered by the party taking them, and allowing a party obtaining evidence by interrogatories to contradict the evidence thus obtained, the party obtaining the deposition is not obliged to offer it in evidence, and merely showing the answer to a witness for the purpose of refreshing his memory as to what he has sworn would not be introducing it in evidence, so as to make the deponent his witness, and preclude impeaching him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1097; Dec. Dig. § 324.*]

7. APPEAL AND ERROR (§ 260*)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

Where no exception is reserved to the action of the court in sustaining an objection to a question asked at the trial, the objection to the question cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1509; Dec. Dig. § 260.*]

8. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Under Code 1907, § 3910, relieving a master of liability for injuries to a servant because of defects in the plant, if the servant knew of the defect, and unless the defect arose from or had not been discovered or remedied owing to the negligence of the master, unless the servant is charged with the duty of inspection, he must either have knowledge of the defect, or it must be obvious to the senses, and the duty does not rest on the servant of discovering latent defects in the plant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

9. MASTER AND SERVANT (§ 262*)—ACTIONS FOR INJURIES—PLEADING.

In an action for injuries to a servant from a defect in a ladder used by the servant, defendant alleged that plaintiff was guilty of negligence which proximately contributed to his injury in negligently failing to discover the alleged defect in the ladder, although he would have done so if he had exercised reasonable care. *Held*, that a demurrer thereto was properly sustained, as the plea did not allege any facts showing any duty on the part of plaintiff to inspect, nor that the defect was obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859; Dec. Dig. § 262.*]

10. MASTER AND SERVANT (§ 293*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries to a servant caused by using a defective ladder, requested instructions that the jury cannot find for plaintiff unless reasonably satisfied from the evidence that a servant named was guilty of negligence either in failing to discover or in failing to repair the defect in the ladder, and that there can be no recovery by plaintiff unless the jury are reasonably satisfied that such servant was guilty of negligence, were properly refused; there being evidence to show that the injury occurred before the servant named was placed in charge of the repairs.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

11. DAMAGES (§ 158*)—PERSONAL INJURIES—PLEADING AND PROOF.

In an action for injuries to a servant, the allegation in the complaint that plaintiff "was made sick, sore, and lame" was sufficient to cover muscular contraction of the knee and a fracture of the hip.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

12. COSTS (§ 256*)—ON APPEAL—BILL OF EXCEPTIONS.

Where a bill of exceptions violates Code 1907, p. 1526, rule 32, providing that bills of exceptions shall not contain a statement of testimony in extenso, except in cases specified, the costs of the appeal will be taxed against the appellant.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 256.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by W. O. Davis against the Grasselli Chemical Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The first count and the second count were drawn under subdivision 1 of the employer's liability act (Code 1907, § 3910), and counted on a defect in the ways, works, machinery, and plant, etc.; the first count alleging that the stepladder used in doing said work about which plaintiff was engaged in pursuit of his employment was old, and the steps in said ladder were insecurely and improperly fixed thereto, and on account thereof, when plaintiff stepped on said ladder, it broke or gave way, throwing him to the ground and inflicting the permanent injuries set out. The averment of the defect in the second count is that the step in said ladder was insecurely and improperly put in and not able to support the weight of plaintiff, and, when he stepped on it, it broke with him, etc.

The fifth plea was as follows: "The defendant says that the plaintiff was guilty of negligence which proximately contributed to his injury in this: Plaintiff negligently failed to discover the alleged defect in said ladder, although he would have done so if he had exercised reasonable care and diligence in the performance of his duties under the said employment." The demurrers were that no facts were averred showing that plaintiff was under any duty to discover the said defects, and that it is not averred that plaintiff knew of said defect, or that he appreciated the danger arising from said defect.

The following charges were refused to the defendant: (1) "You cannot find for the plaintiff unless you are reasonably satisfied from the evidence that Johnsey was guilty of negligence either in failing to discover or in failing to repair the defect in the ladder, if you believe it was defective." (9) "There can be no recovery by the plaintiff unless the jury are reasonably satisfied that Johnsey was guilty of negligence." (2) "I charge you that the plaintiff was not entitled to recover any damages for the muscular contraction in his knee, if you believe that he had suffered from such muscular contraction." (5) General affirmative charge. (6) Affirmative charge as to the second count. (7) Affirmative charge as to the first count. (8) "I charge you that you cannot award any damages to the plain-

tiff for injuries to his hip joint, if you believe he has suffered such injuries."

Tillman, Grubb, Bradley & Morrow and Charles E. Rice, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This suit is by the appellee against the appellant, claiming damages for injury to the plaintiff as an employe of the defendant. The first assignment of error insisted on is to the overruling of the demurrer to the first count of the complaint. The gravamen of this insistence is that the ladder, described in said count, is not a part of the "plant" of the defendant. It is true that the cases from the courts of other states, cited by appellant, do hold that a ladder is a tool, and not a part of the "plant." On the other hand, there are cases in the English and other courts which hold to the contrary. We hold that, under the principles laid down by our court, the ladder is a part of the "plant." *Sloss-Sheffield Steel & I. Co. v. Mobley*, Adm'x, 139 Ala. 425, 434-437, 36 South. 181; *Going v. Ala. Steel & Wire Co.*, 141 Ala. 537, 547, 548, 37 South. 784. Consequently there was no error in overruling the demurrer to either the first or second count of the complaint.

There was no error in overruling the objection to the question to Dr. Masterson: "Did he, or not, complain of any suffering or pain?" This related to the expressions of the plaintiff at the time he was being treated, and was not subject to the objection that it was a mere narrative of a past suffering. 3 *Wigmore on Evidence*, §§ 1718, 1719, pp. 2208, 2209; *Birmingham Ry., L. & P. Co. v. Moore*, 151 Ala. 331, 43 South. 841; *Birmingham Ry., L. & P. Co. v. Enslen*, 144 Ala. 349, 39 South. 74; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748.

The court did not err in sustaining the objection to the question to the witness Dunham as to the position of the ladder when witness went to the place, after the accident, as there was no evidence that the ladder was in the same position as when the plaintiff fell.

There was no error in permitting the hypothetical question to Dr. Pressley: "I say, suppose—you speak of fever when he was 18—that he lived to be about 40 years old, never had the slightest trouble with that limb, that it developed as well as the other limb, would not that indicate there was not likely to be any tubercular trouble there?" The objection to this question is that it does not properly hypothesize the evidence. The doctor had testified that the shortening of the limb was due to tubercular trouble, and not to fever, and there was evidence tending to show the facts hypothesized. While it is true that the jury may be misled, by allowing the opinion of experts on hypotheses not in accordance with the evidence, yet each party has the right to take the opinion of the expert on his theory of the facts. 1 *Wigmore on Evidence*, §§ 672, 682; *Page v. State*, 61

Ala. 16, 18; *Birmingham Ry., L. & P. Co. v. Enslen*, Adm'x, 144 Ala. 343, 344, 349, 39 South. 74; *Parrish v. State*, 139 Ala. 18, 43, 36 South. 1012; *Rogers on Expert Testimony*, § 28, p. 39.

The eighth, ninth, thirteenth, and fourteenth assignments of error are to the action of the court in sustaining objections to the questions, by defendant to the plaintiff, on cross-examination, as to whether he had not made statements, when he was examined under the statute, contradictory to what he had just testified. The only objection offered was that the writing was the best evidence. The court erred in sustaining this objection. It is always the privilege of a party on cross-examination to test the accuracy of the statements of the witness, by asking him if he has not on a particular occasion made a certain statement contradictory to his present testimony. The fact that the previous testimony was in writing does not change the rule, nor is it necessary to introduce the writing in the first instance. If the witness requests to see the writing, it would have to be shown to him; but the defendant could not introduce it for any purpose. *Birmingham Ry., Light & Power Co. v. Oden*, 51 South. 240.

Such evidence is for the purpose of impeaching the accuracy or credibility of a witness, and while a party who introduces deposition of the opposing party, taken on interrogatories, makes him his witness and cannot impeach him (*Warren v. Gabriel*, 51 Ala. 236; *Wilson v. Maria*, 21 Ala. 359), yet he is not obliged to offer the deposition (*Code* 1907, §§ 4053, 4056); but merely showing the answer to the witness, for the purpose of refreshing his memory as to what he has sworn, would not be introducing it in evidence. In the case of *So. Ry. Co. v. Hubbard*, 116 Ala. 387, 22 South. 541, the party offered portions of the answers of the witness "for the purpose of contradicting the plaintiff's testimony on the witness stand," and the reasoning of the court, in refusing to allow it, was that this was offering the portion in evidence, without offering all, which could not be done, and the court said that such portion could not be offered for the purpose of impeaching him because "a proper predicate was not laid to authorize the admission of contradictory statements for impeachment purposes," the very thing which defendant was endeavoring to do here.

For the same reasons the question to the same witness, "Did you remember, at the time you answered the interrogatories, that Henry Redus was present?" should have been allowed.

The record does not show that any exception was reserved to sustaining the objection to the question to the plaintiff as to whether he did not find a check covering every week from the time he got hurt till December, 1906; hence it cannot be considered.

There was no error in sustaining the de-

murrer to the fifth plea. While it is true that the employé is held to the observance of reasonable care in the discharge of the duties devolving upon him, yet that does not place upon him the responsibility of discovering latent defects in the plant. The only exceptions, in the statute, to the liability of the master for defects in the plant, are: First, "if the servant or employé knew of the defect," etc.; and, second, "unless the defect * * * arose from," etc. Section 3910, Code 1907.

We are not to be understood as intimating, however, that the defendant may not set up the plea of contributory negligence in these cases; but the statute is persuasive to show, and it is in accordance with our decisions, that, unless the plaintiff is charged with the duty of inspection, he must either have knowledge of the defect or it must be obvious to the senses. In the quotation made by the appellant from Dresser, the author is speaking of the defense of assumption of risks, and says: "An employé is presumed to have notice of and to have assumed all such risks and hazards which, to a person of his experience, are or ought to be *patent or obvious*" (italics ours), and the entire context shows that he is referring to obvious defects. 2 Dresser's Employer's Liability, § 94, p. 429 (bottom page 224). The case of Sheridan v. Gorham Mfg. Co., 28 R. I. 256, 66 Atl. 576, 13 L. R. A. (N. S.) 687, is based upon a system of pleading different from ours, under which it seems to be required that the complaint must show the absence of contributory negligence, and it was held that the mere allegation of absence of knowledge did not exclude the idea that the defect was obvious (first headnote, and page 691 of 13 L. R. A. (N. S.)). The same principle is involved in the cases of Olsen v. McMurray C. L. Co., 9 Wash. 500, 37 Pac. 679, 680, and Witt v. Girard Lumber Co., 91 Wis. 496, 65 N. W. 173, 174.

In our own case of A. G. S. Ry. Co. v. Roach, 110 Ala. 266, 270, 20 South. 132, while the court held that the absence of a specific allegation that the dangers were obvious did not render the plea demurrable, yet, it was because the facts alleged showed that it was obvious. In the case of Jones & Hooks v. Finch, 128 Ala. 217, 220, 29 South. 182, 183, where a mule was killed by coming in contact with a trolley wire which was hanging down, this court said: "The driver having a right to assume that the way was free from such dangerous obstruction, and not becoming aware of its presence before the animal was stricken, is not chargeable with contributory negligence." In the case of Osborne, Adm'x, v. Ala. Steel & W. Co., 135 Ala. 571, 572, 573, 575, 33 South. 687, 688, this court said: "To withstand an appropriate demurrer, a plea of contributory negligence must go beyond averring negligence, as a conclusion, and must

aver a state of facts to which the law attaches that conclusion." And it was accordingly held that a plea alleging that the plaintiff knew of the facts was good, while one alleging that "he knew or could have known by the exercise of due care" was insufficient.

Said fifth plea does not allege any facts showing any duty on the part of the plaintiff to inspect, nor that the defect was obvious.

Charges 1 and 9, requested by the defendant, were properly refused, as there was evidence tending to show that the injury occurred before the time when Johnsey was placed in charge of the repairs.

There was no error in the refusal to give charge 2, requested by the defendant. While it is true that special damages, to be recoverable, must be specially alleged, yet the allegation that plaintiff "was made sick, sore, and lame" was sufficient to cover the muscular contraction of the knee. Birmingham Ry., Light & Power Co. v. Brown, 150 Ala. 327, 331, 332, 43 South. 342; Ehgrott v. Mayor, etc., N. Y., 96 N. Y. 265, 277, 48 Am. Rep. 622; 16 Ency. Pl. & Rr. pp. 385, 386, and note 1; Yeager v. Bluefield, 40 W. Va. 484, 21 S. E. 752, 753; Hanson v. Anderson, 90 Wis. 195, 62 N. W. 1055, 1056. In the case of City Delivery Co. v. Henry, 139 Ala. 161, 165, 166, 34 South. 389, there was no description of the extent of plaintiff's injury, except that it was "serious," and that he "suffered both in body and mind," and the point was raised by demurrer.

There was no error in refusing to give either of charges 5, 6, or 7, requested by the defendant.

There was no error in the refusal to give charge 8, requested by the defendant. While it may be true that there was no evidence of the "fracture" of the hip, yet, under the principles referred to in treating of the second charge, the injury to the hip was covered by the general averments of the complaint.

The bill of exceptions violates rule 32 of the Code, vol. 2, p. 1526, and the costs of this appeal will be taxed against the appellant.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, O. J., and ANDERSON and MAYFIELD, JJ., concur.

SLOSS-SHEFFIELD STEEL & IRON CO. v. SMITH.

(Supreme Court of Alabama. Feb. 26, 1910.)

1. MASTER AND SERVANT (§ 258*)—LIABILITY ACT—PLEADING.

Where a count in a complaint for injuries to a servant is framed on subdivision 1, employ-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er's liability act (Code 1907, § 3910), making the master liable for a defect in the "ways, works or machinery," and alleges a failure to furnish appliances, it is insufficient, since it fails to aver any defects within the meaning of the statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 256*)—LIABILITY ACT—SUFFICIENCY OF PLEADING.

It is not required of a servant, suing for injuries, to state in his complaint, or in each count thereof, under which subdivision of the employer's liability act he seeks to recover, or whether he seeks to recover under the common law; but he should state a good cause of action in each count, so that the court and defendant may know the exact cause of action alleged in each count.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.*]

3. PLEADING (§ 193*) — DEMURRER TO COMPLAINT—GROUNDS.

A demurrer to a count in a complaint by a servant for injuries, that it does not state a cause of action under the employer's liability act, is insufficient, since defendant cannot dictate under what law plaintiff shall bring his action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443; Dec. Dig. § 193.*]

4. PLEADING (§§ 64, 99*)—"DUPLICITY."

Duplicity in pleading means double pleading, the joining of two or more causes, offenses, or defenses in one count or plea, etc. It does not include a union of two or more facts which together constitute but one cause, offense, or defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137, 202-206; Dec. Dig. §§ 64, 99.*]

For other definitions, see Words and Phrases, vol. 3, p. 2267.]

5. PLEADING (§ 64*)—COUNTS.

If a single count contains several averments, all of which combine to make up the one cause of action, it is a good count; but it requires proof of all to sustain it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

6. PLEADING (§ 64*) — DISJUNCTIVE ALLEGATIONS.

While a single count may contain several distinct and independent averments, each presenting a substantial cause of action, these should not be alleged by disjunctive or alternative averments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

7. PLEADING (§ 64*)—DUPLICITY.

One count may contain several distinct averments, each of itself stating a good cause of action, provided it is the same cause of action in all the averments, and the count will be good on demurrer, and proof of any one of the independent averments will entitle plaintiff to a verdict, since duplicity in pleading is allowed in Alabama.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

8. PLEADING (§ 64*)—DUPLICITY—INDEPENDENT TORTS.

While duplicity in pleading is allowed, it does not authorize the joining of several distinct torts, constituting separate causes of action, in one count, though such causes of action may be joined in one complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

9. PLEADING (§ 8*) — CONCLUSION — NEGLIGENCE.

A complaint for injuries to a servant, alleging that plaintiff suffered injuries which resulted proximately from the negligence of defendant in failing to employ competent workmen, is bad, since no facts showing the mode, manner, means, or agency by which plaintiff was injured are alleged, and hence it states only a legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 12; Dec. Dig. § 8.*]

10. MASTER AND SERVANT (§ 168*)—FELLOW SERVANT—DUTY OF MASTER.

A master owes his servant the duty to employ competent and careful fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 334; Dec. Dig. § 168.*]

11. PLEADING (§ 214*)—ADMISSIONS—CONCLUSIONS.

The truth of a legal conclusion pleaded is never admitted, even when heard on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 527; Dec. Dig. § 214.*]

12. TRIAL (§ 253*)—INSTRUCTIONS—EVIDENCE.

A charge predicated a verdict for defendant on a portion of the evidence alone is bad.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. § 253.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by S. A. Smith against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bankhead & Bankhead, for appellant. Leith & Gunn, for appellee.

MAYFIELD, J. Count 1 of the complaint was as follows: "The plaintiff, S. A. Smith, claims of the defendant, Sloss-Sheffield Steel & Iron Company, a corporation, \$5,000 as damages, for that on, to wit, the 22d day of September, 1906, the defendant was a corporation in Walker county, Alabama, and was engaged in building a trestle, and the plaintiff was an employé of the defendant, and was working on said trestle for defendant, and whilst so engaged on, to wit, the date above specified, plaintiff had the bone in his right arm fractured, and his right arm otherwise injured, and his left arm and wrist was sprained, broken, and injured, and his left leg, head, and neck were also bruised and hurt, and said injuries are permanent, and as a result thereof the plaintiff lost valuable time, and incurred doctor's bills and nurse hire, and suffered great pain, both mentally and physically. And plaintiff alleges that his injuries were proximately caused by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant, and that the said defendant did not furnish the proper and necessary appliances for handling the timbers used in the building of said trestle. And said defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service

of the defendant and intrusted by it with the duty of seeing that the ways, works, machinery, or plant were in proper condition." This count was subsequently amended, but was not cured of the defects hereinafter pointed out.

Count 4 of the complaint was as follows: "The plaintiff, S. A. Smith, claims of the defendant, Sloss-Sheffield Steel & Iron Company, a corporation, \$5,000 as damages, for that on, to wit, the 22d day of September, 1906, the defendant was a corporation in Walker county, Alabama, and was engaged in building a trestle, and the plaintiff was an employé of the defendant, and was working on said trestle for defendant, and whilst so engaged on, to wit, the date above specified, plaintiff had the bone in his right arm fractured, and his arm otherwise injured, and his left leg, his head, and neck were also bruised and hurt, and said injuries are permanent, and as a result thereof the plaintiff lost valuable time and incurred doctor's bills, and nurse hire, and suffered great pain, both physically and mentally. And plaintiff alleges that his injuries resulted proximately from the negligence of the defendant in failing to employ careful and competent workmen in his business, and said failure to so employ careful and competent workmen resulted proximately in plaintiff's injuries aforesaid." These two counts will serve to show the defects and insufficiencies of the complaint which were common to all the counts.

It will be observed that the first count is not certain in its averments as to whether it declares under subdivision 1 of the employer's act (Code 1907, § 3910), as for defects in the master's ways, works, machinery, etc., or whether it declares on the common-law liability of the master to furnish the servant proper and suitable tools and appliances with which to perform the services for which he was engaged. This count seems, however, to have been treated as if it was under the first subdivision of the employer's act. The count is insufficient under this subdivision, in that it fails to allege or specify any particular defect, within the meaning of the statute. The averment that "the defendant did not furnish the proper and necessary appliances for handling the timbers used in the building of the trestle" does not allege a defect in the "ways, works, or machinery," but alleges a failure to furnish appliances, which is a common-law, and not a statutory duty. If it could be said to state a cause of action, it would require proof of these allegations that the failure to furnish the proper appliances was a defect in the ways, works, or machinery within the meaning of the statute; and this would be impossible because, as a matter of fact and of law, it is not such a defect. A plant might be defective, because not supplied with blocks and ropes which were necessary parts of it; but the blocks and ropes themselves, which are appliances,

cannot be defective, in that they, or a sufficient number, were not furnished by the master. This was the allegation of count 1 as amended. This is a common-law duty, and not within subdivision 1 of the employer's liability act. *Jones' Case*, 130 Ala. 471, 30 South. 588. It is not required of a plaintiff to declare or proclaim in his complaint, or in each count thereof, under which subdivision of the employer's act he seeks to recover, or whether he seeks to recover under the master's common-law liability; but he should state a good cause of action in each count, and should state clearly and with certainty, and not have the allegations so indefinite or uncertain that the court cannot know the exact cause of action alleged in each count.

Some of the grounds of demurrer insisted upon by appellee are to the effect that this count, and those like it, did not state a cause of action under the first subdivision of the employer's liability act. These were not good grounds of demurrer, for the reason that there was no duty resting on the plaintiff to declare under this subdivision, or under any other, as to that. The defendant has no right to dictate to the plaintiff under which subdivision or under which law he declares; but he has a right to be informed with certainty as to which the plaintiff will proceed under, and against which he must be prepared to defend. The counts must not be indefinite or uncertain in their averments as to whether they proceed under this or that law—the statute, or the common law—and must identify the subdivision of the law when such subdivision gives a separate and distinct right of action from the others. While a defendant has no right to require the plaintiff to proceed under one law or another, or under one state of facts or another (plaintiff being the one who has the right to choose as to these), yet he has the undoubted right to be informed, with reasonable certainty, as to the particular case against which he is called to make defense. This is proper, not only to prevent surprise at the trial, but to obviate labor and expense to defendant of preparing himself for trial against claims or actions on which the plaintiff may have no thought of relying; but this duty as to particularity should not be carried to the extent of so unduly burdening the plaintiff as to needlessly subject his complaint and proof to the objection of fatal variance.

It is a matter too easy of performance not to be required that a plaintiff shall in each count of his complaint—if the action be by a servant against the master for personal injuries—inform the defendant whether he will proceed to enforce the common-law duty of the master to furnish proper appliances, or whether he will proceed under the employer's act, and, if so, under which subdivision. The averments of the count should not leave it in doubt or uncertainty as to which of

these liabilities is declared on. The plaintiff may select any, or proceed as to all; but it should be by separate counts as to each, which should be reasonably certain in its averments as to the particular liability sought to be enforced. *Baylor's Case*, 101 Ala. 488, 13 South. 793; *Dusenberry's Case*, 94 Ala. 413, 10 South. 274; *Burton's Case*, 97 Ala. 240, 12 South. 88; *Mothershed's Case*, 97 Ala. 261, 12 South. 714; *Clement's Case*, 127 Ala. 171, 28 South. 648; *Bunt's Case*, 131 Ala. 596, 32 South. 507; *Tinney's Case*, 129 Ala. 523, 30 South. 623.

Duplicity in pleading means double pleading, the joining of two or more causes, offenses, or defenses in one count or plea, etc. It does not include a union of two or more facts which together constitute but one cause, offense, or defense. It is the joinder of different grounds of action or defenses to enforce or defeat a single right. *State v. Warren*, 77 Md. 121, 26 Atl. 500, s. c. 39 Am. St. Rep. 401; *Devino's Case*, 63 Vt. 98, 20 Atl. 953; *Tucker v. Ladd*, 7 Cow. (N. Y.) 450. If a single count contains several averments, all of which combine to make up the one cause of action, this is a good count; but it requires proof of all to sustain it. *Baylor's Case*, 101 Ala. 483, 13 South. 793; *Dusenberry's Case*, 94 Ala. 413, 10 South. 274. While a single count may contain several distinct and independent averments, each presenting a substantial cause of action, these should not be alleged by disjunctive or alternative averments; that is to say, that the cause of action consists either of the one or the other alternative.

It was an ancient rule of pleading that the pleadings should not be insensible, repugnant, ambiguous, or doubtful in meaning, nor argumentative, nor in the alternative, nor should they be hypothetical, nor by way of recital; but they should be positive, and should be stated according to their legal effect. 1 Chitty, Plead. 280. This rule, however, in many respects has been more or less relaxed, and in some states changed by statute. One count may contain several distinct and independent averments, each of itself stating a good cause of action, provided it is the same cause of action in all the averments, and the count will be good on demurrer; and proof of any one of the independent averments constituting the cause of action will entitle the plaintiff to a verdict. He need not prove them all. Any one is sufficient. This is contrary to general rules of pleading and practice; but it results in this state for the reason that duplicity in pleading has been allowed in Alabama since the Code of 1852, and is allowed as to the complaint, pleas, replications, or other pleadings. *Baylor's Case*, 101 Ala. 483, 13 South. 793; *Sampson's Case*, 112 Ala. 425, 20 South. 566. The rule or practice in this state is expressed thus by Stone, C. J., in the case of *Houston v. Hilton*, 67 Ala. 374: "Duplicity in a complaint or plea, unless it be a plea in

abatement, is not ground of demurrer in this state." This resulted from statute. See cases collected in 2 Brickell's Dig. 833, and 4 Mayfield's Dig. 452.

This rule, however, does not authorize the joining of several independent and distinct torts, constituting separate causes of action, in one count. Such separate and distinct actions may be joined in one complaint, but not in one count. Our statutes do not authorize this, nor was it allowable at common law. 1 Chitty, Plead. 199, 201, 412. One count might claim in trespass as to land, and also as to the person, provided it was the result of but one transaction, and proof of either would entitle plaintiff to a verdict; but, if each trespass was the result of an independent tort, they could not be joined in the same count. *Henry v. Carlton*, 113 Ala. 639, 21 South. 225; *Cofer's Case*, 110 Ala. 493, 18 South. 110. Alternative averments of matters of substance are destructive of all certainty in the formation of definite issues for trial. If a plaintiff in a single count shifts his right of action from one ground to another, and states several breaches of duty in the alternative or disjunctive, so that it is impossible to tell upon which of the several he will rely, then there is confusion and obscurity. It is variant, if not contradictory, in its allegations. 6 Ency. Pl. & Pr. 268-270.

Our decisions on the subject of alternative averments of material facts in pleadings are, we confess, somewhat obscure, if not conflicting. Up to the time of the adoption of the Code of 1852, the decisions followed the common-law rule, and were consistent and certain in condemning alternative or disjunctive averments as to material facts. The Code expressly authorized alternative or disjunctive averments in indictments in three particular cases: First, when the offense may be committed by different means or by different intents, then the means or intents may be alleged in the alternative; second, when the criminal act may produce different results, then the results may be alleged in the alternative; third, when offenses are of the same character, and subject to the same punishment, the defendant may be charged with the several offenses in the alternative. This was said to be to prevent multiplicity of counts in indictments. The statute prescribed forms of indictment, thus using alternative averments, which, of course, made the forms and the alternative averments sufficient in these cases.

Other Code forms in some civil proceedings have been adopted, with alternative averments; and, of course, in such cases, these alternative averments were held sufficient because the statute made them so. These statutes and Code forms have led to this mode of pleading in this state. But it should never be adopted, unless authorized by the statute, and should be avoided as far as possible, because it leads to confusion and uncertainty of triable issues. A pleader may allege that

his cause of action or defense is the result of "this," "that," and "another" thing, but not that it is the result of "this," if not of "this" then of "that," and if not of "this" or "that" then of the "other." It was said by the best of ancient pleaders that the word "or" was both a bad and dangerous word to use in pleadings, especially in indictments; and this is true yet, unless its use is authorized by statute.

The fourth count of the complaint was ill, in that it failed to aver any facts showing the mode, manner, means, or agency by which the plaintiff was injured. It does not allege whether plaintiff fell on or off the trestle, or whether the trestle fell on him. True, it alleges that his injuries resulted proximately from the negligence of the defendant in failing to employ competent and careful workmen in its business, and it even repeats this allegation, as if to give it emphasis. This is, therefore, nothing more than a purely legal gratuitous conclusion of the pleader. No facts whatever are alleged which will justify such a legal conclusion. No attempt is made to state any facts upon which it is based. It is not alleged that any of defendant's workmen, employes, servants, or agents, competent or otherwise, injured him, or caused him to be injured, intentionally, negligently or accidentally. The master owes his servants the duty to employ competent and careful fellow servants; but his failure so to do does not, alone, render him liable for every injury his servant may suffer while in his employ, nor is it sufficient to merely allege the relation of master and servant, and an injury to the servant, or the failure to employ competent servants and the conclusion that the failure proximately caused the injury. This is no more sufficient than would be the averments that the master had not paid the servant his wages and that this failure caused his personal injuries and suffering complained of.

It is true that our forms of pleadings, in cases of this kind, are very general, and, as has been said, the averments as to negligence are little more than conclusions; yet sufficient facts must be averred to support the conclusions, unless a statute otherwise provides. The negligence or wrong complained of must be alleged and shown to have proximately caused or contributed to the injury, and not merely this gratuitous conclusion of the pleader; but, in addition to it, facts must be alleged to justify the inference or conclusion. For example, if this count sufficiently states a cause of action, and the plaintiff proves the relation of master and servant, proves his personal injury, and that defendant failed to employ competent servants, then he would be entitled to a verdict, no matter what the cause of the injury. The allegation that the injury was proximately caused by the failure to employ is a mere

conclusion, and not susceptible of direct proof, and must be inferred from the facts proven. No facts are required or authorized to be proven which are not alleged. To constitute good pleading the facts should be alleged, whether at common law, in equity, or under Code pleadings. The rule is universal that legal conclusions alone should not be pleaded, and that any pleading which contains nothing more than legal conclusions as to such matter is illy pleaded, unless authorized by statute.

Neither the allegation of a conclusion of law, nor its denial, raises an issue in pleading; hence such averments do not warrant the introduction of evidence. A pleader is under no duty to deny mere legal conclusions; indeed, it is not proper so to do. The truth of such conclusions is never admitted or conceded, even when considered or heard on demurrer. 12 Ency. Pl. & Pr. 1020 et seq. It therefore follows that the demurrers should have been sustained to the first and fourth counts as amended, and to all the others containing the infirmities pointed out in the opinion.

The court properly declined to give the general affirmative charge for defendant. The evidence was abundant and ample to sustain and support a verdict under any one of the counts which remained in the complaint and upon which the trial was had. We are not prepared to say that the evidence did not support amply every material averment of each of the counts upon which the trial was had. The evidence of the defendant's own superintendent certainly tended strongly to support nearly all of the material averments, and some of them are even without dispute.

Nearly all the other charges refused to the defendant were bad, in that they predicated a verdict for defendant upon a finding by the jury of one or more phases of the evidence, to the utter exclusion of other phases, which were made the sole basis of recovery in some of the counts. It is not necessary to consider these charges separately, because the exact issues and charges will probably not be raised or applicable on another trial. Nor is it necessary on this appeal to pass upon all the questions raised as to the evidence, as these exact questions will probably not arise on another trial, though it is proper to say that we have examined each, and see no error of which the defendant can complain. If any of the rulings could be said to be error, they were certainly without injury.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, SAYRE, and EVANS, JJ., concur.

SCPIO v. PIONEER MINING & MFG. CO.
et al.

(Supreme Court of Alabama. Feb. 26, 1910.)

MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSON—ACTS OF SERVANT—SCOPE OF AUTHORITY—QUESTION FOR JURY.

Where a special deputy sheriff in defendant's employ pursued a negro he was attempting to arrest into plaintiff's house, committing an alleged trespass and an assault on plaintiff, and the evidence as to the agency and scope of his authority was such as to justify different inferences, whether his acts were within the line of his employment and the scope of his authority were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274, 1275; Dec. Dig. § 332.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Connatta Scpio against the Pioneer Mining & Manufacturing Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Sumter Lea and Arthur L. Brown, for appellant. Percy, Benners & Burr, for appellees.

MAYFIELD, J. This is a civil action of assault and trespass. The evidence indisputably showed an assault by one Thomas, in pointing a pistol at plaintiff; and in that Thomas, while pursuing another person (a negro) whom he was attempting to capture, entered the house of plaintiff, by force and against her will. The negro fled, and ran into plaintiff's house for shelter; Thomas following and shooting at him, and also shooting into plaintiff's house, and pointing a pistol at or in the direction of the assault, threatening her and the negro. The disputed question on the trial was whether Thomas was the agent of defendant, and, if so, whether, in the commission of the assault and trespass (if such he committed), he was acting in such capacity, and so within the line or scope of his authority as to make his principal liable for the torts so committed.

The little mining town in which plaintiff lived was owned by the defendant mining company, which was engaged in the business of mining and transporting coal. Plaintiff's husband was one of the defendant's coal miners, and she and her husband were living in one of defendant's houses, which they rented. At the time of the commission of the torts, and for some time before, there was what is popularly called a "strike" on at this mining town or camp. Those miners who belonged to the labor unions had refused to work, on account of some disagreement between the union and the mine operators. The union miners were attempting to prevent nonunion miners from working in the mines, and to induce them to join the union, or to join forces with the union min-

ers in not working, until the mining company should accede to their terms, or at least treat with them as to their differences. Under these conditions the mining company, deeming it necessary, applied to the sheriff of Jefferson county to guard and protect its property and nonunion miners, against the efforts of the union miners, or their sympathizers. To this end an arrangement was effected, whereby the sheriff employed men as special deputies and sent them to the mines, and the mining company compensated the sheriff for the expense and services rendered by the special deputies. Thomas, who committed the assault on this occasion, was one of these special deputies. The negro, whom he ran into plaintiff's house, was one of the union miners or their sympathizers, whom the deputy had arrested for some offense, from which arrest the negro had escaped and was fleeing.

To what extent these special deputies, who are called guards—one of whom was Thomas—were agents of the defendant mining company, and what was the exact scope and line of their authority, if agents, does not clearly appear from the record in this case. In fact, this was the bone of contention on the trial in the lower court. The trial court evidently concluded that there was no agency shown; or, if shown, that it conclusively appeared that the assault committed by Thomas and complained of in this action was not within the line or scope of the agency, in such manner or to such extent as to render the defendant liable for the tort. In this we think the trial court was in error. The evidence tending to prove agency was not wholly free from conflict, and different inferences as to this fact might well be drawn from the evidence on the subject of agency and as to the line, extent, and scope of the authority of the agent, if agency be shown. Under this state of the case and the evidence, the existence of agency, the line, scope, and extent of the agent's authority, and whether the tort, the assault committed by Thomas, was within the line of the employment and within the scope of his authority as such agent, were clearly questions of fact to be determined by the jury, under appropriate instructions from the court, and not questions of law for the court. That is, under the issues and proof in this case, the liability of the defendant company for the assault and tort of Thomas on plaintiff, which was clearly alleged and proven without dispute, was a question of fact for the jury and not one of law for the court.

The trial court therefore erred in taking this question from the jury and in directing a verdict for the defendant. There was no error in sustaining the demurrer to the original complaint. It failed to show any liability on the part of the defendant company for the wrongs complained of.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is unnecessary to treat, separately, the other questions raised. They may not arise on another trial.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and SAYRE, JJ., concur in the reversal, but are of the opinion that the action was in case and not in trespass.

Ex parte ALLEN.

(Supreme Court of Alabama. Feb. 26, 1910.)

1. CERTIORARI (§ 28*)—AT COMMON LAW—GROUNDS—ANNULING VOID JUDGMENT.

If a judgment is void on the face of the record, it may be reviewed and annulled by common-law certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

2. DETINUE (§ 19*)—DAMAGES—MEASURE.

The measure of damages in detinue is the value of the use of the chattel while wrongfully detained, exclusive of interest and damages for depreciation in use.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 37-40; Dec. Dig. § 19.*]

3. JUDGMENT (§ 112*)—DEFAULT—MATTERS ADMITTED.

As a rule, a default only admits matters well pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 204; Dec. Dig. § 112.*]

4. CERTIORARI (§ 28*)—SCOPE OF REMEDY.

The complaint in detinue claimed a horse, with the value of the hire or use thereof during detention, and an amendment thereto, which was not served on defendant before default judgment was rendered for plaintiff, alleged that the value of the horse was a certain sum, and that plaintiff claimed the sum of \$50 damages and \$1 per day. *Held*, that the amendment was immaterial, so that any error in not serving the amended complaint upon defendant before rendering default judgment did not make the judgment void, so as to make it reviewable by common-law certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

5. JUDGMENT (§ 132*)—DEFAULT JUDGMENT—TIME OF TAKING.

That a default was taken on Friday, when the court rules required default dockets to be heard on Saturdays, did not make the default judgment void, where defendant was in default on Friday, but was at most an irregularity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 211; Dec. Dig. § 132.*]

Petition by H. K. Allen for certiorari. Writ denied.

B. G. Perry and W. S. Welch, for petitioner. Pinkney Scott, opposed.

McCLELLAN, J. Common-law certiorari.

If the theory of the petitioner is maintainable, as it is presented in this application, viz., that the judgment assailed is void, and if it is of record apparent, common-law certiorari is the proper remedy to review and annul the judgment. Independent Pub. Co.

v. Amer. Press Co., 102 Ala. 475, 490, 15 South. 947.

These are the facts: Pinkney Scott instituted detinue against the petitioner, Alten, in the Bessemer city court. His complaint was: "The plaintiff claims of the defendant the following personal property, to wit, one large bay horse, named John, with tail whiped off, with the value of the hire or use thereof during detention, to wit, from the 31st day of August, 1909." The summons was served on the defendant on August 31, 1909, and the direction to take possession of the animal, the plaintiff having given the requisite bond, executed. The defendant, in his turn, gave a forthcoming bond, and the property was delivered to him. Defendant, not having pleaded within 30 days after service, was in default on Friday, October 1, 1909. On that day the court permitted the amendment of the complaint. It appears from the whole return, after alias certiorari, that the amendment inserted, after the word "off," and before the words, "with the value," these words: "Valued at \$200.00, and plaintiff further claims of defendant the sum of \$50 damages and \$1 per day." After that amending, the court rendered judgment, by default, for the plaintiff for the horse described in the complaint, "or its alternate value of \$200, together with \$31 detention and a further sum of \$50 damages as further detention assessed by the court to the date of the trial." It thus affirmatively appears, and it is not otherwise contended, that there was no service of the amendment or amended complaint on the defendant, before judgment by default was rendered.

The petitioner, in several ways, invoked the court below to set aside the judgment and to quash the execution, following in orderly course from the judgment—in all of which the petitioner was denied relief—before seeking review here. The first basis of insistence that the judgment is void is that neither the amendment nor the amended complaint was served on the defendant before the default was adjudged. Primarily these principles pertain to the question presented and to be decided.

The measure of damages in the action of detinue is the value of the hire or use of the chattel during the period of wrongful detention. 3 May. Dig. pp. 61, 62. Interest on the value of the hire or use is not an element of the damages in such case. *Fralick v. Presley*, 29 Ala. 457, 65 Am. Dec. 413. Ordinary wear and tear of the chattel is included in the rent or hire thereof. Hence damages for wear and tear cannot be added to those awarded for rent or hire in such action. *White v. Sheffield*, 90 Ala. 253, 7 South. 910. Generally speaking, a default only admits matters well pleaded. 23 Cyc. pp. 740, 741, 752, and notes; *McGehee v. Childress*, 2 Stew. (Ala.) 506.

In this instance the court had jurisdiction of the subject-matter and of the person. The amendment, ex parte, fixed the value of the animal and enhanced (let us assume) the amount of the damages claimed in the original declaration. Taking the defendant's failure to plead within the requisite period as an admission of the matters then (after amendment) alleged in the declaration, it is obvious that the court's fault, jurisdictioned as stated above, was, at most, in exceeding, in adjudging, the limits made by the averments of the original declaration in respect to the value of the animal and in the amount of the damages claimed. In short, the defendant's default admitted the wrongful detention of the animal, and that the plaintiff was due, at least, some damages for the hire or use thereof; the amounts, in both instances, being unstated in the original declaration. The result, then, of the allowing of the amendment and, thereupon, the juridical conclusion that defendant admitted the value of the animal and the damages for the detention, as alleged in the amendment only, was to unwarrantably conclude as upon an admission by defendant in excess of what he merely might have been adjudged liable for, under the allegations of the original declaration. Certainly, that consequence did not involve jurisdiction, for plenary and jurisdiction the city court already had. If it did not involve jurisdiction, obviously the act of the court was an error—irregularity—only, and in no sense operated to render void the judgment so entered. 6 Ency. Pl. & Pr. p. 53; Carr v. Sterling, 114 N. Y. 558, 22 N. E. 37; Freeman on Judgments, § 129. See Bash v. Van Osdol, 75 Ind. 186, and May v. Bank, 9 Ind. 233, where the question was presented by and treated on appeal.

It is averred in the petition that by rule duly promulgated by the city court, and in force, the chancery, default, and motion dockets were heard on Saturdays. This judgment by default was taken on Friday. The defendant was in default on that day. The insistence is that the judgment taken on Friday, instead of Saturday, is void. We will assume, for the occasion only, that the rule had the force of a statute; and, if so, the granting of the default was, at most, premature, and, hence, an irregularity. 6 Ency. Pl. & Pr. p. 94, citing, in note 2, our decisions supporting the text.

In my opinion the writ should be denied. ANDERSON, J., concurs in the opinion of the writer.

DOWDELL, C. J., and SIMPSON, MAYFIELD, SAYRE, and EVANS, JJ., hold that the amendment was immaterial, and that judgment entry shows assessment of damages by the court, and concur in the opinion as respects the day on which the default was taken.

Writ denied.

NATIONAL LIFE & ACCIDENT INS. CO. v. LOKEY.

(Supreme Court of Alabama. Jan. 13, 1910.
Rehearing Denied Feb. 26, 1910.)

1. PLEADING (§ 193*)—VARIANCE—MANNER OF RAISING QUESTION—DEMURRER.

If the case made by the evidence was an action on a policy of accident insurance, instead of on a life insurance policy, as alleged by the complaint, a demurrer was not the proper manner of raising the objection.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 193.*]

2. INSURANCE (§ 608*)—FORM OF ACTION—LIFE INSURANCE—NATURE OF POLICY.

A policy insuring against death resulting directly from bodily injuries caused by external, violent, and accidental means, independent of all other causes, though in a sense a life policy, is not the kind of policy contemplated in form 12, contained in Code, § 5382, providing the form of an action on a life insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1517; Dec. Dig. § 608.*]

3. APPEAL AND ERROR (§ 216*)—PRESENTATION BELOW—LIMITING PURPOSE OF EVIDENCE—NECESSITY OF REQUEST.

Since the company, in an action on a policy, could have requested a charge limiting the effect of the policy as evidence to a count in the complaint declaring on an accident policy, where the policy was in effect an accident and not a life policy, it cannot complain of the court's failure to so limit the effect of the policy, where it did not request it to do so.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. §§ 627, 630.]

4. INSURANCE (§ 461*)—ACCIDENT INSURANCE —CONSTRUCTION OF POLICY—COMPANY'S LIABILITY—INJURY FROM INVOLUNTARY RISK.

A provision in an accident policy exempting the company from liability for fatal injury from exposure to risk or known danger did not relieve it of liability for injury from danger to which insured was involuntarily exposed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1180; Dec. Dig. § 461.*]

5. INSURANCE (§ 146*)—CONSTRUCTION OF POLICY.

Every insurance policy, if doubtful, is construed in favor of insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

6. INSURANCE (§ 608*)—ACCIDENT INSURANCE —COMPANY'S LIABILITY—"OBVIOUS DAN- GER."

Stepping from a moving train, irrespective of the speed at which it was moving, is not, as a matter of law, an "obvious danger," within an accident insurance company's policy relieving the company from liability for death resulting from exposure to an obvious risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1745; Dec. Dig. § 608.*]

For other definitions, see Words and Phrases, vol. 6, p. 4896.]

7. INSURANCE (§ 462*)—ACCIDENT INSURANCE —FORFEITURE OF POLICY—VIOLATION OF OR- DINANCE.

Insured's death did not result while violating an ordinance prohibiting persons "to catch hold of, or swing upon the cars of a railroad company, while such car is in motion," where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

death occurred from her attempting to swing herself from a car while in motion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1182; Dec. Dig. § 462.*]

8. INSURANCE (§ 642*)—ACTION ON POLICY—GROUNDS OF DEMURRER—PARTIAL DEFENSE.

Pleas in a count on an accident insurance policy alleging certain facts as a full defense to the action, when the policy provided that the existence of such facts should only reduce the amount recoverable, were demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1630; Dec. Dig. § 642.*]

9. TRIAL (§ 76*)—OBJECTIONS TO EVIDENCE—WAIVER.

Failure to object to the admission of evidence until after it has been offered and admitted waives every objection thereto, except that it was illegal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 185; Dec. Dig. § 76.*]

10. INSURANCE (§ 654½*)—ACCIDENT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

In an action on an accident policy, a receipt showing payment of the original premium was neither irrelevant, incompetent, nor immaterial, showing that the policy had been put into effect, though it was cumulative evidence of that fact after the policy had been introduced without objection.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 654½.*]

11. INSURANCE (§ 651*)—ACCIDENT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

In an action on an accident insurance policy, testimony that defendant's agent executed a renewal receipt was admissible as tending to show a contract of insurance between the company and the person claimed to have been insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1673-1675; Dec. Dig. § 651.*]

12. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in permitting a witness to state that another signed a receipt was harmless, where the latter subsequently testified that he did so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

13. INSURANCE (§ 145*)—CONTRACT—RENEWAL—MODIFICATION OF RENEWAL.

While the mere renewal of an insurance policy does not change its terms, but continues the rights of the parties under the original policy, the parties may change the terms of the contract upon a renewal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 281; Dec. Dig. § 145.*]

14. INSURANCE (§ 145*)—AUTHORITY OF AGENTS—MODIFICATION OF CONTRACT.

Where an insurance agent had authority to issue receipts for renewal premiums for the company, which receipts were on a printed form furnished by it, such agent had authority to modify the contract in the renewal receipt.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 281; Dec. Dig. § 145.*]

15. TRIAL (§ 170*)—AFFIRMATIVE CHARGE—SEPARATE COUNTS.

A general affirmative charge is proper, if plaintiff was entitled to it upon either count of the complaint.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 170.*]

16. APPEAL AND ERROR (§ 926*)—PRESUMPTIONS.

It cannot be presumed on appeal, in the absence of evidence thereof in the record, that an insurance company was informed of insured's death in writing, in order to put the trial court in error for permitting a question as to when the company was informed of insured's death, on the ground that it called for hearsay, and not the best evidence of the facts sought to be elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3735; Dec. Dig. § 926.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Evelyn Lokey against the National Life & Accident Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sterling A. Wood, for appellant. Bowman, Harsh & Beddow, for appellee.

SAYRE, J. It seems entirely clear to us that there was no tenable objection to the first count of the complaint. It followed the form laid down in the Code as for an action on a policy of life insurance, and stated a cause of action. Insurance Company v. Bledsoe, 52 Ala. 538. If the evidence developed a case arising on a policy of accident insurance, that raised a question, we hardly need to say, to be reached otherwise than by demurrer. Nor does counsel for appellant contend for anything different. The contention in the brief is that there was error in that action of the court by which it allowed the policy to be put in evidence, notwithstanding defendant's objection because it tended to establish a case at variance with that stated in count 1. The effort to state in the Code form an action on a policy of accident insurance proceeded, as we think, upon a misapprehension of the proper office of that form. A policy which insures against death resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, though in a sense a policy of life insurance, is not the sort of policy contemplated in form 12 of section 5382 of the Code, nor does it evidence the character of contract men have in mind when they speak of life insurance. But the second count of the complaint states an action on a policy of accident insurance—how defectively we will not say, because its defects are not urged in brief of counsel—and under this count the policy offered was admissible in evidence. The court at the time of its introduction might have appropriately limited the effect of the policy as tending to sustain only the second count; but exactly this the court was not asked to do, and, whether so or not, it cannot be said that there was error in its refusal to do so, for the reason that the correct method of securing its rights in this connection by a charge limiting the effect of the evidence remained open to the defendant.

The same considerations are to be applied with the same result to that assignment of error in which the appellant affirms error of the lower court in overruling its motion to exclude the policy in so far as the first count was concerned.

Plea 12 set up a clause of the policy in which it was stipulated that in the event of fatal injury from exposure to obvious risk of injury or known danger the defendant company should not be liable, and alleges that the death of the insured "did result from external, violent, or accidental means, and was the proximate result of the exposure by the said Mrs. Julia Reese [the insured] of herself to the obvious risk or danger, in this: That she attempted to and did step or jump or alight from a moving car, and that her said death resulted proximately therefrom." In argument stress is laid upon the fact that the exposure to danger provided for in the exception quoted is not described as voluntary, and thus the conclusion is reached by way of the exception that a merely negligent exposure of himself to danger by the insured will relieve the insurer of liability. There seems to have been some conflict of opinion as to whether contributory negligence constitutes a defense to an action on the policy where the contract is general, insuring against accident occurring by external violence without any exception of the character under consideration. *Shevlin v. American Mut. Acc. Ass'n*, 94 Wis. 180, 68 N. W. 966, 36 L. R. A. 52. In that case it is stated that the great weight of authority favors the conclusion that an injury may be said to be accidental, though attributable to the negligence of the insured. That inquiry, however, is excluded from this case by the provision of the policy in hand. Here the exception prevents liability in the event of exposure to obvious risk or known danger, meaning, as we apprehend, that the danger must meet the insured so squarely in front that he cannot in reason be heard to deny knowledge of it, or that it was in fact known; implying in either case an exposure to a danger that the insured knows and is conscious of at the time. Every policy of insurance, if doubtful, is construed in favor of the insured. We think it cannot in reason be said that the exception in question was intended to relieve the insurer of responsibility in the event the insured is involuntarily exposed to danger and suffers injury thereby. That would be contrary to the entire tenor of the contract. It follows, it would seem, that the addition of the word "voluntary," as descriptive of the insured's exposure, would add nothing to the meaning of the exception. The language used implies as much. It has been held by other courts in a number of cases that mere negligence on the part of the insured does not constitute a voluntary exposure, and that the negligence of the insured, to bring his acts within an exception of voluntary exposure to danger, must be ac-

companied with knowledge of the existence of danger, or knowledge that injury is likely to result from his acts. 4 *Cooley's Briefs*, 3216.

But let it be assumed that the exception here relieved defendant of liability on "exposure to obvious danger," and that "exposure to obvious danger" means something less than voluntary exposure to obvious danger. How does the case stand? In *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316, the language of the exception was "exposure to obvious or unnecessary danger." The court applied the general principles of the law of negligence. So in *Smith v. Preferred Mut. Acc. Ass'n*, 104 Mich. 634, 62 N. W. 990, *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270, and *Smith v. Aetna Ins. Co.*, 115 Iowa, 217, 89 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153. In *Shevlin v. American Mut. Acc. Ass'n*, 94 Wis. 180, 68 N. W. 966, 36 L. R. A. 52, the exception was: "Any injury resulting in whole or in part from exposure to unnecessary danger." The court said: "It plainly includes all cases of exposure to unnecessary danger, in which such exposure is attributable to negligence on the part of the assured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care, and to except from the provisions of the policy all cases of injury occurring in whole or in part through a failure to exercise such care. Under such a provision no recovery can be had if the injury is caused by reason of exposure to unnecessary danger, within the general principles of the law of negligence." The meaning, then, of the plea, is that there is obvious risk or danger in stepping, or jumping, or alighting from a moving car, without reference to the speed at which the car may be moving, and that in doing so the insured was guilty of negligence. The averment is, not that the car was moving at a rate of speed obviously dangerous, but in effect that it was obviously dangerous to step from a car moving at any speed whatever; for this, at least, is obvious: That proof that the car was moving at a snail's pace would sustain the plea, as well as proof that it was moving at express speed. Exceptional circumstances may attend an attempt to alight from a moving car, which will justify the court in declaring as matter of law that the attempt was obviously dangerous, as, for example, the car may be moving at a great rate of speed, or the person alighting may be old or infirm, or incumbered with bundles or children. *Watkins v. Birmingham Railway Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297. But no such facts are alleged here. We conclude that the demurrer to this plea was well sustained. Precisely the same line of reasoning reaches the fifth plea, the demurrer to which was sustained.

Of those pleas which seek to set up a violation of a city ordinance by the insured, it

seems sufficient to say that, while speciously worded, they do not aver a violation of the ordinance alleged. The ordinance prohibits persons "to catch hold of, or swing upon, the cars of said railroad company, while such car is in motion." The plea is that the death of the insured took place from her attempting to swing herself from a car while in motion—a different thing.

There is one other reason, applicable to all those pleas which set forth the policy, why demurrers to them should have been sustained: They purport to constitute a full answer to the plaintiff's action, whereas the limitation in the policy, in the event of death or injury from the various causes indicated in the pleas, is to "one-fifth of the amount that would be otherwise payable under this policy."

Plaintiff introduced in evidence certain receipts, one of which showed the payment of policy fee, or original premium, and two the payment of renewal fees or premiums. These receipts were objected to. The natural and easy construction of the bill of exceptions—certainly a strict construction against the exceptor—must be that these receipts had been offered and received in evidence before objection was made. The uniform rule of this court has been to hold that such delay as is shown here waives every objection to the evidence, except that it is illegal, which this evidence was not. But no tenable objection could have been taken at any time. The first receipt showed that the policy had been put into effect. It was cumulative, after the policy had been introduced without objection, and unnecessary, but certainly not irrelevant, incompetent, immaterial, or illegal. The renewal receipts went to the gist of plaintiff's action, and, while the assignments of error predicated upon the rulings admitting them are referred to in appellant's brief, there is no argument to sustain them.

The objection to the renewal receipt signed by William George Fogg came too late, as was the case in respect to the receipts already considered. There were other reasons why the objection to it should have been overruled. The original policy insured Mrs. Julia Reese from 12 o'clock, noon, of September 3, 1907, until 12 o'clock, noon, of the 1st day of October thereafter, and for such further periods to be stated in renewal receipts, as the payment of premiums would maintain. Paragraph N of the policy was in these words: "If the payment of any renewal premium shall be made after the expiration of this policy, or, of the last renewal receipt, neither the assured nor the beneficiary will be entitled to recovery for any accidental injury happening between the date of such expiration and 12 o'clock, noon, of the day following the date of such renewal payment; * * * nor shall the acceptance of an overdue premium constitute a waiver of

the requirement that all renewal premiums be paid in advance as specified in this contract." The second receipt introduced in evidence showed the receipt of a payment on October 1st, continuing the policy in force from that date until November 1st, subject to all the provisions and conditions of the policy. Renewal premiums fell due on the 1st day of each month. The receipt under consideration was dated November 6th, and showed a payment, "renewing," to quote hereafter the receipt, "policy No. 19291 from date hereof until the 1st day of December, 1907, subject to all the provisions and conditions of said policy, particularly paragraph N of said policy, should this receipt be given for a premium collected after it is due as a renewal payment. This premium having been accepted and this receipt given upon the express condition that no claim shall be made, and said company shall not be liable for any indemnity for accident occurring * * * during the interval between 12 o'clock, noon, of the day on which such renewal premium was due, and this day and date one hour following this acknowledgment, and this receipt is accepted upon this condition, by which acceptance all such claims of indemnity are waived. [Signed] Wm. Geo. Fogg, Agent." The evidence showed without conflict that the premium was paid and this receipt issued between the hours of 12, noon, and 1 p. m. of the day of its date. The evidence also showed without conflict that the insured was accidentally killed while alighting from a street car between the hours of 6 and 7 p. m. of the same day. The appellant insists that there was error in permitting proof by the witness Reese that this receipt was executed by Fogg. No reason, beyond the assertion of counsel, occurs to us why this proof was immaterial, irrelevant, and not pertinent to issues in the cause. It certainly tended to show a contract of insurance between the defendant and the person alleged to have been insured; and if perchance there was error in permitting this proof by the witness Reese, it was harmless, for the reason that subsequently Fogg testified without contradiction that he had executed the receipt.

Further objection is that the receipt was a departure from the original contract. No sort of doubt but that the rule is correct which recognizes that the renewal of a policy of insurance, without more, does not change the terms and conditions of the policy, but merely continues them in force. The rights of the parties are still determined by the provisions of the original policy, no matter how often it may have been renewed. Its terms are neither enlarged, restricted, nor changed. 1 Cooley's Briefs, 849. But the rule has always prevailed, in respect to every character of contract, that after an agreement has been made, and re-

duced to writing, it is competent for the parties at any time, by a new contract, either altogether to waive or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify, the terms of it, and thus to make a new agreement which is to be proved partly by the original agreement and partly by the subsequent terms, verbal—unless forbidden by the statute of frauds—or written, ingrafted upon what is left of it. 2 Wendell's Blackstone, 382, note. In *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34, the court recognized both rules, saying: "Where, however, there exists a contract of insurance, not expired, and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract includes and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and upon failure to comply with the agreement the party offending may be * * * held liable in a court of law for damages resulting from a breach of the agreement." From page 847 of 1 Cooley's Briefs we quote: "The general custom is to renew by the mere issuance of a renewal receipt or certificate. * * * It is the evidence of a contract." And from page 850: "But the insurer may, in the renewal, agree to indemnify parties other than those named in the original. * * * The property covered will usually be the same, though it is not absolutely necessary." And from section 70a of 1 May on Insurance: "But the renewal may be upon different interests, or interests held in different rights and by different parties, or in other ways the contract may be changed by circumstances. In such cases, the old contract must necessarily be modified, though the conditions may remain the same."

This seems to leave for consideration in this connection the objection that Fogg was not the agent of the defendant, with authority to modify the contract as shown by the renewal receipt. The record does not sustain the contention. The witness Reese testified that the company got the money. Fogg paid it to them, and he had authority to issue receipts for the company. The receipt was in the printed form furnished by the company to its agents, on which they should give receipts and take money. Appellant suggests that Fogg made a mistake. But, if so, the court could not act upon such suggestion, in the absence of proof to sustain it. Nothing is shown of what passed between the insured and the agent, Fogg, except the payment of the money and the issuance of the receipt. In the absence of proof, it is clear that the court had no warrant for assuming that the insured received thereby a contract in terms more favorable

to her than the company intended or would have issued under the circumstances. That would have been to proceed upon a mere surmise. What we have said disposes of the objection to the receipt in evidence, and of the assignment of error based upon the general affirmative charge for the plaintiff. The plaintiff was not entitled to recover on the first count, as we said in the beginning; but the charge was general, and must be justified, if the plaintiff was entitled to have it on either count. On the undisputed evidence, free as it is from conflict or adverse inference, the plaintiff was entitled to a verdict on the second count.

It only remains to dispose of the following exception: Appellee asked the witness Reese: "When were you informed by the company that Mrs. Reese, the insured, was dead? When, in your recollection, was the company first informed of the death of the insured?" One objection, the one now insisted upon, was that these questions called for hearsay evidence, and not the best evidence of the matter inquired about. The witness answered: "The same day the official letter was written to the company." A motion was then made to exclude the answer on the same grounds. The objection and the motion proceeded both upon an assumption that the company was informed in writing and that the witness had no knowledge of the fact to which he deposed. We cannot indulge either assumption in order to impute error to the trial court.

We have considered every assignment of error insisted upon in appellant's brief. Finding no error, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

BIRMINGHAM & A. R. CO. v. MATTISON.
(Supreme Court of Alabama. Dec. 21, 1909.
Rehearing Denied Feb. 26, 1910.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—RECORD—PRESENTING GROUNDS OF REVIEW.

In reviewing rulings upon a demurrer, the record proper will alone be looked to, and not the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3262; Dec. Dig. § 837.*]

2. RAILROADS (§ 345*)—INJURIES AT CROSSINGS—PLEADINGS.

In an action against a railroad company for injuries received at a public crossing, plaintiff alleged that her injuries were the proximate result of the negligence of defendant through its servants and employees in control of said engine and car, and that such employees or servants recklessly, wantonly, or intentionally ran one of defendant's cars against plaintiff.

Held, that evidence as to the negligence of the flagman at the crossing was admissible.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1115; Dec. Dig. § 345.*]

3. TRIAL (§ 86*)—LIMITING APPLICATION OF EVIDENCE.

Where evidence is admissible for a certain purpose only, it is the duty of the objecting party to request that it be so limited, and the trial court does not err in admitting it if admissible for any purpose.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 226; Dec. Dig. § 86.*]

4. RAILROADS (§ 347*)—INJURIES AT CROSSINGS — ACTIONS — ADMISSIBILITY OF EVIDENCE.

In an action against a railroad company for injuries received at a public crossing, in which plaintiff charges that the injuries resulted from the negligence of defendant in the management of an engine and car, and that its employes or servants, recklessly, wantonly, or intentionally ran said car against plaintiff, a city ordinance providing for the keeping of a watchman at the crossing was admissible as tending to show that plaintiff had a right to look to him to warn her of danger, and thus to disprove contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1137; Dec. Dig. § 347.*]

5. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

An infant may be guilty of negligence, and, if it proximately contributes to its injury, it bars recovery to the same extent as contributory negligence of an adult; but an infant of tender years has capacity to exercise only such care as belongs to childhood, and one too young to exercise care is incapable of contributory negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

6. NEGLIGENCE (§ 122*)—PRESUMPTION AS TO CHILDREN'S NEGLIGENCE.

It is usually a conclusive presumption that children under 7 years cannot be charged with contributory negligence, while those over 7 and under 14 are prima facie presumed incapable thereof, but, over the age of 14, the presumption changes, and the burden is on the infant to show want of capacity or understanding.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 223, 229; Dec. Dig. § 122.*]

7. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE OF CHILDREN—QUESTION FOR JURY.

The question as to whether a child's capacity is such that it may be charged with contributory negligence is one of fact unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, it is responsible.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 347-349; Dec. Dig. § 136.*]

8. INFANTS (§ 2*)—DISABILITIES IN GENERAL.

The law presumes that an infant 14 years old has sufficient discretion to select its own guardian, to contract a lawful marriage, and to be capable of malice.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 2; Dec. Dig. § 2.*]

9. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—CHILDREN—PRESUMPTION.

In an action for injuries to a girl 11 years of age, an instruction as to the degree of proof necessary to rebut the presumption of plaintiff's immunity from negligence on account of her

age, which requires the jury to be "satisfied," instead of "reasonably satisfied," is too onerous.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 223, 229; Dec. Dig. § 122.*]

Appeal from City Court of Talladega; G. K. Miller, Judge.

Action by Laura Augusta Mattison against the Birmingham & Atlantic Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Knox, Acker, Dixon & Blackmon, for appellant. Whitson & Harrison and Cecil Browne, for appellee.

MAYFIELD, J. Plaintiff, appellee, a girl 11 years of age, by her next friend, sues the defendant, appellant, to recover damages for personal injuries. The plaintiff was run over by a freight train of defendant at a public crossing in the city of Talladega, receiving serious personal injuries, the worst of which was the loss of a leg. The complaint contained three counts, 1, 2, and 3. Count 2 was eliminated by amendment and need not be considered. Count 1 declared on simple negligence; count 3 on wanton negligence or willful injury. Demurrers were interposed to the complaint and to each count, severally. The demurrers were all overruled. The plaintiff, nevertheless, thereafter amended each count, and to the complaint as amended the demurrers were re-interposed, as before, and again overruled. To the complaint, and to each count thereof, separately and severally, the defendant pleaded the general issue and 11 special pleas, setting up that plaintiff was a trespasser, contributory negligence, and assumption of risk. To these special pleas, the plaintiff interposed demurrers, in so far as they attempted to answer the whole complaint, and also in so far as they attempted to answer each count. The demurrers were sustained generally. The defendant then amended its special pleas, and the plaintiff again interposed the demurrers thereto as before, with some additional grounds, and the demurrers were again sustained generally.

The averments of each count, as originally filed and as amended, were very general as to the allegations of negligence or wrongful acts complained of; but under our system of pleading in such cases they were at least not subject to the demurrers interposed. We are unable to intelligently review the rulings of the trial court upon the demurrers to the special pleas. The demurrers were properly sustained to each of the pleas in so far as the plea attempted to answer count 3. The defenses attempted to be set up were not availing as a defense to this count which declared on wanton negligence or willful injury; some of the pleas were not answers to either count, while some were good as to count 1. The record proper must alone be

looked to in reviewing rulings, upon demurrer, and it merely shows that the demurrers were sustained as to all the special pleas. We must presume in favor of the trial court's ruling that this was the demurrer to the pleas in so far as they attempted to answer the whole complaint, or the third count, which was clearly proper. There is no ruling shown by the record proper upon the demurrer to the pleas in so far as they are answers to the first count. The bill of exceptions recites that issue was joined upon special pleas 2, 4, 5, 9, and 12, to the first count; but we cannot look to this as to rulings upon pleadings. The record proper should show the issues upon which the case was tried, and not the bill of exceptions. It clearly appearing that the case was tried upon the general issue as to counts 1 and 3, and pleas of contributory negligence to count 1, we will so treat the case as to rulings upon the charges and the evidence, but cannot review the rulings upon the demurrers to the pleas, for the reason assigned, and for the further reason the bill of exceptions does not inform us sufficiently as to this, even if we could look to it.

Being tried upon the issues indicated, plaintiff obtained a verdict and judgment for \$4,500, from which the defendant appeals and assigns 142 grounds of error. Many of these grounds are not insisted upon at all, many are insufficiently insisted upon, many of them are properly grouped together and insisted upon jointly and severally in this manner, and some of them are fully and ably argued. We will only respond to those properly assigned and properly treated by counsel, and which are necessary to a proper determination of the cause; and we will then, to keep this opinion within reasonable compass, have to treat the assignments in groups which involve but a single question of law. The only negligent or wrongful acts alleged in the complaint as amended, which were relied upon for recovery, were as follows: Count 1: "All of said injuries were the proximate result of the negligence of defendant through its servants and employes in and about the running and pushing of said engine and car, and the management and control thereof by them said servants and employes being then and there in charge and control of said engine and cars—all of which was and is to plaintiff's great damage as aforesaid." Count 3: "The employes or servants of the said defendant, being then and there in charge of one of defendant's trains, recklessly and wantonly or intentionally ran one of defendant's said cars of said train on and against plaintiff." These averments were sufficient to authorize evidence as to the negligence of the negro flagman at the public crossing of the streets and the railroad. If the evidence should have been limited for certain purposes, it was the duty of the objecting party to request that it be so limited. The trial court will not be put in error for admitting

it, if admissible for any purpose. The city ordinance as to the provision of keeping a watchman at the crossing was admissible, as tending to show that the plaintiff had a right to look to him to warn her of approaching danger, and thus to disprove contributory negligence.

As to the rulings of the trial court upon the question of contributory negligence of the plaintiff and as to the effect of her infancy upon that question, it is proper to say that we cannot revise the rulings on the demurrers to the pleas which set up this as a defense to count one.

An infant, of course, may be guilty of negligence, and, if it proximately contribute to its injury, it bars a recovery by the infant in the same manner and to the same extent that contributory negligence of an adult bars an action by the latter; but the difficulty arises in determining when, and under what circumstances, is an infant guilty of contributory negligence. That which will be contributory negligence on the part of an adult may be proper care on the part of an infant. That which will be negligence on the part of one infant may be proper care on the part of another, depending upon the age, discretion, intelligence, experience, etc., of the infant. A child of tender years has capacity to exercise only such care and self-restraint as belongs to childhood. Reasonable men are presumed to know this and must govern themselves accordingly. The caution and care required of others toward the infant are measured by the age, the maturity, the capacity, and intelligence of the child.

A child too young to exercise any care or discretion is clearly as incapable of negligence as it is of crime or sin, and is therefore not answerable to the doctrine of self-defense. There are ages so young (usually under 7) that there is a conclusive presumption of law, and hence evidence is not admissible to refute the presumption; while there are other ages, usually 7, after reaching which, it becomes a prima facie presumption only, and may then be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like. This prima facie presumption continues in its favor till it reaches another age, usually 14, after which the presumption changes, and the burden is then on the infant to show want of capacity or understanding. The question as to whether a child's capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible.

While the ages of 7 and 14 are those usually fixed at which the presumptions arise and change, as above indicated, yet, as is well said by the Supreme Court of Pennsyl-

vanity, "the law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin." For some purposes 21 years is the rule, but not so as to negligence or crime. At what age must a child's responsibility for negligence be presumed to begin is a question of law and not of fact, and the courts as a rule have fixed it as above stated. At 14 the law presumes the infant to have sufficient discretion to select its own guardian, to contract a lawful marriage, and to be capable of malice. It is therefore very reasonable to fix this age as that at which it becomes, and will be presumed to be, sensible of and responsible for danger. We do not pass from childhood to manhood by one jump—it is by many and slow steps, accompanied by many falls and bumps. We cannot say that one day a child is wholly immune and the next day responsible; that one day his responsibility is that of a child, and the next, that of a man. The law only fixes the dates of 7, 14, and 21 as to the presumptions. The dates are not arbitrary as to absolute immunity or liability. With the limitations heretofore mentioned this depends upon the facts of each particular case, and as to these cases the decisions of the courts, as is to be expected, are far from uniform. Some courts hold that a child of 6 is conclusively presumed to be immune; others have held children of 4 responsible in particular cases.

There is no inflexible rule by which we can determine the capacity, of all children, under all circumstances, for observing and avoiding danger; each child is bound to use the reason it possesses and to exercise the degree of care and caution of which it is capable. One child may understand and appreciate one danger and not another. Another child, of the same age as the first, may understand the danger the first does not, and be insensible to the danger of which the first was aware. A child raised in a city may be perfectly capable of understanding and avoiding the danger of street cars, railroads, and crowded streets, but insensible of the dangers of a mowing or threshing machine, a foot adz, or a scythe blade, etc.; while a child of the same age and average intelligence, raised on a farm, would fully comprehend and understand the dangers of the latter class, but be wholly unconscious or ignorant of those of the former. Some children at the age of 7 better understand the dangers of trains and cars than do others at 14. Therefore, the capacity, the intelligence, the knowledge, the experience, and discretion of the child are always evidentiary circumstances. There is no ideal standard by which the court or jury can determine whether a given child in a particular case exercised that measure of care which the law requires. Courts know that by nature most children run the gauntlet of many risks, and

suffer, as a natural and inevitable consequence, injuries more or less severe; that in many of such cases no one is liable therefor; that such can only be ascribed to accident or misfortune; and in such cases the law properly declines to hold any one liable for injuries which are the result of childish instinct or helplessness.

Some of the charges given by the trial court, upon the question of the negligence of the plaintiff, fixed too high a degree of proof upon the defendant to rebut the presumption of plaintiff's immunity from negligence on account of her age. Many of the statements of the law, by the court, upon this subject, were accurate and correct, but some were not, because they required the jury to be "satisfied" of the facts hypothesized, instead of "reasonably satisfied." 5 Mayfield's Dig. p. 309, §§ 76, 77.

As this case must be reversed, it is unnecessary to pass upon the other questions, which may not arise again, and discussion of them would be of no benefit on another trial.

The judgment of the trial court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur in the conclusion. DOWDELL, C. J., does not commit himself to all that is said in the opinion.

PACE v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. Feb. 28, 1910.)

1. PLEADING (§ 96*)—PLEAS—SUFFICIENCY.

A plea must contain a succinct statement of the facts relied on in bar.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 193; Dec. Dig. § 96.*]

2. PLEADING (§ 9*) — CONCLUSIONS OF LAW FROM FACTS.

An averment of negligence, whether stated as a cause of action or a defense, need not be as specific as the proof essential to support it, and, where from the facts as they are and as they must be alleged different minds might draw different conclusions, it is the office of the pleader to draw the conclusion necessary to the maintenance of his action or defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

3. MASTER AND SERVANT (§ 262*)—INJURY TO SERVANT—SUFFICIENCY OF PLEAS.

In an action for injuries to a servant from the defective condition of a lubricator on a locomotive which he was employed to run, pleas, averring that after discovering the defect plaintiff negligently failed to shut off the steam, were not insufficient because not charging in so many words that a reasonable time within which to turn off the steam intervened after plaintiff's discovery of the defect, since that necessarily was embraced in the language used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859; Dec. Dig. § 262.*]

4. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a servant from the defective condition of a lubricator on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

locomotive which he was employed to run, where a defense was plaintiff's contributory negligence in failing to shut off the steam and use certain auxiliaries, which would have prevented the injury, after he discovered the defective condition of the lubricator, so that it was a question in issue as to whether the auxiliaries were defective, or whether any other fact stood in the way of plaintiff's use of them under the circumstances, evidence of plaintiff as to the condition of the auxiliaries was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

5. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXAMINATION OF WITNESS.

A question asked plaintiff as a witness as to whether or not the auxiliaries could have been used on the lubricator though calling for a conclusion was not prejudicial where plaintiff on examination both by his own counsel and by defendant's counsel distinctly testified that he had tried to use the auxiliaries but had found them out of order, so that they would not work, and that he could not work them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

6. MASTER AND SERVANT (§ 279*)—INJURIES TO SERVANT—INCOMPETENT FELLOW SERVANT—SUFFICIENCY OF EVIDENCE.

That a single accident had happened from defects in the lubricator on an engine, which a servant injured thereby had pointed out to the master's superintendent when entering the employment, and which the superintendent had ordered another servant to repair, would not show that the master had been negligent from the beginning in employing the other servant, or in failing to acquire knowledge of his incompetency during the employment and before the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 974, 975; Dec. Dig. § 279.*]

7. MASTER AND SERVANT (§ 271*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

Where a witness had testified that he did not know the servant who had made the repairs, such witness' testimony that previous to the injury witness had been employed with the master, where repairs were made, and that the men employed there were not competent machinists, was inadmissible to show such servant's incompetency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 928-931; Dec. Dig. § 271.*]

8. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF TESTIMONY.

A question asked a witness as to whether an expert engineer could not see the threads on a water valve of a lubricator without taking it out, to which the witness answered that he did not know, was not prejudicial, though the question asked for an opinion in respect to a matter which the jury understood as well as the witness, no matter how expert he may have been.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

9. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ADMISSION OF TESTIMONY.

Where a witness had testified that, if a water valve does not leak when the steam is turned on, it indicates that the valve is all right, and that one could put a water valve in a lubricator so that it would not leak and yet it might be fractured, a question asked on cross-examination, if it were not true that many

times things like that water valve blow out on engines where steam is used, and the very best machinist would not know that there was any defect in it until it blew out, answered merely by the statement that "there are exceptions to all rules," did not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

10. EVIDENCE (§ 317*)—HEARSAY.

A witness having testified that, when plaintiff was preparing for the trip on the engine with the defective lubricator, he heard plaintiff ask defendant's superintendent in charge of preparing engines if the work on the lubricator had been done, and heard him state that if the work had not been done he was not going out on the engine, witness' testimony that, after plaintiff had left the room in which the conversation occurred, the superintendent asked the foreman if he had done such work, and he replied that he had, but that the lubricator was broken, but might make the trip, was not inadmissible as hearsay; it going to show, not that the lubricator was in a defective condition, but that the superintendent had notice of the defect, and was admissible for that purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

11. MASTER AND SERVANT (§ 271*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

It appearing beyond controversy that a certain employé had repaired the lubricator, evidence to show that another employé was an incompetent mechanic was properly excluded as irrelevant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 928-931; Dec. Dig. § 271.*]

12. EVIDENCE (§ 355*) — DOCUMENTARY EVIDENCE—MEMORY AS TO FACTS RECORDED.

Where a witness, who had as engineer taken out the engine with the alleged defective lubricator, on the day before plaintiff's injury, testified of his own knowledge and recollection, and without the need of refreshment, that at the time of a report made by him on his return from the trip the water valve on the lubricator was not leaking, the condition of the lubricator or its water valve being the only item of proper inquiry, a memorandum, consisting of the report merely showing in a negative way that the lubricator or its water valve was in good repair at that time, was improperly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1490; Dec. Dig. § 355.*]

13. APPEAL AND ERROR (§ 1053*)—CURE OF ERRONEOUS RULINGS ON EVIDENCE BY INSTRUCTIONS.

Erroneous rulings on the admissibility of evidence cannot be cured by charges.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. § 1053.*]

14. EVIDENCE (§ 130*) — RES INTER ALIOS ACTA.

Ordinarily it is not competent in an injury action to show compensation for an injury, where it comes from a collateral source wholly independent of defendant, as illustrating either the circumstances of the accident, or for abatement of damages, such compensation being as to defendant res inter alios acta with which defendant has no concern; and, in an action by a servant for alleged injury to his eye from a defective lubricator on a locomotive, evidence that plaintiff had been paid \$4,500 by a benefit association for the loss of his eye was not admissible to show interest where plaintiff no

longer had a questioned or litigated interest in the insurance money.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

15. WITNESSES (§ 331½*)—IMPEACHMENT.

In such an action, where the conductor on the train which plaintiff was pulling testified that he was on the engine at the time and place when and where plaintiff located the accident resulting in his injury, and saw no occurrence of the kind, plaintiff could ask him whether he violated a rule of his employer when he rode upon the engine to discredit his statements, though plaintiff could not argue the probative force of the matter sought in the question.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

16. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO ASK—"ACCIDENT."

A charge that plaintiff was not entitled to recover if the loss of his eye was the result of an accident, being abstractly correct, the term "accident" as used meaning "inevitable" in the sense that it could not have been prevented by the exercise of the care which the master was required to exercise, if plaintiff apprehended misconception of the charge by the jury, he should have asked an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 629, 639; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 1, pp. 62-70; vol. 8, p. 7560.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by George G. Pace against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Tate & Walker, for appellant. Knox, Ackers, Dixon & Blackmon, for appellee.

SAYRE, J. Counts 1 and 2 were framed under the first subdivision of the employer's liability act (Code 1907, § 3910) as for an injury caused by a defect in the works, ways, machinery, or plant used in the business of the defendant; the particular defect alleged in the first being the defective condition of the lubricator on the engine plaintiff was employed to run, and in the second that the water valve of the lubricator on the engine was broken and unfit for use. The third counts upon the negligence of one McDowell to whom superintendence was intrusted; the fourth, upon negligence of McDowell in giving orders or directions to which plaintiff was bound to conform and did conform; the fifth, upon a breach of the master's common-law duty to exercise reasonable care in the selection of the fellow servant by whose negligence the plaintiff suffered.

Defendant's second and third pleas set up plaintiff's contributory negligence, in that, after discovering the defective condition of the lubricator, he negligently failed to shut off the steam pressure and failed to use the auxiliaries which would have prevented the injury. The fourth that, after discovering the defect, plaintiff proceeded to make an investigation of the lubricator, and negligently

failed before doing so to shut off the steam pressure. The argument against the pleas is that they fail to aver that plaintiff had time or opportunity to shut off steam after discovering the defect in the lubricator. A plea must contain a succinct statement of the facts relied on in bar. The gist of the pleas is that, after discovering the defective condition of the water valve on the lubricator, plaintiff negligently failed to shut off steam. They are not intended to assert the proposition that after knowledge of the defect plaintiff had opportunity to choose between assuming the particular risk or abandoning the master's service, and chose to assume the risk, for it is inferable that he learned of the defective lubricator while operating his engine upon the road where neither his duty to his master nor to himself required that he should incontinently abandon his machine. The idea rather is that, after learning of the defect and of the danger which the continued use of the defective appliance threatened, for it was a defect within the meaning of the statute only as it threatened danger, he failed to make use of an immediately available means of averting the danger. In Tennessee, *C. I. & R. R. Co. v. Burgess*, 158 Ala. 519, 47 South. 1029, the plea was that "plaintiff knew of the defect in the mine of which he complains, and of the danger arising therefrom, and with such knowledge remained in said mine." In respect to this plea the court said: "The correctness of the court's ruling, sustaining the demurrer to this plea, is obvious. For aught that appears on the face of the plea, the plaintiff may have acquired the knowledge alleged only a moment before the roof fell, and not in time to save himself by even a hasty retreat." The difference between that plea and this is to be found in the allegation of this that "the plaintiff negligently failed," etc. A statement, in form a conclusion, approaches occasionally so nearly the ultimate facts as to make the effort at further analysis futile for the practical purposes of pleading. An averment of negligence, whether stated as a cause of action or as a defense, is not required to be as specific as the proof essential to support it. Further, where from the facts as they are and as they must be alleged different minds might draw different conclusions, it is the office of the pleader to draw the conclusion necessary to the maintenance of his action or defense as the case may be. This finds illustration in the case at bar. The allegation that after discovering the defect the plaintiff negligently failed to shut off steam may amount to a conclusion in some sort, but it is no more a conclusion than would have been the allegation that he failed after he had time, etc., proposed by the appellant as a sufficient and necessary alternative. It was not necessary to charge, in so many words, that a reasonable time within which to turn off steam inter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vened after the discovery by plaintiff of the defect, since that was necessarily embraced in the averment that after discovery he negligently failed, etc. In our judgment the pleas, as for any objection taken to them, were sufficient. In *Osborne v. Alabama Steel & Wire Co.*, 135 Ala. 571, 33 South. 687, the plea was that the plaintiff continued in the service of the defendant after he knew or could have known of the defect by the exercise of due care. The point of the decision was that the plea was bad because it imposed on the employé the duty to use care to discover the defect; whereas, he had a right to assume, and to act upon the presumption, that the defendant had not been negligent and that there was no defect. That decision is malapropos of any question here involved.

The plaintiff when testifying as a witness was asked by his counsel to state whether or not the auxiliaries could have been used on the lubricator. In view of the special defense interposed, it was the right of plaintiff to have his testimony as to the condition of the auxiliaries go to the jury. But the question by which he sought that end was not insusceptible to unfavorable criticism. The true inquiry, of course, was as to the condition of the auxiliaries—whether they were defective, or whether any other fact stood in the way of his use of them under the circumstances then obtaining—and such fact was easily capable of statement; whereas, the question asked for a conclusion. But, however that may be, the plaintiff on examination both by his own counsel and by counsel for the defendant did testify with great distinctness that he had tried to use the auxiliaries, but had found that they were “out of fix,” and would not work, and again that he could not work them. No more could have been gotten out of the witness by the question propounded than was in fact drawn out on both direct and cross examination, and so the ruling was not hurtful to plaintiff’s case. *Kroell v. State*, 139 Ala. 1, 36 South. 1025; *Central of Georgia v. Simons*, 50 South. 50.

The trial court would not permit the plaintiff to ask the witness Reaves how long Fisher had been working for the defendant. It appeared that, when plaintiff went to defendant’s roundhouse in Anniston to prepare for his trip, the lubricator was leaking at the water valve; that plaintiff reported this fact to McDowell, the night foreman, who thereupon directed Fisher, an employé of defendant, to repair it, which the latter undertook to do. It is supposed that these facts, in connection with the subsequent accident, and the fact which plaintiff sought to develop by this question, tended to show that Fisher was incompetent, and negligence on the part of the defendant in his employment to do the work intrusted to him. In this connection, also, the plaintiff reserved an exception to a ruling of the court which denied to him the advantage of an opinion by the witness Pace (not the plaintiff) that at a time pre-

vious to plaintiff’s injury he had been employed at the shops, where we presume repairs were made, and that the men employed there were not competent machinists. But the witness had deposed that he did not know Fisher, and obviously his opinion was of no probative value as to his competency, and the court properly refused to allow the record to be incumbered by it. The happening of the accident may have had a tendency to prove the incompetency of Fisher. If it had been one of a series of similar accidents, traceable to his negligence, it would certainly have had such tendency; but, standing alone, it was not effective in proof of the contention that defendant had been negligent in his employment in the beginning, or that it had been negligent in failing to acquire knowledge of his incompetency during the employment and before the accident; nor would its probative force in that direction have been aided or enhanced by the answer, which we presume the plaintiff expected, that he had been a long time in the defendant’s employment, or, to state the proposition as it is stated by the counsel for appellant, that he had been in the employment of defendant at the time when the witness Pace undertook to say that the defendant’s employes about the shop were generally not competent machinists. This was the evidence to support the fifth count, and its totally ineffectual character justified the court in giving the general affirmative charge for the defendant as to that count.

The witness Reaves had been testifying about the lubricator and the water valve which was a part of it. Defendant’s counsel asked the witness: “An expert engineer could not see through there and see those threads unless he took it out”—referring to the threads on the water valve by which it was held in place as a part of the lubricator. The question asked for an opinion in respect to a matter which the jury, no matter how inexpert, understood as well as the witness, no matter how expert, and might well have been omitted. The witness, with possible excess of caution, answered that he did not know. The question and answer were obviously harmless, and we have considered them thus in detail only because they are insisted upon as involving reversible error.

That an inexperienced man might in a contingency think that the valve in a lubricator was all right, when in fact it was not, had no tendency towards showing that Fisher was inexperienced, still less that he was incompetent. There is no merit in the tenth assignment of error.

The witness Fitzgerald was shown to be an expert machinist. He had testified that, if a water valve does not leak when the steam is turned on, that would indicate that it is all right, and that one could put a water valve in a lubricator so that it will not leak and yet it may be fractured. On cross-examination he was asked by defendant: “Isn’t

It true that many times things like that water valve blow out on engines where steam is used and the very best machinist, the most experienced machinists, would not know that there was any defect in it until it blew out?" Plaintiff objected, assigning no grounds. The witness, with commendable prudence, answered: "There are exceptions to all rules." The trial court was not required to cast about for tenable objections to the question. Nor do we, after considering appellant's brief, find reversible error in the ruling below. If the witness had answered the question affirmatively, his answer would have had a tendency to show a general state of expert knowledge in respect to things of the sort involved, or rather a general limitation upon expert knowledge, proper for the consideration of the jury in weighing his testimony and the testimony of the other witnesses in respect to the probable manifestation of defect in the water valve. So of the twelfth assignment of error.

Burns, a witness for plaintiff, testified that on the occasion of the trip on which plaintiff was injured, evidently referring to the time when plaintiff was preparing for the trip, he heard the plaintiff ask McDowell if the work had been done on the engine. This question referred to work on the leaky water valve, as other parts of the evidence make sufficiently clear. The plaintiff told McDowell, according to the witness, that if the work had not been done he was not going out on the engine. Plaintiff then offered to prove by the witness, that, after plaintiff had left the room in which the conversation occurred, McDowell asked Fisher if he had done the work to which plaintiff had called his attention, and that Fisher replied: "Yes, but the lubricator is broken. It may make the trip." The court seems to have sustained an objection on the ground that the proposed evidence was hearsay. The relevancy and competency of the proposed evidence is to be found in the fact that it went to show, not that the lubricator was in a defective condition, for as to that it was hearsay, but that McDowell had notice of the defect which other evidence tended to prove. The defendant was charged with responsibility for the alleged negligence of McDowell in two respects upon which this testimony shed light: He had charge of the repairing of the engine, and he was intrusted with superintendence, and the character of his conduct in both regards was to be affected by his notice or knowledge of the alleged defect. It therefore seems clear enough to us that the proposed testimony should have been admitted for the purpose of tracing knowledge or notice of the alleged defect to McDowell. We cannot assume on the facts in the record, nor do we think the trial court could assume in passing upon this testimony, that after notice received in the manner indicated by the testimony of Burns, if it was so received, McDowell had or had not time in which to

have repaired the engine or, in default thereof, to have prevented plaintiff from going out upon the engine. It was for the jury to do that.

Fisher, beyond controversy, had repaired the lubricator. It was therefore utterly irrelevant to show that his co-employé, Williams, was an incompetent mechanic. And the trial court so held.

Buckpitt, a witness for defendant, and an engineer in its employment, testified that he had taken the same engine out on a trip on the day previous to that on which plaintiff was alleged to have been injured. Thereupon the defendant offered to read in evidence a paper writing containing a report made by him (Buckpitt) on his return from that trip as to the condition of the engine. The report showed "valves O. K.," but nothing as to the lubricator or its water valve specifically. The witness, speaking of his own knowledge and recollection, and without the need of refreshment, testified that at the time of the report the water valve on the lubricator was not leaking. Doubtless the report was allowed to go to the jury on the authority of *Foster v. Smith*, 104 Ala. 248, 16 South. 61, *Mooney v. Hough*, 84 Ala. 80, 4 South. 19, and *Hirschfelder v. Levy*, 69 Ala. 351. Certainly it was not competent within the rule laid down in *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54. We think it can hardly be said that the case is brought within the reason of *Foster v. Smith* and that line of cases. The rule there established is a rule of convenience rather than a rule of evidence, and has been applied in cases where, a witness having testified out of his own independent recollection to a considerable number of items, a memorandum of them is permitted to go to the jury lest they forget. But here there was but one item of proper inquiry, i. e., the condition of the lubricator or its water valve. The witness needed no memorandum to refresh his memory, nor did the jury. The memorandum was understood, it seems, to show in a negative way only that the lubricator or its water valve was in good repair when the engine left the hands of the witness. We do not think it proper that it should go to the jury, though we do not affirm reversible error of the action of the court in that regard, for doubtless it had no prejudicial effect upon plaintiff's case.

Plaintiff had been insured against accidental injury with the Brotherhood of Locomotive Engineers; and against his objection Buckpitt was allowed to testify that as secretary of the order he had paid to plaintiff the sum of \$4,500 for the loss of his eye, which was the injury for which he sought compensation in this suit. This evidence was limited by the court at the time of its admission and subsequently by written charges as going to show a motive on the part of the plaintiff for the loss of his eye. Indeed, charges "Y" and "Z," given at the request of plaintiff, appear to have eliminated, as well

as charges could, this evidence from the cause. But erroneous rulings on the admissibility of evidence cannot be cured by charges. See *Harbour v. State*, 140 Ala. 103, 37 South. 330. If the evidence ruled upon relates to an issue which is subsequently removed from the case in some proper way, or becomes immaterial because in any event the cause must be determined on a different issue the ruling becomes harmless and of no consequence. *Stevenson v. Whatley*, 50 South. 41. Such was not the case here. All issues were litigated to the end, and their determination remained necessary to a proper verdict. The question of error must then be decided without regard to the charges given. It was shown that some time after his alleged injury the plaintiff's eye was removed by surgeons, that he had urged its removal a month earlier but after the time of the alleged injury, and that its removal or loss was the condition upon which he was to receive the money paid to him by the Brotherhood. It also appeared without conflict that finally the surgeons had advised the plaintiff to have the eye removed and had removed it on their own judgment as to the necessity of that course. One contention made by the defendant, which found support in the evidence, and upon which probably the jury determined the case, was that the plaintiff had not been injured by the blowing out of the water valve, but that he was engaged in an effort to make the best of the opportunity offered by that occurrence to claim damages of the defendant for a trouble with his eye for which the defendant was in no sense responsible. Ordinarily it is not competent to show compensation for an injury where it comes from a collateral source wholly independent of the defendant as illustrating either the circumstances of the accident, for that it has no tendency to do, or for abatement of damages, for such compensation is as to the defendant *res inter alios acta* with which the defendant has no concern. Nor do we understand appellee's argument to take issue with the proposition just stated. The argument is, as we understand its effect, that the fact of the receipt of the insurance money could be weighed as affecting the general credibility of the plaintiff; in other words, it showed interest. But plaintiff no longer had a questioned or litigated interest in the insurance money, and to permit the defendant to go into his original right to it, or to question his good faith in the receipt of it, would have introduced an issue with which the case in hand ought not to have been burdened and beclouded. We are unable to say that the introduction of this evidence was harmless, and feel constrained to adjudge that its admission was error.

Witness Clements was the conductor on the train which plaintiff was pulling, and depored that he was on the engine at the time

and place when and where plaintiff located the accident which resulted in his injury, and saw no occurrence of the sort. It was competent for the plaintiff to ask the witness whether he violated a rule of his employer when he rode upon the engine for the purpose of discrediting his statements, to what extent the jury should say, but he had no right to argue in the question the probative force of the matter sought.

Charge "C." given at the request of the defendant, asserted that plaintiff was not entitled to recover if the loss of his eye was the result of an accident. Abstractly the charge was correct, for "accident" as there used meant inevitable accident, i. e., inevitable in the sense that it could not have been prevented by the exercise of that degree of care which the employer is required to exercise for the safety of his employes; in other words, accident without the concurring negligence of the defendant. If the plaintiff apprehended misconception of the charge by the jury, he should have asked an explanatory charge.

We will not prolong this opinion by dealing in detail with the remaining assignments of error. Such of them as have been argued have been considered and found to be either rather obviously unsound or to have had antidote in other parts of the record. What we have said will suffice for the future progress of the case.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD, J., concur. McCLELLAN, J., concurs in the conclusion, but thinks pleas 2, 3, and 4 should have been held bad, and relies upon *Osborne v. Ala. S. & W. Co.*, 135 Ala. 571, 33 South. 687, and *T. C. & I. Co. v. Burgess*, 158 Ala. 519, 47 South. 1029.

SOUTHERN RY. CO. v. HARRINGTON. (Supreme Court of Alabama. Feb. 26, 1910.)

1. CORPORATIONS (§ 503*)—PERSONAL INJURIES—ACTIONS—PLACE OF INJURY—VENUE.

Under Code 1907, § 6112, requiring actions for personal injuries against a corporation to be brought in the county where the injury occurred or where plaintiff resides, if the corporation does business there, it is sufficient if the injury occurred partly within a county, in order to sue the corporation there.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1936; Dec. Dig. § 503.*]

2. CORPORATIONS (§ 503*)—ACTIONS—VENUE—PERSONAL INJURIES—RESIDENCE OF PLAINTIFF.

It is sufficient under Code 1907, § 6112, requiring actions for personal injuries against a corporation to be brought in the county where the injury occurred or where plaintiff resides, if the corporation does business there, if plaintiff resides in the county of the venue when the suit is begun against a corporation, though not at the time of the injury.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1935; Dec. Dig. § 503.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CARRIERS (§ 241*)—PASSENGERS—RELATION—CARRIAGE OF RAILWAY POSTAL CLERKS.

Mail agents, postal clerks, and express messengers are passengers on the train on which they ride while working, and while they cannot rely upon the contract between the carrier and the government to impose a liability on the carrier in their favor, they may rely upon the legal duty of one undertaking to perform even a gratuitous service to exercise the care which the nature of the undertaking requires.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 978, 979; Dec. Dig. § 241.*]

4. CARRIERS (§ 290*)—PASSENGERS—COMPANY'S DUTY—EQUIPMENT.

A railroad company must warm its coaches for the safety and comfort of passengers, and its duty extends to mail cars in which postal clerks ride, in the absence of contract exempting them from doing so.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 290.*]

5. CARRIERS (§ 337*)—PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE.

A passenger cannot recover for illness caused by failure to heat the coach, if his contributory negligence proximately caused the injury, and the passenger's failure to protect himself from unnecessary cold or provide sufficient clothing may or may not be contributory negligence according to the circumstances.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 337.*]

6. NEGLIGENCE (§ 82*)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

In determining the right to recover for personal injuries, the question is whether the damages were caused entirely by defendant's negligence or whether plaintiff's negligence so contributed to his injury that, except for such negligence, the injury would not have happened.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. § 82.*]

7. CARRIERS (§ 337*)—PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE.

Since a postal clerk is required by act of Congress to remain in the mail car while on duty, he is not prima facie guilty of contributory negligence precluding recovery for illness by remaining in the car knowing that it is so insufficiently heated as to be uncomfortable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 337.*]

8. CARRIERS (§ 317*)—PASSENGERS—ACTION—ADMISSION OF EVIDENCE.

In an action by a railroad postal clerk against a railroad company for damages for illness caused by defendant's failure to heat its mail car, plaintiff could show that the car was wet and damp as tending to show that it would be uncomfortable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

9. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE.

In an action by a railroad postal clerk for damages caused by illness due to working in an unheated car, plaintiff could testify as to his duties as postal clerk in the car and how long he was compelled to remain therein.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

10. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE.

In an action by a railroad postal clerk for damages caused by illness resulting from a railroad company's failure to heat a mail car, plaintiff could show that he complained to defend-

ant of the unheated condition of the car to show actual notice.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

11. CARRIERS (§ 317*)—PASSENGERS—INJURY—ACTIONS—ADMISSION OF EVIDENCE.

In an action by a railroad postal clerk against a railroad company for damages resulting from illness caused by failure to heat the mail car in which plaintiff worked, evidence that plaintiff was a "chronic kicker" was properly excluded.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

12. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE—IRRELEVANCY.

In an action by a railroad postal clerk for damages caused by illness from failure to heat the mail car in which he worked, evidence as to the temperature of the express car in the same train was not relevant, where it appeared that the express and mail cars were heated differently in some respects, though each contained steam pipes from the engine, and the evidence showed that the mail car was cold while the express car was comfortable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

13. CARRIERS (§ 317*)—INJURY TO PASSENGER—EVIDENCE—OTHER ACTIONS.

In an action for damages by illness occurring on three days in January, defendant could not show that plaintiff brought another suit against it to recover for illness occurring thereafter in February.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

14. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE.

In a passenger's action for illness caused by a railroad company's failure to heat the car, where there was no evidence that the illness was caused by insufficient clothing, a charge directing a verdict for defendant if it was so caused was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

15. CARRIERS (§ 343*)—PASSENGERS—INJURIES—PLEADING—CONTRIBUTORY NEGLIGENCE—NECESSITY.

In an action by a railroad mail clerk for damages by illness because of a railroad company's failure to heat the mail car in which plaintiff worked, defendant could not rely on plaintiff's contributory negligence in wearing insufficient clothing unless it was pleaded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1138; Dec. Dig. § 343.*]

Appeal from Circuit Court, Walker County; A. O. Lane, Judge.

Action by C. F. Harrington against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The pleadings and the facts are sufficiently set out in the opinion of the court. The following charges were refused to the defendant: (1) "The court charges you that if you are reasonably satisfied from the evidence that plaintiff's injuries were proximately caused by inadequate clothing, worn by plaintiff, to meet the demands of the season and climate, you must find for the defendant." Charges 9 and 10 were the af-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

firmative charges as to the third and fourth counts. (11) "The court charges you that if you believe from the evidence that the cold condition of the car, as complained of by the plaintiff, was due to unusual cold weather, and that plaintiff made no complaint to those in charge of the train, and made no effort to remedy or have remedied the condition of the car, you must find for the defendant." (12) "If you are reasonably satisfied from the evidence that the mail car was equipped with stoves sufficient to properly warm the car, and that sufficient fuel was placed in the car, the court charges you that it was the duty of the plaintiff, for his own protection to start or cause to be started the fire in said stove."

Bankhead & Bankhead, for appellant. W. J. Martin, and James A. Mitchell, for appellee.

MAYFIELD, J. Appellee, a railway postal clerk, sues the defendant, railroad company, a carrier of the United States mail, for failure to properly heat or warm the car in which the mails were carried, and in which his duties required him to work and remain while on duty, as such postal clerk, by reason of which failure, on the part of the defendant, he was unduly exposed to the cold and was thereby made sick, had his feet frost-bitten, contracted severe cold, bronchitis, etc. The defendant attempted to plead contributory negligence and assumption of risk as a defense to the action, together with the general issue. However, the defendant first interposed a plea in abatement, for that the wrongs and injuries complained of did not wholly occur within the county of Walker, in which the action was brought, that plaintiff did not reside in Walker county at the time of the injury, the run in which plaintiff was engaged being from Birmingham, Ala., to Greenville, Miss., and that a part of the wrongs and injuries complained of were committed and suffered, if at all, outside of Walker county, that of the venue. This plea was filed under section 6112 of the Code of 1907. A demurrer to this plea in abatement was sustained, which is the first assignment insisted upon as error.

The plea was open to the demurrer leveled against it. It is not required by the statute (Code 1907, § 6112) that the injury should have wholly occurred within the county in which suit is brought—partly therein is sufficient; nor is it necessary that plaintiff should have resided in the county at the time of the injury—at the time of bringing the suit is sufficient. The original complaint claimed damages in one count for wrongs and injuries suffered on three separate and distinct days, a demurrer being sustained to it for this reason. The complaint was amended by adding three counts, each claiming damages for the wrongs com-

mitted on one day only, though each count claimed as for a different day. Demurrers were interposed to the amended complaint and were overruled, and the only material difference in the counts was that, as amended, each claimed as for a different day. Only the rulings as to the first count as amended are insisted upon as error, and only such will be treated.

In order to determine the sufficiency of this count, or of any other in the complaint, or the correctness of the ruling upon the demurrer thereto, it becomes necessary to first determine the relation of the parties, and their respective rights and duties, one to the other. It has been generally, if not uniformly, held that the relation of carrier and passenger exists between railroads carrying United States mails, and the mail agents and postal clerks, and not that of master and servants. The same rule is declared as to express messengers. Elliott on Railroads (1897 Ed.) § 1578; Hutchinson on Carriers, § 1017 (563). These authorities hold that while postal clerks or mail agents cannot avail themselves of the contract between the railroad carrier and the government, and make it a foundation for recovery, they can, however, rest upon the breach of the duty which the law imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise the degree of care and skill in its performance which the nature of the undertaking requires; the obligation to carry, therefore, in such cases, may arise from duty as well as from contract.

It is indisputably the duty of railroads, as common carriers, to warm their cars for the comfort and safety of their passengers, and they are liable in damages for injuries suffered in consequence of failure to discharge such duty. The passenger, however, may, in such cases, be guilty of such contributory negligence as to cause the injury complained of, and if it is alleged and proven that such contributory negligence proximately caused the injury complained of, on account of failure to heat the car, of course the passenger cannot recover. The failure of the passenger to protect himself from unnecessary cold, or to provide sufficient clothing, may or may not, be contributory negligence, depending upon the peculiar facts of each particular case. Taylor v. Wabash R. R. Co. (Mo.) 38 S. W. 304, 42 L. R. A. 110, and note. The true rule is, as stated by Chief Justice Smith, in the case of Turrentine v. R. & D. R. Co., 92 N. C. 641, in which he correctly quotes from an English case, "Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence and

want of ordinary care and caution on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not; as but for his own fault the misfortune would not have happened.' And in explanation of the proposition he adds: 'Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care and caution, the misfortune would not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.' *Wightman, J., in Tuft v. Warman*, 94 Eng. Com. Law Rep. 573. The rule is thus so fully and definitely expressed as to require no further comments from us. The counterpart of this rule is declared in *Gunter v. Wicker*, 85 N. C. 310, *Owens v. Railroad*, 88 N. C. 502, *Farmer v. Railroad*, *Ibid.* 564, and in *Aycock v. Railroad*, 89 N. C. 321, that the defendant will be liable, notwithstanding previous negligence of the plaintiff, if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant." This North Carolina case was a case on all fours with the one at bar, except that the acts of negligence, and contributory negligence, were somewhat different.

Postal clerks while on duty are not employes of the railroad carrier, and the railroad company may be liable to them for injuries caused by the negligence of its employes; they are entitled to the same degree of care as passengers, in the absence of an express agreement exempting the carrier from such liability; and the power to contract for carrying the mails, under the United States Revised Statutes, §§ 3097, 4007, has been held not to give the right to contract for such exemption. *Seybolt's Case*, 95 N. Y. 562, 47 Am. Rep. 75; *Nolton's Case*, 15 N. Y. 444, 69 Am. Dec. 623; *Mellor's Case*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Ketcham's Case*, 133 Ind. 340, 33 N. E. 116, 19 L. R. A. 330, 36 Am. St. Rep. 550, and note.

The relation of carrier and passenger being shown to have existed between the parties, we hold that count 1 of the complaint as amended, was, under our liberal rules of pleading, sufficient, and certainly not subject to the infirmities insisted upon by the appellant; that is, that the count did not show the duty to carry plaintiff and did not sufficiently show negligence to support the action.

As to the sufficiency of the pleas of contributory negligence and assumption of risk, to which demurrers were sustained, we find no reversible error.

It is true, as claimed by appellant, that it is common knowledge that postal clerks, with United States mail, are carried in separate cars and coaches and not with other passengers; that these cars are specially equipped for the mail clerks and their particular work,

and that passengers, as a rule, are not carried therein; but this does not, without a special contract, relieve the railroad company of the duty to properly heat these cars, for the comfort and health of the clerks and agents of the United States, who, by contract and by law, are required to remain at their posts while on duty. They cannot like ordinary passengers, go to another car if theirs is uncomfortable, but must remain in it while on duty, under a penalty imposed by statute of Congress. Fed. St. Ann. § 5474. In the absence of a special contract it is the duty of the railroad company to provide and maintain these cars, and to maintain and keep them safe and comfortable for these agents of the government. It is certainly not primarily the duty of the agents to heat, or to care for their cars otherwise than to protect the mails. Consequently, a postal clerk is not *prima facie* guilty of contributory negligence, nor does he assume the risk, by remaining in the car, and at his post of duty, after he knows of the uncomfortable condition of the car. He may, under certain conditions, be chargeable with the duty of notifying the proper agents or servants of the railroad company of the improper condition of the car, and of thus attempting to have it remedied, so as to alleviate the pain, suffering, or discomfort arising therefrom; but he is not guilty of contributory negligence or of assumption of risk by remaining in the car with knowledge of its condition, or by failing to warm or heat it himself. In the absence of contract, it is not his duty to heat it, but that of the railroad company; and it is also its duty to know, or at least to use due diligence to know, its condition, and to keep it reasonably safe and comfortable for the postal clerks and agents. None of these special pleas were sufficient as pleas of contributory negligence or assumption of risk, and the demurrers were properly sustained thereto. The pleas are treated by appellant, in bulk or in sections, and we will so treat them; but all were clearly insufficient.

There is nothing in appellee's contention that the bill of exceptions should be stricken. There is no motion to strike it; but, even if there were, the bill appears to have been signed within the time and in the manner required by law.

It was clearly competent for plaintiff to prove that the car was wet and damp; this certainly tended to show that the car would be thereby rendered cold and uncomfortable.

It was also competent and proper for plaintiff to testify as to his duties as postal clerk, when he had to enter the car, and how long he had to remain therein.

It was also proper to allow plaintiff to show that he made complaint, to defendant's agents, of the condition of the car to show that they had actual notice of its condition, and that it was the duty of such agents to heat the car.

The court properly limited the cross-ex-

amination as to the kind of bed plaintiff slept on in the car; there was no claim or contention that the car was cold, or that plaintiff suffered at that particular time. The court also properly declined to allow defendant to prove that plaintiff was a "chronic kicker." Any one might "kick" rather than have his "kickers" frostbitten.

We cannot say that there was reversible error in declining to allow the questions propounded to the express messenger, as to the temperature of the express car; it was sufficiently shown that such evidence would be relevant. It was not shown that the two cars were heated in all respects alike, but, on the contrary, it was shown that they were in some respects heated differently and constructed differently. So far as the evidence did appear, one was warm and one was cold; and one might very easily be comfortable and the other not. While it was shown that each had heating pipes supplied with steam from the engine, they also had other means of heating, which were different. It was indisputably shown that these pipes in the mail car were not heating the car—that it was in fact very cold—and that they had been cold for a long time. The evidence could probably have been made relevant, but it was not.

The court properly declined to allow defendant to prove that plaintiff had brought another suit against the defendant, to recover damages for sickness which occurred after the date of the injuries complained of in this case, to wit, on the 24th of February. The dates of the injuries here sued for, being January 16th, 18th, and 20th, that issue could not and should not be litigated on this trial. It could neither prove nor disprove any material issue on this trial.

Charge 1 was properly refused. There was no issue of contributory negligence in that the injuries of plaintiff were proximately caused by his wearing insufficient clothing; nor do we think there was any proof tending to show that all his damages were the result of inadequate clothing. If defendant relied upon this as contributory negligence it should have set it up. The evidence having indisputably shown negligence of defendant, as alleged, this could not be a bar to the entire right of recovery unless specially pleaded. The question of adequate clothing was not litigated, and there was no evidence whatever to show that his clothing was not ample and sufficient, if the car had been properly heated.

Charges 9 and 10 were properly refused. There was no evidence to show that the action was barred by the statute of limitations; the amendments clearly related back to the beginning of the suit, which was within a year from the date of the wrong complained of.

Charge 11 was improper, as has been heretofore stated as to the sufficiency of the pleas.

There was no contributory negligence or assumption of risk on the part of the plaintiff in not quitting the car and his post of duty because the car was not heated.

Charge 12 was properly refused because it does not assert a correct proposition of law. There was shown no duty on the part of the plaintiff to heat the car; that was defendant's duty.

There being no error, the judgment of the trial court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

CITY OF ENSLEY et al. v. SIMPSON.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied Feb. 26, 1910.)

1. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY—PRESUMPTIONS.

While every possible intentment must be indulged in favor of the constitutionality of a statute, plain provisions of the Constitution must be enforced.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48;* Statutes, Cent. Dig. § 56.]

2. STATUTES (§ 90*)—SPECIAL STATUTES—VALIDITY.

Const. 1901, § 104, prohibiting special laws amending the charter of a municipal corporation, but providing that the prohibition shall not prohibit the Legislature from altering the boundaries of a city, does not prohibit an act altering the boundaries of a city so as to include within its limits territory included within existing cities.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

3. STATUTES (§ 90*)—SPECIAL STATUTES—VALIDITY.

Act Aug. 20, 1909 (Loc. Laws Sp. Sess. 1909, p. 392), altering the boundary of a city so as to include within its limits territory included within designated cities, etc., affects non-contiguous municipalities, and is not in conflict with Const. 1901, § 105, prohibiting any special law in any case which is provided for by a general law, since the general law (Municipal Code; Act Aug. 13, 1907 [Acts 1907, p. 604]) merely permits the alteration of municipal boundaries by the acquisition of contiguous territory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

4. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY.

Before a statute can be declared unconstitutional, it must clearly and unavoidably appear to have been without the power of the Legislature to enact.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48;* Statutes, Cent. Dig. § 56.]

5. STATUTES (§ 90*) — SPECIAL STATUTES — "AMEND."

Const. 1901, § 104, subds. 5, 18, prohibiting any special law incorporating a city or amending its charter, etc., does not prohibit a special act, the effect of which is to destroy

an incorporated municipality, for to destroy is not to amend, as a statute amended survives.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98–100; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 1, pp. 368–370; vol. 8, pp. 7573, 7574.]

6. STATUTES (§ 80*) — SPECIAL STATUTES — AMEND—"PRIVATE CORPORATION."

Const. 1901, § 229, providing that the charter of any corporation shall be subject to amendment or repeal under general laws, which, as shown by the official copy of the Constitution on file in the office of the Secretary of State, is under the subhead "Private Corporations," applies only to private business corporations.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 80.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5571, 5572; vol. 8, p. 7763.]

7. MUNICIPAL CORPORATIONS (§§ 44, 49*) — LEGISLATIVE CONTROL.

The charter of a municipal corporation is conferred for political purposes, and the power to alter municipal charters or to repeal them exists without limitation in the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 122, 134–137; Dec. Dig. §§ 44, 49.*]

8. CONSTITUTIONAL LAW (§ 70*) — STATUTES — VALIDITY — JUDICIAL QUESTIONS.

The propriety and wisdom of a statute are questions exclusively for the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

9. CONSTITUTIONAL LAW (§ 278*) — DUE PROCESS OF LAW — MUNICIPAL CORPORATIONS.

Since municipal corporations are merely political subdivisions of the state, created as convenient agencies for exercising such governmental powers as may be entrusted to them, and since the state may at its pleasure modify or withdraw the powers conferred on a municipality, a statute operating to destroy an incorporated city is not invalid as depriving it of its property in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.*]

10. STATUTES (§ 8½*) — LOCAL LAWS — PASSES — CONSTITUTIONAL PROVISIONS.

An affidavit of the publisher of a newspaper that a notice of intention to apply for the passage of a local law was published once a week for four consecutive weeks sufficiently shows the publication of the notice, prescribed by Const. 1901, § 100, to justify the Legislature in finding that the notice of intention had been published.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 8½.*]

11. STATES (§ 37*) — LEGISLATURE — JOURNALS.

A member of the Legislature spreading on its journal his protest against the passage of a bill merely exercises a personal privilege conferred by Const. 1901, § 53, and the protest does not destroy the conclusive effect of the legislative journal.

[Ed. Note.—For other cases, see States, Cent. Dig. § 44; Dec. Dig. § 37.*]

12. STATUTES (§ 8½*) — LOCAL LAWS — NOTICE OF INTENTION — PUBLICATION — SUFFICIENCY.

The Governor convened the Legislature in special session on July 27, 1909, by proclamation issued a few weeks before. The affidavit of publication of notice of intention to apply to the special session for the passage of a local law averred the publication of the notice once a week for four consecutive weeks, and was subscribed and sworn to July 28, 1909. *Held*, that

the publication of the notice was had at a time not unreasonably remote from the introduction of the bill on July 29, 1909.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 8½.*]

13. STATUTES (§ 28*) — APPROVAL BY GOVERNOR — CONSTITUTIONAL PROVISIONS.

Under Const. 1901, §§ 66, 125, requiring the presiding officer of each house to sign the bills and joint resolutions passed by the Legislature, and providing that every vote, order, or resolution to which concurrence of both houses shall be necessary shall be presented to the Governor for approval, etc., a joint resolution requesting the Governor to return a bill which had passed both houses to enable the Legislature to correct errors therein need not be submitted to the Governor for approval, and where, on the return of the bill pursuant to the request of such resolution, the journals showed that the bill was without amendment enrolled again, and again signed by the Speaker of the House and the President of the Senate, and again presented to the Governor, who approved it in due course, the bill was legally enacted into a law, the joint resolution referred to in the Constitution being limited to resolutions applying to a form of legislation for administrative purposes of a local or temporary character, and known in legislative assemblies as joint resolutions, resolutions, or resolves.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 28.*]

14. CONSTITUTIONAL LAW (§ 121*) — OBLIGATION OF CONTRACTS — OBLIGATIONS OF MUNICIPAL CORPORATIONS.

The enforcement of obligations assumed by municipal corporations in existence when the obligations were made cannot be impaired by the Legislature, and, where they are changed, a substantial equivalent must be provided.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 304–348; Dec. Dig. § 121.*]

15. MUNICIPAL CORPORATIONS (§ 36*) — CONSOLIDATION — PRE-EXISTING OBLIGATIONS — ENFORCEMENT.

Even if the merger of a city which had issued bonds under an agreement to levy a tax for a sinking fund for the payment of interest on the bonds into another city, destroyed the security of the bonds, on the ground that the general credit of the larger city was not a substantial equivalent for the security contracted for, the legal obligation remained unimpaired and a remedy for the diversion of funds impairing the security may be had on proper application.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 105–111; Dec. Dig. § 36.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Judge.

Suit by J. B. Simpson against the City of Ensley and others. From a decree for complainant, defendants appeal. Reversed and rendered.

Fred G. Moore, Gunter & Gunter, Cabaniss & Bowie, Romaine Boyd, and Jere C. King, for appellant. F. E. Blackburn and John C. Forney, for appellee.

SAYRE, J. This case questions the constitutional validity of the act approved August 20, 1909 (Loc. Laws Sp. Sess. 1909, p. 392), entitled "An act to alter or rearrange the boundary lines of the city of Birmingham, Alabama, so as to include within the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

corporate limits of said city the territory now included within the cities or towns of Avondale, Woodlawn, East Lake, North Birmingham, North Haven, Graymont, Elyton, West End, Pratt City, Wylam, and Ensley, and other territory, and so as to exclude from the city of Birmingham certain territory now included within the corporate limits of said city of Birmingham." The chancellor decreed the invalidity of the act, and this appeal brings that decree under review.

While every possible intendment must be indulged in favor of the constitutionality of the enactment, plain mandates of the Constitution must be recognized and enforced. For one thing, it is urged that the act in question is violative of that part of section 105 of the Constitution which provides that "no special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law." The city of Avondale and the territory embraced within the corporate limits of that city had been annexed to and merged into the city of Birmingham in accordance with the general law prior to the passage of the act. The territory of that corporation, as it had been, was contiguous to the city of Birmingham. The city of Ensley and each of the municipalities named in the act and included within the limits of the enlarged city of Birmingham, as well as the last-named city, were at the date of the passage and approval of the act municipalities existing under the general law of the state. Some of them covered territory contiguous to the city of Birmingham; others did not. These municipalities and much intervening unincorporated territory were merged into the enlarged city of Birmingham. Sections 20 to 22 of the act approved August 13, 1907 (Acts 1907, p. 790), commonly known as the "Municipal Code law," provide for the consolidation of two or more municipalities lying contiguous to each other. Section 23 of the Municipal Code law provides a means for the extension of corporate limits to include new territory. The territory so included must be contiguous to the boundary of the city at some point, but may not embrace any territory within the corporate limits of another municipality. An act approved August 13, 1907 (Acts 1907, p. 604), contained provisions similar to those of section 23 of the Municipal Code law. An act of August 15, 1907 (Acts 1907, p. 598), also provided for the annexation and merger of any city or town into a contiguous city or town. Section 104 of the Constitution denies to the Legislature the right to pass any special, private, or local law amending, confirming, or extending the charter of any private or municipal corporation; but in subdivision 18 of that section it was provided that this should not prohibit the Legislature from altering or rearranging the boundaries of a city, town, or village. It is clear enough that nothing contained in

section 104 denies to the Legislature the power to pass the act in question. Nor can section 105 be so interpreted. Its language has been quoted. If it should be conceded, contrary to our present impression, that the power of legislation by special or local laws in respect to the alteration or rearrangement of municipal boundaries is excepted and reserved by the proviso of subsection 18 of section 104 only in the event there is no general law on the subject, that concession would not determine this case, for here the Legislature has embodied in one comprehensive scheme the inclusion, not only of contiguous territory and municipalities, but of municipalities not contiguous at the time of the passage of the act. True, under the general law, the same result might have been obtained by a tedious and embarrassing process of repeated additions to the territory of the absorbing city, each in turn, and so ultimately the scheme as an entirety, being dependent upon the vote of the electors resident in the municipality or unincorporated territory annexed from time to time. But the Legislature had the right to weigh the advantages of the scheme as a whole and enact law accordingly to accomplish the desired end at one stroke. Under no general law could the same considerations be submitted to the same electorate or the same result reached in the same way.

We do not deem it necessary to enter upon a detailed statement of distinctions which may be taken between the case at bar and the cases of *Town of McGregor v. Baylies*, 19 Iowa, 43, and *In re Extension of Boundaries of City of Denver*, 18 Colo. 288, 32 Pac. 615. In Colorado judges of the highest court are required to give opinions on request of the executive or the Legislature. But the judicial quality of such opinions has been questioned. In Rhode Island there is a similar requirement. Said Ames, C. J., in *Taylor v. Place*, 4 R. I. 324-362: "The advice, or opinion, given by the judges of this court, when requested, to the Governor or to either house of the General Assembly, under the third section of the tenth article of the Constitution, is not a decision of this court; and given, as it must be, without the aid which the court derives in adversary cases from able and experienced counsel, though it may afford much light from the reasonings or research displayed in it, can have no weight as a precedent." Neither of the cited cases involved constitutional provisions similar to those of this state to which reference has been made. The Constitution of Iowa contained a provision that, "in all cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." It also prohibited the incorporation of cities and towns by special or local laws (held to prohibit the passing of any act to amend a municipal charter) without exception in favor of acts altering or rearranging boundaries. So much

of the Constitution of Iowa as we have quoted is in effect the same as section 24 of article 4 of the Alabama Constitution of 1875 under which it was frequently held in this state that the courts would not review the legislative judgment that a matter of legislation could not be provided for by general law. The departure worked by section 105 of the Constitution of 1901 has significance. The inhibition now is against special, private, or local laws in any case which is provided for by a general law, of which the courts shall judge. Formerly the inquiry was whether the Legislature could provide for a particular case by general law. Now the question is whether it has so provided. We need not be understood as impairing the authority of *City Council of Montgomery v. Reese*, 149 Ala. 188, 43 South. 110. The court there said that it could not perceive that the framers of the Constitution intended the prohibition to operate only against special, local, or private laws which are in *ipsis verbis* of the general law. The effect of the ruling was that the enactment of a general law authorizing municipal corporations to issue bonds to run not exceeding 30 years, while permitted to stand upon the statute books, operated as a constitutional inhibition against any act permitting any particular municipality to issue bonds to run exceeding 30 years. Appellee's argument applies that decision to the case in hand as follows: The general statute permitting the alteration or rearrangement of municipal boundaries by the acquisition of contiguous territory only, while it stands, must operate as a constitutional inhibition against any act consolidating noncontiguous municipalities, if at the same time, and in order to preserve the unity and contiguity of the consolidated municipality, as perhaps is necessary to the validity of the act (*City of Denver v. Coulehan*, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751), intervening territory, contiguous to both of the constituent municipalities, is included in the act of consolidation. The subject of legislation in the general law is the alteration or rearrangement of boundaries as affecting contiguous municipalities and unincorporated territory. The subject-matter dealt with in the special act is the alteration or rearrangement of boundaries as affecting noncontiguous municipalities as well. Considered in their totality the two acts are not identical as to subject-matter. We therefore conclude that the special act is not obnoxious to section 105 of the Constitution.

Another insistence is that the act in question is in contravention of subdivisions 5 and 18 of section 104 of the Constitution, for that one necessary effect of the act, if valid, is to repeal the charters of those incorporated cities and towns merged by the act into the greater city of Birmingham. This court has settled the question, in accordance with obvious reason, that two municipalities cannot exist over the same territory at the same

time. *Butler v. Walker*, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61. Subdivision 5 prohibits the Legislature to pass any special, private, or local law "incorporating a city, town or village." It is urged on the authority of the case *In re Extension of Boundaries of Denver*, supra, that the quoted provision includes a prohibition of any special or local act the effect of which is to destroy an incorporated municipality. Considering a section of the Constitution of Colorado which reads as follows: "The General Assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions"—the court, in response to a resolution of the House of Representatives, having reference to the constitutionality of a bill to revise and amend the charter of the city of Denver, expressed its opinion that the power of the Legislature to disincorporate cities and towns by special act must be denied, the reason given being that such an act, if "not directly inhibited by the letter of the Constitution, is certainly opposed to the spirit of the provision. The object being to free all towns and cities from local or special legislation," it was said to be "clear that the inhibition of the section must be held to extend to the disincorporation, as well as the incorporation, of such cities and towns." We cannot follow the reasoning of the case. There is no literal prohibition in the Constitution of this state against the disincorporation of cities and towns by special laws. Before an act of the Legislature can be declared unconstitutional, it must clearly, decisively, and unavoidably appear to have been without the power of the Legislature. Nor can any purpose conceivably entertained by the framers of the Constitution be served by keeping in existence a municipal corporation which for any reason has outlived its usefulness or when an enlightened policy shall determine that its people and territory may find better government as a part of another municipality. The purpose was to bring about uniformity of organization and government because wisdom might better be expected in laws which must affect cities and towns having many representatives in the Legislature, and for the advantages of a uniform system of law throughout the state. Neither of these purposes is to be served by an interpretation of the Constitution, which, traveling beyond its letter, denies the power of the Legislature to disincorporate a city, town, or village. The other cases cited by appellee (*Davis v. Woolnough*, 9 Iowa, 104; *Ex parte Pritz*, 9 Iowa, 30; *State ex rel. Atty. Gen. v. Cincinnati*, 20 Ohio St. 18) hark back to the proposition, already discussed, that the Legislature may not amend municipal char-

ters by special acts. To destroy is not to amend. A thing amended survives. Nor is an alteration or rearrangement of the boundaries an amendment of the charter of a municipality. The Constitution clearly recognizes this fact by excepting an act altering or rearranging boundaries from the prohibition against local laws amending charters. Nor, again, does appellee's contention gain comfort in section 229 of the Constitution, which contains this provision among others: "The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws." The context of that section makes it clear that this provision was intended for application to private business corporations. In the printed copies of the Constitution, to be found in the Code and elsewhere, this section, along with others which seem to pertain to private corporations only, is grouped under the subhead "Municipal Corporations." But an inspection of the official copy on file in the office of the Secretary of State makes it to appear that the sections referred to are grouped under the subhead "Private Corporations," thus relieving the situation of any doubt supposed to grow out of section 229.

We are asked to condemn this act as evincing an arbitrary exercise of legislative discretion. Again, the case of the city of Denver is referred to. But we have said enough of that case and of the different constitutional provisions there involved to indicate our opinion that it ought not to control the decision of this case. It would require an extreme case to induce us to declare an exercise of legislative discretion as to the territory to be included in a city or town to constitute an usurpation of power and an unjustifiable disregard of the rights of municipalities destroyed by merger. If, indeed, any case of that character could be made the subject of judicial review. *Tiedeman, Mun. Corp. § 56.* The character of a municipal corporation is conferred for political purposes. In *Town of East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518, it is said that cities and towns which are public municipal and political bodies "are incorporated for public, and not private, objects. They are allowed to hold privileges and property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts. Hence generally the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes." The power to alter, amend (subject in this state to the limitation that in certain conditions it must be done by general bill), or repeal the charter of a public corporation must necessarily exist without limitation in the

sovereign, otherwise there would be "numberless petty governments existing within the state, forming a part of it, but independent of the control of the sovereign power." 1 *Abbott, Mun. Corp. § 22*, where numerous authorities are cited. As for the reasonableness of the exercise of power in this particular case, "this court has, as it should, borne constantly in mind * * * that the propriety and wisdom of enactments by the law-makers are questions peculiarly and exclusively within the decisive right of that department, and, if the act under investigation contravenes no provision of the organic law, the judiciary is without rightful power to review the legislative determination of the wisdom and propriety of the action taken." *State ex rel. Meyer v. Greene*, 154 Ala. 249, 46 South. 268. These considerations dispose, also, of the allegations of the bill that the act runs counter to the fourteenth amendment of the Constitution of the United States, in that the city of Ensley will by this act be deprived of its property without due process of law. This question was disposed of in the case of *Hunter v. Pittsburg*, 207 U. S. 161, 28 Sup. Ct. 207, 52 L. Ed. 151, in language so apt and conclusive that we quote it as follows: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently, they are usually given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or oth-

erwise, in the altered or continued existence of the corporation or its powers, and there is nothing in the federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

In the next place, we are asked to consider whether the act be not offensive to section 106 of the Constitution. The journal of the House of Representatives shows as proof of notice an affidavit of one James J. Smith, who deposes and says that he was the publisher of the "Birmingham Ledger," a newspaper published in the city of Birmingham, Jefferson county, Ala., and that the notice, a copy of which was attached, was inserted, published, and appeared regularly in the said "Birmingham Ledger" once a week for four consecutive weeks, without cost to the state of Alabama. This was subscribed and sworn to on the 28th day of July, 1909. The attached copy of the notice was in the following words and figures: "Notice is hereby given that at the next special session of the Legislature of Alabama, which will convene in the city of Montgomery on the 27th day of July, 1909, a bill will be introduced for passage, the substance of which will be." Here followed the bill in extenso. This bill was introduced into the house on July 29, 1909. It is contended that the journal does not show publication once a week for four consecutive weeks, but only the conclusion of affiant that such publication had been made. In support of this contention *State ex rel. Frederick v. Brodie*, 148 Ala. 381, 41 South. 180, is cited. In that case the affidavit stated that "notice stating the substance of the foregoing bill, and the intention to apply for the enactment of such into law, was duly published in the *Ensley Herald*, at least once a week for four consecutive weeks, prior to the day hereof." This was said to fall short of legal proof of the publication of the substance of the bill as showing nothing more than the conclusion of the witness that the notice had contained the substance of the bill. Nothing was said as to the notice being defective in other respects, though in the respect now material it was identical with the notice here in question. Such, also, was the case in *Childers v. Shepherd*, 142 Ala. 385, 39 South. 235, in which the notice was held to comply with the constitutional requirements. The argument now is that the affidavit shows nothing more than the conclusion of the witness that publication made had been begun four entire weeks before the introduction of the bill. The affidavit was accepted by the Legislature as sufficient, and some imperative reason must be made to appear why we should hold otherwise. We do not question the decision in *State ex rel. Frederick v. Brodie*, supra. In that case it was obvious that a statement

that the substance of the bill had been published conveyed no intimation as to what had been published. Here, however, the statement as to the length of time during which the publication had been made followed the language of the Constitution. It was in a sense, to be sure, the statement of a conclusion, as every statement must be. But it was not an offensive conclusion. Witnesses are permitted to state many conclusions where they may involve necessarily certain facts. Such conclusions are indulged as statements of collective facts. But witnesses are never permitted to state the contents of a paper writing, nor to state that one paper is a substantial copy of another. If publication begun at least four weeks in advance of the introduction of a bill is the only publication which complies with the language of the Constitution requiring publication for four consecutive weeks, the meaning of the language of the affidavit must be that publication was begun at least four weeks before the bill at issue was introduced. The Legislature in the discharge of its sworn duty so interpreted the affidavits; that interpretation was not strained, forced, or unnatural, and we will not say that there was a breach of constitutional duty in so accepting it.

A member of the house caused to be spread upon the journal of the house his protest against the passage of the bill. What other reasons he had for protesting are immaterial to this inquiry; but he incorporated into his protest an affidavit made by the secretary and business manager of the "Birmingham Ledger," to the effect that the first publication of the bill in that paper had been made on the twenty-second day before its introduction into the House. But we cannot look to the protest in order to convict the House of wrongdoing, nor to impeach its action in passing the bill in any respect. Section 55 of the Constitution provides that: "Any member of either house shall have liberty to dissent from or protest against any act or resolution which he may think injurious to the public, or to an individual, and have the reason for his dissent entered on the journal." But it was never intended by this provision that any member should have the power to destroy the conclusive effect of the journal kept by the House, nor that any member might invalidate the action of the House. In spreading his protest upon the journal the member exercises a personal privilege by which he vindicates his own course and appeals to the people. The question here presented had elaborate consideration in the case of *Auditor General v. Board of Supervisors*, 89 Mich. 552, 51 N. W. 483. In that case 16 members of a Senate of 32 protested, with affidavits, that the law in question had been passed by the vote of only 15 members; that is, by less than a quorum. But the court held that the protest could not be looked to

as qualifying the assertions of the legislative journal. Speaking of the protest, the court said: "It has no force as legislative action, and cannot be resorted to to nullify a legislative act. It has no force as a statement of fact contradicting the journal. It certainly was not intended that the protest should have greater weight against legislative action than his vote would have." The protest "is on the journal, not by any act of the Legislature, but by reason of the constitutional provision extending to members that privilege." We may add that so long as the protest contained no scandalous matter, and was respectful in tone, the House had no right to deny the member the exercise of his privilege, no matter how ill advised or untrue in fact it may have been. The Supreme Court of Michigan continues: "The protest and affidavit can have no effect whatever, and can no more be considered as impeaching the verity of the journal than would parol or other proof outside of such journal. The right to protest and spread the same at length upon the journal is given by the Constitution to any member; but such protest cannot be permitted to impeach the journal entries. * * * We have nothing before us but the journals of that body, and the assertion of a fact in a protest contradicting the record does not have the force and effect to overthrow the journal of that body."

But it is said it does not appear when the notice was published—it may have been years before the session of the Legislature at which the bill was passed. There must in reason be a limit to the time during which published notice may be effective to accomplish the constitutional purpose. But we hardly think any serious controversy can be raised in respect to the notice under consideration. It contains internal evidence enough to satisfy the mind that the publication was had at a time not unreasonably remote from the introduction of the bill. The notice was that the bill would be introduced at the next special session of the Legislature, which would convene on the 27th day of July, 1909. We judicially know that the Governor's proclamation convening the Legislature in special session on the 27th day of July, 1909, was issued a few weeks before that day, but for some weeks, as we know by reference to the current history of the time, it had been the general expectation that the Legislature would be convened on that day. By the barest chance imaginable could the notice have been framed for any unreasonable length of time theretofore. The possibility of such an occurrence is negligible.

On the foregoing considerations, we are satisfied with the conclusion that the injunction cannot be grounded upon the idea that the journal of the House does not affirmatively disclose that proper notice was given

of the intention to apply for the passage of the act.

It is further urged that the legislative journal of the proceedings had in the passage of the act shows that the bill which passed both houses, and was enrolled and sent to the Governor for approval, had no enacting clause, and, further, that the bill which so reached the Governor was returned by him to the House in which it originated in obedience to a joint resolution adopted by the House and Senate; that the action of the Governor in relinquishing control of the bill without signing or vetoing or offering amendments was illegal; and that whatever else was done to the bill after it was returned to the House under the joint resolution was illegal and the act itself a nullity, all for the reason that the joint resolution was not signed by the Speaker of the House and the President of the Senate and approved by the Governor as required by sections 66 and 125 of the Constitution. On the return of the bill to the House, the journal shows that without amendment it was enrolled again, again signed by the Speaker of the House and the President of the Senate, again transmitted to the Governor, where it received his approval in due course. Section 66 is as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the Legislature, after the same shall have been publicly read at length immediately before signing, and the fact of reading and signing shall be entered upon the journal," etc. The language of section 125 is: "Every vote, order or resolution to which concurrence of both houses may be necessary, except on questions of adjournment and the bringing on of elections, shall be presented to the Governor, and before the same shall take effect, be approved by him; or, being disapproved, shall be re-passed by both houses according to the rules and limitations prescribed in the case of a bill." It is supposed that the case of *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, gives support to appellee's contention that this bill was not passed in the observance of the constitutional provisions just quoted. The facts of that case were that a bill perfect in every respect was sent to the Governor for approval. Subsequently the House desired to amend the bill, and, without consulting the Senate, requested that the bill be returned, which was accordingly done. Prolonged differences between the House and Senate over the bill resulted in nothing. The court held that the united action of both houses was necessary to recall the bill, and that the bill, having been regularly transmitted to the Governor in the form in which the Legislature passed it, and not recalled by the action of both houses, and not vetoed by the Governor, became law. Likewise in *Harpending v. Haight*, 39 Cal. 198, 2 Am. Rep. 432. If it be assumed that the bill at the time of its re-

turn to the House was in form as it now appears, the effect of the decisions relied upon is that the return in the case of the act in hand was ineffectual for any purpose, and the law as it stands upon the statute book was constitutionally enacted as for the objection taken at this point. If, on the other hand, the enrolled copy sent first to the Governor was so variant from the bill as passed by the Legislature as to require material changes on its return, then that presentation of the bill was spurious, and, that fact becoming known, it was the duty of the Governor *ex mero* to call attention to it, and of the Legislature to recall it for correction, and this, although if the bill had been signed in its shape as first presented to the Governor, it might be impossible to show its variance from the bill passed. So then the question is whether the recall and return of the bill with the consent of both houses and of the Governor shall be held to vitiate subsequent proceedings with respect to the bill which appears to have been dealt with in a constitutional way throughout but for the fact that the will of the House and Senate that it be returned is not evidenced by a joint resolution signed by the Speaker of the House and the President of the Senate in the presence of their respective houses. It has been the unbroken custom of the Legislature for many years to send concurrent resolutions requesting the return of bills for correction and amendment to the Governor with the authentication of the clerk and secretary of the two houses only. The Legislature has never construed the constitutional requirement that joint resolution should be signed by the presiding officers of the two houses to have any relation to concurrent resolutions governing such emergencies. These provisions must have been brought forward into the Constitution of 1901 with this legislative construction and practice in the minds of its framers. Many laws are now on the statute books in which this practice was followed. There is a class of legislation which may take the form of a resolution and to which the constitutional requirement was intended to apply—a form of legislation, in frequent use in this country, chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, and known in legislative assemblies as joint resolutions, resolutions, or resolves. This form of legislation is recognized in most Constitutions, in which, and in the rules and regulations of legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. Cushing's *Law & Practice of Legislative Assemblies*, § 2403. The constitutional provisions in question were doubtless intended for resolutions of that character. While the two houses of the Legislature were yet in session and capable of acting concurrently with the Governor and with each other, and the matter of the

bills was in fieri, they had an inherent right, and it was their plain duty, to correct errors, and no reasonable theory of constitutional requirement would deny the right or duty, nor can any valid reason be assigned for holding that a concurrent resolution, not intended to have the force and effect of law, but merely to facilitate the correction of errors in a bill properly so called, should require authentication in so solemn a way. Of the concurrent action of the two houses and the Governor in this case there can be no doubt. The indisputable evidence of that fact is to be found in the journals of the two houses and in the bill as finally enrolled and signed by the Governor. The purpose of the Constitution is to assure complete agreement in legislative acts designed to operate as law, and to provide a permanent memorial of the act agreed upon. These purposes are served by the constitutional requirement, complied with in this case, that the bill in its final shape as law shall be so authenticated. We are therefore of opinion the act under review is not open to objection on the ground here under consideration.

We have thus reached the last contention which seems to us to demand special notice. Appellee is the holder and owner of a bond of the city of Ensley issued subsequent to the year 1901. We do not see that the allegation of this fact in the amendment of the bill added strength to complainant's position. It has been settled that the remedies for the enforcement of obligations assumed by municipal corporations, which existed when the contract was made, cannot be impaired by the Legislature, or, if they are changed, a substantial equivalent must be provided. "Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620, and authorities there cited. To the same effect are decisions of this court. *Amy v. Selma*, 77 Ala. 103; *Slaughter v. Mobile County*, 73 Ala. 134; *Edwards v. Williamson*, 70 Ala. 145; *Commissioners of Limestone County v. Rather*, 48 Ala. 433. There is no complaint of any impairment of complainant's security for his debt. Appellee's contention just here takes this form: Under section 216 of the Constitution cities and towns are authorized to levy a tax for general purposes. The city of Birmingham is authorized to levy an additional tax of one-half of 1 per centum to be devoted exclusively to the payment of the interest on the bonded indebtedness of that city existing at the time of the ratification of the Constitution and to the creation of a sinking fund for the payment of its bonded indebtedness at maturity. Ensley was also authorized to levy an additional

tax of one-half of 1 per centum whenever a majority of the voters of that city should so determine, with the proviso that the special purposes for which the additional tax was to be levied should be stipulated in the call for the election. Ensley held an election by which it was stipulated that one-tenth of the additional tax should go into and form a sinking fund for the payment of interest on bonds to be issued for the construction of a system of storm sewers. Complainant's bond belongs to this issue. The argument is that the merger of Ensley into Birmingham will destroy this security. If it be that the general credit of the larger city is not a substantial equivalent for the special security contracted for, which is not alleged and which we cannot assume to know in the absence of allegation and proof, under the authorities cited above the legal obligation of that security remains unimpaired, and a remedy for the diversion of funds tending to impair it in fact may be had on proper application to the courts. This proposition is sustained by the authorities cited by the appellee as well as those hereinabove cited. *United States ex rel. Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403.

We have found in appellee's case no sufficient warrant for declaring the act in question unconstitutional. The decree of the chancery court will be reversed, and a decree here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

ROBINSON v. CITY OF ENSLEY et al.
(Supreme Court of Alabama. Dec. 13, 1909.
Rehearing Denied Feb. 26, 1910.)

Appeal from Chancery Court, Jefferson County; A. H. Benners, Judge.

Suit between James Robinson and the City of Ensley and others. From a decree for the latter, the former appeals. Affirmed.

Goodwyn & McIntyre and Ludlow Elmore, for appellant. Jere C. King, for appellees.

SAYRE, J. Affirmed on the authority of *City of Ensley v. Simpson*, 52 South. 61.

**SLOSS-SHEFFIELD STEEL & IRON CO.
v. MITCHELL.**

(Supreme Court of Alabama. June 30, 1909.
In Response to Application for Rehearing
Feb. 26, 1910.)

**1. WATERS AND WATER COURSES (§ 171*)—
FLOWING LANDS—FILLING LOWLANDS BE-
SIDE STREAM.**

Defendant, having, though solely by filling in its lowlands on one side of a stream, not at all obstructing its channel proper, caused the

flooding of plaintiff's land in times of high water, is liable for the damage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 216; Dec. Dig. § 171.*]

**2. WATERS AND WATER COURSES (§ 171*)—
FLOWING LANDS—FILLING LOWLANDS BE-
SIDE STREAM.**

The exception of "city and village lots" from the rule that the owner of lower land has no right to obstruct the natural flow thereon of water from higher land, to the damage of the latter, applies only to drainage of surface waters, and not to running streams.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 216; Dec. Dig. § 171.*]

3. TRIAL (§ 219*)—INSTRUCTIONS—DEFINITION OF TERMS—FLOWING LANDS.

Requested charges that defendant would not be liable for damages, the result of "extraordinary floods," in the absence of definition of that term, could be properly refused as calculated to mislead the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 489; Dec. Dig. § 219.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, under the evidence, part of the damages to plaintiff's lands might have been the result of an ordinary flood, in connection with defendant's filling in the lowlands on one side of the stream, though part of it might have been the result of an extraordinary flood, an instruction requesting a verdict for defendant on the finding of there having been an extraordinary flood was properly refused, as based on a part of the evidence only.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 618; Dec. Dig. § 253.*]

**5. WATERS AND WATER COURSES (§ 178*)—
OVERFLOWING LANDS—MEASURE OF DAM-
AGES.**

The measure of damages for overflowing land is the difference between the reasonable rental value of the lots and houses thereon with and without the overflow, during the period covered thereby.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 255; Dec. Dig. § 178; * *Damages*, Cent. Dig. §§ 276½, 282.]

**6. WATERS AND WATER COURSES (§ 171*)—
CAUSING OVERFLOWS—LIABILITY.**

Defendant, having caused the overflow of plaintiff's land by putting an obstruction on low land beside a stream, is liable for the damages, though such low land was the property of a third person.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 219; Dec. Dig. § 171.*]

7. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE OF ACTION—CAUSING OVERFLOW OF LANDS.

Limitations against an action for the flooding of plaintiff's land from waters of a stream does not begin to run from the time defendant filled in low land beside the stream, causing the overflow, but only from the time when, during high water, it was actually overflowed.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 305; Dec. Dig. § 55.*]

8. ACTION (§ 38*)—JOINDER OF CAUSES IN SINGLE COUNT.

Each count of a complaint for overflowing lands having claimed damages for separate and distinct overflows is subject to demurrer.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 549; Dec. Dig. § 38.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by G. B. Mitchell against the Sloss-Sheffield Steel & Iron Company for damages for flooding land. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 49 South. 851.

The complaint was as follows:

Count 1: "Plaintiff claims of the defendant the sum of \$10,000 damages in this: That on and prior to the 23d day of August, 1907, plaintiff was the owner and in possession of the following described real estate in Jefferson county, Alabama, to wit: [Here follows a description by blocks and lots.] That all of said property is adjoining and contiguous, and constitutes one tract or body of land. That on and prior to said date the defendant's servants or agents, acting within the line and scope of their authority, caused to be filled or partially filled or obstructed the channel of a branch or stream which ran near said property, which said branch or stream was a tributary of Village creek, and which empties into Village creek at a point between Third and Fourth streets in the town of North Birmingham, and because thereof said streams were made to overflow said plaintiff's real estate above described. That water was made to flow over and stand upon said above-described real estate, which but for the conduct of the defendant's servants or agents as aforesaid would not have flowed upon or stood on said property. That water was made to flow upon or stand on said property by reason of the conduct of the defendant's servants or agents as aforesaid at various and divers times, and that because thereof plaintiff's property became inaccessible, large quantities of mud, slime, filth, and debris were cast upon said land from time to time, greatly injuring and damaging same. That said property was suitable for residences, and that the same had been laid off in lots with a view to building residences thereon, or of selling the same. That a great many residences had been built thereon, which were occupied by plaintiff's tenants, for which he received large sums of money as rent. That by reason of the overflow and the standing of said water on said premises as aforesaid said property became undesirable and unhealthful. That it was made less valuable, and the market value was greatly decreased. The rent thereon was greatly impaired or reduced. The occupancy of his houses by tenants was prevented. That he was unable, because thereof, to obtain persons or tenants to occupy said premises, or to sell the same, or that the value of the rentals was greatly reduced. That the houses on said premises were made undesirable for occupancy because of the flowing of said water through and under said houses, and of the standing of the water in and under said houses, caused as aforesaid. That said water caused to be deposited on and in said

houses large quantities of mud, slime, and filth, and that said houses were thereby made to decay, and the foundations thereof weakened and caused to give way. The chimneys on said houses were damaged and caused to sink and careen. That on account thereof plaintiff has been unable to sell or dispose of said property to an advantage, or to rent the same, and that said premises have been rendered unhealthy, and sickness has resulted from the said overflows and standing of said water. That said property was otherwise rendered undesirable and untenable. That the public highway on which said property abuts, namely, Stout's or Cheel's Road, which said public highway is also overflowed, and water was caused to stand upon the same, rendering travel upon the same dangerous, inconvenient, and impossible, thereby greatly damaging said property. That by the conduct of defendant's servants or agents as aforesaid large quantities of water were caused to stand for days at a time on said property. That property adjacent and adjoining said property was caused to be overflowed by the conduct of the defendant's servants or agents as aforesaid, and water was caused to stand upon the same, rendering his said property inaccessible, undesirable, and unhealthful. That the wells on said property from which his said tenant obtained water for domestic purposes were filled with said overflow, and that the said water was filthy and unclean, and that the said wells were filled up and rendered less useful and valuable, and some were destroyed by said overflow. That the drinking water in said wells was rendered unwholesome and undesirable. That the poultry and live stock of the said tenant were drowned and damaged by reason of the said overflow, and the water standing on said premises as aforesaid. That a large number of dead animals were by said overflow cast and carried through and left upon said property, and on the property adjacent thereto, causing great stench, rendering said premises unwholesome, undesirable, and unhealthful."

Count 2 is very similar to count 1, except that the averments are changed somewhat in respect to damages, although all the damages alleged in the first count are alleged in the second and third counts.

The demurrers take the point that each count joins separate causes of action in one count, in that it claims for damages done by separate and distinct overflows, and also joins causes of action for separate and distinct lots in one count.

Tillman, Grubb, Bradley & Morrow and L. C. Leadbeater, for appellant. Frank S. White & Sons, for appellee.

MAYFIELD, J. This action is one for damages, brought by one riparian owner, the appellant, against another, the appellee, for wrongfully obstructing one or both of two streams of water, one known as "Jackson's

Branch," the other as "Village Creek," the former being a tributary of the latter, and the lands flooded being near the junction of the two streams. It is alleged that in consequence of the obstructions complained of the waters of these two streams, in times of high water, were caused to flood or overflow the plaintiff's lands, to his great damage, in that slime and filth were cast thereon, impairing the healthfulness, desirability, and value of the lands for residences, the use to which they were put; that the rental value was greatly diminished thereby; that the houses thereon, 24 in number, were thereby greatly damaged, and a great number of other damages were particularly alleged. The complaint contained three counts, all of which were practically alike so far as need be considered on this appeal. Each was amended, and demurrers were overruled to each as amended. To the complaint as amended the defendant filed several pleas, the general issue, and some special pleas, unnecessary to here notice particularly. The trial resulted in a verdict and judgment for plaintiff, from which the defendant appeals.

The first error insisted upon is that the trial court erred in overruling defendant's demurrers to complaint. The particular defect insisted upon is, first, that each count joins therein several distinct causes of action; second, that each count claims damages for separate and distinct overflows. If any count does, or attempts to do, either of the two things set forth above and pointed out by the demurrers, it is bad, and the demurrer should have been sustained. *Shahan's Case*, 116 Ala. 302, 22 South. 509; *Cofers Case*, 110 Ala. 491, 18 South. 110; *Dusenberry's Case*, 94 Ala. 413, 10 South. 274. We do not think any one of the counts was subject to this defect, but the allegation was rather of a continuing injury by flooding plaintiff's lands for several days, and so that the injury done on one particular day is not distinguished from that done on another day except as to amount and extent. *Sloss-Sheffield Co. v. G. B. Mitchell*, 49 South. 851.

The next error insisted upon is the refusal of the court to give each of the charges 3, 11, 12, 13, and 14, requested by defendant. Each of these charges was confessedly intended to raise the question, Is the defendant liable under all the circumstances of this case for damages suffered by plaintiff on account of flooding his lands, if the flooding was caused solely by the defendant's filling in its own lowlands on one side of the creek not at all thereby obstructing the channel proper of the streams? Appellant concedes that this court has adopted the rule of the civil law rather than that of the common law as to this question. The rules of law applicable to this question are two, and have been thus stated by this court in the case of *Farris & McCurdy v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24: "The first of these principles is that the owner of higher ground has a legal and nat-

ural servitude upon all lower estates, by which he is entitled to have discharged all surface water, or running streams, from the higher upon the lower estate, and the owner of the lower estate has no lawful right to obstruct the natural flow of such water, to the serious injury of the superior proprietor. The only recognized exception to this rule is said to be in the case of buildings erected upon city or village lots. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Wood on Nuisances* (2d Ed.) pp. 440, 446, 456. The second principle is strictly analogous, and applies to ordinary water courses, without regard to any question of the superior altitude of one adjacent estate to that of another. This rule is that a riparian proprietor, whether he be the owner of one or both banks of a running stream of water, has no lawful right to build any obstruction which, in times of ordinary flood, will operate to throw the waters of such stream upon the lands of another proprietor, so as to overflow and damage them. *Nininger v. Norwood*, supra; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 163; 2 Kent's Com. 439. The whole law of nuisances rests upon the maxim of the common law 'Sic utere tuo ut laedas non alienum'—every man must so use his own property as not to injure that of his neighbor. So, the whole law of water courses is founded on the maxim 'Aqua currit, et curere debet'—water naturally runs, and must be allowed to run in its natural course. As said in *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452, 'where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper, to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude;' or, as otherwise expressed in the same case, 'the owner of the upper parcel of land has a natural easement in the lower parcel, to the extent of the natural flow of water from the upper parcel to and upon the lower.'

The appellant insists that the case in question falls within the exception of "city and village lots." While the lands in question may be within a village, the case-made is not within the exception. The exception as to "city or village lots," if it does not apply exclusively to drainage of surface water, by artificial and municipal drainage, certainly it is to such cases the exception has been applied. We know of no case in which the exception has been extended to running streams or to change the rights of riparian owners as to the law of such streams.

The question in this case is not one as to the drainage of surface water, but is one as to the obstructing of the flow of a natural stream. *Farnham on Waters and Water Rights*, vol. 3, p. 2607; *Gould on Waters*, §

277; *Hall v. Rising*, 141 Ala. 433, 37 South. 586.

The next error insisted upon is the refusal of the trial court to give, at the request of the defendant, charges 4 and 7. It is insisted that each of these charges asserts only a correct proposition of law, that the defendant would not be liable for damages the result of an extraordinary or unprecedented flood—to put the proposition in a different form, that the defendant is not liable for the “act of God”—and that this is all the charges state. If this was all the charges asserted of course they were correct and should have been given. *Gulf Co. v. Walker*, 132 Ala. 553, 31 South. 374; *So. Ry. Co. v. Plott*, 131 Ala. 312, 31 South. 33. An extraordinary flood or “act of God” was defined by this court in the above-cited cases and the rule stated to be as follows: “Floods such as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstruction of water courses. The term ‘act of God,’ in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” This rule as thus stated by this court has been adopted by Mr. Farnham in his work on *Waters and Water Rights*, vol. 2, p. 1840, § 577A. These charges could well be refused because calculated to mislead the jury, in that they do not define “extraordinary floods.” They also request a verdict for defendant based upon a part only of the evidence; a part of the damages might have been the result of an extraordinary flood, and a part that of an ordinary flood. Charges similar to these two were held to be properly refused in the above cases cited.

We do not think charge 8 correctly stated the rule as to the measure of damages as for loss of rents on account of the overflow. Of course plaintiff was not entitled to recover more than his actual damages on account of loss of rents. We think the difference between the reasonable rental value of the lots and houses with and without the overflow during the period covered by the suit is the correct measure of such damages. It is not equitable to fix the amount before the overflow at the reasonable value, and the amount after the overflow at what was actually recovered. The latter amount could be greatly increased by the industry of the landlord, or the scarcity of lands and houses of like kind to which increased value the wrongdoer would not be entitled, any more than he would be required to suffer the loss on account of the neglect or failure of the landlord to rent or collect, or to suffer the loss occasioned by failure of demand for such property after the injury to which he did not contribute. *Farnham on Waters and Water Rights*, p. 1874 et seq.

We do not think defendant should escape

liability if it actually obstructed the streams or the flow thereof, to the damage of plaintiff, as alleged and proven, merely because it did not own all the land upon which all of the obstruction was placed, if the damages were the result of that part of the obstruction not on its land, though it placed the obstruction there. This was the effect of charge 9, and it was therefore properly refused.

Charge 10 was properly refused. The action was not barred by the statute of limitations of 10 years by reason of the maintenance of the slag pile along the north side of Village creek in the same condition for 10 years preceding the time the damages were suffered or the action was brought. It is true, as contended, that 10 years' adverse possession of an easement may confer title and right as to such easement. If the lands in question had been overflowed in this manner by this slag pile continuously for 10 years the bar would be complete; but that is not the case. The slag pile might have remained as it did for 10 years without causing plaintiff any injury or damage; the evidence shows it would only damage him, as it is alleged in this case, during very high waters and then probably only in conjunction with some other obstruction. So far as plaintiff was concerned defendant needed no prescriptive right or any other right from him to construct the slag pile.

Until some damage was done plaintiff thereby he had no right of action, and consequently the statute of limitations did not begin to run until his right of action accrued. *Polly v. McCall*, 37 Ala. 20; *Sloss-Sheffield Co. v. Mitchell*, 49 South. 851.

Finding no error in the record the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

In Response to Application for Rehearing.

MAYFIELD, J. We are of the opinion that each count of the complaint alleged more than one distinct cause of action, in that it claimed damages for separate and distinct overflows, and was therefore subject to the demurrer interposed thereto which took this point. The court therefore erred in overruling the demurrer to these counts. See *Shahan's Case*, 116 Ala. 302, 22 South. 509; *Cofers Case*, 110 Ala. 491, 18 South. 110; *Dusenberry's Case*, 94 Ala. 113, 10 South. 274.

In the original opinion we held that these counts each contained but one distinct cause of action, in that they claimed damages as for one continuing overflow; but on further consideration we are at the conclusion that we were in error in the former opinion, to this extent.

It follows, therefore, that the application for a rehearing must be granted, and the de-

cision of affirmance set aside. And a judgment will be now entered, reversing the judgment of the lower court for the error indicated, and remanding the cause.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, and SAYRE, JJ., concur.

THACKER et al. v. MORRIS et al.

(Supreme Court of Alabama. Jan. 13, 1910.
Rehearing Denied Feb. 26, 1910.)

1. HOMESTEAD (§ 70*)—PROPERTY CONSTITUTING HOMESTEAD.

The owner of a tract of land less than 160 acres, and less in value than \$2,000, lived upon an adjoining tract, in which he owned a life estate, both tracts aggregating more than 160 acres, and being all the land owned by him at the time of his death. Both tracts were cultivated by him for the common support of his family prior to a sale of the land in which he owned the fee. *Held*, that both tracts prior to the sale constituted his homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 100-103; Dec. Dig. § 70.*]

2. HOMESTEAD (§ 167*)—ABANDONMENT—EXECUTION OF INVALID DEED.

The transfer of a homestead under a deed invalid for want of proper execution and putting the purchaser into possession, the owner believing he had made a valid transfer, was an abandonment of the homestead pro tanto as much so as if the owner had moved away from the tract and settled on another.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 331; Dec. Dig. § 167.*]

3. HOMESTEAD (§ 145*)—DEATH OF FATHER—RIGHTS OF SURVIVORS.

Code 1896, § 2069, provides that the homestead of any resident leaving surviving him a widow and minor children, with the improvements not exceeding in value \$2,000 and in area 160 acres, shall be exempt from administration. Section 2070 provides that, if the decedent at the time of his death has no homestead exempt to him, his widow and minor children become entitled to a homestead in any other realty owned by him. Section 2071 provides that, when the homestead set apart to the widow and minor children constitutes all the real estate owned by decedent at the time of his death, title to such homestead vests absolutely in them. Acts 1886-87, p. 112, provided for the setting apart of homestead and other exemptions, where decedent left property in amount not exceeding exemptions. Decedent sold land constituting a part of his homestead, and surrendered possession thereof, but the deed was invalid for want of proper execution. After his death his widow filed a bill to foreclose a vendor's lien on the land, and collected the money thereunder. Decedent's children were not parties to the bill to foreclose the lien. *Held* that the widow was estopped by her suit to foreclose the lien from setting up title to the property, but that the children were not estopped from claiming property, and the title to the land descended to the heirs.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 277; Dec. Dig. § 145.*]

Appeal from Chancery Court, Walker County; A. H. Benners, Judge.

Bill by S. N. Morris and others against Hulda Thacker and others, to restrain the re-

spondents and their attorneys of record from proceeding with an ejectment suit, and to correct the description of the deed, and declare the complainants the legal and equitable owners of the land. Decree for complainants, and respondents appeal. Reversed and remanded.

The facts made by the bill are that the lands were once the property of Beril Earnest, who, with his wife, conveyed them to Carrington. Carrington conveyed to Kilgore, and Kilgore a part of them to Morris; he and Morris being parties complainant. It is alleged that Carrington became the equitable owner of the land by the deed, although the deed was invalid or defective, because signed by mark by Earnest and his wife, and not witnessed, but an acknowledgment taken before a notary public, whose acts were not valid because he was a notary in Walker county, and when taking the acknowledgment was in Fayette county. The mistake in the description is alleged, as are the facts set up showing the estoppel spoken of in the opinion. The respondents are alleged to be the children of Beril Earnest, deceased, who is alleged to be the common source of title.

Ernest Lacy, for appellants. W. C. Davis, and A. F. Fite, for appellees.

SAYRE, J. The pivotal question in this case is whether upon the death of Beril Earnest, in whom title was, his title to the land in controversy vested in his widow absolutely by virtue of statutory provisions relating to homestead exemptions, or descended to his children, then adults, in virtue of the statute of descents. The land was less in area than 160 acres, and less in value than \$2,000. Earnest owned a life estate in an adjoining tract, and upon that was located the dwelling or home place which he occupied for many years before his death and where his widow lived subsequently. The two tracts—to speak of the land in controversy as one tract, though constituted in fact of separated parcels—aggregated more than 160 acres, and were all the land owned by Earnest at the time of his death. Prior to the sale to be mentioned, all the land owned by decedent, whether in fee or as life tenant, was cultivated and used by him for the common support of the family. It was the homestead. *Dicus v. Hall*, 83 Ala. 159, 3 South. 239. On October 29, 1903, Earnest, his wife joining, sold the land in question to one Carrington, under whom complainants (appellees) claim by mesne conveyances, payment of a part of the purchase money being deferred. The purchaser was put into possession. Subsequently, the husband having died in the meantime, the widow filed her bill to foreclose a vendor's lien on the tract in question for the unpaid balance of the purchase money, and had a decree and collected the money thereunder.

There was no proceeding to set apart the land as exempt to the widow, nor was there any administration of the estate of Beril Earnest. The children were not parties to the bill filed by the widow. Are they now estopped by the decree rendered in that cause to claim title to the property in controversy?

Obviously, the widow would be estopped without regard to the nature of her claim of title or interest. But if the children are to be estopped, it must be for the reason that they have inherited, not from the father, but from the mother, which is to say, the fee did not vest in the mother. Confessedly, the deed from Beril and Matilda Earnest was void for lack of compliance with statutory requirements in its execution. The estoppel which subsequently became operative against the widow did not affect the rights of the heirs. The deed to the homestead being a nullity, no subsequent act of the widow by which she claimed under the deed as valid, after the husband's death, could affect intervening rights of the heirs of the decedent, unless the fee had vested in her in the meantime. The execution of the deed and the putting the purchaser into possession was an abandonment of the homestead pro tanto, as much so as if the owner had moved away from the tract in controversy and settled at another place, though done under the erroneous impression on the part of the owner that he had parted with title and had no right to retain possession and occupancy. *Smith v. Pearce*, 85 Ala. 264, 4 South. 616, 7 Am. St. Rep. 44. The lands were therefore not the homestead of Beril Earnest at the time of his death and descended to his heirs unless some statutory provision can be pointed out which vested them in the widow. Section 2069 of the Code of 1896 provides that the homestead of any resident of this state, leaving surviving him at his death a widow and minor child or children, or either, with the improvements and appurtenances, not exceeding in value \$2,000, and in area 160 acres, shall be exempt from administration. This means land occupied as a homestead at the time of the death of the owner. If the decedent, at the time of his death, has no homestead exempt to him, his widow and minor child or children, or either, become entitled to a homestead exemption out of any other real estate owned by him. Section 2070. Section 2071 provides that when the homestead set apart to the widow and minor child or children, or either, constitutes all the real estate owned in this state by the decedent at the time of his death, the title to such homestead vests absolutely in them, whether there be administration on the estate of the decedent or not. This section contemplates a setting apart of the homestead as a condition to the absolute vesting of the title in the widow, or widow and children, in a case where decedent, at the time of his death, had no homestead exempt to him. The language of the original act from which this section was codified makes this

even clearer than the section itself. The language is that "whenever the estate of a decedent who dies leaving an estate less in value than the amount exempted by law, either real or personal, or both, is set aside as provided by law," etc. Acts 1892-93, p. 138. The phrase "As provided by law" must be referred alike to the act of February 28, 1887 (Acts 1886-87, p. 112), which provided for the setting apart under the direction of the probate court of homestead and other exemptions in cases where the decedent left property in amount not exceeding exemptions, and to those provisions of the Code under which a homestead of statutory area and value is carved out of land of greater area and value. It was said in *Tartt v. Negus*, 127 Ala. 301, 28 South. 713, that when the homestead—meaning, we apprehend, land occupied as a home place, for such was the case being dealt with, and such were the cases cited—does not exceed in value or area the legal exemption, and there is no selection or setting apart from other lands to be made, as in the case where the decedent owns no other real estate, or where the homestead is of defined limits and is disconnected from other lands, legal proceedings are not essential to vest the right of exemption, but it attaches by the force and terms of the statute itself, though, it was also said, in such cases the proceedings authorized by law may be resorted to with advantage for the purpose of establishing the exempt character of the particular property by record evidence. In the absence of occupancy by the decedent at the time of his death judicial proceedings would seem to be necessary in order to separate and impress the homestead character upon land not then so used, and thus withdraw it from administration. In the case of personality no proceeding is necessary for the reason, as was distinctly pointed out in *Gamble v. Kellum*, 97 Ala. 679, 12 South. 82, that possession, retention, and use constitute a sufficient selection. We think that *Brooks v. Johns*, 119 Ala. 416, 24 South. 345, when considered in connection with the facts of that case, is not to be construed as holding that no setting apart is essential where the decedent owned, but did not occupy as a homestead, land less in area and value than the legal exemption. In that case, as in all the other cases to which we have been referred or which have come to our attention, the decedent was the owner and resided upon the land at the time of his death. So in *Faircloth v. Carroll*, 137 Ala. 243, 34 South. 182. Whether such was the case or not in *Jackson v. Wilson*, 117 Ala. 432, 23 South. 521, does not appear from the report of the case. No more is there said than that, if the tract of land in question was the homestead, the widow had the right to occupy it, and there was no need of laying formal claim to it as exempt. We conclude, therefore, that the title to the land in controversy in this case descended to the heirs of Beril Earnest, and that they were not estopped by the decree

rendered in the chancery court in favor of the vendor's lien there asserted by the widow.

We note that in section 4196 of the Code of 1907 there appears a legislative declaration of the law on the subject we have considered, along with other provisions affecting creditors. The case in hand has been controlled by the Code of 1896.

The decree rendered in the chancery court in this cause was not in accord with the views we have expressed, and must be reversed.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

ALABAMA STEEL & WIRE CO. v. THOMPSON.

(Supreme Court of Alabama. Dec. 21, 1909.
On Application for Rehearing, Feb. 26, 1910.)

1. EVIDENCE (§ 588*)—WEIGHT AND SUFFICIENCY—CREDIBILITY OF WITNESS.

The jury need not take the version of any one witness, but may consider the entire evidence and accept or reject any part of the testimony in arriving at a verdict.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

2. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Where the negligence counted on in the complaint in an action for injury to a servant was the proximate cause of the injury, the fact that other negligence of the master or of a fellow servant concurred in producing the injury did not prevent a recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 285*)—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Whether the negligence counted on in the complaint in an action for injury to a servant was the proximate cause of the injury held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003; Dec. Dig. § 285.*]

4. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—QUESTION FOR JURY.

In an action under Employer's Liability Act, Code 1907, § 3910, subd. 1, for injuries to a servant by a defect in the machinery, evidence held to require the submission of the issue of negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1031; Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—QUESTION FOR JURY.

In an action under Employer's Liability Act, Code 1907, § 3910, subd. 1, for injuries to a servant by a defect in the machinery, evidence held to require the submission to the jury of the issue of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1106-1109; Dec. Dig. § 289.*]

6. NEW TRIAL (§ 71*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

The existence of a conflict in the testimony of plaintiff's witnesses presents a question for

the jury and does not of itself furnish a ground for interference by the court with the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

7. MASTER AND SERVANT (§ 263*)—INJURY TO SERVANT—PLEADINGS.

Where, in an action for injuries to a servant, a plea setting up the defense under Employer's Liability Act, Code 1907, § 3910, that the servant failed to give information of the defect in the machinery causing the accident, replications averring that the master already had the information and that the servant knew it were sufficient on demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 263.*]

8. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.

The error, if any, in rulings on demurrers to pleadings, was not prejudicial, where the party was entitled under other pleadings to introduce all the evidence that he could introduce under all his pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

9. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action for injuries to a servant, contributory negligence was relied on, a charge that, if the evidence reasonably satisfied the jury that the material averment of the complaint was established, they would find for plaintiff, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

10. MASTER AND SERVANT (§ 296*)—INSTRUCTIONS—IGNORING EVIDENCE.

In an action for injuries to a servant, a charge that an act of the servant was, as a matter of law, negligent, was properly refused, where the evidence showed that the act could be safely done.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

11. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

Instructions which ignore phases of the evidence on which plaintiff may be entitled to recover, independent of the facts hypothesized, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

12. APPEAL AND ERROR (§ 1032*)—RULINGS ON EVIDENCE—REVIEW—BILL OF EXCEPTIONS.

A party taking a bill of exceptions to the admission or rejection of evidence must affirmatively show error to his prejudice, and hence a party complaining of the sustaining of an objection to a question asked a witness must show what the answer of the witness would have been had he been permitted to answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4049; Dec. Dig. § 1032.*]

13. EVIDENCE (§ 471*)—OPINION EVIDENCE—FACTS OR CONCLUSION.

A question whether it was an engineer's duty to do a certain thing, to make the engine work better, is objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14. APPEAL AND ERROR (§ 854*)—REVIEW—REASONS FOR DECISION.

Where for any reason a question asked a witness was properly excluded, the general objection to the question was sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 854.*]

15. WITNESSES (§ 290*)—EXAMINATION—DISCRETION OF COURT.

The court may in its discretion refuse to permit a redirect examination on a subject previously gone over and not called for by the cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1005; Dec. Dig. § 290.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by J. M. Thompson against, the Alabama Steel & Wire Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The pleadings and evidence are sufficiently stated in the opinion. The following charge was given for the plaintiff: (2) "If the evidence reasonably satisfies the jury that the material averments of any one count of the complaint are true, they will find a verdict for the plaintiff." The following charges were refused to the defendant: (O) "If you believe from the evidence that the plaintiff attempted to place a block under the rope after it had been set in motion by the engineer, and that, while he was so attempting to place the block, the rope continued in motion, but suddenly moved faster, without special warning to him beforehand that it would be moved faster, your verdict should be for the defendant." (D) "If you believe from the evidence that the plaintiff's version or statement of the manner of his injury is true, your verdict should be for the defendant." (E) "If you believe from the evidence that there is an irreconcilable conflict between the plaintiff's account as to how the injury happened, and the account of it as given by the engineer, Ledford, and this conflict is upon a fact or facts material to be ascertained to your reasonable satisfaction before you can find a verdict for the plaintiff, you should find for the defendant." (F) "If you believe from the evidence that the engine started the rope and sheave to moving when plaintiff was not expecting it to move, and when it ought not to have moved without a signal from him for it to move, and that he did not give such signal, your verdict must be for the defendant. If you believe from the evidence that the engine started to move the rope on the sheave just as plaintiff attempted to put the block under the rope, without a signal from the plaintiff and when the plaintiff had no reasonable ground to believe that it would thus start to move without such signal, your verdict must be for the defendant." (H) "If you believe from the evidence that the engine started to move the rope on the sheave and the sheave just as plaintiff attempted to put the block under the rope, with-

out a signal from him and when he had no right or reasonable ground to apprehend that it would so move without his signal, and if you further believe from the evidence that the engine did not start off from a standstill of its own motion, your verdict must be for the defendant."

Weatherly & Stokely, for appellant. Frank S. White & Sons, for appellee.

DOWDELL, C. J. This cause was tried in the court below on the first and second counts of the complaint. These counts are based on subdivision 1 of the employer's liability statute (section 3910 of the Code of 1907). The pleas were the general issue, contributory negligence, and assumption of risk. Demurrers were interposed to the special pleas, but the rulings of the court on these demurrers are not insisted on as error. Special replications were made to the plea of assumption of risk, and demurrers interposed to the replication, which were overruled as answers to plea No. 4, and sustained as answers to pleas Nos. 5, 6, and 7. The case was tried on evidence introduced by the plaintiff; the defendant offering none. Verdict was returned in favor of the plaintiff, and judgment rendered thereon, from which this appeal is prosecuted.

The refusal of the court to give the peremptory charge in favor of the defendant, as requested in writing, is the first assignment of error insisted on in argument by counsel for appellant.

The evidence without dispute showed that the plaintiff received the injuries complained of, while in the discharge of his duties under his employment with the defendant company. It also showed the existence of the alleged defect in the machinery used in the business of the defendant, in doing the work at which plaintiff was engaged when injured, viz., a defective valve whereby steam was allowed to leak into the steam chest and becoming there an unknown quantity of power in the proper and usual manner of operating the engine if no such defect had existed. The evidence also showed that, as a result of the leakage of the steam, the engine worked unevenly and irregularly, and this, beyond the control of the engineer; and that sometimes it would start of its own motion. The evidence also showed that the alleged defect in the machinery had existed for some time and was known to the defendant or to its servant having the superintendence and control of the same.

The plaintiff, testifying as a witness in his own behalf, swore that he was not informed and had no knowledge of the existence of the alleged defect before, and up to, the time he received his injury. The plaintiff further testified that at the time he got hurt the engine had come to a full stop, and that as he was placing the block under the rope on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sheave, as his duty required, the engine without warning or signal started suddenly, causing his hand to be caught under the rope and his body to be drawn over the sheave, inflicting the injury complained of. If the plaintiff's testimony is to be believed, he was not guilty of any negligence that contributed to his injury, nor was there any assumption of risk by him of the dangers from the operation of the engine with the defective valve of which he had no knowledge. There was evidence that the leaking valve not only caused the engine to work irregularly, but sometimes to start of its own motion. It was open for the jury to believe and conclude that on the instant occasion the sudden starting of the engine, testified to, might have been caused by the leaking steam. The jury were not bound to take the version of any one witness. It was their duty to consider the entire evidence, and their province to accept or reject any part of the testimony in arriving at a just verdict.

That there was negligence on the part of the defendant, or of a fellow servant, other than that counted on in the complaint, which concurred in producing the injury, would not avail the defendant as a defense, so long as the alleged negligence was a proximate cause of the injury. And whether it was or not in the present case, it was a question of fact to be determined by the jury. Taking the whole evidence in this cause, in connection with reasonable inferences afforded by undisputed facts in evidence, the trial court would not have been justified in giving the peremptory charge as requested, to find in favor of the defendant, and therefore properly refused it.

The defendant offered no evidence, but rested its case upon that of the plaintiff. On the question of the court's refusal to grant the motion for a new trial, counsel for appellant relies to an extent upon his reasons given in argument on the question of the refusal of the peremptory charge, and to that extent what we have already said on the latter question we think sufficient. It is insisted, however, that the verdict of the jury was against the weight of the evidence, and that for this reason the trial court erred in not granting a new trial. It may be conceded, as argued by counsel, that there was a conflict in the testimony of plaintiff's witnesses; but this was a question for the jury to deal with, and peculiarly within its province and outside of the control of the court, and of itself could furnish no reason or just ground for the court to interfere with the verdict.

In the light of the presumption to be indulged by this court in favor of the action of the trial court that had the witnesses before it, and after a consideration of the whole evidence, we are not prepared to say, under the principles laid down in the leading case of *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, so often followed, that the court below erred in refusing the motion for a new trial.

The fourth plea set up the defense, under

the statute (section 3910, Code 1907), of the plaintiff's knowledge of the defective throttle valve and his failure in a reasonable time to give information thereof to the master or some person superior to himself in the service of the defendant, but nevertheless attempted to adjust the rope on the shaft with knowledge of such defect and with knowledge of the danger arising therefrom, and thereby assumed the risk of such dangers. The special replication to this plea, to which demurrers were interposed and overruled, averred that the defendant already had knowledge of the defect, and that plaintiff was aware that defendant knew of it. It would seem that, as the plea was based on the failure of the plaintiff to give information of the defect, the replications setting up the exception in the statute, viz., that the defendant already had the information and the plaintiff was aware that the defendant had such knowledge, rendered the replications unobjectionable on the grounds of demurrer interposed. But apart from this, the demurrers were sustained to the replications as answers to pleas 5, 6, and 7, setting up the defense of assumption of risk, and issue was had on the pleas. And under plea 5 the same defense was set up as under plea 4. If, therefore, there was error in the ruling on the demurrer to the replication as an answer to plea 4, it was error without injury. It appears from the record that the defendant was not prejudiced by the ruling.

Charge numbered 2, given at the request of the plaintiff, should have been refused. A similar charge was condemned in *Friereson v. Frazier*, 142 Ala. 232, 37 South. 825, for the reason that it ignored that phase of the defense presented under the plea of plaintiff's contributory negligence, and it was there decided to be reversible error. It is true that the giving of a like charge was held not to constitute reversible error, in the case of *Virginia Bridge & Iron Co. v. Jordan*, 143 Ala. 603, 42 South. 73. In the last-named case no mention was made of the former, and it seems to have been overlooked. The two cases are in conflict on the question before us, and both cannot stand. We adhere to the ruling as first announced in the case of *Friereson v. Frazier*, 142 Ala. 232, 37 South. 825. It follows that the case of *Virginia Bridge & Iron Co. v. Jordan*, supra, on the point in question must be overruled.

Charge C, refused to the defendant, was properly refused. This charge required the court to instruct the jury as matter of law that it would be negligence to attempt to place the block while the engine was in motion, when there was evidence tending to show that this could be done safely.

It follows from what we have already said in respect to the refusal of the court to give the peremptory charge in favor of the defendant, in connection with the evidence of the plaintiff, heretofore adverted to, that charges D and E were properly refused.

Charges F, G, and H ignore phases of the

evidence on which the plaintiff might have been entitled to recover, independent of the facts hypothesized, and were for that, if for no other reason, properly refused.

No reversible error was committed in sustaining the plaintiff's objection to the question asked the witness Curley, by defendant's counsel, viz., "And if it makes the engine work better that way, it is the engineer's duty to do it, to make it work best?" "The general rule in reference to the admission or rejection of evidence is that the party taking the bill of exceptions must affirmatively show error to his prejudice, or the proceedings will not be disturbed." *Burgess v. American Mortgage Co.*, 115 Ala. 468-473, 22 South. 282. It is not shown what would have been the answer of the witness had he been permitted to answer. Non constat, it might have been prejudicial to the defendant instead of beneficial. *Allen v. State*, 73 Ala. 23; *Perry v. Danner*, 74 Ala. 485. Moreover, we are of the opinion that the question called for a conclusion. That the objection was general can make no difference, if for any reason it was properly sustained.

The question asked the witness Curley, on recross-examination, to which objection was sustained, as shown by the record, did not call for anything in rebuttal of plaintiff's redirect examination after cross-examination by the defendant. The court stated that it was going over what had already been gone over. It was within the discretion of the court to permit, or not, the question, and the exercise of that discretion will not be reviewed.

The evidence showed that, in the operation of the engine, to unhook the low-pressure engine while the engineer was attending the high-pressure engine, would require the presence and aid of another person besides the engineer, and no second person to do this was furnished by the master. The question, therefore: "Can he (meaning the engineer) prevent it some? Don't you know if he unhooks the low-pressure side of the engine he disconnects that side of the engine altogether"—called for immaterial evidence. Moreover, it is not shown what would have been the answer of the witness, if permitted to answer the question.

For the single error indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

On Application for Rehearing.

PER CURIAM. After a careful examination of the record by the court en banc, the court is of the opinion that the tendencies of the evidence in this case were sufficient to require the submission of the question of contributory negligence to the jury. This being so, we adhere to the holding that the giving

of charge No. 2, requested by the plaintiff, was reversible error, following the case of *Frierson v. Frazier*, 142 Ala. 232, 37 South. 825, as asserting sound principle of law.

The application for rehearing must, consequently, be overruled.

MATTINGLY et al. v. HOUSTON.

(Supreme Court of Alabama. Nov. 25, 1909.
Rehearing Denied Feb. 26, 1910.)

1. TROVER AND CONVERSION (§ 32*)—PLEADING—SUFFICIENCY.

In trover, where two counts showed a single trespass, and one a single conversion, alleged to have been the act of the defendants, the wrong complained of was charged as the joint act of the defendants.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 32.*]

2. PLEADING (§ 54*)—REFERENCE FROM ONE COUNT TO ANOTHER—PERMISSIBILITY.

Specific reference from one count to another is not only permissible, but often proper to avoid unnecessary repetition and prolixity.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 118; Dec. Dig. § 54.*]

3. SHERIFFS AND CONSTABLES (§ 88*)—DUTY TO LEVY ATTACHMENT—POSSESSION OF PROPERTY—PRESUMPTION OF OWNERSHIP.

Where a sheriff or constable seeking to levy an attachment finds personal property in the possession of the defendant in attachment, he is entitled, in the absence of notice to the contrary, to presume that the person in possession is the owner of the property, and it is his duty to levy upon it accordingly.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 120-122; Dec. Dig. § 88.*]

4. ATTACHMENT (§ 373*)—WRONGFUL LEVY—PLEA—DEFENSES.

In an action in trover for levying an attachment against a third person on the property of plaintiff in attachment, a plea failing to deny that defendants had notice of plaintiff's claim of ownership in the property levied on does not state a defense.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 1362; Dec. Dig. § 373.*]

5. TROVER AND CONVERSION (§ 46*)—MEASURE OF DAMAGES.

In trover, the measure of damages is the value of the property at the time of the conversion or at any time subsequent thereto with interest.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 263, 264; Dec. Dig. § 46.*]

6. DAMAGES (§ 15*)—NEGLIGENCE—MEASURE OF DAMAGES.

The measure of damages for a wrong, the result of mere negligence, is compensation for the proximately resulting pecuniary loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 15.*]

7. TRESPASS (§ 47*)—DAMAGES—MENTAL SUFFERING.

Mental suffering established as the proximate and natural consequence of a trespass to property committed with circumstances of insult or contumely is a proper element of the damages.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 128; Dec. Dig. § 47.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

8. TRESPASS (§ 68*)—DAMAGES—INSTRUCTIONS—REFUSAL.

In an action for trespass to property, accompanied by insulting and aggravating circumstances, a charge requiring the jury to find for defendant unless actual damages were shown was properly refused.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 151; Dec. Dig. § 68.*]

9. ATTACHMENT (§ 380*)—WRONGFUL LEVY—PROPERTY OF WIFE OF DEFENDANT—INSTRUCTIONS.

In trover for levying an attachment against a husband on the property of the wife, where the levy in part was upon the wife's personal apparel and upon furniture in which she had the beneficial ownership subject to the seller's title, retained for security, a charge that if the jury found that the property was in the possession of plaintiff's husband, and he instructed the constable to go and take charge of it, then they should find for defendant, was properly refused, since the husband could not dispose of the wife's property without her consent.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 1373; Dec. Dig. § 380.*]

10. ATTACHMENT (§ 380*)—WRONGFUL LEVY—DAMAGES—INSTRUCTIONS.

In trover for levying an attachment on the property of plaintiff, where the evidence required the submission of the questions whether plaintiff was entitled to damages for injured feelings or in the way of smart money, a charge that the measure of damages is the value of the hire or use of the property belonging to plaintiff from the time of the taking to the return of the same, together with the damage to the same, was properly refused.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 380.*]

11. DAMAGES (§ 178*)—MENTAL SUFFERING—DIRECT PROOF.

In trover for levying an attachment against a third party on the property of plaintiff, it was error to allow plaintiff to testify that she suffered and nearly worried to death about it, since mental suffering is not capable of being proved by direct proof.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 472; Dec. Dig. § 178.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Nellie M. Houston against J. L. Mattingly and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The complaint was as follows: Count 1: "Plaintiff claims of the defendant \$3,000 damages for wrongfully taking the following goods and chattels, the property of plaintiff, to wit: [Here follows a detailed statement of the property alleged to have been wrongfully taken.]" Count 2: "Plaintiff claims of the defendant \$3,000 damages, for that on, to wit, December 15, 1906, defendants with force and arms entered upon the premises of plaintiff at Bessemer, Ala., and took therefrom the following goods and chattels, to wit, the goods and chattels described in the first count of the complaint, wrongfully and maliciously, and to the great damage of plaintiff. Plaintiff avers that at the time of said taking said property was used by her in furnishing a home, that plaintiff was very

ill and away from home, and that the defendant Sellers, at the instance and procurement of the other defendant, went to her home aforesaid, and forcibly entered said house and removed said property; that the said removal of said property caused great annoyance, suffering, and mental anguish to the plaintiff, and caused plaintiff great loss of property, and put her to great inconvenience, to her damage as aforesaid." Count 3: "Plaintiff claims of defendant \$3,000 damages for the conversion by them on, to wit, the 15th day of December, 1906, of the following chattels, to wit, the same property as is described in the first count of this complaint, the property of the plaintiff."

The demurrers take the point that the complaint states no cause of action, and because it is not shown that the trespass complained of was a joint trespass. To the second and third counts the demurrers take the point that the property is not set out, and its value is not stated.

The plaintiff afterwards amended the second and third counts by the addition of the words: "And the said goods and chattels were the property of the plaintiff." The pleas were not guilty, and justification under process, the substance of which is set out in the opinion.

The evidence tended to show that the house was rented from J. W. Waldrop as agent for Mrs. K. O. Ware, and that Mrs. Ware, through Waldrop, made the affidavit and procured the attachment to be issued to enforce collection of rent, and that Mattingly and Sellers, as constable and deputy constable, made the levy under the attachment upon the goods found in the house, which had been rented to Charles M. Houston. It further appears from the testimony that at the time the levy was made neither Houston nor his wife were at home, that the house was locked up, and that an entrance was obtained by forcing the lock on the back door. The other facts sufficiently appear from the opinion of the court.

The following charges were refused to the defendant: (12) "The court charges the jury that there can be no recovery in this case for annoyance, suffering, and mental anguish of the plaintiff." Charges 13, 14, 15, and 16 were very similar, and all directed that there could be no recovery on account of inconvenience, suffering, or mental anguish. (7) "The court charges the jury that there can be no recovery of anything except actual damages; and if you find from the evidence that the plaintiff has suffered no actual damages, then you should find for the defendant." (10) "The court charges the jury that if they find from the evidence in this case that the property in question in this case was in the possession of the husband of the plaintiff, and he instructed the con-

stable to go and take charge of said property, then you should find for the defendant." (18) "The court charges the jury that the measure of damages in this case is the value of the hire or use of the articles of property shown to have been the property of the plaintiff, from the time of the taking to the return of the same, together with the damage done to the same, provided there was any damage to them."

Estes, Jones & Welch, for appellants. C. B. Powell, for appellee.

SAYRE, J. Waldrop, as agent for the owner, had sued out an attachment against Charles M. Houston for rent in arrears. The attachment was levied by Mattingly and Sellers, who were constable and deputy constable, on household goods in the house occupied as a residence by Houston and his wife, the appellee. A major part of the goods had been purchased by Houston from the Martin Furniture Company on the installment plan with title reserved in the company. Appellee contended that the goods bought from the furniture company had been given to her by her husband. After a few days the rights of the furniture company and Mrs. Houston were recognized, and such of the property as belonged to them respectively was restored to their possession; but in the handling incident to the levy some articles belonging to Mrs. Houston had been damaged or destroyed. In the suit which followed judgment was recovered by Mrs. Houston on a complaint containing counts in trespass and trover. From that judgment this appeal is prosecuted.

There was no error in the rulings of the court on questions raised by the pleading. Two counts show a single trespass, one a single conversion alleged to have been the act of the defendants. The only reasonable interpretation of the complaint is that the wrong complained of is charged as the joint act of the defendants named.

The second count charges an offense against "the following goods and chattels, to wit, the goods and chattels described in the first count of the complaint." The third describes them as follows, to wit, "the same property as is described in the first count of this complaint." The method of adopting the averments of preceding counts has been tolerated by this court, but has never been approved as an admirable habit in pleading. Specific reference from one count to another is a different thing. It is not only permissible according to the precedents, but often proper, in order to avoid unnecessary repetition and prolixity, that one count should refer specifically to another. *Robinson v. Drummond*, 24 Ala. 174; *Mardis v. Shackelford*, 6 Ala. 433. There is no virtue in forms of words. The language used in these counts imports more than a mere incidental reference to the property described in the

first count. It informed the defendant of the purpose of the pleader to proceed in the second and third counts for a wrong to the same property as that described with detail in the first count, and so accomplished the purpose of all pleading. Appellant's insistence just here considered was reiterated in some of the charges requested in the court below, but to no better effect.

Demurrer to the second plea was sustained. The substance of the plea is that the defendants took the plaintiff's goods in the way of levying upon them while acting under authority of the writ of attachment and had at the time no knowledge of plaintiff's ownership of the property which was in the possession of the plaintiff's husband, the defendant in attachment, and that the property levied upon was delivered to plaintiff as soon as she made known her claim to it. When a sheriff or constable, seeking to levy a valid writ of attachment, finds personal property in the possession of the defendant in attachment, he is entitled, in the absence of knowledge or notice to the contrary, to presume that the person in possession is the owner of the property, and it is his duty to levy upon it accordingly. *Murphree on Sheriffs*, § 965. The plea fails to deny that defendants had notice of plaintiff's claim of ownership in the property levied on, and for that reason falls short of stating a valid defense. It is doubtful, however, whether the demurrer takes this point.

Charges 12, 13, 14, 15, and 16, refused to the defendants, asserted that there could be no recovery on account of plaintiff's annoyance, suffering, or mental anguish. The proposition of these charges, so far as it referred to the count in trover, was correctly stated. The measure of recovery under that count was the value of the property at the time of the conversion or at any time subsequent thereto, with interest. *Sharpe v. Barney*, 114 Ala. 361, 21 South. 490; *Curry v. Wilson*, 48 Ala. 638. But in trespass damages take a wider range. A wrong, the result of mere negligence, is righted by awarding compensation for the proximately resulting pecuniary loss. In *1 Sutherland on Damages*, § 95, it is stated on the authority of *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454, that injured feelings are not to be regarded in awarding damages for wrongs done to property through gross carelessness (which means no more than negligence); no act or word of insult or contumely or any intentional violation of plaintiff's rights being shown. For intentional wrong and such entire lack of care as raises the presumption of a conscious indifference to consequences punitive damages are awarded, of course. There was evidence which, if it found credence with the jury, justified the jury in imposing damages of this character. The precise question, however, is whether annoyance, suffering, or mental anguish—which terms it seems were used as being practically synonymous—caused by malicious wrong, as

alleged in the second count to have been the case, are to be compensated for as actual damages, or whether the assessment of damages on that account is to be left to the sound discretion of the jury in assessing punitive damages. It was said, in *City National Bank v. Jeffries*, 73 Ala. 183, that it could not be denied that one who has been wrongfully and vexatiously attached might recover for his wounded feelings. We do not doubt that in assessing damages for a trespass to property mental suffering, established in the proof as the proximate and natural consequence of the trespass committed with circumstances of insult or contumely, is to be taken into account and compensated as a matter of right. There was therefore no error in refusing these charges to the defendant.

The proposition of charge 7 refused to the defendant has been more than once denied by this court. *Alabama G. S. R. R. Co. v. Sellers*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17; *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776. We are not aware of any occasion calling for a review of the cases in which it has been so ruled.

Charge 10 asserts that if the jury should find from the evidence that the property in question was in the possession of the plaintiff's husband, and he instructed the constable to go and take charge of it, then they should find for the defendants. In argument it is said that the possession of the husband, his direction to take the property, and its subsequent return to the wife on discovery that it belonged to her, relieved the defendants of any liability as for wrong done. But as to a part of the property the possession shown in evidence was not the mere possession spoken of in the charge. It was materially qualified by attendant circumstances. The charge pretermits all consideration of those circumstances which informed the defendants, in the exercise of reasonable prudence, that the husband's possession was specious only. Possession without more, such possession as was referred to in the charge, is evidence of ownership; but it is *prima facie* only. Where husband and wife live together, and his possession is worked out by reference to his general dominance of the household, as was the case here, the defendants when making the levy could not justly or becomingly extend his possession to the wife's personal apparel. The levy in part was upon the wife's apparel. Further, there was evidence tending—how strongly we will not say—to show the wife's beneficial ownership of the furniture purchased from the furniture company subject to the company's title retained for security, and that the husband ordered it to be restored to the furniture company. The husband could not dispose of the wife's property without her consent in either of the ways here supposed to have been shown. The charge did not fairly present the phase of the

case with which it dealt, and was properly refused.

Charge 18 upon which the appellant insists states the rule for the admeasurement of damages in trespass *de bonis asportatis* as it was stated in *Fields v. Williams*, 91 Ala. 502, 8 South. 808, except that it omits all mention of circumstances of aggravation, which is to say the charge assumes that there was no evidence to warrant the assessment of damages for injured feelings or in the way of smart money. As the case must be tried again, we prefer not to go into details to show that there was such evidence. Suffice it to say there was evidence which required the submission of these questions to the jury, and there was no error in refusing the charge.

Plaintiff, being examined as a witness, was asked: "State whether or not you suffered any by reason of the defendants taking the property involved in this case." After objection overruled and exception reserved, she answered: "Certainly, I suffered; I was nearly worried to death about it." This was error. The matter sought to be proved is not capable of direct proof under the rule which has long prevailed in this state. The admission of testimony very nearly in identical language was held to be reversible error in *City National Bank v. Jeffries*, *supra*. The complaint, the course of the examination, and the question itself clearly indicated plaintiff's purpose to establish by the question a case of mental suffering. This could not be done in the manner attempted. We feel safe in the conclusion that the objectionable purpose of the question was entirely clear, that the evidence elicited by it was not free of injurious consequence to the case of defendants, that the objection should have been sustained in the form in which it was stated, and that for the error here shown the judgment ought to be reversed on the appeal of all the defendants.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

BROYLES v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied Feb. 26, 1910.)

1. CARRIERS (§ 314*)—INJURIES TO PASSENGER —PLEADING—RELATION OF PARTIES.

A count, in a complaint against a carrier for injuries, which charges simple negligence and fails to show that plaintiff was rightfully in the car, is insufficient, since, if plaintiff were a trespasser, defendant owed only the duty not to wantonly injure.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 314.*]

2. CARRIERS (§ 314*)—INJURIES TO PASSENGER —CONSTRUCTION OF PLEADING—NEGLIGENCE CHARGED.

A count, in a complaint against a carrier for injuries, alleging that the wreck was caused

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the gross or reckless negligence of defendant, and that said gross and reckless negligence consisted in allowing rotten, unsound, and insecure cross-ties to remain under the rails of said road, etc., charges only simple negligence, and hence a failure to aver that plaintiff was rightfully on the train makes the count demurrable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273, 1275, 1275½; Dec. Dig. § 314.*]

3. CARRIERS (§ 239*) — RIDING ON PASS — FRAUD ON CARRIER—RECOVERY FOR INJURIES.

Where plaintiff, with her mother, enters a train, and on demand for fare the mother gives a pass, issued for others, which the conductor takes, a fraud is practiced on the carrier, and the plaintiff is a trespasser on the train, even though she did not know about the pass, and hence she could not recover for injuries resulting from simple negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 975; Dec. Dig. § 239.*]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PLEADING.

Error in sustaining a demurrer to a replication to a plea is harmless, where the replication contained the same averments as were contained in a count in the complaint, and a general issue was filed to that count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4095; Dec. Dig. § 1040.*]

5. PLEADING (§ 165*)—PLEADING IN A CIRCLE—REPLICATION.

It is not proper pleading to reply to a plea, where a defect is sought to be reached which could have been reached by a demurrer to the plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 321; Dec. Dig. § 165.*]

6. EVIDENCE (§ 151*)—UNCOMMUNICATED INTENTION.

A witness may not testify, on the issue whether she knew that she was riding on a pass furnished by her mother, that she would have gone if her mother had not said anything about the pass, since a witness cannot testify as to uncommunicated motives or intentions, and for the same reason such witness could not testify that she would have paid her fare if demanded, and that she had money to pay her fare if demanded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

7. CARRIERS (§ 246*)—INJURIES TO PASSENGER—ADMISSIBILITY OF EVIDENCE.

Where a carrier claimed that plaintiff, suing for injuries, was not a passenger because she was riding on a pass issued to another, a question to plaintiff as a witness, whether it was customary for her to ride on a pass, is properly excluded, since it did not cover the issue.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 246.*]

8. EVIDENCE (§ 151*)—SUPPOSITIONS.

On an issue of the right to ride on a pass, a witness may not testify whether she thought she had a right to ride on the pass, as uncommunicated thoughts or suppositions cannot be testified to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

9. CARRIERS (§ 246*)—INJURIES TO PASSENGER—ADMISSIBILITY OF EVIDENCE.

Where a carrier claimed that an injured passenger was a trespasser because riding on a pass issued to another given to the conductor

by plaintiff's mother, who was sitting beside her, it is proper to ask the conductor whether he knew that the plaintiff and her mother were known by him to be the persons to whom the pass was issued, since, if they were not, they would be trespassers, and not passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 246.*]

10. CARRIERS (§ 317*)—RELATION OF PARTIES—EVIDENCE.

Where the issue was whether persons riding on a train were trespassers because riding on a pass which was issued to others, the conductor of the train may properly testify as to what a passenger must have to entitle him to ride.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 317.*]

11. EVIDENCE (§ 121*)—RES GESTÆ—PASSENGER RIDING ON PASS.

Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her or her mother, who was traveling with her, the conductor may testify as to whether the mother in handing the pass to the conductor indicated for whom she was tendering the pass, as it was part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 307, 322, 326; Dec. Dig. § 121.*]

12. CARRIERS (§ 317*)—INJURIES TO PASSENGER—RIDING ON PASS—COMPETENCY OF EVIDENCE.

Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her, the conductor may be properly questioned as to whether he agreed to let plaintiff ride without paying her fare or showing some other right to ride in the train, and whether he had any right to permit plaintiff to ride without paying her fare or being provided with a pass, since it was competent to show that the conductor did not knowingly permit plaintiff to ride on a pass not issued to her.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 317.*]

13. CARRIERS (§ 317*)—INJURIES TO PASSENGER—RIGHT TO RIDE ON PASS—EVIDENCE.

Where a carrier claims that one injured while riding on a train was a trespasser, because riding on a pass not issued to her, which pass was given to the conductor by her mother, who was traveling with her, testimony of the conductor that the mother stated that she was giving the pass for her daughter as well as herself, in tones loud enough for her daughter to hear, is not subject to a general objection that it was incompetent, immaterial, and irrelevant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 317.*]

14. CARRIERS (§ 317*)—INJURIES TO PASSENGER—RIDING ON PASS.

Where the issue was whether one injured while riding on a train was a trespasser, because riding on a pass issued to another, the conductor may testify whether he was under duty to compel passengers to identify themselves as the persons named in the passes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1296; Dec. Dig. § 317.*]

15. CARRIERS (§ 239*)—RELATION OF PARTIES—PRESUMPTIONS.

Ordinarily, where a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded, unless his conduct should be such as to show that he was trying to evade a demand being made on him, by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

secreting himself or otherwise; but, if he fails to pay after demand and opportunity to pay, the presumption ceases.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Mrs. Mamie Broyles against the Central of Georgia Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint was as follows: Count 2: "Plaintiff claims of the defendant the like sum of \$20,000 as damages, for that heretofore, to wit, on or about the 14th day of November, 1906, the defendant was engaged in carrying passengers for hire between Birmingham, Ala., and Montezuma, Ga.; that on or about said date the plaintiff entered a car on one of defendant's trains, in the city of Birmingham, Ala., and while riding therein, and while the said car was at or about Kellyton, Ala., the said car became wrecked or derailed, and as a result thereof the plaintiff was thrown against a portion of said car in which she was riding, and was bruised, maimed, wounded, and injured internally and externally, and as a result thereof she has been caused to suffer," etc., a catalogue of which is given. The averments in counts A and B as to negligence are sufficiently set out in the opinion.

The following pleas were filed: (1, 2, and 3) The general issue. (4) "For further answer to each of the counts, separately and severally, defendant says that when plaintiff presented herself as a passenger, and got upon defendant's train at Birmingham, she had in her possession, or her mother, with whom she was at the time, and who undertook to arrange for the transportation of plaintiff, had in her possession, a pass issued by defendant to one Mrs. J. F. Slover and daughter; and the plaintiff, or her mother, Mrs. Little, presented said pass to the defendant's conductor without disclosing that the plaintiff and Mrs. Little were not the parties mentioned, described, and referred to in said pass, but as if they were the parties entitled to ride thereon; and defendant says that plaintiff was not Mrs. J. F. Slover, or Mrs. Slover's daughter, and was not entitled to ride on said pass, and had no other right to be on said train, and was accepted as a passenger and carried upon said train upon the said conduct or act of the plaintiff or her mother in presenting said pass to the defendant's conductor, and the belief of defendant's servant in charge of said train that plaintiff was one of the persons entitled to ride on the pass issued to Mrs. J. F. Slover and daughter; and defendant avers that its servants or agents did not know that plaintiff was not one of the persons entitled to ride on said pass; and defendant says that the plaintiff neither paid nor offered to pay anything for

her transportation of said train from Birmingham to Kellyton." Plea 5 sets up the same state of facts, and alleges that the pass entitled Mrs. Slover and daughter, and no one else, to ride thereon, and was not intended for the use of the plaintiff, and did not entitle her to ride thereon, and avers that the plaintiff was neither Mrs. Slover nor her daughter. Plea 7 is in all respects similar to the other two.

The following replications were filed to the pleas: (1) "That if any pass or authority for being upon said train was presented to or accepted by the conductor or agent of defendant, and was a pass or authority for another to ride upon the said train other than plaintiff's mother or herself, it was without the knowledge of plaintiff." (2) "Plaintiff says that she entered upon plaintiff's train at Birmingham, intending to be a passenger thereon from Birmingham to Montezuma, Ga.; that she was in company with her mother, who had the said pass or token; that she, the plaintiff did not have possession of said pass or token, and did not deliver the same to the conductor or agent of defendant; but that her mother had the said pass or token, and delivered the same to the said conductor or agent of the defendant, and that the said conductor or agent received the same. Plaintiff avers that she went upon said train or car in good faith, believing that she had a right to be there as a passenger, and not knowing that she had no right to be received as a passenger upon said train or car under said token or pass, and that said conductor or agent of the defendant received from plaintiff the sum of \$1 for the right to ride on said car or train."

Arthur L. Brown, for appellant. London & Fitts, for appellee.

EVANS, J. This action was brought by the appellant, Mrs. Mamie Broyles, against appellee, the Central of Georgia Railway Company, seeking damages for personal injuries sustained by her while on one of the regular passenger trains of defendant en route from Birmingham, Ala., to Montezuma, Ga. The train was derailed near Kellyton, Ala., and plaintiff sustained injuries by reason thereof. There are 22 assignments of error by appellant to the rulings of the court below upon the pleadings and the evidence.

The demurrer to second count of complaint was properly sustained. Said count charges only simple negligence and does not show that plaintiff was rightfully in the car of defendant. Construing said count most strongly against the pleader, as the law requires, we must conclude therefrom that plaintiff was a trespasser, and, therefore, that defendant owed her no duty except not to willfully, wantonly, or intentionally injure her. *Beyer v. Louisville & Nashville Railroad Co.*, 114

Ala. 429, 21 South. 932; James M. Brown & Co. et al. v. Scarboro, 97 Ala. 316, 12 South. 289.

The demurrer to counts A and B were properly sustained for the same reasons above given for sustaining demurrer to count 2. The allegations of count A as to negligence are as follows: "Plaintiff avers that said wreck or derailment was caused or brought about by the gross or reckless negligence of defendant, its agents, servants, or employees, whilst engaged in or about the duties of their employment. And plaintiff avers that said gross and reckless negligence consisted in this, to wit, that rotten, unsound, and insecure cross-ties were allowed to remain under the rails of said road at the place where said wreck or derailment occurred, and that said track was in an unsafe condition, thereby causing said wreck or derailment of said train when passing over said defective track. Plaintiff avers that the injuries so received by her were proximately caused by said gross and reckless negligence." We are of opinion that the facts as set out in said count, when construed most strongly against the pleader, do not constitute anything amounting to willfulness or wantonness. This court could not say that an occasional rotten, unsound, and insecure cross-tie amounted to willfulness or wantonness even if known to defendant. We would not be understood as saying that cross-ties might not be rotten, unsound, and insecure to sufficient extent in number and degree to constitute wantonness and willfulness to run a passenger train over them at sufficient rate of speed. But what we say is that the averments in said count A, construed as the law construes them, do not make a case of wantonness or willfulness. We therefore construe said count to allege that plaintiff was a trespasser on said car and was injured by the simple negligence of defendant.

We think that count B is subject to the same criticism as count A. The averments in both counts A and B constitute simple negligence. *Stringer's Case*, 99 Ala. 410, 13 South. 75; *K. C., M. & B. R. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435, 11 South. 453.

Demurrers to pleas 4, 5, and 7 were properly overruled. The pleas clearly allege facts showing that the plaintiff practiced a fraud upon defendant; or her mother, acting for her, practiced a fraud upon defendant; and plaintiff was enjoying the benefits of such fraud, at the time she received the injuries complained of, and after the conductor in charge of the train had demanded her fare. Such being the case, defendant was under no duty to carry plaintiff as a passenger, and the relation of passenger and carrier did not exist, and plaintiff was a trespasser. If there are any defects in said pleas, they are not pointed out by the demurrer.

The demurrer to replication 1 was well taken and properly sustained. If the other

matters set up in the pleas were true, it is manifestly immaterial whether she knew or did not know the matters set up in said replication. If plaintiff's mother was acting as her agent in tendering said pass for plaintiff, she cannot be heard to say that she did not know the contents thereof and thereby escape the consequences of such fraud.

If there was error in sustaining demurrer to replication 2, it was error without injury, in so much as said replication is a substantial reproduction of the allegations of count E of the complaint, so far as said replication undertakes to show the right of plaintiff to be upon defendant's train. The plaintiff had the full benefit of the matter there pleaded in the issue raised by the general issue filed to said count E. Pleas 4, 5, and 7 were pleas in confession and avoidance, confessing all of said count except that part which is reproduced in replication No. 2. If said pleas were not a sufficient answer to count E, the defect should have been pointed out by proper demurrer to said pleas as an answer to that count. To allow that kind of pleading would be pleading in a circle, and there would be no end to it. The court, of its own motion, would have a right to eliminate it as a waste of time.

The plaintiff, testifying for herself, stated: "I did not request Mrs. Little to get or furnish me with a pass or transportation, because I would have gone if she had not said anything about a pass." On motion of defendant the words, "because I would have gone if she had not said anything about a pass," were stricken. It has been so often decided by this court that a witness cannot testify to his uncommunicated motive or intention that we deem it unnecessary to cite authorities. Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from facts proven.

Plaintiff, testifying for herself, was asked by her attorney, "I will ask you if you had money to pay your fare if it had been demanded." Witness had been allowed to testify that she had with her a certain amount of money, and she could not testify to her secret intentions or purposes. The court properly sustained the objection to the question. So, also, to the following question asked plaintiff by her attorney: "I will ask you whether or not you would have been willing to have paid your fare if it had been demanded?"

The court also properly ruled in sustaining objection to the following question propounded to plaintiff by her counsel: "I will ask you if it was not customary for you all to ride on passes." The question did not go far enough to state a custom which would include the present case; that is, to ride upon passes issued for other people and upon which plaintiff and her mother had no right to ride, and that it was done with the knowledge and consent of the proper authorities

of the defendant corporation. So, also, were objections properly sustained to the following questions asked the same witness by her counsel: "Did you know of your mother having a pass before this time over this road?" Whether she did or not was clearly immaterial. So, also, the following question asked the same witness by her counsel: "I will ask you whether you supposed or thought when you boarded the car that you had a right to ride on the pass which was held by your mother." Uncommunicated thoughts and suppositions cannot be testified to.

The defendant asked his witness T. L. Gordy, the conductor who took up the fares upon this occasion, "At the time the pass was handed to you, was any information given you that the plaintiff was not the person named in the pass?" The plaintiff objected to this question, and the court overruled the objection, and plaintiff excepted to the ruling of the court. We think the court properly overruled the objection. If the mother of plaintiff and the plaintiff were not known to witness, and the mother handed to witness a pass in due and proper form, properly signed, and pointed out plaintiff, who was sitting on the same seat with her, as one of the persons to ride upon said pass, the conductor had the right to presume that the mother and plaintiff were the persons named in said pass; and to hand in such a pass and conceal their identity by their silence was a fraud and was entirely relevant to issues raised by the fourth, fifth, and seventh pleas. The plaintiff moved to exclude the following testimony of the witness Gordy: "You have to have a ticket, cash fare, or pass, or something the conductor can turn into headquarters, showing that that passenger was entitled on that train." The above was in answer to the following question: "What must a passenger have to entitle him to ride on the train?" The question was also objected to, but the overruling of the objection is not assigned as error. There was no error in refusing to exclude said testimony. The conductor of a train, whose duty it is to determine who are passengers and who are not, is presumed to know what a passenger must have in order to entitle him to ride on the train and thereby become a passenger, and that is one of the material inquiries in this case. Defendant asked the witness Gordy the following questions: "At the time the elderly lady handed you the pass, how, if in any way, did she indicate for whom she was tendering the pass?" The objection to this question was properly overruled, as it would naturally call for evidence entirely legal and proper. It called for evidence as to a part of the actual transaction whereby defendant was allowed to ride upon said train. It was a part of the res gestæ.

Defendant asked the witness Gordy, "Did you agree for her to ride without paying her fare?" The objection to this question

was properly overruled because it was inquiring as to right of plaintiff to be upon the car, as was also objection to the following question and for the same reason: "I will ask you if you agreed for the plaintiff to ride without paying her fare, or showing some other right to ride on the train." Also, the objection to the following question: "I will ask you under the rules of the company if you had any right to permit plaintiff to ride without she was paying her fare or being provided with a pass." If any inference could arise from the evidence that he was knowingly permitting her to ride without paying fare or having a pass, then it was proper to show that he, as agent of defendant, had no such authority whereby he could establish the relation of carrier and passenger between defendant and plaintiff. It was evidently competent under the issues of this case that its agent did not knowingly consent for plaintiff to ride as a passenger without paying her fare or to ride upon a pass issued to another and that he had no authority to do so.

Plaintiff assigns as error the overruling of her objection to the following question asked by defendant of the witness Gordy: "Did the lady make the statement for herself and daughter?" The witness had just stated that "the lady handed me the pass and said it was for herself and daughter" in a tone loud enough for plaintiff to hear. The answer of the witness to the said question objected to was: "O, just an ordinary tone. It was loud enough for plaintiff to have heard what was said." It is evident from this answer that the witness did not understand, and did not answer, the question; but, if it is an answer to the question, then the question was properly allowed. In either event there was no reversible error. The grounds of objection were that it was incompetent, immaterial, and irrelevant. It was not subject to objection on these general grounds.

The following question propounded to the witness Gordy by defendant was objected to by plaintiff: "Are you by the rules required to compel persons who tender passes on your train to identify themselves as the persons named in the passes?" The objection was properly overruled, as it called for evidence pertinent to the inquiry as to whether she was or could have been, under any inference to be drawn from the evidence, a legal passenger on said train.

The twentieth assignment of error is the same as the third, fourth, and fifth assignments, which have already been considered.

The court, upon request of defendant, gave the general affirmative charge for defendant in writing, viz.: "If the jury believe the evidence, you will find for the defendant." The plaintiff now assigns the giving of said charge as error. As stated in the briefs of both sides to this suit, "The whole question in the case is whether or not appellant was

rightfully on defendant's train." It is proper to add, "at the time the injury to plaintiff was inflicted." The decision of this question in this case depends upon whether or not, at the time of the wreck, the relation of carrier and passenger existed between appellee and appellant. There can be no dispute, and it has been universally so held, that to create this relation there must be a contract to that effect either express or implied. There can be no doubt but that the relation exists by implied contract from the moment a person enters the passenger coach of a regular passenger train with the bona fide intention of becoming a passenger and of paying fare according to the rules and regulations of such carrier, when the same is demanded by the proper person, and has with him the means of doing so. In this case we are not concerned with the question of good or bad intent. Under the facts of this case, did the relation of carrier and passenger exist at the time of the accident or injury? Plaintiff's fare had already been demanded by the conductor, and her mother, in her presence, had given the conductor a pass, which was issued for the benefit of other parties than plaintiff and her mother, and which gave plaintiff and her mother no right to ride thereon. The fact that plaintiff's mother and plaintiff were not the persons named in said pass was not known to the conductor, nor was it disclosed by either the mother or plaintiff; and the mother pointed out plaintiff as the other person entitled to ride on said pass besides herself. The conductor took the pass as authority for them to ride on said train, and plaintiff continued to ride thereon. Some time after this transaction the accident occurred from which the injury resulted. Can the plaintiff claim that the facts of this transaction made a contract whereby the relation of passenger and carrier was created between the plaintiff and defendant, of which she can take advantage in this suit? We think that the facts show a fraud from which the plaintiff can derive no benefit in this suit. Even if the conductor had known the parties and connived with them to beat the defendant out of the fare due for the transportation, the rule would be the same. As stated in the case of *Condran, Adm'x, etc., v. Chicago, Milwaukee & St. Paul R. Co.*, 67 Fed. 523, 14 C. C. A. 508, 28 L. R. A. 752: "The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its trains, under the conditions named, the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge of which the

court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. * * * It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. * * * One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured, by an accident happening to the train, not due to recklessness or willfulness on the part of the company, he cannot recover." Ordinarily, when a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded, unless his conduct should be such as to show that he was trying to evade demand being made on him by secreting himself or otherwise; but after demand is made, and he has the opportunity of paying, and he fails to do so, the presumption ceases unless some good excuse is shown for not then paying.

The affirmative charge was properly given for defendant.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

TOBLER v. PIONEER MINING & MFG. CO.
(Supreme Court of Alabama. Dec. 21, 1909.
Rehearing Denied Feb. 23, 1910.)

1. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—ACTION UNDER EMPLOYER'S LIABILITY ACT—COMPLAINT—EVIDENCE.

Where the complaint in an action under the employer's liability act (Code 1896, §§ 1749, 1751) for the death of an employé, caused by defects in the ways, works, machinery, etc., used in connection with the master's business, alleges several defects conjunctively, it is necessary to prove all of the defects alleged.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 107*)—OBLIGATION OF MASTER—SAFE PLACE TO WORK.

The duties of a master to a servant preparing material to construct or repair the ways, works, or machinery of the plant of the master, and putting the same in suitable condition for use, are not the same as those he owes to a servant using such ways, works, machinery, etc., after the construction or repairs are completed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§ 208*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant constructing or repairing the ways, works, or machinery of a plant of the master assumes the risks obviously incident to the work, and cannot complain of the fact that they are defective, when that defect is the reason of his being at work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 551; Dec. Dig. § 208.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—NEGLIGENCE.

That a master has failed to provide means to avoid injury to a servant does not make him responsible in the absence of proof of negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 101, 102.*]

5. MASTER AND SERVANT (§ 203*)—OBLIGATION OF MASTER—SAFE PLACE TO WORK.

Where a master has done everything that the law requires him to do to maintain the safety of his servant, he is not liable for any risk which the employment involves.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 203.*]

6. NEGLIGENCE (§ 62*)—ACTIONABLE NEGLIGENCE—PROXIMATE CAUSE.

To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence without intervening sufficient cause so that, but for the negligence, the injury would not have occurred, and the negligence must be the direct and immediate efficient cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

7. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—NEGLIGENCE.

A servant, employed to repair a furnace of an iron manufacturing plant, rode in a car on an incline tramway to the top of the furnace, and the car was then dumped into the furnace and the servant was killed. There was no defect in the engine, tramway, or car. The rails on the top of the furnace had been removed in making the repairs. Stop blocks could have been erected to prevent the car from dumping into the furnace. The engineer employed to operate the engine could stop the car at any place on the incline. A stranger operated the engine at the time of the accident, and he failed to stop the car in time to prevent accident. The master had provided another way for employees to take to reach the top of the furnace. *Held*, that the master was as a matter of law free from actionable negligence proximately causing the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 157-162; Dec. Dig. § 96.*]

8. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—WRONGFUL ACT OF INDEPENDENT THIRD PERSON.

A wrongful act of a third person causing injury to a servant, not actually intended or reasonably to be expected by the master, is not the result of the master's wrong, and he is not liable therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 157-162; Dec. Dig. § 96.*]

9. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—NEGLIGENCE OF THIRD PERSON.

A servant employed to operate the engine operating cars on a tramway leading from the ground to the top of a furnace of an iron manufacturing plant was not guilty of culpable negligence in allowing strangers to go into the engine house, for he could not anticipate that they would meddle with the machinery while there, and attempt to operate a car on the incline, and the master need not anticipate such meddling.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 96.*]

10. TRIAL (§ 169*)—DIRECTED VERDICT—WHEN AUTHORIZED.

Where the evidence affirmatively disproved one or more material averments of every count

of the complaint, the general affirmative charge for defendant should be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

11. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the general affirmative charge should be given for defendant, the error, if any, in the manner in which it was given, or in any other instruction, was without injury to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

12. MASTER AND SERVANT (§ 159*)—INJURY TO SERVANT—FELLOW SERVANTS.

An injury to a servant resulting from the negligence of a fellow servant not within the line of the employment, or within employer's liability act (Code 1896, § 1749 et seq.) does not render the master liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 818-325; Dec. Dig. § 159.*]

13. TRIAL (§ 143*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the evidence is conflicting, the issues should be submitted to the jury without interference by the court, and where there is any evidence tending to prove a fact, however slight, the court cannot withdraw the issue from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

14. TRIAL (§ 134*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

It is the exclusive province of the court to determine all questions of law arising in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 317; Dec. Dig. § 134.*]

15. TRIAL (§ 169*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where plaintiff's evidence does not tend to prove a cause of action, the court may refuse to hear evidence of defendant, and, if properly requested, it may direct a verdict against plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

16. TRIAL (§ 139*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

The court should not leave a question to the jury in respect to which there is no evidence, and when the facts are undisputed, and the evidence with all the inferences which may rightfully be drawn therefrom does not establish the action, the court must, on request, so instruct the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

17. TRIAL (§ 139*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

The affirmative charge should not be given when the evidence is conflicting on any material question necessary to a verdict, or when the evidence is circumstantial, or when a material fact rests wholly in inference; but it may be given on request when the court would sustain a demurrer to the evidence interposed by the party making the request.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 139.*]

McClellan and Sayre, JJ., dissenting.

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Mary Tobler, as administratrix, against the Pioneer Mining & Manufacturing Company. From a judgment for defendant

rendered on a directed verdict, plaintiff appeals. Affirmed.

This was an action by the personal representative of a deceased servant against the master under the employer's liability act to recover damages for the injury which resulted in the death of the servant. The action is brought under sections 1751 and 1749 of the Code of 1896, commonly known as the "Employer's Liability Act."

The complaint consisted of 16 counts, some of which were added and amended at various times while the action was pending in the lower court. Various demurrers were filed by the defendant to the original complaint and as it was amended from time to time. The demurrers were overruled to some of the counts and sustained as to others. To the complaint as last amended the defendant filed several pleas; the general issue and to some of the counts special pleas of contributory negligence. It is not certain from an examination of the minute entries and judgments as shown by this transcript the precise issues upon which the trial was finally had. This uncertainty was probably occasioned, as stated by counsel for appellant in their brief, by two or three judges ruling upon the pleadings at different times, and because of the great length of time the case had been pending in the lower court. It is, however, stated by counsel for appellant and appellee that for the purpose of this appeal it must be taken that the trial was had upon the plea of general issue to all 16 counts of the complaint with the exception of 2, to wit, the thirteenth and fourteenth counts, and also upon the special pleas of contributory negligence as shown by the record as to all counts except those which declared upon wanton negligence or willful injury.

After the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge with the hypothesis "If the jury believe the evidence," and refused quite a number of written charges requested by the plaintiff. The jury retired, and notwithstanding this affirmative charge for the defendant with the hypothesis brought in a verdict for the plaintiff, which was read in open court by the clerk of the court, and the court upon the motion of the defendant refused to receive the verdict after it was read, and proceeded again to charge the jury that they must find a verdict for the defendant, and sent them back to the jury room, to which action of the court the plaintiff objected and excepted. Later, the jury returned another verdict: "For the defendant according to instructions from the court." The court then entered up a judgment for the defendant, from which the plaintiff appeals, and assigns various errors as to the rulings of the court upon the pleadings and evidence which were adverse to the plaintiff.

It therefore clearly appears that the prime and pivotal question to be determined on this

appeal is whether or not the affirmative charge with the hypothesis and without the hypothesis could and should have been given by the trial court for the defendant. If this instruction by the court to the jury could and should have been given by the trial court with the admission of all the evidence which the plaintiff sought to introduce, and with the exclusion of all the evidence which he sought to exclude, then there could be no injury as to any other error complained of by him.

In determining whether or not there was error in the giving of the affirmative charge for the defendant, the following questions must be determined: (1) Was there evidence before the jury tending to prove, or from which the jury had a right to infer, the truth of every material averment of any one count of the complaint? (2) Did the evidence conclusively prove, without conflict and without any legitimate adverse inference, from the evidence, any one or more of the pleas interposed by the defendant which were interposed as complete answers and defenses to every count of the complaint upon which issue was joined? If either one of these questions can be answered affirmatively, then the general affirmative charge was properly given for the defendant. If neither one of them can be answered affirmatively, then it was reversible error to give the charge.

The questions involved on this appeal are so important that it is probably well to set out one or more of the counts of the complaint in this opinion and to set out the substance of the evidence, as the court finds it upon the record, and which we may say is in the main practically conceded by counsel in their briefs.

The first count of the complaint was in words and figures as follows: "The plaintiff, Mary Schmidt, who sues as administratrix of Joseph Schmidt, deceased, claims of the defendant the Pioneer Mining & Manufacturing Company, a corporation, the sum of forty thousand (\$40,000) dollars as damages, for that, whereas, on, to wit, the 6th day of March, 1899, the defendant was a corporation and owned and controlled a certain iron manufacturing plant, known as Thomas Furnaces, at Thomas, in Jefferson County, Ala., and it became and then was its duty to have and keep its said plant, ways, works, and machinery connected therewith in a reasonably safe condition, and to keep in its employ reasonably prudent and competent engineers, and other employes in and about the operation and control of its engine and other machinery in making repairs on its said work, and plaintiff avers that said deceased, Joseph Schmidt, was on said 6th day of March in the employment of the defendant as a mechanic under one Thomas McLaughlin, defendant's foreman, and was employed in repairing one of the defendant's said furnaces, known as No. 1; that while he was so employed and in the discharge of his duties

as such mechanic he received orders from McLaughlin to take certain tools and a piece of lumber to the top of said furnace; that in compliance with such order he took the required articles, and in company with one Brooks Hall, an employé of the defendant, got in the car on the incline railway, provided by the defendant for hauling material and men to the top of the furnace, and when they were safely seated in said car the said Hall gave the signal for the defendant's engineer in charge of the hoisting engine to draw them up, whereupon the defendant did then and there by its servants in charge of said hoisting engine carelessly and negligently hoist said car in such a manner that said car and plaintiff's intestate were dumped into the said furnace, and said deceased fell, to wit, 90 feet to the bottom of said furnace and was killed. To the damage of the plaintiff in the sum of forty thousand (\$40,000) dollars as aforesaid, wherefore she brings 'this suit."

The second and third counts adopted the words of the first count, down to and including the words "safely seated in said car."

The fourth and sixth counts adopted the words of the first count down to and including the words "as a mechanic."

The fifth count is for wanton negligence or willful injury, and avers that the defendant, by its servants who were making repairs on said furnace recklessly, willfully and wantonly dumped the said deceased into the said furnace and killed him.

The sixth count also declares upon wanton negligence or willful injury, in that the defendant by its servants recklessly, willfully, and wantonly ran said car to the top of the furnace and dumped said deceased into the furnace whereby he fell to the ground and was killed.

The seventh count of the complaint was in words and figures as follows: "Plaintiff, who sues as administratrix of Jacob Schmidt, deceased, claims of the defendant the sum of forty thousand (\$40,000) dollars damages for that, whereas, on, to wit, the 6th day of March, 1899, the defendant was a corporation, and controlled and operated a certain iron manufacturing plant, known as the "Thomas Furnace," and situated at Thomas, Jefferson county, Ala., and it became and was its duty as such manufacturer to keep its ways, works, and machines or plants connected thereto, or used in its business as such manufacturer, in a reasonably safe condition while being operated or repaired, and that on said day the plaintiff's intestate was in the employ of the defendant as a mechanic, and while so in the defendant's employ and in the faithful discharge of his duties as such employé he was thrown from one of defendant's cars into its furnace and killed, and plaintiff avers that the death of said decedent was caused by the reason of a defective condition of defendant's works, ways, machines, or plant. In that, to wit, there was no chock or other good and sufficient means to stop said

car provided, and defective condition of such was known or by reasonable diligence could have been known to defendant or its servants who were intrusted by defendant with the duty to see that machinery, ways, works, and plant were kept in safe and proper condition, to the damage of the plaintiff in the sum of forty thousand dollars aforesaid, therefore she sues."

The eighth count with somewhat kindred preliminary averments to the others avers that decedent was killed by reason of the negligence of a person in the employ or service to whose orders or directions intestate was then and there bound to conform and did conform, and that his death resulted from his having so conformed.

The ninth count adopted the first count down to the words "safely seated in the car," and alleges that the death of decedent was caused by reason of the negligence of a person in the service or employ of defendant who had charge or control of the hoisting engine.

The tenth count adopted the first count down to the words "safely seated in the car," and avers that the defendant negligently allowed one Jim Doolittle, an ignorant and inexperienced and incompetent negro boy to take charge of its hoisting engine, and did negligently and carelessly hoist said car to the top of the furnace and dumped said deceased into the furnace and killed him, and that the death of deceased was caused by the negligence of one H. B. Kiser, its general manager, in charge of the furnace, who had superintendence intrusted to him, in that he allowed and intrusted the negro boy named to have control off the engine, etc.

The eleventh count was as follows: "The plaintiff who sues as administratrix of Joseph Schmidt, deceased, claims of the defendant the sum of forty thousand (\$40,000) dollars damages, for that, whereas, on, to wit, the 6th day of March, 1899, the defendant was a corporation, and as such controlled a certain iron manufacturing plant known as "Thomas Furnace," situated at Thomas, Jefferson county, Ala., and it became and was then and there its duty to keep in its employ a capable, competent, and careful superintendent and other employes, and to keep its said plant, ways, works, and machinery connected therewith in a reasonably safe condition, and plaintiff avers that said deceased was on said date in the employment of said defendant as a mechanic, and while so employed, and in the discharge of his duty as said mechanic, was carelessly and negligently hoisted to the top of said furnace in one of defendant's cars and thrown into the furnace and killed, and plaintiff avers that the death of said decedent was caused by reason of the act or omission of the person in the employ or service of the defendant, whose name plaintiff does not know, done or made in obedience to the rules and regulations or by-laws of defendant, or in obedience to in-

structions given by persons delegated by the authority of the defendant in that behalf, in this, that he allowed one Jim Doolittle, an incapable and ignorant negro boy to have control of its hoisting engine and said tram car, by reason whereof said deceased was killed as aforesaid to the damage of the plaintiff in the sum of forty thousand dollars, wherefore she sues."

The twelfth count contained similar averments to the eleventh, and alleged that the injury was due to the negligence of a person in the employment of the defendant, whose name was unknown and who had superintendence intrusted to him, and while in the exercise of it that the engine was left unattended by any one capable of controlling it.

The thirteenth and fourteenth counts were eliminated.

The fifteenth count adopted the seventh count down to and including the words "the death of said decedent was caused," and alleges that the injury was the proximate consequence of the negligence of a person whose name was unknown, who was in the service of the defendant and who was intrusted with superintendence, and, while in the exercise of it, negligently caused plaintiff's intestate to be carried upon said car to the top of the furnace when it was highly dangerous, etc.,

The sixteenth count adopted the seventh count down to and including the words "as such employé," and alleged the accident and death of the intestate, etc., and averred that the intestate was dumped or caused to fall into the furnace by the defendant wantonly and willfully in the following manner: that the person in the service or employment of defendant intrusted by it with superintendence, whose name was unknown, while in the exercise of the superintendence, knowing that the engine was in the control of a careless and unskillful person, and knowing that the track and dumping apparatus across the top of the furnace had been removed, and knowing that there was not sufficient chock or sufficient appliances to prevent the car from dumping into the furnace, and knowing that to cause the deceased to be transported to the top of the furnace by means of the car and engine would probably result in his death, nevertheless willfully and wantonly or intentionally, with knowledge as aforesaid, caused the plaintiff's intestate to be transported to the top of the furnace by means of the car operated by the engine.

The general issue was filed to each of these counts, and special pleas, setting up contributory negligence and assumption of risk, seem to have been allowed to all the counts except those which declare on wanton negligence or willful injury.

Without setting out the evidence in detail in this opinion, but to set out the substance and effect as far as we may in reasonable space, and which in the main as we have stated is conceded by both counsel for ap-

pellant and appellee in their briefs, it is as follows:

The defendant for several years before and at the time of the injury was operating an iron furnace plant near Birmingham, known as "Thomas Furnace" at Thomas, Ala., and plaintiff's intestate several years prior thereto and at the time of the injury was in the employ of defendant as boss carpenter. One of the furnaces known as No. 1, which was the scene of the accident and injury complained of, was at the time of the injury out of blast and was being repaired, which was the work upon which the defendant's agents or servants were engaged at the time of the injury and upon whose negligence or wrongful acts the suit is based. The furnace was about 80 feet high and there was constructed at the furnace an incline rail or tramway from the ground to the top of the furnace, which was about 150 feet in length, along which cars were drawn primarily for the purpose of carrying iron ore, coke, and other material to the top of the furnace when it was in operation. The tram cars were carried up this incline track by means of a pusher called a "monkey" which was operated by a wire rope, and which caught the car behind and pushed it up. The apparatus was run by means of an engine located upon the ground near the furnace, but the cars and machinery for running them were controlled by means of levers, and a station for the person operating the cars was in the little room or house at the top of the furnace called a "doghouse." It appeared also that it was the custom for the employés of the defendant to ride up and down that incline on the cars. There was also evidence that notices were posted about the yards, and at the end of the incline, forbidding persons from riding up and down the incline or from trespassing. Some of the witnesses were unable to give the exact language of the notices; some said that the notices in effect prevented any person from riding up and down the incline on the cars, and others that the notices limited them only to cars called "filling cars" or "pushers," and that the car that intestate was riding upon at the time of the injury was a "dust car." The evidence also showed that there was a stairway running up from the ground to the top of the furnace parallel to the railway which was intended and was used by persons to go up and down in going from the ground to the top of the furnace or in descending from the top of the furnace to the ground, but that a number of employés at different times would ride up and down the incline on the cars notwithstanding the notices. At the time of the injury the framework over the top of the furnace and a part of the furnace called the bell, which was hung to the framework and suspended in the furnace, had been removed preparatory to relining the furnace and the employés or agents of the defendant

at the time of the injury were engaged in taking out the fire brick which constituted the lining of the furnace and preparing to reline the furnace. When the furnace was in operation and running the incline railway upon which the cars were operated ran up to the top of the furnace and then ran horizontally across the top of the furnace; that the track across the top of the furnace is laid on beams; that a part of the track across the top of the furnace and beams upon which it rested were removed at the time of the injury and were removed for the purpose of relining the furnace, and that after they were so removed there was nothing to prevent the car which was run up the incline to the top from being dumped into the furnace, which could not happen if the beams and track thereon had been in their normal or usual condition as they were when the furnace was in operation. It also appeared that if a strong chock block or obstruction had been built across the upper end of the incline track that the cars could have been prevented from dumping off from the top and end of the incline into the furnace as this one did on the occasion of the injury.

The morning on which the accident and injury happened was cold, some of the witnesses say that it was sleeting or snowing, and that a fire had been built in the doghouse and that half a dozen or more negroes had gone in there to warm. The defendant's general foreman, McLaughlin and the boss James Moore, and the regular hoister who operated the incline railway, whose name was Mylam, were at the top of the furnace; that the foreman and boss had gone down into the furnace to make some observations and to take some measurements relative to the scaffolding necessary to relining the furnace, and that Mylam was at the very top of the furnace, having lowered McLaughlin and Moore into the furnace and at the very moment of the injury was lowering a light to them; that while McLaughlin and Moore were in the furnace, McLaughlin sent a negro named Brooks Hall with a message or directions to get some tools, a plank, or something of the kind from the carpenter's shop or carpenter. The exact nature or wording of this message or direction by McLaughlin to the negro is not certain. Mylam, who was plaintiff's witness, testified that he heard McLaughlin tell Brooks he wanted the square, saw, and a piece of plank, or something of the kind, and to go down to the carpenter's shop and tell the carpenter; that he did not understand exactly what McLaughlin said, but he said tell the carpenter, or to the carpenter's shop, and the negro went away for it. The witness Moore testified that McLaughlin hollered up for a strip and square, and that these things were kept at the carpenter's shop and he sent to the carpenter's shop for them, and that Mr. Schmidt the intestate had charge of the carpenter's shop. After the negro Brooks had gone off on this er-

rand McLaughlin called for a lamp and Mylam had gotten the lamp, lighted it and at the very time of the injury was lowering it down into the furnace. The last Mylam saw of Brooks was when he was going on the errand, he was going toward the entrance to the steps which led down from the top of the furnace. He saw nothing more of Brooks nor the intestate until he heard the car rolling close by him as he was lowering the lamp, that before he could raise up the car went into the furnace. So far as the evidence shows, at the time the car went into the furnace with the intestate was the only time that the car had brought any one up to the top of the furnace that day. It also appeared that Mylam was the only person that morning who had the right to run the hoisting engine or had any duty in connection with it, and that he at the time hoisted up all the material with it that was needed to be hoisted. It did not appear that any of the persons in the doghouse at the time of the injury had any duty to perform in hoisting or that they had any right to hoist it, so far as the evidence shows. The only purpose of their being in there was to warm. It does not appear at this time that the hoister had any helper or assistant, neither he nor any one else seem to know who hoisted the car; at least, there was no evidence tending to show that any one of them hoisted it. There was some evidence to show that the negro Jim Doolittle had upon some past time hoisted the car, and that therefore he had some knowledge as to the mode of operating it. There was no evidence to show from which the jury or any one else could infer who moved the lever and hoisted the car at the time. The hoister Mylam is conclusively shown not to have done it and not to have given any orders for any one else to hoist the car, and it is conclusively shown by the plaintiff's own evidence that he had no knowledge that it was being hoisted or that it would be hoisted. It also was shown that if the car happened to be at the bottom when employes of the company were going up, and that he was at the time hoisting or lowering the car, they would sometimes get into the car and go up; if not, they would go up the steps; that they never waited for the car like they would for a street car, but that they did often come up that way. It does not clearly appear when or where the negro Brooks and the intestate got into the car, but under all the evidence it appears that they could only have done so at the foot of the incline, and that if they did, they did so when the hoisting engineer was engaged in lowering the lamp into the furnace, and that if the car was run to the top by any one it was done so by some person in the doghouse, who was shown to have no right or duty to hoist the car. The car, instead of being stopped at the top of the furnace as it could easily have been done if properly operated by a competent and careful person, was allowed to run to the end

of the tram, and was dumped into the furnace, killing plaintiff's intestate.

It also appeared as stated above, that the tracks across the top of the furnace as they were used when the furnace was being operated could have been replaced while repair upon the furnace was going on, but that it would have required a good deal of labor and trouble, and that the track was not needed on top of the furnace except for dumping raw material into the furnace when it was in operation. It also appeared that if the track had been across the top of the furnace the car could not have been dumped into it, or that if sufficient chocks or deadmen had been placed at the top across the top of the furnace it could not have dumped in. It was also shown of the evidence that the repairs on the furnace were about to reach a stage when the carpenter would be needed to cut and fit the timbers for the scaffolding, but that this work was and could be done in the carpenter's shop, situated a few hundred feet from the base of the furnace. The top of the furnace had been off for four or five days; during that time some of the employes had ridden up and down the incline on the car, while others had gone up and down the steps, but so far as the evidence showed, upon every occasion on which people had gone up and down the incline during the time the furnace was being repaired, the cars were operated by the holster, Mylam. The evidence also showed that it was dangerous to ride upon the cars going up and down this incline, and that it required a man of skill and caution to operate it, but that such operator could stop the car quickly at any time or place desired. That it could not be operated faster than a speed of six miles per hour, but that the speed could be regulated to any velocity less than that. The evidence was somewhat in conflict as to whether or not on the occasion one standing at the foot of the incline could tell the condition of the track at the top of the furnace, or could tell who was operating the car, on account of the distances, the condition of the weather, etc. The evidence did not show whether or not the intestate had been upon the top of the furnace since the top was taken off, or that he knew of its condition, or that he had or would have anything to do with repairing the furnace other than cutting the timbers necessary for making the scaffolding.

It is contended by counsel for appellant in their brief that the evidence showed that when Brooks and intestate returned to the foot of the incline and took a seat in the little dust car which was standing at the bottom, having in their possession the articles wanted, some one in the doghouse then moved the lever which started the car up the incline and failed to stop it at the top before reaching a point where the track was removed, and the car went over into the fur-

nace, etc. The evidence has been carefully examined time and time again, and we are unable to find any evidence of any person which showed that the plaintiff's intestate and the negro Brooks came to the foot of the incline and took a seat in the little dust car which was then standing at the bottom, and that some one in the doghouse then moved the lever which started the car up the incline. The plaintiff's witness Mylam certainly did not testify to these facts for the reason that he says that the first he saw of the intestate and the negro Brooks after the negro left the top of the furnace to go on the errand was the very moment the car went over the top of the furnace. He did not see them get into the car, nor know of their approach until they were within a few feet of where the car dumped into the furnace. Plaintiff's witness Monroe did not and could not testify to such fact for the reason that he testified that he was not on the furnace when Mr. Schmidt got hurt. He did not witness the accident nor did he attempt to define or to describe the time when or the mode in which the intestate and Brooks got into the car, how or by whom they were elevated. Neither did the witness Derrick, because he did not claim to be at Thomas at the time of the injury; neither did Mrs. Tobler testify to any such facts because she was not present on the occasion; nor did or could the witness Moore testify to such facts, because he was down in the furnace at the time, and of course could not have witnessed it. So it is certain that there was no evidence showing or tending to show these facts. The only evidence that the intestate had the articles—saw, piece of plank, or something of the kind, with him at the time of the injury as claimed by counsel for appellant—is that they were found in the bottom of the furnace after the accident. This was substantially all the evidence as to the material facts. Of course there was evidence as to details, but which are immaterial, and which could not add to or take from the right of the plaintiff to recover in this action.

It will be observed that there was no evidence whatever showing or tending to show that the plaintiff's intestate was requested, ordered, or directed by any one of the defendant's servants, or for that matter by any one, to get into the car, or to go to the top of the furnace at the time or on the occasion of the injury. His presence there, so far as the evidence shows, was wholly gratuitous. The most that could be said to be shown to justify his presence there was that he was the boss carpenter, and may or may not have had occasion to go to the top of the furnace at the time he was injured—that is, the evidence is sufficient to show that he was not a trespasser at the time of the injury; that is to say, the evidence on the other hand shows that the measurements of the furnace were made by others, and were in fact being made at the very time of

the injury, and that the carpenter's work, or especially that to be done by the plaintiff's intestate, would be done in the shop and not at the top of the furnace. It may be that he had a right to be there at the time or on the occasion of the injury, but the evidence does not show it, nor does it show any facts from which the jury might reasonably infer that he was there by the direction of the defendant or any of its agents or servants. The most that can be said to be shown by the evidence in this connection was that the orders or directions given to the negro were that he go to the carpenter or carpenter's shop and get those tools and plank. No one contends that McLaughlin sent for the carpenter; the most that could be inferred was that he directed the carpenter to send those articles by the negro who was sent on the errand. There is likewise no evidence showing or tending to show who operated the lever that propelled the car to the top of the furnace at the time of the injury, except that it was some one of a half dozen persons, neither of whom had any right or duty to operate it, and that if they did so they did it without any directions or instructions from the defendant or any of its agents authorized to give such directions or instructions, and without the knowledge or consent of the defendant or any of its agents so authorized. It must also be remembered that the plaintiff's own evidence, coming from her own witnesses, showing affirmatively and conclusively that whoever operated the engine on the occasion which hurled the plaintiff's intestate to the bottom of the furnace and caused the injury complained of, did so without any authority or instructions from the defendant, or any of its agents authorized to give authority or instructions, and that they did it without any right or duty. The witness Mylam, who was the first witness introduced by plaintiff, was the only witness examined who saw any part of the accident, or could have seen or witnessed it. The other witnesses were either not present, or were down in the furnace and could not have witnessed it. His evidence, to give his own words, relating to the accident was as follows: "I had been up there 15 or 20 minutes when this accident happened; I was always there on time, and it was just after six a little. It was my business to do all the holisting there was to do there, what I was employed for was to run that engine. I operated it from the little iron house I was speaking of at the top that was built right off to one side of the incline where the incline reaches the top. * * * I cannot say positively, but it is my recollection I had not pulled any cars up that morning up to this time. I have pulled people up and down on this car I cannot say how often, frequently some mornings—frequent. I cannot say positively whether or not I had moved that car that morning, nor can I state whether any other person had moved it that morning.

If they did I did not know it." It therefore clearly appears that the plaintiff's own witness Mylam was the person intrusted to operate this engine, and that he did not operate it on this occasion, and that he did not authorize any one else to operate it, and so far as he knows the car had not been moved that day before the accident. The witness further said, when this accident happened, he was lying down at the time reaching a lamp—lowering a lamp—down to the boss down on the scaffold, "I had just let the men down in the furnace by means of a rope, and then they called for a lamp, and I lighted the lamp, and tied it to a small rope, and was lying down at the rim of the furnace where I could reach over. I saw the car just as it made the leap, just as I heard it come by I turned and looked, and it made a leap. I do not know who pulled the car up. The engine room was full of negroes, the door was closed and I do not know who was in there. There was no racket, no discharge of the engine, but I heard the car rolling right close to me, and I looked around, and before I could raise up it went into the furnace. It was at the top when I first heard it right about where it ought to stop." The witness further testified that during the four or five days when the top of the furnace was out he had pulled people up and down the incline, that he did not know of anybody else doing so during that time until this accident happened. He further says that: "I hoisted up all the material that day that needed to be hoisted. I do not know whether any one else gave any orders, that was a portion of my job at this particular time, I had other duties. While they were repairing the furnace and when it was not in operation, it was not necessary to hoist the car up and down nearly so often as when it was in operation. We had to bring up tools and material for repairs, to lower down all the stuff removed from the top." This was the plaintiff's own witness, and the only witness who attempted to testify as to how the injury occurred.

L. C. Dickey and James A. Mitchell, for appellant. Percy & Benners, for appellee.

MAYFIELD, J. We will now apply this evidence to this case, and see if it tended to prove, or if it authorized the jury to infer, the truth of every material averment of any one count of the complaint. If so, the giving of the general affirmative charge in this case was error.

The first count, among other material averments, alleges that the death of the plaintiff's intestate was the result of defects in the condition of defendant's ways, works, machinery, etc., used in connection with its business; that the incline railway was defective, the means and appliances for stopping and preventing the car from falling into the furnace were defective, and said hoisting engine was defective. This count, it will

be observed, alleges several defects conjunctively, consequently it was necessary to prove, or to introduce evidence tending to prove, all of the defects. There was not a particle of evidence that the engine was defective, but it affirmatively appears that it was in good condition. It affirmatively appears by the plaintiff's own evidence that the engineer, whose duty it was to operate it and who was operating it on that day, could stop the car at any time and at any place he pleased. Consequently, it affirmatively appears that there was no defect in the appliances for stopping said car. Nor did the evidence show any defect whatever in the ways, works, or machinery of this plant within the meaning of the statute. It affirmatively and conclusively appeared by the plaintiff's own evidence that this furnace was not being operated at the time of the injury; that the incline tramway and cars necessarily were not used at the time for the purpose for which they were built and intended, but for the incidental purpose of repairing the furnace or relining it. The evidence affirmatively showed that the tramway, car, and device for operating it were in good condition for the purpose of operating the furnace—the purpose for which they were intended. All the evidence showed that it was necessary to take up the rails of the tramway from across the top of the furnace in order to take out the bell and hopper preparatory to doing the repair work or relining the furnace. These rails were not put across the top of the furnace to keep the car from falling into the furnace, but it conclusively appears that they were put there for the purpose of running the car over the top of the furnace so that the contents of the car could be dumped into the furnace. It conclusively appears that the rails were not needed across the top of the furnace until it was ready to resume operations. This we think is perfectly obvious to any person. It is true that some of the witnesses said the rails could have been put back after the bell and hopper had been removed, and then again have been taken out when the bell and hopper were to be put back in the furnace, and then again replaced after the bell and hopper had been let down; it also appeared that if the rails had been across the top of the furnace the car would not have fallen. It was also testified by some of the witnesses that stop or chock blocks could have been erected at the end of the tram lines and at the edge of the top of the furnace to prevent the cars from running into the furnace while it was open, but the evidence did not show that it was necessary or proper in relining the furnace or in the repair of it, but, on the other hand, to our minds it conclusively shows that they would have been obstructions rather than benefits in repairing the furnace as it was being repaired. This was affirmatively shown by the evidence of some of the wit-

nesses, was not denied by any, and it would not be reasonable to suppose that they were necessary or proper in carrying on this repair work, but that they would be obstructions and hindrances. Consequently the failure to run a track across the top of the furnace or to chock blocks or deadmen at the ends of the tramway at the top of the furnace cannot be said to have constituted a defect in the ways, works, and machinery within the meaning of the statute. We are not unmindful of the evidence in this case that if this track had been built across the top of the furnace or if the deadman or chock block had been erected as it was shown that it could have been done, the injury would not have happened; but this is far from showing that a failure to do this constituted a defect in the ways, works, and machinery of this plant, at this time and on this occasion; but, on the other hand, it affirmatively shows that their erection during the repair would have been an obstruction. The deadmen or chock blocks, or the track across the top of the furnace, would without doubt have prevented injury, but their absence did not occasion the injury; it merely constituted a condition upon which another wrongful act operated to produce the injury. The master cannot be held to have anticipated this accident, nor can it be held to have provided against it more than it did. If a strong net had been stretched across the top of the furnace, this would have prevented the injury; if the tram track had been taken up clear down to the ground, it would have prevented the injury; if the plaintiff had provided an elevator, such as is used in hotels, to carry its employees to the top of the furnace, it might not have happened; but the absence of these provisions certainly did not constitute actionable negligence. As will be more fully shown hereafter the wrongful act which caused the injury was that of an intruder, some person who acted without right or duty, and, so far as this record shows, is unknown. It was the act of this unknown person, in elevating the car upon the incline, instead of stopping it where it should and could have been easily stopped, avoiding the injury, and then either negligently or intentionally running it to the middle of the furnace, and dumping it and its contents to the bottom of the furnace below. It is the law of this state, of England, and of the other states, and is well settled, that the duties of the master to his servants who are engaged in preparing or collecting material to construct or repair the ways, works, or machinery of the plant, and putting it in suitable condition for use for the carrying on of the master's business, are not the same as the duties he owes to his servants who are using such ways, works, machinery, etc., after the construction or repairs are completed and the business of the master is in operation; and that servants who are engaged in this construction or re-

pair work of the plant of the master assume the risks which are obviously incident to the work of construction or repair. They are not allowed to complain of the ways, works or machinery as being defective, when that defect is the very reason or the very cause of the servant's being there and at work, upon the occasion. The duty which originally rests upon the master to furnish safe ways, works, and machinery, for the time being and for the purpose of construction or repair, is suspended. It would be unreasonable to hold the master to the same degree of strictness, while he is constructing his plant or repairing his ways, works, or machinery, as is required of him after he has constructed, or after the repairs have been completed, and the plant is in operation. If it were otherwise, the master could not with safety repair or remedy a defect. Of course this rule of law, like others, has its limitations. It is not contended by the authorities on this subject, nor is it attempted to be decided here, that the master is never liable to the servant for an injury received while engaged in repairing or remedying the ways, works, or machinery of the master, but it is decided that the same rules will not apply in the construction or repairing of the ways, works, or machinery that apply after the completion of repairs and during operation. *Labatt on Master and Servant*, § 29 et seq.

The mere fact that the master has omitted to provide means to avoid injury does not make the master responsible, in the absence of proof of negligence. In the absence of actionable negligence on the part of the master, an accident to the servant must be regarded as one of the hazards of the employment of which the servant takes the risk. When the master has done everything that the law requires him to do to insure and maintain the safety of his servant, any risk which the employment otherwise involves is not assumed by him, nor should he be made liable therefor. The final question to be determined, in every case of an action by the servant against the master as such, is this: Was the master guilty of a breach of duty to the servant who brings the action? The duty of the master to his servant, arising from the contract of employment, is either express or implied, consequently the master's liability to his servant as such is limited to those obligations and those duties which arise under the contract and which he has either expressly or impliedly agreed to. *Jones v. Granite Mills Co.*, 126 Mass. 84, 30 Am. Rep. 661; *Mensch v. Pa. Co.*, 150 Pa. 598, 25 Atl. 31, 17 L. R. A. 450; *Hough v. Texas Co.*, 100 U. S. 213, 25 L. Ed. 612; *Ford v. Fitzburg*, 110 Mass. 240, 14 Am. Rep. 598; *Farwell v. Boston Co.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339; *Harrison v. Central R. Co.*, 31 N. J. Law, 293. As was said by the learned Chief Justice Stone, of

this court, in *Mutch's Case*, 97 Ala. 196, 11 South. 895 (21 L. R. A. 316, 38 Am. St. Rep. 179): "To constitute actionable negligence there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence without intervening efficient cause, so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be the cause, but it must be the proximate cause; that is, the direct and immediate efficient cause of the injury."

We do not decide that any negligence on the part of the master was shown in this case, nor do we decide that there was any evidence tending to show that the master was guilty of any negligence, or that he was liable or answerable for the negligence of the party who committed the wrong which resulted in the injury. But we do decide that if it can be said that the master was guilty of any actionable negligence, such negligence was not the proximate cause, it was not the direct and immediate efficient cause of the injury. As to this proposition, we do not think there can be a doubt. In *Mutch's Case* it was conceded by the court that the railroad company was guilty of negligence in running the train at a greater rate of speed than was provided by law, but the plaintiff, who was a boy 12 or 14 years of age, of average intelligence, attempted to climb the ladder of a freight car and was injured. Judge Stone held that in that case the negligence of the railroad company was not the proximate cause of the injury. Then much more so must it be in this case, when it indisputably appears that the direct cause of this injury was the negligent or wrongful act of some person running the car up the incline and dumping plaintiff's intestate into the furnace. It affirmatively appeared by the plaintiff's own evidence that the defendant did not do it, and that no agent of defendant, authorized to act for it, did it, but it affirmatively appeared from the plaintiff's own evidence that it was done by an unknown intruder, interloper, or intermeddler, against whose wrongful acts the defendant company could not be held to have provided. It is true, as we have said above, that if the chock blocks had been at the end of the track, or if the track had extended across the top of the furnace, the injury would not have resulted, and the master could have provided the chock blocks and could have extended the tracks across the furnace, and, if this had been done, the injury would not have resulted, yet his failure to do this was not and could not be held to be actionable negligence. The injury was the saddest and most deplorable that could have happened, but the facts do not show that the master can be held liable. He could not have anticipated it, nor could he reasonably have been expected to provide against

it. If the master had had no furnace, if he had never employed plaintiff's intestate, if he had taken down the tramway to the ground, if he had not fired up the engine on the morning of the accident, if he had put a net across the top of the furnace while it was being repaired, the sad and deplorable accident would not have happened, but certainly his failure to do any one of these does not and should not make him liable.

A wrongful act of independent third persons (it conclusively appears that this was such, though they may have been servants of the master), not actually intended or reasonably to be expected by the master, is not the consequence of the master's wrong, and he is not bound to anticipate the general probability of such acts. *Burt v. Advertiser Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. The act of the person in elevating the car upon the incline and dumping it into the furnace, which unquestionably resulted in the injury here complained of, was a trespass upon the rights of the defendant as well as those of the plaintiff, though it may have been the act of the master's servant. The master could not foresee or reasonably anticipate, and he was not required to anticipate or to provide for, violations of the law of trespass upon his property, by other persons or by his own servants. They were not employed by him for this purpose, and were not authorized to perform it. They were not shown to be incompetent for the purpose and work for which they were employed. It is true that the master is liable in damages for an injury negligently or intentionally inflicted by his servants upon others, third persons, or upon other servants in certain cases, but in order for him to be liable the negligent or wrongful act of the servant must be within the scope or line of employment, and the master may sometimes be liable, though the wrongful act was done by his servants in express disobedience to the master's order, but he is not liable unless the act was within the line or scope of employment. In some degree the same rule holds as with principal and agent. The rule has been clearly expressed by our court as follows: "If the employé, while acting within the scope of the authority of the employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of authority conferred upon him or implied in his employment, the master or employer is responsible in damages to the person thus injured. But if the servant or agent go beyond the range of his employment or duties, and of his own will do an unlawful act, injurious to another, the agent is liable, but the master is not." *Gilliam v. R. R. Co.*, 70 Ala. 268; *Goodloe v. Memphis Co.*, 107 Ala. 233, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67.

It conclusively appears from the evidence in this case that whoever pulled the lever and propelled the car and dumped it into the

furnace, the cause of this injury, did so without right or authority from the defendant company; and if it was done by one of the defendant's servants or agents, it affirmatively appears from the plaintiff's own evidence that it was not within the line or scope of the employment, and for this reason the defendant could not be liable to the plaintiff for the death of the intestate who was another servant. That is to say, it conclusively appears that the wrongful act, the cause of the injury, was not the result of any actionable negligence or intentional wrong on the part of the defendant or of any agent or servant of it, acting within the line or scope of his employment, without which there could be no liability on the part of the defendant.

The second count of the complaint, among other things, charges that the death of the intestate was caused by the failure of the defendant to provide a careful and competent engineer, and its negligence in allowing said engine to be operated by said incompetent negro boy Jim Doolittle. The evidence not only fails to prove this allegation, but the plaintiff's own evidence affirmatively disproves it.

The fifth count charges that the defendant, by its servants who were making such repairs on said furnace did recklessly, willfully, and wantonly dump said deceased into said furnace and kill him. It certainly cannot be contended that there was any evidence to prove this count of the complaint. There was certainly no proof of the defendant's actual participation in this wrongful act as alleged, and there was no evidence to show that it authorized or ratified the wrongful act, but it affirmatively appears by the plaintiff's own witness that the defendant had no knowledge of the fact that it was or could be done.

This disposes also of the sixth count for the same reason, and what has been said of the first and fifth counts disposes of the seventh count.

The eighth count contained an allegation that intestate was killed by reason of the negligence of a person to whose orders or directions he was then and there bound to conform and did conform. There was no direct evidence, nor any from which an inference could well be drawn that any orders or directions had been given to the intestate, or that he was conforming to any orders or directions when he was killed.

As we have stated above, it did not appear that any order or direction whatever was given to him upon this occasion; but if it could be said, as contended by counsel for appellant, that the direction or order from McLaughlin was given to Mylam or the negro Brooks to bring the articles to him, it certainly cannot be contended that this was a negligent order, or that he was guilty of any negligence in giving it, and the plaintiff proved by the witness Mylam himself that he had

charge and control of the hoisting engine, and of the tramway at the time, and the plaintiff proved by him conclusively that there was no negligence on his part as was alleged in the ninth count of the complaint. It conclusively appears from the evidence that the negligence was not on the part of a person who had charge or control of that hoisting engine, but was the result of the negligence or intentional wrongful act of a person who meddled with the engine, but who did not have charge or control of it, nor any duty to perform in connection with it.

As to the allegations in the tenth count of the complaint, that the defendant negligently and carelessly allowed Jim Doolittle, an ignorant, incompetent, and inexperienced negro boy, to take charge of the hoisting engine, and that he negligently and carelessly hoisted the car to the top of the furnace, and also as to the averment that the death of the intestate was caused by one Kiser, the defendant's general manager, in intrusting Doolittle with the charge or control of the hoisting engine, they are absolutely unsupported by the testimony, in fact the plaintiff's witnesses affirmatively proved the contrary.

And as to the eleventh count, which contained an averment that it was caused by reason of the act or omission of a person in the employ of defendant, in obedience to the rules and regulations or by-laws of the defendant, and in obedience to instructions given by a person delegated by the authority of the defendant in that behalf, in that he allowed Jim Doolittle, an incapable negro boy, to have control of the hoisting engine, the evidence does not show that Doolittle had charge or control of the hoisting engine, but affirmatively shows that he did not have charge or control of it, and it affirmatively appears that if he did handle it at the time he did so without authority, express or implied, and without the knowledge or consent of the defendant or of any one authorized to consent to it; and if all this could be said to be otherwise, it is beyond question that it was not in pursuance of any rules, regulations, by-laws, or instructions.

As to the twelfth count, which, among other things, claimed that the death was the result of the negligence of a person who had superintendence intrusted to him, while in the exercise of the superintendence, in that the engine was left unattended by any one capable of properly controlling it, it is not supported by the evidence. The plaintiff proved by the witness Mylam, who was intrusted with the care and management of it, that he was there present all the while, and that he was within a few feet of the engine when the accident happened; and there was nothing to show that it was negligence on his part to be a few feet away from the lever. It was proven by him himself that the operation of this engine was not the only duty enjoined upon him; that he was the only one authorized to operate it; and that he was not required to operate it

very much while the furnace was in process of construction, and that he was engaged in doing other duties at the very time; and it certainly could not be said to be culpable negligence of his allowing the negroes to go into the doghouse to warm on the occasion, and he certainly had no right to anticipate that they would meddle with the lever while in there, or attempt to usurp his authority in his very presence. Certainly the employer is not called upon to anticipate meddling with instrumentalities, though they be dangerous ones, by grown people and those who know of their dangerous uses and purposes.

As to the allegation of the fifteenth count, that the injury was the result of the act of a person whose name and particular office are unknown and who was entrusted with superintendence while in the exercise of it, in negligently causing plaintiff's intestate to be carried upon the car when it was highly dangerous to his life, it is not supported by any evidence, but the contrary is affirmatively proven by plaintiff's own evidence. It appeared from all the evidence (and it must be remembered that all the evidence in this case was that of plaintiff's own witnesses) that the intestate rode upon the car as a matter of his own choice and own convenience. There was no evidence to show or tending to show that he was invited, ordered, or directed so to do. It does not appear that any witness had seen him before the accident. It also affirmatively appeared, without contradiction, that there was a stairway leading up from the ground to the top of the furnace, parallel with the incline tramway, by which the intestate could have made the trip if he had desired; that it was built for the very purpose of persons ascending and descending; that it was at the time in a perfectly safe condition, unobstructed, and that he chose the route by the car rather than the other which was safe and open to him.

As has been said before in reference to the fifth and sixth counts, there is no evidence whatever to support the averments of willfulness or wantonness on the part of the defendant or any of its agents for whose acts it was responsible.

What has been said above with reference to the first and second counts disposes of the third count, and what we have said with reference to the first count disposes of the fourth count, and what has been said of the other counts when specifically mentioned disposes of all the counts of the complaint.

If the propositions of law which we have already announced and which we hereafter announce are correct, the evidence not only failed to support all the material averments of any one count, but it affirmatively disproves one or more material averments of every count of the complaint. This being true, the general affirmative charge should have been given for the defendant as requested, and if there be error in the way or manner in which it was given, or in other in-

structions to the jury, it of necessity was without injury to the plaintiff.

It is proper for us to say that we have not ignored the fact that evidence was excluded by the court against the objection of plaintiff, as to which he assigns error, and we have considered the case thus far as if all those rulings had been made in favor of the plaintiff; that is to say, if the evidence had been introduced which he desired to introduce, but which was not allowed, and if that had been excluded which he desired to be excluded, but which was not allowed, the plaintiff would still not have been entitled to recover for the same reason—that is to say, it would not have overcome the difficulties. In fact, the evidence which he sought to introduce in several instances was subsequently allowed; that is to say, that it was dangerous to ride upon the car in the condition and under the circumstances under which plaintiff's intestate rode.

Injuries to servants resulting from the negligence of fellow servants, not within the line or scope of the employment or within the provisions of the employer's liability act, do not render the master liable for such act. As was said by Chief Justice Brickell in the case of *Smoot v. M. & M. Ry. Co.*, 67 Ala. 17, from which we have almost quoted: "The reason for relieving the master from liability for such injuries is founded in the policy of encouraging and compelling servants to exercise diligence and caution in the discharge of their duties, and which, while protecting him, affords protection also to the master." It is true that this case was decided before the employer's liability act, but the rule and proposition are true except as to cases taken without the rule by authority of the provisions of the employer's liability act.

It is true that when the evidence is conflicting the jury should be left to find the facts without interference by the court, and if there is any evidence tending to prove a fact, no matter how slight, the court has no right to take such question from the consideration of the jury. It is the province of the jury and not of the court to find from the evidence the truth of a disputed fact. It is also well settled that in jury trials it is the exclusive province of the court to determine all questions of law arising in the case, and it is likewise the exclusive province of the jury to determine the facts under proper instructions from the court. The line between the duties of the court and those of the jury should be observed. It is of the greatest importance to the administration of justice that each should be made responsible for its appropriate department, for in this way only can errors of fact and errors of law be traced to their proper source. *State v. Smith*, 6 R. I. 34.

Under our system of laws and the practice prevailing in our court for nearly 100 years, the power is vested in the court in proper cases to determine whether the evi-

dence offered tends to support the allegations of the party. The right should be cautiously exercised, but in some cases it is the duty of the court to direct a verdict when thereunto requested in writing, and a failure so to do will be error, for it is not only the right, but it is the duty, of the court. When the plaintiff has introduced his evidence, and it does not tend to prove the plaintiff's cause of action, the court may refuse to hear evidence offered by the defendant, and, if properly requested, direct the jury to find against the plaintiff, but it is only in the absence of all evidence against the defendant that the court should direct a verdict in his favor. And it is always error and not within the discretion of the court to leave a question to the jury in respect of which there is no evidence. If there is none to support the theory of fact assumed, the court should not let the case go to the jury; likewise, when the facts in the case are undisputed and the evidence, with all the inferences which the jury can rightfully draw from it, does not as a matter of law have any tendency to establish the proposition which is essential to the maintenance of the action, it is the duty of the judge, if properly requested, to so instruct the jury; but if there be any evidence which tends to establish the plaintiff's cause, it is error for the court to withdraw the case from the jury or to direct a verdict, because it is not for the court to judge of the sufficiency of the evidence. But the affirmative charge should not be given when the evidence is conflicting as to any material question necessary for a verdict, or when the evidence is circumstantial, or when a material fact rests wholly in inference; but it may be given, and should on request be given, whenever the court would sustain a demurrer to the evidence interposed by the party requesting the instruction. *Smoot v. M. & M. Ry. Co.*, 67 Ala. 17; *Tabler v. Sheffield Co.*, 87 Ala. 309, 6 South. 196.

Applying these propositions of law above stated to the evidence in this case, a verdict should not have been allowed against the defendant, for the reason that there was an entire failure of proof as to each count of the complaint. Some of the material averments in each count of the complaint were expressly and conclusively disproved by the evidence of the plaintiff. There was no conflict as to any material fact which was necessary to the defense; there could be no reversible error because there could be no injury done the plaintiff by the direction of a verdict for the defendant.

The case is affirmed.

Affirmed.

SIMPSON, ANDERSON, and EVANS, JJ., concur. McCLELLAN and SAYRE, JJ., dissent; the former being of the opinion that the court erred in giving the general affirmative charge.

(125 La.)

No. 17,993.

JOLIVET v. CHAVES et al.

In re JOLIVET.

(Supreme Court of Louisiana. Feb. 28, 1910.
Rehearing Denied April 11, 1910.)*(Syllabus by the Court.)*VENDOR AND PURCHASER (§ 233*)—BONA FIDE
PURCHASER—RECORD.

Where an authentic act purporting to be a "sale with right of redemption" is placed of record, and the delay for redemption has passed without there being any evidence of record showing that the right of redemption had been exercised within the delay fixed, a person who has bought the property from the apparent vendee on the faith of the record will be protected in his purchase from an attack on his title by the apparent vendor on the ground that the act purporting to be "an act of sale with a right of redemption" was in reality only an act of mortgage securing a specific debt to the apparent vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 233.*]

Action by Victorin Jolivet against Francesca Chaves and others. Judgment for plaintiff was reversed by the Court of Appeal, and he applies for certiorari or writ of review. Affirmed.

John L. Kennedy, for plaintiff. Orther C. Mouton and Ralph W. Elliott, for defendants.

NICHOLLS, J. In his petition to the district court plaintiff averred: That he was the true and lawful owner of certain described property. That on the 17th day of February, 1886, he pledged said property to the commercial firm of Gerac Bros., a copartnership composed of Jean Gerac and Pierre Gerac, to secure pre-existing indebtedness to said firm amounting to the sum of \$192.29. That said pledge was embodied and set forth in a certain act executed before Crow Girard, notary public, which, in form, purported to be a vente à réméré, and which was recorded in the recorder's office of this parish under No. 1,449, as would more fully appear by reference to a certified copy of said act attached. That said act was intended by the parties thereto merely as a contract of security or pledge, and that since the execution thereof petitioner had continuously remained in possession of the property pledged, and had each year since the date thereof turned over to the said Gerac Bros., and since their deaths, or to their legal representatives who were thereafter named, the whole or a portion of the crops raised on the land pledged as aforesaid in settlement of petitioner's indebtedness to them. That petitioner believed, and so averred, that the value of the produce turned over to said Gerac Bros. or their legal representatives far exceeded in value the amount of petitioner's indebtedness to them, and that he was entitled to an acquittance therefor and the cancellation upon the rec-

ords of the recorder's office of the act securing the same.

That John Gerac and Pierre Gerac, who composed the commercial firm of Gerac Bros., were both dead, and that Mrs. Francesca Chaves, widow of Pierre Gerac, as surviving widow in community with Pierre Gerac and Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, Louise Gerac, a femme sole, Felix Gerac, and Robert Ivan Gerac, as the heirs of Jean Gerac and Pierre Gerac, had not only refused to grant petitioner an acquittance of receipt for the indebtedness to the firm of Gerac Bros. or to give any statement of the value of the produce turned over in settlement, but they had fraudulently and illegally slandered petitioner's title to the property hereinbefore described by claiming to be the owners of the same under and by virtue of the act of pledge, executed in the form of a redemption sale, No. 1,449 of the recorder's records, certified copy of which was attached, and causing to be inscribed on the records of the recorder's office an act of partition among themselves, wherein petitioner's property was assigned to Mrs. Ellen Gerac, wife of Rene Delhomme, as her share of the property, as would more fully appear by reference to said act executed on May 30, 1908, and recorded under No. 37,232 in book Q 3, p. 37, a certified copy of which act was attached to the petition, and that the said Mrs. Ellen Gerac, wife of Rene Delhomme, had further slandered petitioner's title by executing, and causing to be inscribed on the records of said recorder's office, what purports to be a sale of petitioner's property to Louis Domongeaux, as would more fully appear by reference to said act recorded in conveyance book R 3, p. 167, a certified copy of which was attached. That said acts were executed and recorded, as aforesaid, in fraud of petitioner's rights and to his injury, and he was entitled to have the inscription of said acts canceled upon the records of the recorder's office, and to recover of the parties herein made defendants, jointly and in solido, the sum of \$300 as damages, occasioned to him by the slander of his title, as aforesaid. That all the parties made defendant were residents of the parish of Lafayette, La. He prayed that Mrs. Francesca Chaves, widow of Pierre Gerac, Sr., Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, and her said husband, to authorize and assist her, Louise Gerac, Ellen Gerac, wife of Rene Delhomme, and her said husband to authorize and assist her, Felix Gerac, Pierre Gerac, Luc Raoul Gerac, and Robert Ivan Gerac, and also the said Louis Domongeaux, be duly cited, and that he have judgment against said defendants, decreeing him to be the true and lawful owner of the property hereinbefore described, and canceling the inscription of the act of pledge or mortgage

as registered under No. 1,449, in the recorder's office, in book X, p. 329, and also canceling the act of partition and erasing the inscription thereof, as registered under No. 37,232, in book Q 3, p. 37, in so far as said act affected petitioner's property, and also canceling the inscription of the pretended act of sale to Louis Domongaux, as registered in said office, under No. 37,685, in book R. 3, p. 167, and condemning said defendants, jointly and in solido, to pay to petitioner the full sum of \$300 as damages as aforesaid, with legal interest on said sum from judicial demand until paid. He further prayed for all necessary orders, for costs, and for general relief.

Louis Domongaux answered. After pleading the general issue, he admitted that he purchased the property described in plaintiff's petition by purchase, as alleged by plaintiff, but respondent denied specially that plaintiff was in possession of said property as owner at the date of said purchase, or at any time after February 17, 1886, the date of the sale and delivery thereof to Gerac Bros. by plaintiff. He averred: That in the act of sale, with the right of redemption, of February 17, 1886, by plaintiff to Gerac Bros., of the property herein claimed and referred to by plaintiff in his petition, said property was declared to have been delivered to the vendee, and the plaintiff was estopped from contradicting the fact of delivery thereof as against respondent, who acquired in good faith and for a valuable consideration, on the faith of the public record. That he purchased said property from Mrs. Ellen Gerac, wife of Rene Delhomme, duly assisted by her husband, on October 28, 1908, for the sum of \$1,300 cash in hand paid with full warranty of title, and with subrogation to all her rights and actions of warranty against previous owners.

That the said Mrs. Ellen Gerac acquired said property in the partition made between her and Mrs. Francesca Chaves, widow Pierre Gerac, Sr., Henry Gerac, Mrs. Estelle Gerac, wife of Gustave Lacoste, Louise Gerac, a femme sole, Felix Gerac, Pierre Gerac, Luc Raoul Gerac, and Robert Ivan Gerac, the other defendants herein, on May 30, 1908, as alleged by plaintiff, with full warranty of title, at the valuation and at the price of \$1,120, and that said parties should be called in warranty to appear and defend this suit.

In view of the premises, respondent prayed that Mrs. Francesca Chaves, widow Pierre Gerac, Sr., Henry Gerac, Estelle Gerac, wife of Gustave Lacoste, and her said husband to assist and authorize her, Louise Gerac, Felix Gerac, Pierre Gerac, Mrs. Ellen Gerac, wife of Rene Delhomme, and her said husband to assist and authorize her, Luc Raoul Gerac, and Robert Ivan Gerac, residents of said parish, be called in warranty to appear and defend this suit, and, after due hearing, respondent have judgment recognizing him as the owner of the property herein

claimed by plaintiff; that he be quieted in his title and possession, with all costs of court; and, should judgment be rendered against him, that he have judgment against the warrantors as rendered against him on the principal action, and for the sum of \$1,300, with 5 per cent. per annum interest from October 28, 1908, with all costs of court, and for general relief, etc.

The other defendants answered. After pleading the general issue, they averred: That on February 17, 1886, plaintiff sold and delivered to Jean and Pierre Gerac, for an adequate price, the property described in plaintiff's petition, subject to a right of redemption, reserved by the plaintiff therein. That the plaintiff failed to exercise the equity of redemption by paying the price therefor and within the time fixed in said contract, and the said vendees thus became the irrevocable owners thereof. That the plaintiff herein was in possession of said property at said sale as a tenant of Jean and Pierre Gerac up to their death; and since then up to May 30, 1908, the date of the act of partition between respondent and Ellen Gerac, wife of Rene Delhomme, as a tenant of respondent and the said Ellen Gerac, who held said property as owners, as the surviving widow of Pierre Gerac, and as the heirs of Pierre Gerac and Jean Gerac, and at the institution of said suit as the tenant of Ellen Gerac, who acquired it in said partition. That Jean and Pierre Gerac were at the date of said sale engaged in commercial business in this parish, and thereafter continued to make advances of goods and supplies to the plaintiff, who occupied said land and cultivated it as their tenant up to the death of Jean Gerac.

That Pierre Gerac continued in said business after the death of Jean Gerac, and he also made advances of goods and supplies to the plaintiff, who still occupied and cultivated said land as his tenant. That all payments made by the plaintiff out of his two-thirds of the proceeds of the cotton crop made on said land, if any, were for said advances. That respondents discontinued said business of Pierre Gerac after his death, and since then have only received from the plaintiff annually one-third of the proceeds of the cotton crop, made by said plaintiff on said land, as their tenant, save and except for the year 1908, when said plaintiff, for the first time and during his possession thereof as lessee, as aforesaid, attempted to change the nature of his possession by claiming to be the owner thereof, and refusing to pay Ellen Gerac, who acquired said land in said partition of May 30, 1908, as aforesaid, the one-third of the cotton crop made and cultivated thereon during the year 1908, and for which suit had been instituted against said plaintiff, and was then pending.

That the plaintiff herein could not, during his possession as lessee or tenant of respondent and of Ellen Gerac and husband,

change the nature of that possession, and, having leased said property, as aforesaid, from respondent and their authors, the plaintiff was estopped from asserting title thereto. Respondents admitted that they were surviving widow of Pierre Gerac, Sr., and the heirs of Pierre Gerac, as alleged by plaintiff. In view of the premises, respondents prayed that the title of Louis Domongaux, as the vendee of Ellen Gerac, wife of Rene Delhomme, be recognized; that he be placed in possession and quieted therein with all costs; and, in the alternative, if judgment be rendered against the said Louis Domongaux, that defendants be decreed to pay as warrantors only the sum at which Ellen Gerac obtained said property in said partition and for general relief.

The district court rendered judgment in favor of the plaintiff, but, on appeal to the Court of Appeal, that judgment was reversed. After an unsuccessful application for a rehearing, that judgment, under orders of this court, has been brought before it and is now before it for review. The Court of Appeal assigned the following reasons for its judgment:

"The first question to which our attention is directed by the appellant is the refusal of the trial judge to rule out all the parol evidence to show a different intent from that expressed in the act of sale, and to show that there was no money paid as the price of the sale as recited in the act.

"The objection was that plaintiff, having signed the authentic act attacked as a sale for a cash price and with delivery of possession, could not contradict the act by parol; second, that, having since the sale and up to the period of redemption worked the plantation (land) from Gerac Bros. and their legal representatives as lessee, cannot be permitted to change the status of his possession or to contradict defendant's title.

"The objection appears to us to be well founded. The act which the plaintiff characterizes as a pledge, in the form of a sale, with the right of redemption 'vente à réméré,' is authentic in form. On its face it evidences a sale with a full warranty, made for a cash consideration in hand paid, for which the vendor gives full acquittance. It is declared that the purchasers acknowledge delivery and possession of the property conveyed. The only condition imposed is the right of redemption stipulated in the following words:

"The condition of this sale is such that if the said vendor shall pay and reimburse unto said Gerac Freres (Gerac Bros.) the price hereinafter mentioned, of two hundred and two $\frac{29}{100}$ dollars (\$202.29), before the first day of January, eighteen hundred and eighty-seven, then this sale shall be null and void, otherwise, on failure to exercise his right of redemption, before said date, property shall be irrevocably vested in said Gerac Bros."

"Here we have then a perfectly valid contract specially authorized under the law. Civ. Code, arts. 2566-2588. It is purely a sale, with the right of redemption, evidenced by an authentic act, with nothing upon its face to suggest that the parties to it had any other intention in making it than that therein expressed. The authentic act is full proof of the agreement contained in it against the contracting parties, and their heirs or assigns, unless it be declared and proved a forgery. Civ. Code, art. 2236.

"Parol evidence will not be admitted against

or beyond what is contained in the act, nor on what may have been said before or at the time of making it or since. Civ. Code, art. 2275; *Calderwood v. Calderwood*, 23 La. Ann. 658, 659.

"Declaration of a party in an authentic act can be contradicted by parol testimony by such party only in cases of fraud, error, or violence. *McRae v. Creditors*, 16 La. Ann. 305, on page 307.

"The instant case does not fall within the exception. We conclude that the parol testimony was inadmissible to vary or contradict the written act, and it was therefore improperly considered in determining the issues herein. The testimony of the notary and of the plaintiff as to the intention of the parties to the act will not therefore be regarded here in passing on the contention of the plaintiff that the sale was not intended as a bona fide sale, but merely as a security for debt. In *Lawler & Huck v. Cosgrove*, 39 La. Ann. 488, 2 South. 34, the Supreme Court says:

"It is settled beyond the possibility of a doubt that a bona fide sale of property for a valuable consideration, coupled with the pact of redemption, transfers the ownership to the purchaser, under a condition suspensive as to the vendor, resolutive as to the vendee." See authorities cited therein.

"The right of redemption constitutes a resolutive and not a suspensive condition as to the purchaser, and he therefore becomes at once proprietor, and can exercise all the rights of property, including the right of disposition. 23 La. Ann. 658.

"Whether a sale with right of redemption is a bona fide sale—that is, with an intention on the part of the vendor to sell, concurring with the intention on the part of the purchaser to buy, and it be made for a valuable consideration—are questions which, in the absence of literal or written proof to vary or explain the authentic act evidencing it, must depend upon the facts and circumstances of the case. The sale with right of redemption being a contract authorized and regulated by law, the burden of proof rests primarily on the vendor to show facts and circumstances tending to negative a bona fide sale. If it be shown that the sale was for an inadequate consideration and unaccompanied by delivery of the thing sold, then the burden shifts to the vendee, for, without sufficient evidence to the contrary, such a sale will be treated as mere security for debt. *Howe v. Powell*, 40 La. Ann. 307, 4 South. 450; *Baker v. Smith*, 44 La. Ann. 925, 11 South. 585; *Davis v. Kendall*, 50 La. Ann. 1121, 24 South. 264; *Marbury v. Colbert*, 105 La. 467, 29 South. 871.

"The plaintiff has produced in evidence a receipt signed Gerac Freres (Gerac Bros.) appended to an account, dated February 18, 1886, of amount due by himself to Gerac Bros., as proof that the sale was intended to secure the amount due by himself to Gerac Bros. This receipt is written in French, and reads: 'Recu par une vente à réméré payable dans un an pour solde de tout compte a ce jour. [Signed] Gerac Freres.' (Received by a sale with right of redemption payable in one year in full settlement of all accounts up to this day.)

"This is not conclusive proof that the parties intended by the act a mere security, and not a bona fide sale with right of redemption; for a debtor may make a valid sale to his creditor in payment of his debt, stipulating the right of redemption, and, if he fails to pay the price in accordance with the terms of the contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser. *Bevens v. Weill*, 30 La. Ann. 185; *Soulie v. Ranson*, 29 La. Ann. 161; *Keough v. Meyers & Co.*, 43 La. Ann. 952, 9 South. 913.

"The receipt shows that Gerac Bros. considered the account paid and extinguished by the sale or dation en paiement with right of redemp-

tion, and the proof is that, though the plaintiff continued to deal with them at their store for years, old account, so settled, never figured again on their books.

"Measured by the value of property of the vicinage at the time of the sale, the price paid was adequate. It was not a vile or grossly inadequate price held in jurisprudence as one of the indicia that the contract was intended as mere security for debt, though in the form of a sale. It but remains to consider the question of possession, and whether the plaintiff paid to Gerac Bros. the price stipulated within the delay fixed for the exercise of the right of redemption. The plaintiff alleges and testifies that he remained in possession of the land continuously after the sale, and worked and cultivated the same. The bare fact of possession is not disputed, but the nature of that possession is the point around which the controversy revolves.

"The defendants contend that the plaintiff remained in possession, not as owner, but as tenant or lessee of Gerac Bros., and, after their deaths, of their legal representatives. A careful reading and appreciation of the testimony bearing on this point fully supports their position. The plaintiff himself admits that, while at first he turned over all the cotton raised on the plantation, later he delivered one-third to Gerac Bros. and two-thirds came to him. When asked why, after the death of the Geracs, of Gerac Bros., he continued to give their representatives one-third and kept for himself two-thirds of the cotton, he answered: 'I followed the condition between me and Mr. Gerac. I followed the condition, although verbal.'

"This fully confirms the testimony of Henry Gerac, Pierre Gerac, Jr., and Mrs. Gustave Lacoste, children of Pierre Gerac, deceased, of Gerac Bros., that the plaintiff, during the lifetime of their father, worked the land now claimed by him as tenant, yielding annually one-third of the crop as rental.

"This act alone concludes the plaintiff in the absence of error or fraud, and establishes the nature of his possession as the possession of his vendees and their assigns. Leasing the property by the vendor after the time for redeeming it has passed, in the absence of error or fraud, estops him from asserting title thereto. *Jackson v. Lemle et al.*, 35 La. Ann. 855. Here not only is there no error or fraud alleged, much less proven, but the plaintiff himself frankly admits, under oath, that he continued to give one-third of the crop raised on the land to the widow and usufructuary in accordance with the verbal condition or agreement between himself and Mr. Gerac, his vendee. He is therefore estopped from asserting title to the land, or, at least, from denying the possession of his vendees through him. As to the payment of the price, the plaintiff does not assert positively that he has paid it, but avers that he delivered all the cotton made on the land to Gerac Bros. during a number of years, and he believes that the value thereof far exceeded the price of the property which he was to return to redeem it. The proof of the record is that the plaintiff continued to deal with Gerac Bros. and to receive advances on the crop from them, and that his share of the proceeds of the cotton delivered to Gerac Bros., was applied to the payment of the price for the redemption of the property. 35 La. Ann. 855.

"We consider the evidence conclusive on this point, but, even if it were not, the result would be the same, for the burden of proof is upon the plaintiff to show the payment within the delay fixed, and in this he has signally failed. We have carefully considered every phase of this case, because somewhat loath to disturb the judgment appealed from, which means much to the plaintiff, an aged negro, tottering to the grave. Our appreciation of the law and the facts of the case point unerringly, we think,

to the conclusion that the judgment below is erroneous, and must be reversed.

"For the foregoing reasons, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that the plaintiff's demand be rejected in its entirety, at his costs in both courts, and the defendant Louis Domongaux be, and he is hereby, recognized and declared to be the true owner of the land in controversy fully described in the pleadings, and he is hereby quieted in the title and possession thereof."

Plaintiff makes a strong showing in the brief filed in his behalf in respect to the position taken by him in this case that the act, purporting to be a *vente à réméré*, was, in fact, intended as an act passed to secure payment of a debt due by the party named as vendor to the party appearing as vendee therein, and not an absolute sale. While the price declared in the act cannot be said to have been a "vile" price (that is, one not serious), we think it was below the real and actual value at the time of the act of the property transferred. The plaintiff has always remained in actual physical possession of the property since the so-called act of sale. Defendants urge that, although plaintiff has been in the physical possession of the property since the act of the 17th day of February, 1886, his status has always been that of a tenant. There is no direct evidence that the relation of landlord and tenant existed between plaintiff and declared vendee. No one swears to an actual knowledge of such fact. The evidence of such a relation is merely argued upon, presumptively based on, the fact that several years after the act was passed the plaintiff consented to receive one-third of the products of the farm, while the Geracs received two-thirds, which is the usual agreement as to the consideration for a lease between a tenant working land on shares and the owner. The testimony shows that plaintiff shipped for several years to the Geracs the whole of the crop raised on the land, to be by them sold, and the proceeds of the same applied, so plaintiff testifies, to the extinguishment of his indebtedness.

If this be true, it would appear that, if the plaintiff ever occupied the position of a tenant of the Geracs, he became so, not contemporaneously with the passing of the act, but at a later period, by some subsequent agreement. If in point of fact the contract of the 17th of February, 1886, evidenced originally a contract of security for money due and not a contract of sale, the ownership of the property remained after the act in the plaintiff, and the title could be transferred or shifted only by written evidence, and not by parol proof of a verbal lease of the property as between the parties. The rule is that "once a mortgage, always a mortgage." That is, an act of mortgage cannot be converted into an act transferring ownership unless and until a subsequent contract to that ef-

fect be made between the parties, conforming in all essential features to the requirements of the law for a contract of that character.

After the passing of the contract of February 17, 1886, the Geracs dealt at their store with the plaintiff, and the latter appears to have become indebted to them in a large amount for goods, wares, and merchandise sold him, later than that date, distinct and separate from the debt to secure which the act of February 17th was passed. For this later debt Jolivet executed his note. The act of mortgage did not extend to nor cover that debt; it covering only the specific debt existing when the act was passed. We think it was to this last debt that plaintiff referred when he said that he consented that two-thirds of the product of the crop, which were retained by the Geracs, might be imputed to it. We do not think that the plaintiff ever admitted that those two-thirds were retained by them by reason of their being his lessors of the property on which the crops were produced. The Geracs have never made a settlement between them and plaintiff further than to get the latter to recognize an indebtedness due by him to them to the amount of the note.

The property was assessed for taxation in the name of the plaintiff for the years 1887, 1888, and 1889, and in the name of the Geracs for the years 1890 to 1902. In 1902 it was again assessed in the name of the plaintiff. In the year 1908 the plaintiff refused to deliver to Mrs. Delhomme one-third of the crop, and she brought suit to recover it in the justice's court. That suit is still pending. Plaintiff then brought the present suit (November 13, 1908). On October 28, 1908, Mrs. Delhomme sold the property to Louis Domongeaux. It appears that in 1897 (a short time before his death) Mr. Gerac desired to sell this land to a Mr. Arceneaux, and the latter, having been advised that, in order to avoid a lawsuit, the signature of the plaintiff would have to be obtained, so informed Mr. Gerac, who stated that he knew this and would attend to it, but never did, and that he died three or four months after.

Plaintiff alleges in his pleadings that the act relied on as a sale did not conform to the intention of the parties, and he demands substantially a reformation of the contract so as to make matters conform to "the contract and to make matters take their actual shape." The Court of Appeal was of the opinion that parol evidence was not admissible for that purpose in the absence of an express charge of fraud, but we think the court carried the rule on that subject too far.

In *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775, the Supreme Court of the United States used the following language:

"It is established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a

loan of money. That court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual control of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors or to give a preference or to secure a loan or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice." *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796; *Pierce v. Robinson*, 13 Cal. 116.

"A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. *Russell v. Southard*, supra. Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in price paid will vitiate the proceeding."

The same views, even more forcibly expressed, were announced in *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256. Counsel refer the court to 27 Cyc. pp. 1023, 1024; to 20 Am. & Eng. Ency. of Law (2d Ed.) p. 953; and counsel refers the court to 29 Id. (2d Ed.) p. 847; to 10 Current Law, p. 859; to *Leger v. Leger*, 118 La. 322, 42 South. 951; *Franklin v. Sewell*, 110 La. 294, 34 South. 443; *Baker v. Smith*, 44 La. Ann. 925, 11 South. 585; *Marbury v. Colbert*, 105 La. 467, 29 South. 871, and authorities; 7 Current Law, p. 1830; also *Rion v. Reeves*, 122 La. 650, 48 South. 138; *Collins v. Pellerin*, 5 La. Ann. 99; *Le Blanc v. Bouchereau*, 16 La. Ann. 11; *Crozler v. Ragan*, 38 La. Ann. 154; *Ware v. Morris*, 23 La. Ann. 605; *Parmer v. Mangham*, 31 La. Ann. 348; *Howe v. Powell*, 40 La. Ann. 307, 4 South. 450. I personally am of the opinion that the act of February 17, 1886, was not what it purports to be (a sale with power of redemption), but was intended to evidence a security for a specific debt; that it did not convey the ownership of the property declared therein to be transferred; but that

the ownership of the same remained in Jolivet, and it still remains in him. I am also of the opinion that the relation of landlord and tenant between the plaintiff and the Geracs has never existed. The record does not satisfactorily show the state of the accounts between the plaintiff and the Geracs, and it would be impossible for us to fix by it the situation of the parties as creditors and debtor. There is a feature of this case which has been passed by without much comment. It is how far the decision in the case is to be affected by the rights resulting from the sale of this property by Mrs. Delhomme to Louis Domongaux on October 28, 1908. The act of February 17, 1886, was, on its face, an act of sale, with power of redemption. It was recorded as such. Such a contract is recognized in law as a valid contract. The public had a right to act with it on the faith of the record. The attorney of the plaintiff testified that shortly before or shortly after Domongaux bought the property from Mr. Delhomme (he did not know which) he met Domongaux and spoke to him of Jolivet's claims to the property, and that he said he knew all about it, and had taken an indemnity bond to fully protect him, from which he argues, that Domongaux was not a purchaser in good faith. Domongaux purchased the property from Mrs. Delhomme under an act of sale with full warranty. The act of the 17th of February, 1886, purporting to be an act of sale recognizing and reciting that possession of the property, had been delivered to the Geracs. It is not claimed that in point of fact Domongaux knew of the actual relations between the Geracs and the plaintiff, or had heard of any admissions made by Gerac, Sr., before his death.

We are of the opinion that the act of the 17th of February, 1886, purporting, on its face, by authentic act, to be a sale with right of redemption, having been recorded as such, and no redemption of the property appearing on the records, although the delay for redemption had expired, Louis Domongaux who bought the property from Mrs. Delhomme on the faith of the record is protected in his purchase from an attack on his title on the ground that the act purporting to be a sale with right of redemption was, in fact, an act of mortgage or security, securing a specific debt of the apparent vendor to the declared vendee in that act.

We are of the opinion that the judgment of the Court of Appeal brought up for review is correct, and it is hereby affirmed.

BREAUX, C. J. I concur in the decree.

LAND and MONROE, JJ., concur in the decree. PROVOSTY, J., concurs in the decree for the reasons given by the Court of Appeal.

(125 La.)

No. 17,681.

ALFRED HILLER CO., Limited, v. INSURANCE COMPANY OF NORTH AMERICA.

(Supreme Court of Louisiana. March 14, 1910.
Rehearing Denied April 11, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 281*)—FORFEITURE OF POLICY—PADDING INVENTORY.

The "padding" of an inventory of merchandise by false entries of articles not on hand will work a forfeiture of a fire insurance policy, when such entries cannot be explained on any reasonable theory of honest mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 597, 598; Dec. Dig. § 281.*]

2. INSURANCE (§ 388*)—FORFEITURE—WAIVER.

Under the New York standard policy, a forfeiture is not waived by any requirement, act, or proceeding on the part of the insurer relating to the appraisal of the loss or to any examination of the insured provided for in the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 388.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by the Alfred Hiller Company, Limited, against the Insurance Company of North America. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Clegg & Quintero & Gidliere and McLaurin, Armstead & Brien, for appellant. T. M. & J. D. Miller and Dart, Kernan & Dart, for appellee.

LAND, J. This is a suit on two policies of fire insurance for \$2,500 each, issued by the defendant on plaintiff's stock of merchandise in a certain storehouse on Magazine street in the city of New Orleans. There was other insurance on the same stock. Plaintiff sued for \$4,120.29 as representing defendant's proportion of liability for the loss.

The petition represents that the plaintiff's stock of merchandise was directly damaged and destroyed by fire to the full amount and value of \$30,969.19, after deducting all salvage, and that the amount of insurance then held by the plaintiff on said property aggregated \$37,250.

The petition represents that the defendant refused, and still refuses, to pay its proportion of the aforesaid loss or any part thereof, and has denied, and continues to deny, liability in the premises upon the utterly false pretense that petitioner has exaggerated its loss by making fraudulent entries in its inventories, books, and records, and submitting fraudulent proofs from its books.

The gist of defendant's answer is that the two policies were forfeited through fraud and false swearing—fraud in the padding of the inventory, and false swearing on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the officers of the company in the attempt to perpetrate the fraud.

Besides this issue of fraud, there is the secondary question as to what was the actual amount of the loss by fire, which, however, is immaterial, if the policies have been forfeited.

After a protracted trial before a jury, there was a judgment for the plaintiff in the sum of \$2,115, based on a verdict as follows, to wit:

"We, the jury, * * * find for plaintiff in the sum of fifteen thousand seven hundred and fifty-seven dollars and twelve cents (\$15,757.12), to be prorated on \$37,250.00 of insurance."

Defendant has appealed from the judgment. Plaintiff has not prayed for an increase of the amount awarded by the jury.

According to the statement of defendant's expert accountant, the actual total loss of the plaintiff amounted to \$15,767.12. The jury fixed said loss at \$15,757.12, and therefore must have adopted said statement as correct.

The amount of loss, according to plaintiff's proof of loss, was \$31,718.82, and, according to the petition, was \$30,968.19. This claim of loss based on the inventory and books of the plaintiff exceeds the actual loss by nearly 100 per cent.

Besides errors in bookkeeping, the jury must have found, as contended by the defendant, that three certain items of cement, aggregating \$6,050, appearing on the inventory of January 31, 1908, did not truly represent stock on hand at the time.

These three items on the inventory read as follows:

1000 (Bbls.) German Alsen 2.35 . . .	\$2,350 00
718 " Old Stock Lafargue 2.80	2,010 40
4214 (Sacks) Atlas 1053½ bbls.	2,159 69

These entries exhibit marks of erasure and substitution of words and figures, and the footing at bottom of the page has been changed.

The president and the secretary-treasurer of the plaintiff company, when examined under oath in the office of the Adjustment Company, testified that these three items were correct to the best of their knowledge and belief. The president stated that he had no personal knowledge of the items. The secretary, however, testified specifically that the 1,000 barrels of German Alsen cement were on hand when the inventory was taken, and, being asked if he was positive, replied:

"I am more positive of that than I am of anything in that book."

A few days thereafter the insurance companies denied all liability.

The item of German Alsen was written by the secretary over an erased entry of a small amount of another kind of cement.

The second item, as originally entered, read:

"118 (bbls.) Old Stock Lafargue."

And afterwards the figure "7" was written over the first figure "1." A corresponding change was made in the extensions.

The third item, as originally entered, read, "214 (Sacks) Atlas," and afterwards the figure "4" was inserted before the figure "2," and the extension figures were altered to correspond.

A photographic copy of page 147 of the inventory, on which the three entries appear, is in the record before us, and it is apparent to the naked eye that the original entries and extensions were changed.

It was conceded on the trial that the entry of "German Alsen" was erroneous, and the evidence shows that this item was included in the sworn proofs of loss, but was excluded in the account of loss sued on in this case. It was proven that the plaintiff had on hand only two barrels of German Alsen cement at the date of the inventory, and none at the date of the fire.

It is also shown by the evidence that the item of Old Lafargue cement was raised by 600 barrels, and the item of Atlas cement by 1,000 barrels. This conclusion necessarily results from the fact that there is a deficit of 605 barrels of Lafargue and 1,004¼ of Atlas cement, which cannot be accounted for on any reasonable hypothesis.

The expert accountant employed by the defendants testified that the three items of cement in question were "loaded" to the extent of 2,600 barrels, and that, in addition, all other cement items were short by 350¼. There is no serious dispute as to the figures given by this accountant, and the secretary himself admits a very large apparent shortage in the cement account, which he endeavored to explain by loss in reworking damaged cement within the short period of four months. His explanations did not satisfy the jury, and certainly have made no favorable impression on this court.

The same accountant found errors in bookkeeping to a very large amount, and, finally, that the book value of the stock actually destroyed was \$15,767.12, and the jury awarded that sum to the plaintiff company.

The only debatable question on this appeal is whether or not the policies should be declared forfeited under the following stipulation written therein, to wit:

"The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, or in case of fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, before or after a loss."

If the inventory was "padded," the intent must have been to deceive and defraud the insurance companies in the event of loss by fire. In the course of the cross-examination on the trial of the case, the secretary was driven into the admission that the cement was either "loaded" in the inventory, or was

"lost" by waste in reworking. There is no evidence in the record to support the assertion that 1,600 barrels of cement was thus lost in the short period of four months, and the testimony of the president and the secretary that such a loss might have occurred within that time in the usual course of business is rebutted by the testimony of other dealers in the same line. The annual loss by waste of 6,400 barrels of cement would soon force any ordinary business concern into insolvency. There is no suggestion of any such depreciation in plaintiff's proofs of loss or in the subsequent proofs prepared for the purposes of this suit, and plaintiff's claim is based on the assumption that all the cement on the inventory not sold in the usual course of business was on hand at the time of the fire.

The explanation of the item of 1,000 barrels of German Alsen cement is equally unsatisfactory. Plaintiff had only two barrels of this cement in stock on January 31, 1908. The secretary erased an original entry on the second line of page 147 of the inventory and inserted in lieu thereof "1,000 German Alsen 2.35 2.350." The explanation that this entry was intended to cover 500 barrels of Eagle cement, and 500 barrels of Dromedary cement, just landed but not in the warehouse, is not plausible on its face, but ceases to be worthy of consideration in the face of the facts that the Eagle and Domedary cements were entered at the foot of the same inventory, that the entry of German Alsen was not canceled or erased, and that the secretary swore a few months after the fire that he was positive that the German Alsen was on hand when the inventory was taken.

We consider that this case shows very clearly a fraudulent attempt to impose on the defendant insurance company by exaggeration of the loss.

An extended citation of authorities is not necessary to the decision of this case. See *Regnier v. Insurance Co.*, 12 La. 336; *Schmidt v. Underwriters*, 109 La. 884, 33 South. 907; *Clafin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507, 23 L. Ed. 76.

It is argued by counsel for plaintiff that a false swearing by the assured subsequent to the loss must be shown to be material to avoid the policy, and, if the company had knowledge of the facts, a false statement in regard thereto cannot reasonably deceive or mislead it. 1 *Clement, Fire Insurance*, 279, Rule 9. It is unnecessary to consider the doctrine thus announced, as the case is with the defendant on the question of fraud in the concoction of the inventory.

The policy provides that a fraud of this kind shall not be held to have been waived by the insurer "by any requirement, act, or proceeding on its part relating to the appraisal or to any examination" therein provided for.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's suit be dismissed, with costs in both courts.

(125 La.)

No. 17,613.

MOREN v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. March 14, 1910.
Rehearing Denied April 11, 1910.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 16*)—DANGEROUS SUBSTANCES—CARE REQUIRED.

There are usually two factors of safety in any condition in which harm may befall one person by the act of another; the one, the instinct and obligation of self-preservation; the other, the duty which every one owes to so use his own as not to inflict injury upon his neighbor; and, where that which one uses is an agency of an extraordinarily dangerous character, the law throws upon the user the burden of the greater care.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 19-21; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 16*)—INSULATION OF WIRES.

The city of New Orleans has declared, by ordinance, that "electric light and power conductors shall be secured to insulating fastenings and covered with an insulation which is waterproof and not easily abraded. Whenever such insulation becomes impaired, it shall be renewed immediately." The use in the streets of New Orleans upon electric conductors, carrying dangerous currents, of a cheap insulation, which, when new, is almost, and within a few months becomes absolutely, worthless, is worse than no pretense of compliance with this ordinance, since it holds out an assurance of compliance upon which the uninformed may be led to rely, and thereby led to sudden death.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

3. ELECTRICITY (§ 16*)—ACTIONS FOR INJURIES—DEFENSES.

Where a corporation makes use of electric wires carrying dangerous currents in the streets of a city, under an ordinance requiring effective insulation, it is not a sufficient answer to the charge of failure to comply with its obligation, and to a demand for damages for injury and death resulting from such failure, for it to say that such insulation is unnecessary and expensive, and that other persons and other contractors have no reason for coming in contact with its wires. The necessity is determined by the ordinance, which is intended for the protection of persons who may come in contact with such wires without reasoning upon the subject, through accident, ignorance, inadvertence, or imprudence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

(Additional Syllabus by Editorial Staff.)

4. DEATH (§ 99*)—DAMAGES.

Where a lineman, 36 years old, earning \$75 a month, came in contact with a high voltage wire improperly insulated, burned his hand to a crisp, jumped from the pole 25 or 30 feet high to free himself from the wires, breaking the bones of his wrist and dislocating his thumb, and injuring his spine, so that he suffered untold agonies every minute until he died of lock-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jaw three months later, being unable to turn over in bed, a recovery of \$10,000 by his widow and child was not excessive.

[Ed. Note.—For other cases, see Death, Gent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Provosty, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mrs. Linnie Cornelia Moren, individually and as guardian for Ruth Evelyn Moren against the New Orleans Railway & Light Company. Judgment for defendant and plaintiff appeals. Reversed and rendered.

Bernard Bruenn and A. W. Cooper, for appellant. Dart, Kernan & Dart, for appellee.

Statement of the Case.

MONROE, J. Plaintiff sues in her own behalf and in behalf of her minor child, issue of her marriage with her deceased husband, for damages for injuries to the latter, resulting in his death, which injuries she alleges were caused by the negligence of the defendant. The answer is a general denial, coupled with a plea of contributory negligence.

The facts, as we find them, are as follows: The decedent had been employed by the Cumberland Telephone & Telegraph Company, at Memphis; had then gone into some other business; had returned to the telephone company, and had been employed by it for about two years at Covington, from which place, about two months before the accident out of which the suit has arisen, he had been transferred to New Orleans. At the time of the accident he was discharging the functions of "trouble man," and on the morning of March 16, 1907, he went to the corner of Chestnut and Peniston streets to remedy a trouble which he appears to have located at that point. The wires of the telephone company were strung near the top of a creosoted or carbolineum pole, which stood upon the lower, lake-side, corner, and upon the same pole, some 15 or 16 feet lower down, and about 30 feet from the ground, were 3 cross-arms, upon which were strung the wires of the Railway & Light Company, defendant herein, the telephone wires running along and in the direction of, Chestnut street, and those of the Railway & Light Company running at a right angle with them along Peniston street. The currents of electricity carried by the wires of the defendant meant certain death to any one who touched a wire not properly insulated, and there were 6 such wires upon the cross-arms mentioned; one, upon the upper cross-arm, which supplied the street lights of the city, and from which at the time of the accident the current was probably shut off; two, called "primary" wires (carrying 2,300 volts), upon the next cross-arm, 18 inches below; and three, called "secondary" wires, upon the third arm, which was 18 inches below the one last mentioned.

The cross-arms were, say, 8 feet long, and the primary wires were strung on either side of, and about 3 feet from, the pole. Of the three secondary wires, two were strung on one side of the pole, the nearest, about 2 feet distant, and the other, about 3 feet, and the third wire was strung upon the other side of, and 8 feet distant from, the pole. In order to reach the telephone wires, therefore, for the purpose of making repairs or other purpose, it was necessary that the workman should ascend between the power and light wires and the pole, and, where a new wire was needed (for the telephone service), it was necessary that, whilst, himself, so ascending, he should pass such new wire around upon the outside of the power and light wires. Moren appears to have reached the scene about 8 o'clock in the morning and to have spent some time in investigation, during which he ascended the pole to the place where the telephone wires were strung. He then concluded that he needed assistance, and about 10 o'clock went to a residence in the neighborhood, and telephoned the main office of his company to that effect, and the man who received the message, and whose duty it was to attend to such matters, answered, telling him to "let the line go" until 1 o'clock, at which hour a helper would be sent to him. He, however, appears to have decided that, rather than wait, he would endeavor to go on with the job by himself, and shortly after he had sent the message he climbed the pole, carrying with him the end of a wire which came from a reel that was lying on the Chestnut street banquette, some 20 or 30 feet away, and he reached the cross-arms upon which defendant's wires were strung, and, whilst there, received a shock, and the next that was seen of him he was holding on to, and at the same time trying to fight himself loose from, one of the 2,300 volt wires on the middle cross-arm. The only witness who saw him at that moment was Mrs. Landry, who lived in one side of the double tenement in front of which the pole in question was situated, and she described what she saw as follows:

"While I was on my gallery, I was attracted by a peculiar noise, and I turned around and saw this man on the pole, and he seemed to have been holding his wires, or something, and sparks came out of his hands, and the man fought himself away from those wires and simply fell, and, when he struck the ground, he grunted, and that is all. * * * Q. What kind of a noise? A. It was just going as if something was frying."

The attention of William Dodge was attracted by a boy, who said, "Just look at that man falling," and Dodge looked, barely in time to see the body of Moren strike the wooden crossing over the gutter. He did not see the beginning of the fall, nor, did he go near the injured man after he fell. Moren was moved from the wooden crossing upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which he fell into Mrs. Landry's yard, but by whom the record does not show. Mrs. Behrens and Mrs. Govan, who live quite near, found him in the yard, and he told Mrs. Behrens that he fell because "he had to let go; that he was burning up." Dodge did not know whether he had gloves on or not, and neither of the ladies mentioned saw any gloves when they reached him, in the yard. They did not look about the place where he had fallen. A negro gardener, who was at work in Mrs. Behrens' yard, upon the corner diagonally opposite to that upon which the accident happened, testifies that Moren ascended to, and fell from, the top of the pole, and, catching on the power and light wires, fell from there to the ground. He thinks he had on gloves. Moren was taken, in the hospital ambulance (after being afforded some relief by the student in charge), to his home, and was thereafter treated by Dr. Dabney, who says:

"He suffered excruciatingly. * * * His suffering was constant * * * until he died, except in brief intervals when he was under pain-alleviating drugs."

The doctor also says that he died of lock-jaw on June 22d. E. L. Powell, division superintendent, and Loyd Dietz, chief city wireman, of the telephone company, called on Moren on the day of the accident, and they testify that he said that he, and not the "trouble man" at the office, was to blame. Powell's testimony reads, in part as follows:

"He said that he went up there to put a broken line in, and that, when he first arrived at the scene of the break, he thought it was a dangerous thing to attempt to put up the wire by himself; that he called up the trouble department of the telephone company, and, in talking to the young man in charge of the trouble desk, he explained just the condition, and told him that he was afraid to put up the wire by himself. The young man in charge instructed him not to put up the wire; that he would send a man up there to help him, * * * about 1 o'clock. He says, 'You just get it out of danger.' Mr. Moren told me that, after waiting a few minutes, being in a hurry, as he had other work, he decided that he could put the wire up himself, and he undertook to do so; and, in attempting to pass the telephone wire over the electric wire, his arm got too close to the electric light wire and it seemed to be drawn to the electric wire, he didn't know how, but that the whole thing occurred in a very short space of time, just as he was raising the wire over, and he received a shock and a burn. I asked him if he thought anybody was at fault in the matter, at all, and he said, no, he did not blame anybody. He said: 'I ought to have known better than to have attempted to put that wire up myself,' and he said that the trouble chief * * * told him not to try it. Q. What appliances does the telephone company require its men to have in doing this kind of work? A. When putting up broken wires, and particularly, when putting them up in a dangerous locality, the men are required to use a hand line, a rope; instead of attempting to draw the wire over, they pass the rope over from a safe position, and pull it out of the way. They are also required to have rubber gloves. Q. Did Mr. Moren tell you whether he used any one of these appliances? A. I didn't ask him and he didn't tell me. * * * The immediate cause of the accident was undoubtedly, in my mind,

coming in contact—that is, the telephone wire that he held in his hand—with the electric wire, or it came in contact with his arm or hand. * * * Q. Your company owns that pole? A. Yes, sir. * * * Q. Therefore your company had to give permission to the Electric Light Company to string its wires on it? A. Yes, sir; there was an agreement, either with the New Orleans Railway Company or with the Edison Company. I think the agreement is an old one with the Edison Company. * * * Moren was quite a reliable, honest, sober, and industrious man," and he was regular in his work.

Dietz, after testifying that he had been for 12 years in the employ of the telephone company, that he had instructed Moren as to the danger of passing through electric wires, that he had himself "many times" climbed upon the pole upon which the accident happened, and that there was room enough, between it and the power and light wires, for him to pass in safety, was cross-examined by plaintiff's counsel (he and the other employees of the telephone company having been called as witnesses for defendant), as follows:

"Q. What is the object of insulation on these dangerously charged electric wires? A. I can't say. Q. You don't know why electric wires are insulated? A. No, sir. Q. And you are the chief city wireman of the Cumberland Company, situated in New Orleans? A. I can't say why they insulate them. Q. And you make that admission? A. Yes, sir. Q. And you testify that you are absolutely ignorant? A. I know, but I don't see any reason. Q. You don't see any reason for carrying a current severe enough to kill a man? By Mr. Kernan (counsel for defendant): Q. You stated you didn't see why they insulated the wires; tell us why? A. Well, that is the reason, I don't know; but from my own standpoint, it is because I treat all electric wires as not insulated, and that would be a chance for everybody to protect themselves. When I see an electric light wire I treat as a bare wire."

Mrs. Moren testified, in part, as follows:

"From the time my husband was brought home, in a helpless condition, until lockjaw set in, which prevented his talking, he told me, at different times, how the accident occurred. * * * The accident was caused by his ascending the pole, about 25 or 30 feet, with the wire of the Cumberland Telephone & Telegraph Company in his hand, and in passing that wire over and through the New Orleans Railway & Light Company's wires, which he was compelled to do; * * * there was a contact with a worn wire of the defendant company, and the shock was so great that Mr. Moren was drawn on the insulated wires; his left hand and fingers were burned to a crisp. He jumped to free himself from the improperly insulated wires, and fell to the ground, and the bones of his left wrist were broken and the thumb of his right hand was dislocated at the first joint. His spine was injured in the fall, and he suffered untold agonies every minute. He was hurt internally. The jump was made to save himself from being burned to death. When brought home, he was helpless and was never, afterwards, able to turn over in bed. He had to be turned over every 30 minutes, both day and night, and I was by his side almost all the time. * * * About Wednesday, after the accident" (which seems to have happened on Saturday), "an agent of the defendant company came to see Mr. Moren and to take a statement from him. In answering the questions of the agent, Mr. Moren was weak and indistinct, and the agent asked him the direct question: 'You don't claim that it

was our wires that caused your injuries, do you?" Mr. Moren replied, "Yes; I do say it was the improper insulation of your wires which caused me to be in this fix."

On the day after the accident, Jules Meyer, the assistant to defendant's general foreman, made an inspection of the pole and wires in question, and, speaking of the wires he says:

"Well, the wires were all right—a little weather-beaten. I saw a little spot where the man got burned, and that is the only place where I could see any wrong. Q. On what wire was that? A. On the second arm; on the primary. By the Court: You mean that wire carrying 2,300 volts? A. Yes, sir. By Counsel: * * * Q. What sort of wires are the electric light wires considered to be; * * * I mean in respect to their safety or danger? A. They are all insulated, of course, with the regular insulation we have all over the city. Q. Take one of these 2,300 volt wires, how do you look upon it when you handle it? A. We handle it with rubber gloves. Q. And, in taking something over it, to hang it higher up, what is the proper way to proceed to do it? A. You have to take a rope and tie your wire on it and get it to the height, then, swing it over, but the proper way is to throw the rope over it and get in such a position that you can clear your wires without touching anything else. If you come in contact with the electric wires, you have no show at all with them, and especially on a carbolineum pole."

The cross-examination of the witness proceeded, in part, as follows:

"Q. And you discovered on the 2,300 volt wire a defective spot, in the insulation, where this man was burned? A. Yes, sir; I saw a little of the skin of his hand on it. Q. Skin from the palm of his hand? A. Yes, sir; it was sticking to the wire. Q. You also stated something with regard to the creosoted pole, or carbolineum pole, that was on the corner, and you gave your understanding, or belief, that the fact that the pole was creosoted made it—what? A. Made it more dangerous. Q. Was it more dangerous than a wooden pole? A. Why, yes, it was like iron. * * * Q. And all the officers in charge of your corporation know that? A. Yes, sir."

The witness further testifies that the telephone company had a wire running down the pole, into the ground, to protect its system from lightning. And he was asked:

"Did that have any bearing on the accident?"

To which he answered:

"It was against the pole."

He was then asked:

"The pole was a good conductor, and, besides, it had this wire on it?"

And he replied:

"Yes, sir."

Wm. Murphy, defendant's general foreman, visited the scene on the day of and after the accident, and climbed the pole. Being asked what he found he said:

"Some few small, little, places on the 2,300 volt wire, underneath which was covered on top like a little finger mark."(?)

City ordinance No. 13,970, Council Series (adopted February 1, 1898), contains, among others, the following provisions:

"Electric Light and Power Wires.

"aa. Electric light and power conductors shall be secured to insulating fastenings, covered with an insulation which is waterproof and not easily abraded. Whenever the insulation becomes impaired it shall be renewed immediately.

"bb. In the construction of lines, the insulation to be used shall be approved by the city electrician, in writing.

"General.

"Sec. 2. All * * * corporations violating any of the provisions of this ordinance shall, on conviction, * * * be fined," etc.

A. L. Black, defendant's engineer, testifies that he did not recall submitting the wires (referring to the insulation) to the city electrician, and further, as follows (on direct examination):

"Q. What sort of insulation is used on those wires? A. All of our wires, on poles, have on them insulation known as waterproof. Q. Do you know what sort of insulation the wires had at that time? A. I understand they had the usual insulation—triple plate. Q. Where does the railway company get its wire from that it uses in this system? A. From standard manufacturers, and there are a number of them.

* * * Q. In reference to insulation, what is the use or purpose of that insulation? A. The weather proof covering of a wire consists of a cotton tape impregnated with asphaltum; its value as an insulator is almost nothing, and it is simply used to prevent actual contact between the wires, in case they blow together or, accidentally, touch. When this insulation is perfectly new, it has some value as an insulator, but it is rapidly washed out, and, in the course of a few months, it is useless as an insulator. Q. What is the only safe insulation known in the electrical world? A. There are several classes of insulation used; they either use rubber, in some cases, paper, and in some cases, varnish, cambric, or silk. Q. Why don't you use that kind of insulation? A. It would not be permanent in the weather, and it is not necessary; there is no reason for other contractors coming in contact with our wires, on our poles; we rely on the class of insulation attached to the cross-arm. * * * (Cross-examination):

* * * Q. What is the relative cost between the ordinary tape insulator that you testified to be used for these high current wires that your company use and the better insulation which gives more thorough protection from contact with the current? A. The better insulation is of a higher cost. Q. It is very much more expensive, is it not? A. It depends upon the extent to which it is carried; yes. Q. Mr. Black, you have testified that this tape insulation, which is used by your company on its high current wires, is only effective for a short while, and, after it is exposed to the atmosphere and weather, it is absolutely useless? A. Yes, sir. Q. Do you know how long this wire was up, on this particular corner? A. No, sir."

Whether the agreement, under which defendant strings its wires on the poles of the telephone company, includes any provision with reference to the liability of the respective companies for damages for injuries to employes does not appear. The fact that the employes of both companies are massed on the side of the defendant would seem, however, to suggest an inference to that effect.

Opinion.

Defendant's engineer testifies, in effect, that the so-called insulation upon its wires was never approved by the city electrician; that the so-called "weather proof tape, impregnated with asphaltum," which defendant uses, is worth "almost nothing" for that purpose, even when new, and is rapidly washed out, and, in the course of a few months, becomes absolutely worthless; that he did not know how long the particular tape had been on the wire here in question; and that a better insulation could be obtained "at a higher cost." The city ordinance, upon the other hand, reads:

"Electric light and power conductors shall be secured by insulating fastenings, covered with an insulation which is waterproof and is not easily abraded. Whenever the insulation becomes impaired, it shall be renewed immediately. * * * In the construction of lines, the insulation to be used shall be approved by the city electrician, in writing. * * * All * * * corporations violating any of the provisions of this ordinance shall, on conviction, * * * be fined," etc.

Comparing what defendant did with what the law required it to do, it is evident that it not only failed to comply with the obligations imposed by the ordinance, but that the course pursued by it was more dangerous to human life than mere noncompliance, since it held out to the public an assurance of compliance upon which the uninformed might be led to rely, and thereby led, also, to sudden death. In *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452, it appeared that (as in this case) plaintiff's decedent was an employé of the telephone company, and that he lost his life by reason of accidental contact between a wire that he was handling and a "span" wire, charged with a high voltage, through lack of insulation of the main power wire which it was supporting. It does not appear that there was any ordinance of the city of Shreveport requiring the railway company to insulate its wires, but this court held that such obligation was imposed on it by the general law, the opinion on that point reading, in part, as follows, to wit:

"Using an agency of such subtle and dangerous power as electricity, the burden of the utmost care and vigilance to keep all wires connected with the trolley perfectly insulated was upon the company. * * * Defendant company knew that the employés of the telephone company must needs be in the street and on the poles and among the wires in the discharge of their duties. It knew that wires for the telephone service were continually being strung, and, since there was joint occupancy of the street by the two companies with their poles and wires and servants, it was all the more incumbent upon that one of the companies whose wires carried the deadly current to see to it that its transmission was effected with safety to all concerned."

In *Hébert v. Lake Charles, etc., Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505, it appeared that a wire of the telephone company, having been blown

loose in a storm, fell across an uninsulated wire carrying a high voltage, belonging to the defendant, and that, defendant's wire having been burned in two, one end of it came in contact with the husband of the plaintiff, who, at night, was seeking shelter from a shower, under a shed, with the result that he was killed. In the course of the opinion the court said:

"In the case at bar, the defendant was in default as to the condition of its wires at the point where the accident took place, not only as respects extraordinary storms, but as to events likely to happen, at any moment, from the simplest causes. It was failing, and had, for a long time before, failed, to have placed matters in such a condition as was required of it, affirmatively, to do, for the public safety not only by the general law, but as the condition upon which it had been granted the right or privilege of stringing its wires on the public streets. Had its wires been, in fact, in such a condition as they were required to be at the time of an extraordinary storm, a different case would be presented to us. * * * The care and true caution required at the hands of the defendant were not simply the ordinary care of a reasonably prudent man. In the case of *Will v. Edison Electric Illuminating Co.* [200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732], the Supreme Court of Pennsylvania laid down the rule applicable to a company, like the defendant, making use of a dangerous agency; that it was bound to know, not only the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them. The defendant (the court said), in accord with the common practice of electric companies, recognizes this obligation by insulating its wires; but the duty was not only to make the wires safe by proper insulation, but to keep them so by constant oversight and repairs."

The duty thus referred to was imposed on the defendant now before this court, not only by the general law, but, categorically, by special ordinance, and it has been here shown, not only that defendant and the telephone company are joint occupants of the streets, but that they are joint occupants of the poles upon which they string their wires, and that defendant must have known that, in reaching the telephone wires, it would be necessary for the employés of the telephone company frequently to pass between, and in close proximity to, its (defendant's) heavily charged light and power wires.

The answer which defendant, speaking through its engineer, makes to the charge—that it has neglected to make proper provision with reference to the conditions stated for the handling of the dangerous agency which it controls—appears in the testimony of the officer mentioned, as follows:

"Q. What is the only safe insulation known in the electric world? A. There are several classes of insulation used; they are either rubber; in some cases, paper; and in some cases varnish, cambric, or silk. Q. Why don't you use that kind of insulation? A. It would not be permanent in the weather, and it is not necessary; there is no reason for other contractors coming in contact with our wires, on our poles; we rely on the class of insulation attached to the cross-arm."

The city ordinance, which is here invoked, does not contemplate that the insulation shall be permanent, but it specifically provides that, whenever it becomes impaired, "it shall be renewed, immediately." It may be that there is no reason why other contractors should come in contact with defendant's wires, on defendant's poles, but the evidence shows that the pole upon which Moren lost his life was not defendant's pole, but belonged to the company for which Moren was working, and, by agreement, was so used by both companies that the employes of the telephone company were at all times, when handling their own wires, in danger of coming in contact with those of defendant. Whether it is necessary that defendant's wires should be insulated is a matter which the city council has determined, in passing the ordinance, and defendant is without authority to decide that the ordinance applies only to those persons who may get in the way of the death dealing agency controlled by it as a result of ratiocination, rather than of imprudence, inadvertence, or accident. When, in the case to which we have above referred, Potts' friend, Whitworth, saw him being burned up, by contact with a live wire, he did not stop to reason the question out, but, upon the impulse of the moment, laid his hands upon Potts, or the wire, or both, with a view of separating them, and was instantly killed, but this court held that his widow and minor child were nevertheless entitled to recover for his death. *Whitworth v. Shreveport Belt R. Co.*, 112 La. 363, 36 South. 414, 65 L. R. A. 129. In a still later case, the court was dealing with a claim for damages, resulting from the nonobservance of an ordinance, reading in part as follows:

"Where there are two tracks, * * * the electric car coming in the opposite direction of the car that has stopped to permit a passenger * * * to get off * * * must stop * * * long enough to permit the passenger * * * who alights * * * to cross the tracks, if the passenger so desires."

It was said that the passenger who had alighted from a car that had stopped was guilty of negligence in not looking, before attempting to cross the adjacent track, to see whether there was a car approaching thereon. This court, however, said:

"The very object of the ordinance was to protect the citizen from the consequences of his own forgetfulness or imprudence in that respect. The ordinance was not enacted in the interest of any particular person, but in that of the general public, known to be not as careful as the danger of the situation would require."

(And to that, it may be added, that as a railway company operates its electric cars through the streets of a city only by virtue of a special grant of authority, and not by the natural right that a citizen exercises in walking through the streets, it must operate them subject to the conditions of the grant or not at all.) The court (in the case referred to) then took up the defense that

the plaintiff saw the car by which he was injured approaching, and deliberately took the chances of being able to cross the track ahead of it, and, in considering it, practically conceded that, if the facts were as stated, such defense would be good; in other words, that, notwithstanding the railway company might have violated the ordinance, such plea of contributory negligence might be successfully urged. But it found against the defendant on the facts. *Jones v. New Orleans Ry. & Light Co.*, 123 La. 1066, 49 South. 706. And the same thing may be said here; that is to say, if it were shown here that the decedent, knowing that defendant's wires were practically uninsulated and bare, and knowing that contact between them and the wire that he was handling would result in his death, had recklessly placed himself in a position to render such contact probable, we should say that no damages could be recovered. But that is not the case presented. The defendant professed and now professes to have complied with the ordinance. Its learned counsel say, in the very able brief filed by them:

"In any event, the insulation was sufficient to prevent the wires, while in the air, from coming in contact, and that was all that the ordinance was intended to effect."

And upon that theory defendant had covered its wires with a cheap material, which, from the beginning, was almost, and at the time of the accident was absolutely, worthless as an insulator. And there is nothing in the record which would authorize this court to hold that any one save defendant's engineer was apprised either of the construction which defendant had placed upon the ordinance or of the condition resulting from the practical application of that construction. In our opinion, that construction is wholly unwarranted; and though it may be that the employes of both the railway and the telephone companies have usually dealt with the wires of the former as though they were bare, it does not follow that in a case where injury, resulting in death, has been inflicted upon a citizen, whether employed by the telephone company or not, by reason of his failure to observe that precaution, and of his having assumed that the railway company had complied with the plain and imperative requirements of the law, the railway company is to escape liability, upon the plea that it was the duty of the citizen to look out for himself. There are usually two factors of safety in any condition in which harm may befall one person by the act of another; the one, the instinct and obligation, of self-preservation, the other, the duty which every one owes to so use his own as not to injure another; and where that which one uses is an agency of an extraordinarily dangerous character, the law throws upon the user the burden of the greater care. No doubt, at this time, most people have certain information in regard to the danger of contact

with electric wires, and yet it can readily be imagined that if a bare wire, carrying 2,300 volts, were stretched along a street of New Orleans, at the height of a handrail from the sidewalk, the loss of life would be appalling, and the danger from such wires, strung, as they are, 30 feet above the sidewalk, is only less, to those who are required to work among them, in proportion, partly to their experience, but, mainly, to the capacity of the individual to maintain, at all times, absolute control of the operations of his mind and his physical members. He who, under such circumstances, allows his thoughts to wander, or his hand to move without due consideration, dies. As to the man whose death is the cause of this litigation, there is nothing in the record to show that he knew that the insulation on defendant's wires was in the condition described by defendant's engineer. It may be conceded that, like others who work among such wires, it was his habit, *ex abundanti cautela*, to make use of ropes and gloves, but, so, a business man may habitually require more security than he needs for the money that he loans, and yet, he is not necessarily incautious, because, on a particular occasion, he requires only that which, under the law, appears to be sufficient.

There is no direct evidence in the record that Moren was not using all the appliances with which, it is said, he should have been supplied. Neither of the witnesses who saw him on the pole was asked whether he had a rope attached to the wire that he was carrying. Mrs. Behrens testified that he carried a wire up with him, but, being asked whether he carried it in his hand or attached to his body, said she did not know. Washington, the negro gardener (the only other witness who is said to have seen him climbing the pole), testified that he carried one end of a wire, in his hand, but he also testifies that he went to the top of the pole, and that he wore gloves, and he was not asked whether there was any rope attached to the wire. In fact, no one's attention was attracted to that point. Mrs. Moren says that he told her that he ascended the pole with a wire in his hand; but Superintendent Powell testifies that he did not ask Moren whether he used a rope or gloves, and that Moren did not tell him. We are therefore in doubt as to how he would have answered that question if it had been asked, and speaking as he was, to his wife, in the very agony of impending death, he might not have considered it any more worth mentioning than did Mr. Powell; or, Mrs. Moren, in attempting to repeat what he said, may have allowed it to escape her. As to the gloves, it appears to us to be remarkable that no witness was called, save the boy Dodge, who saw Moren whilst he was on the crossing, where he fell, or who could tell anything about the manner of his removal into Mrs. Landry's yard, and Dodge merely saw him fall, but did not go near him and did not know whether he had gloves on or

not. Mrs. Behrens and Mrs. Govan say that they saw no gloves near him, as he lay in the yard, but it was not to be expected that they should. Some time had then elapsed since his fall, and those who had handled him in the meanwhile might very well, as a matter of common humanity, have cut the gloves from his hands. Counsel for defendant say:

"Moren was an experienced lineman, and knew that electric wires were dangerous. * * * When Moren investigated the trouble he was sent to repair, he knew that it would be dangerous for him to undertake to repair it without help. The evidence shows that Moren was an experienced lineman, and knew the dangerous nature of the work he was engaged upon. * * * He was engaged in work requiring knowledge of different kinds of conductors of electricity and of the methods of handling such conductors, and, necessarily knew the dangerous consequences to himself should he in any way permit his body to become part of the electric circuit by coming in contact with an electrically charged and grounded conductor."

And Superintendent Powell testifies that Moren was entirely familiar with his duties and with the dangers incident thereto. But, if all that be as stated, why should it be assumed, in absence of positive evidence to that effect, that in an emergency, when he was trying to get along without a helper, Moren should have neglected precautions for his own safety which, according to the view of defendant's witnesses, would not have been neglected by the most thoughtless apprentice? Again, and accepting for the moment the construction which the defendant places on the city ordinance, it was at least bound to so cover its wires as to prevent them, "while in the air, from coming in contact," by which we understand the learned counsel to mean that the covering should be of such a character as to prevent, in case of casual contact, the current from one wire being discharged into the other. But the consensus of the testimony for the defense seems to be that it was by just such casual contact between the wire that Moren was carrying and defendant's primary wire that Moren received the shock which resulted in his death. It is said that the impaired condition of the insulation was obvious, and that there should be no recovery on that account; but, the evidence does not sustain that theory. Murphy, defendant's foreman, who inspected the wires a few hours after the accident, says he found some "few small, little, places" on the 2,300 volt wire. And Meyer, the assistant foreman, who made an inspection the next day, says:

"Well, the wires were all right—a little weather-beaten. I saw a little spot where the man got burned, and that is the only place that I could see any wrong."

Both the witnesses went there for the express purpose of finding defects, if any there were, and the only defects which they found were those which were marked by the impress of Moren's fingers, or the skin which had been burned off of them; indications

which, of course were not to be seen by Moren.

Our conclusion is that plaintiff is entitled to recover. It appears that Moren was 36 years old and was earning \$75 per month, and that he left a widow and a minor child (a girl), between two and three years old, both in destitute circumstances. The suit is brought, in the right of the decedent, for his suffering prior to his death, and, in the right of the widow and minor, for loss of companionship and support, the total amount claimed being \$25,000. We are of opinion that this total should be reduced to \$10,000, divided as in the decree.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiff, Mrs. Linnie Cornelia Wilson, widow of Charles Moren, individually, and as guardian of her minor child, Ruth Evelyn Moren, and against the defendant, the New Orleans Railway & Light Company, in the sum of \$10,000, with legal interest thereon from the date at which this judgment shall become final until paid; one half of said amount to inure to said widow, individually, and the other half to be paid to her, as guardian, for the use and benefit of said minor. It is further decreed that defendant pay all costs.

PROVOSTY, J., dissents.

(125 La.)

No. 18,103.

STATE v. LATHAM.

(Supreme Court of Louisiana. March 28, 1910.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1156*)—APPEAL—REVIEW—RULING ON MOTION FOR NEW TRIAL.

The trial judge being in a much better position to estimate the value of the testimony given in support of a motion for new trial in a criminal case, and the matter of granting or denying such motion being largely within his discretion, this court would hesitate, under any circumstances, in reversing his ruling on the subject. In this instant case, it has no hesitation in affirming it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

(*Additional Syllabus by Editorial Staff.*)

2. CRIMINAL LAW (§ 911*)—APPEAL—DISCRETION OF COURT—DENIAL OF NEW TRIAL.

In a criminal case, the court held, under the evidence, not to have abused its discretion in denying a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 911.*]

Appeal from Eighth Judicial District Court, Parish of Franklin; D. N. Thompson, Judge.

Ora Latham was convicted of crime, and he appeals. Affirmed.

See, also, 124 La. 876, 50 South. 780.

Ellis & Dorsett, for appellant. Walter Guion, Atty. Gen., and R. J. Wilson, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

Statement of the Case.

MONROE, J. The jury convicted defendant by a vote of nine to three; Robert Killian being a juror who had voted with the majority. Thereafter a motion for new trial was made, on the ground that defendant had discovered, after the trial, that Killian had previously, on more than one occasion, expressed the opinion that he (defendant) was guilty and should be punished, which motion was verified by the affidavits of Mrs. H. C. Abell, Curtis Baird, W. J. Ensminger, and Mack Wiggers. When the motion was called for hearing, however, those persons, through misunderstanding on the part of the defendant's counsel, were not present, and, though the juror was heard to testify, they were not, and the motion was denied. On the appeal, the ruling of the court in that respect, and the sentence, were set aside, and the case was remanded for a rehearing of said motion. On the rehearing, defendant produced witnesses who testified in effect as follows: Curtis Baird: About May 15, 1909 (it being charged that the homicide was committed about April 25th), he heard Killian say that "if he ever got on the jury he would send Mr. Latham down the river"; that was said on the back gallery of a house, near Winnsboro; could not tell what else was said; that is all that was said; made it known on the day of the trial, before the verdict, to a boy in the blacksmith shop. Mrs. H. C. Abell: Heard Killian say that, if he was on the jury, he would hang that man; know that he was talking of Latham; do not know to whom he was talking; he was behind the house, and only saw Killian; know that he was talking to some one, because he could not have been talking to himself; does not know whether anything else was said; Killian walked right off; told defendant's attorney as soon as defendant was convicted; Latham's wife was staying at her house; witness took a very active interest in his behalf "before and during the trial"; heard Killian say nothing before or after the remark testified to; and does not know to whom he was talking. Mack Wiggers: On or about May 8th heard Killian say that Latham ought to be punished for the killing of John Bowman; does not know where the statement was made, or to whom; witness was passing by a crowd; does not know how many; did not hear anything else; could not name any one in the crowd; heard no other talking; does not remember in what part of the town it was; knows everybody living in or about Winnsboro; remembers that the crowd was on Prairie street, but

cannot remember what part of the street. S. N. Dorsett (defendant's counsel) did not know, when Killian was accepted, that he had ever expressed an opinion about the guilt of Latham. He answered, on his voir dire, that he had not.

On the part of the state, the testimony was in part as follows: Killian (the juror) never discussed the case in Winnsboro, before the trial; made no statement, back of Mrs. Abell's house, or to Mrs. Abell; is not in favor of capital punishment; did not discuss the matter, or say that Latham ought to be punished, in any crowd; had no prejudice against Latham; made no statement, in the presence of Baird, to the effect that Latham ought to be convicted.

C. L. Snyder, assessor, testifies that Killian's standing is good, and he thinks his honesty unquestionable.

W. E. Robinson, police juror, has known Killian all his life; thinks he has a good reputation. W. H. Adams, sheriff, to the same effect.

Opinion.

The judge a quo says "the verdict was justified by the evidence," and, further, in effect, as follows: That in the original affidavits of Baird, Wiggers, Ensminger, and Mrs. Abell it had been stated that Killian knew all the circumstances of the killing, but that no such showing had been made on the trial of the motion; that Ensminger, though in court, had not been sworn as a witness; that Baird, Mrs. Abell, and her son, Mack Wiggers, fixed the dates of the statements testified to by them more than four months before the trial; that the statement testified to by Baird was said to have been made at an ice cream supper, where there were 25 or 30 people, and no one appears to have heard it, save an unidentified "medicine man"; that Baird could give nothing that was said before or afterwards; that Mrs. Abell professed to have heard a remark which nothing led up to, and did not know whether Killian was talking to her or to some one else, though she was not engaged in conversation with him, and she saw no one else. The judge then refers to the testimony of Mack Wiggers; says that Killian did not live in Winnsboro, but in the country; that he barely knew the accused and the deceased; that he had no interest in either; that "it is claimed" (he disclaimed) "that he knew anything about the facts of the killing or the cause that led up to it"; that he bears a good reputation; and he concludes as follows:

"I have given the case a patient consideration, and cannot reach the conclusion that such a showing has been made as would justify the court in setting aside the verdict on the ground presented. If I entertained any doubt as to the correctness of the conviction, I would sustain the motion. It is true the case is an im-

portant one and of serious consequence to the accused, carrying with it an imprisonment in the penitentiary for a term of years; but the court cannot be expected to go contrary to its deliberate and conscientious conviction, and set aside a verdict on such unreasonable and improbable testimony."

We have only to add that, the trial judge being in much better position to estimate the value of the testimony relied on in a case such as this, and the matter of granting a new trial being largely within his discretion, we should, under any circumstances, hesitate about reversing his ruling. As it is, we have no hesitation in saying that we fully and entirely agree with him.

Judgment affirmed.

(125 La.)

No. 18,015.

STATE v. LE BLANC.

In re LE BLANC.

(Supreme Court of Louisiana. Jan. 17, 1910.
On Application for Rehearing,
Feb. 14, 1910.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW (§ 1158*)—PROHIBITION (§ 28*)
—FINDINGS—CONCLUSIVENESS.

A finding of the trial judge on a trial for selling spirituous liquors in violation of Rev. St. § 910, that near beer or silver spray is a spirituous liquor, based on an agreed statement of facts that the beverage is a beer from which all but one-half of 1 per cent. of the alcohol has been evaporated, and that it cannot be taken into the body in sufficient quantity to produce intoxication, and that the federal government allows its sale without a revenue license, is not reviewable in the Supreme Court on certiorari and prohibition.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158;* Prohibition, Dec. Dig. § 28.*]

Breaux, C. J., dissenting as to refusal of rehearing.

Roman Le Blanc was convicted of selling spirituous liquors, and he applies for certiorari and prohibition. Application dismissed.

See 124 La. 974, 50 South. 814.

Story & Pugh and Howe, Fenner, Spencer & Cocke, for relator. Walter Gulon, Atty. Gen., and John J. Robira, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

PROVOSTY, J. The relator was charged under section 910 of the Revised Statutes with having sold spirituous liquors, "to wit, near beer, a certain beverage known as silver spray," at retail without a license.

The case was submitted to the trial judge upon an agreed statement of facts. He found relator guilty and sentenced him to pay a fine of \$500. Relator moved in vain for a new trial, and then appealed to this court. This court rejected the appeal, as not involving any question of law, but only a question of fact upon the guilt or innocence

of the defendant, of which this court had no jurisdiction.

The question of fact is whether near beer or silver spray is a spirituous liquor. The agreed statement of facts shows that it is beer from which all but one-half of 1 per cent of the alcohol has been evaporated, and that it cannot be taken into the human stomach in sufficient quantity to produce intoxication, and that the United States government allows its sale without a revenue license. The trial judge's appreciation of these facts led him to conclude that the said beverage is a spirituous liquor. By a settled jurisprudence this court has no jurisdiction to review the trial court's appreciation of the facts upon the question of guilt or innocence, or, in other words, upon the question of whether the evidence adduced on the trial has or not supported the allegations of fact of the indictment. This court has heretofore refused to entertain this jurisdiction, even by writ of review under its supervisory power over inferior courts. *State v. Bauriens*, 117 La. 136, 41 South. 442. This is not a case of arbitrary abuse of authority, but of honest exercise of the discretion vested in the trial judge.

The writ nisi is recalled, and the application of relator is dismissed, at his cost.

On Application for Rehearing.

PER CURIAM. Rehearing denied.

BREAUX, C. J. (dissenting). If there was no evidence to convict, and no ground to draw conclusions of guilt, certiorari should lie.

The contention of applicant is that there is no evidence whatever to justify conviction, and the contention is sufficiently sustained on the face of the papers to warrant the issuing of the writ of certiorari.

The defendant should have a hearing under the supervisory jurisdiction of this court. For authority, see *Graffina v. Recorder*, 52 La. Ann. 694, 27 South. 564; *City of New Orleans v. Judge*, 52 La. Ann. 1275, 27 South. 697; *State v. Summerlin*, 116 La. 455, 40 South. 792.

If it be true that judgment was rendered as alleged, and verified by oath that no evidence was introduced, it is a fundamental error. The question is one which should be heard particularly, as the rule to compel respondent to answer has already been issued. Whether the writ should be granted and made perpetual is another matter. My only dissent is directed to the refusal to hear the application at all. It should not have been dismissed as if before the court as when application is considered the first time. It would be time enough, after further examination, to decide whether or not the proceedings should be annulled.

The question is not as to the weight of the testimony, but whether or not there is testimony at all. Not sufficiency, but entire want, of evidence is the question.

I am constrained to dissent, as I think that a rehearing should be granted.

(125 La.)

No. 17,776.

BAKER v. BAKER (BANK OF DELHI,
Intervener).

(Supreme Court of Louisiana. March 28,
1910.)

(Syllabus by the Court.)

1. GIFTS (§ 41*)—INTER VIVOS—REVOCATION.

A donation of lands made on certain potestative conditions may be revoked by the donor on the failure of the donee to perform, and where it was stipulated that, in the event of such failure, the conveyance shall be null and void, if the donor so elect, and the donor brought suit to annul on the ground of nonperformance of the conditions, *held*, that it was too late for the donee or his mortgage creditor to tender performance, and that the court had no power to grant delay in such a case.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 20; Dec. Dig. § 41.*]

2. GIFTS (§ 26*)—INTER VIVOS—VALIDITY—EXECUTION.

A deed of gift of lands in Louisiana, executed by the donor alone in the state of Texas by private act and acknowledged before a notary public, is null and void for want of the formalities required by the laws of the situs.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 4; Dec. Dig. § 26.*]

3. ACKNOWLEDGMENT (§ 19*)—AUTHORITY TO TAKE—EXTRATERRITORIAL AUTHORITY.

A deed of gift under private signature, attested by two witnesses and acknowledged by the donor before a notary in another state, is not such an authentic act as is required by the law of Louisiana to evidence donations of immovables.

[Ed. Note.—For other cases, see *Acknowledgment*, Dec. Dig. § 19.*]

4. GIFTS (§ 41*)—ACTION TO ANNUL—GROUNDS.

A donor in the same action may set up different grounds for annulling the donation, such as nonperformance of conditions imposed on the donee and the nullity of the donation for want of form.

[Ed. Note.—For other cases, see *Gifts*, Dec. Dig. § 41.*]

5. GIFTS (§ 41*)—ANNULMENT—REVERSION OF PROPERTY.

Where a donation is annulled, the property reverts to the donor free from all incumbrances and mortgages created by the donee.

[Ed. Note.—For other cases, see *Gifts*, Dec. Dig. § 41.*]

6. GIFTS (§ 41*)—ANNULMENT—BETTERMENTS—RIGHT OF DONEE.

Where a donation is annulled, the donee has no equitable claim for improvements and betterments, when their cost is less than the value of timber on the premises converted to his own use by the donee.

[Ed. Note.—For other cases, see *Gifts*, Dec. Dig. § 41.*]

Appeal from Eighth Judicial District Court, Parish of Franklin; D. N. Thompson, Judge.

Action by Mrs. Eliza Baker against John H. Baker, in which the Bank of Delhi intervened. Judgment for plaintiff, and intervenor appeals. Affirmed.

Howe, Fenner, Spencer & Cocke and C. J. Ellis, for appellant. H. Flood Madison, for appellee Eliza Baker. J. S. Peters, for appellee John H. Baker.

LAND, J. On the 21st day of May, 1898, Mrs. Eliza Baker, widow, of Parker county, state of Texas, executed a deed of gift to her son, Jno. Baker, of Franklin parish, state of Louisiana, his heirs and assigns, of certain tracts or parcels of land situated in said parish and state. This gift, or donation, was made on the following conditions, viz.:

"That the said John Baker, his heirs or assigns, shall pay or cause to be paid to me, the said Eliza Baker, the sum of \$500 annually on the 1st day of each January hereafter, until my death, when the fee in and to said land shall vest absolutely in the said Jno. Baker, his heirs or assigns.

"In the event that the said sum of \$500 annually is not paid as above specified, then, at any time after the failure so to pay, if I so elect, this conveyance shall be null and void, and the said land shall revert to me free from all claims whatsoever."

This instrument was signed "Eliza Baker," and was attested by two witnesses. On the same day the following acknowledgment was attached to said instrument, to wit:

"Before me, the undersigned authority, on this day personally came and appeared Mrs. Eliza Baker, to me personally known, who acknowledged to me, in the presence of two subscribing witnesses, that she had signed and accepted the above and foregoing as her voluntary act and deed, and for the uses and purposes therein set forth.

"In faith whereof I hereunto set my hand and seal of office this 21st day of May, 1898."

"[Signed] Henry Miller, Notary Public."

This instrument was recorded in Franklin parish, La., in the year 1902, and the grantee accepted the gift by entering into possession of said tracts of land, on which there was a farm and much valuable timber.

The son complied in part with the condition of the donation, but was always in arrears, and made no payments whatever for the years 1907 and 1908. In fact, the donee became insolvent.

This suit was brought to have the donation decreed null and void for nonperformance of the conditions imposed on the donee, and to recover the property free of all incumbrances, and for the rents and revenues of the same for the years 1907 and 1908.

Some weeks after the institution of the suit, the Bank of Delhi, claiming that it held a special mortgage for \$8,000 on the property, executed in its favor by the donee, tendered to the plaintiff \$4,100 in settlement of her claims, and on the same day filed its

petition of intervention, praying that the plaintiff be condemned to accept said tender in full settlement of her rights, that the said mortgage be recognized and enforced against the property, and that the same be sold subject to her future rights as set forth in the act of donation. The intervenor also alleged that the suit was fraudulent and collusive for the purpose of screening the property of the defendant from the pursuit of his creditors, and especially for the purpose of defeating the rights of the intervenor.

For answer to the petition of intervention the plaintiff denied the allegations of fraudulent collusion, denied the alleged good faith of the intervenor in taking the mortgage in the face of the duly recorded act of donation showing that the defendant had a defeasible title, and averred that said act was null and void in law because it was not passed before a notary public and two witnesses. The plaintiff set up the same alleged cause of nullity by amended petition. The intervenor filed a plea of estoppel against the additional cause of nullity set up in plaintiff's answer to the petition of intervention, because of inconsistency with the allegations and prayer of her original petition.

The defendant answered, denying the intervenor's allegations of fraud, but admitting the indebtedness claimed by the Bank of Delhi. Defendant answered the petition of the plaintiff, admitting all the allegations of facts therein contained, and submitted the case to the court for such decision as the law and facts might warrant.

Upon the issues thus made the case was tried, and judgment was rendered in favor of the plaintiff as prayed for. The intervenor has appealed.

As the value of the lands donated exceeded by more than one-half that of the charges or services imposed on the donee, the rules peculiar to donations inter vivos are applicable. Civ. Code, arts. 1524, 1528. The deed of gift vested a conditional title in the grantee, and his nonperformance of the conditions vested a legal right in the grantor, at her option to declare the conveyance null and void. Plaintiff exercised her right of election by the institution of the present suit.

Donations inter vivos may be revoked or dissolved for the nonperformance of the conditions imposed on the donee. Civ. Code, art. 1559. But if the conditions be potestative—that is, if the donee is obliged to perform them—the dissolution must be sued for and decreed judicially. Civ. Code, art. 1565. In case of revocation or rescission on account of the nonexecution of conditions, the property returns to the donor free of all incumbrances or mortgages created by the donee. Civ. Code, art. 1568.

In case of nonfulfillment of conditions, which the donee is bound to fulfill, if it be proven to have proceeded from his fault, he may be condemned to restore the fruits by

him received since his neglect to fulfill the conditions. Civ. Code, art. 1569.

"The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals." Civ. Code, art. 1527.

By the terms of the act of donation the title of the donee was made dependent on the annual payment of \$500 to the donor until her death, and the nonpayment of any installment rendered the conveyance null and void at the election of the donor.

It is well settled in the jurisprudence of France that the donor may stipulate in his own interest that the revocation of the donation shall take place of right, and that such a stipulation is not contrary to public order or good morals. *Carpentier-Du Saint, Répertoire du Droit Français*, vol. 18, Nos. 2943, 2944, 2945. As a general rule in such cases a judicial summons is necessary to complete the revocation, if such a summons has not been specially waived; but the judge cannot grant a delay for the fulfillment of the conditions or the payment of the charges. *Id.* Nos. 2854, 2946, 2947, 2948, 2949, 2950.

The Code Napoléon, like the Civil Code, does not provide that the judge may grant a delay to the donee to perform conditions; but the court and jurists have applied to donations the same rule applicable to commutative contracts. *Code Nap.* art. 1184; *Civ. Code*, art. 2047; *In re Mechanics' Society*, 31 La. Ann. 634. Hence, whether the instrument sued on be considered a donation or an onerous contract, the judge has no power to grant delays, and the donee no right to perform or pay after the institution of suit.

We do not think that the so-called plea of estoppel can be sustained. The original petition sought to annul the donation on the ground of nonfulfillment of the conditions imposed on the donee. The amended petition and the answer to the petition of intervenor alleged another cause of nullity. Plaintiff sued to annul, and not to enforce the instrument.

"The donor cannot, by any confirmative act, supply the defects of a donation *inter vivos* null in form; it must be executed again in legal form." *Civ. Code*, art. 2273; *In re Lahaye*, 115 La. 1089, 40 South. 468; *Ackerman v. Larner*, 116 La. 101, 40 South. 581.

Estoppel has no application to a donation void in law *ab initio*.

The instrument sued on is in form an act under private signature. The law declares that:

"An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property * * * under the penalty of nullity." *Civ. Code*, art. 1536.

The contention that the notary's certificate of acknowledgment attached to the instrument converted it into an authentic act is

without force, as the acknowledgment was not signed by the grantor and the witnesses. An act, to be authentic, must show on its face that it was passed before a notary or other officer authorized to execute such functions and two competent witnesses. *Civ. Code*, art. 2234. The parties, the notary or other officer, and the witnesses must sign the act, in order to make it authentic.

The proposition that a notary by a mere certificate can convert an act under private signature into a notarial act is clearly untenable. *In Spanier v. De Voe*, 52 La. Ann. 584, 27 South. 175, the court said:

"The donor made this donation in this private instrument. The certificate of the commissioner adds no weight to it as a donation. It only proves that, prior to issuing it, the donor declared to him as a commissioner that the private deed was her own act of donation. This declaration, contained in a private deed, and the certificate that it had been made, do not have the effect of investing the deed with authenticity. In point of dignity, the certificate is not to be considered higher than the private act it certifies. The bed of the stream does not rise higher than its source."

In the same case the court quoted *Laurent*, as follows:

"The form prescribed is essential to the validity of the donation, and the writing which does not make proof of itself is null."

See, also, *Leibe v. Hebersmith*, 39 La. Ann. 1050, 3 South. 283.

It is not disputed that the instrument, as to form and effect, is governed by the laws of Louisiana. Not only was the property situated in the state of Louisiana, but the donation was without effect until formally accepted by the donee, who resided in said state, or until the donee was put into corporal possession of the property. *Civ. Code*, arts. 1500, 1541; *Succession of Larendon*, 39 La. Ann. 952, 3 South. 219.

The claim for improvements and betterments is precluded by the terms of the instrument, to wit:

"In the event that the said sum of \$500 annually is not paid as above specified, then at any time after the failure so to pay, if I so elect, this conveyance shall be null and void, and the said land shall revert to me free from all claims whatsoever."

In the absence of any stipulation on the subject, the property "returns free from all incumbrances and mortgages created by the donee." *Civ. Code*, art. 1568.

The trial judge found that the donee had converted to his own use timber on the premises of greater value than the cost of his improvements and betterments. We concur in this finding. It is also shown by the evidence that the rental value of the premises exceeded by far the charges imposed on the donee. Under this state of facts, there is no equity in the intervenor's claim for improvements.

Judgment affirmed.

(125 La.)

No. 17,832.

FIDELITY MUT. LIFE INS. CO. v. FITZPATRICK, State Tax Collector, et al.

(Supreme Court of Louisiana. March 28, 1910.)

*(Syllabus by Editorial Staff.)***1. TAXATION (§ 95*)—ASSESSMENT—PERSONALTY—MONEY LOANED.**

Transactions between a life insurance company and policy holders, by which the company advanced to the policy holders a part of the amount due at the time on the policy and received notes therefor maturing when the policy matured, were not loans to the policy holders, but merely advance payments, so that the company could not be assessed thereupon as for money loaned.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 95.*]

2. TAXATION (§ 500*)—COLLECTION—PROCEEDINGS—RELIEF—ALTERNATIVE RELIEF—REDUCTION.

The petition, in an action to cancel an assessment of personalty, prayed for judgment that the assessment against petitioner on money loaned on interest, etc., was void, and that defendant board of assessors be ordered to cancel it, and that the state tax collector and the city be restrained from claiming taxes thereon, or attempting to collect said taxes, and for such other relief as petitioner was entitled to. *Held*, that the petition was for cancellation of the assessment, and not for reduction thereof, and hence a reduction could not be decreed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 500.*]

3. APPEAL AND ERROR (§ 1178*)—REVERSAL—REMAND—AMENDMENT OF PLEADINGS.

Where plaintiff's judgment in a suit for the cancellation of a tax must be reversed because he made out a case only for a reduction of his assessment, for which there was no prayer, yet, having made out a clear right to a reduction, he will be permitted after remand to amend so as to ask for the reduction as alternative relief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

4. APPEAL AND ERROR (§ 1106*)—DISPOSITION—REMAND—NECESSITY.

Where, upon deciding that certain assessments as for money loaned were improper, the Supreme Court is unable to determine what deduction should be made from the total amount assessed on account of the improper assessments for money loaned because the assessment was based upon all of the taxpayer's credits, the case must be remanded for further proceedings, even though the remainder of the assessments are correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386-4398; Dec. Dig. § 1106.*]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Petition by the Fidelity Mutual Life Insurance Company against John Fitzpatrick, State Tax Collector, and others. From a judgment denying relief, defendants appeal. Reversed and remanded for further proceedings.

Harry P. Sneed, for appellant State Tax Collector. Geo. H. Terriberry, for appellant Board of Assessors. E. Garland Dupre, for appellant City of New Orleans. Dene-gre & Blair, for appellee.

PROVOSTY, J. This court has frequently had occasion to announce that:

"A reduction of assessment cannot be decreed in a suit which is distinctly and exclusively for cancellation." Insurance Co. v. Board, 122 La. 98, 47 South. 415.

One of the questions in the present case being whether plaintiff's petition is such that a reduction may be granted upon it, we give the petition in full:

"To the," etc.

"The petition of," etc., shows:

"That the board of assessors for the parish of Orleans, in making up the assessment rolls for the year 1908, assessed your petitioner under the heading of 'Money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold,' in the sum of \$72,295. That subsequently, on or about the 20th of March, 1908, the tax rolls having been opened for inspection as provided by law, your petitioner, through its agent, protested to the said board of assessors against the aforesaid assessment, and said board disregarded said protest and persisted in said assessment.

"That on or about the 8th day of April, 1908, said assessment rolls having been by the board of assessors placed in the hands of the assessment committee of the city council for revision as provided by law, said committee acting as a board of reviewers, your petitioner, through its aforesaid agent, appeared before the said committee and protested against the aforesaid assessment and asked relief therefrom, but his protest was disregarded, and the assessment made by the board of assessors approved.

"Your petitioner shows in the aforesaid particulars and in all other respects it has complied with all the formalities and requirements of law, and that the aforesaid assessment of \$72,295, on 'Money loaned at interest, all credits, and all bills receivable for money loaned or advanced or for goods sold,' is now final and conclusive unless set aside by the court as provided by the Constitution and laws of Louisiana, that taxes thereon at the rate of 22 mills for city purposes, amounting to \$1,590.49, have been demanded of petitioner by the city of New Orleans and state and levee taxes under the said assessment at the rate of six mills, amounting to \$433.77, will shortly be due and claimed and payment of both and city and state taxes under said assessment will be enforced by all means provided by law, unless restrained by this court.

"Petitioner shows that it has not now, and had not during the year 1907, in the state of Louisiana or the city of New Orleans, any property falling within the description of 'Money loaned on interest, all credits and all bills receivable for money loaned, or advanced or goods sold'; that no money has ever been loaned by petitioner on interest in the state of Louisiana, nor was loaned during the year 1907, nor credits created, nor had petitioner any bills receivable for money loaned or advanced or for goods sold; and that your petitioner had not at the time of the aforesaid assessment, nor during the year 1907, any officers or agents in the state of Louisiana, except with limited power, and no one authorized to loan money on interest, accept bills receivable therefor, nor create credits.

"Petitioner shows that the aforesaid assessment against petitioner is illegal, unconstitutional

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tional, and void; that John Fitzpatrick, state tax collector for the city of New Orleans, and the city of New Orleans, profess that the said assessment is valid and propose to proceed against petitioner and undertake to seize and sell its property for the purpose of enforcing payment of the aforesaid taxes claimed to be due the city and state, and the collection, seizure, and sale will constitute a taking of petitioner's property without due process of the law and will deprive petitioner of its property without due process of law and deny it the equal protection of the laws, in contravention of section 1 of the fourteenth amendment of the Constitution of the United States, and petitioner will be powerless to prevent said illegal measures unless protected by this court.

"Wherefore, petitioner prays that the board of assessors for the parish of Orleans, John Fitzpatrick, state tax collector for the city of New Orleans, and the city of New Orleans, through its mayor, Martin Behrman, be cited to appear and answer this petition, and for judgment in due course in favor of petitioner and against each of said defendants, ordering and decreeing that the assessment made against petitioner for the year 1908 of \$72,295 on 'Money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold' is unconstitutional, illegal, null, and void; that the defendant board of assessors be ordered to cancel the same; and that the said John Fitzpatrick, state tax collector for the city of New Orleans, and the city of New Orleans, be perpetually restrained and enjoined from claiming taxes thereon from your petitioner, or from attempting in any manner to claim or collect said taxes or enforce the payment thereof; and your petitioner further prays for such other and further relief as may be just and equitable."

On the trial the following proof was made without objection:

That on the assessment blank required by law to be furnished to the taxpayer on which to make a return to the board of assessors of his taxable property, plaintiff made the following return:

"No. 4. 'Money Loaned on Interest, All Credits and All Bills Receivable for Money Loaned or Advanced for Goods Sold.'"

"The company has no money loaned on interest, no credits, no bills receivable for money loaned or advanced for goods sold, and nothing taxable in Louisiana under this heading of description. The company has made partial and advance settlements to its policy holders pursuant to stipulations of its policies and contracts of sums already earned on its policies, which are nothing more than crediting the company in its final settlement of the policies with the amounts so paid in advance to its policy holders, and at the same time securing to the company right to make this compensation. It has also extended the time for payment of premiums, received notes simply evidencing said postponement, which are not taxable credits and which are moreover situated in New York. Subject to the above and without any admission or consent, but, on the contrary, reiterating that this company cannot be assessed and taxed thereon in this state, the company says that amount of postponed premiums represented by premium notes is \$17,722.84, and the amount of advanced payments to policy holders as above stated is \$10,286.67."

Also, that when the board of assessors fixed the assessment at \$72,295, instead of adopting the figures of the return, the plaintiff filed a protest before said board, insisting that said property was not taxable in

this state, because not situated here, and that a part was not taxable because it was not property at all but merely payments in advance on the policies, and insisting further that at all events the said estimate of \$72,295 was excessive and should be reduced as stated in the return.

Also, that plaintiff filed a similar protest before the assessment committee of the city council or board of reviewers.

Also, that the amounts stated in the return of plaintiff were correct.

While the plaintiff still insists that the \$17,722.84 shown by the return is not taxable in this state, because not situated in this state, it recognizes that the numerous recent decisions of this court holding such credits to be taxable have made that point a closed chapter before this court.

The \$10,286.67, shown by the return, is represented by notes of which the following is the form:

Policy Loan Note.

The Fidelity Mutual Life Insurance Company
L. G. Fouse, President

Head Office: Fidelity Building, Philadelphia, Pa.
\$..... 190—.

..... have this day received from the Fidelity Mutual Life Insurance Company the sum of dollars, as a loan on policy No., for \$....., issued by the said company on the life of hereby promise to pay to the Fidelity Mutual Life Insurance Company, at its head office in the city of Philadelphia, Pa., the said sum of dollars, with interest thereon from until paid, at the rate of per cent. per annum, to be paid annually in advance on the anniversary of said policy. With this note is delivered to the company said policy No., and it is hereby agreed that this note shall be a first lien against the same.

It is further agreed that if interest on this note on any premium on said policy be not paid when due, said policy shall be ipso facto null and void, and all liability of the said company by reason of same shall thereupon cease and determine. Said company is thereupon authorized, without notice to the undersigned, to ascertain the cash value of said policy, according to its rules for the purchase of policies, and to apply the same, first to the payment of this note and any interest or costs that may be due hereon; second in the payment of any unpaid premiums note or other obligation; third to the payment of any other indebtedness of the maker or makers hereof to said company. The residue of said cash value, if any, shall then be applied by said company (at its option) to the purchase of non-participating paid up or extended insurance (payable as the said policy is payable) for such sum or for such period of time as the said residue will purchase at the then age of the assured, or said company may, at its option, pay said residue to the member in cash, which shall be in lieu of all other benefits.

It is further expressly agreed that if the said policy be surrendered all the values mentioned therein shall be reduced or diminished in the ratio that the amount of this note and all other loans or indebtedness on said policy bears to the total cash value thereof, any law or statute to the contrary notwithstanding.

..... [L. S.]
Insured.
..... [L. S.]
Beneficiary.
..... [L. S.]

Signed, sealed and delivered in presence of us:

This note is made to mature when the policy matures, and the testimony shows that the amount of such loans, in capital and interest, never equals the amount payable to the maker of the note under his policy; so that he never becomes a debtor on the note, without at the same time the company becoming his debtor for a larger amount. Under these circumstances, the so-called "loan" is, as contended by the plaintiff, nothing more than an advance payment on the policy; and, moreover, the express testimony shows that that is what it is intended to be. As to this \$10,286.67, then, the case is similar to that of *New York Life Insurance Company v. Board of Assessors* (C. C.) 158 Fed. 462, recently affirmed by the Supreme Court of the United States (30 Sup. Ct. 385, 54 L. Ed. —), wherein it was held that these loans were not loans, or credits, but mere advance payments. The assessment must therefore be annulled in so far as it is based on these so-called "loans."

Plaintiff insists that, while there is no express prayer for reduction, yet that the suit is in effect for reduction as well as for cancellation, on the principle of the greater including the less; and that in view of the very full prayer for general relief, and of the evidence admitted without objection, the said relief may be granted even though not expressly prayed for. Plaintiff's learned counsel review extensively the cases wherein this court has heretofore granted relief under similar circumstances.

The presentation thus made is very strong. Nevertheless, this court does not feel justified in departing from the well-established rule in these tax suits, and will have to hold that the relief of reduction cannot be extended upon the petition as it now stands, which is "distinctly for cancellation, and not for reduction." *Travelers' Insurance Company v. Board*, 122 La. 136, 47 South. 439; *Standard Marine Ins. Co. v. Board*, 123 La. 717, 49 South. 483.

This case, however, does present the feature, absent from all the others, that by having made due and proper return to the board of assessors, and duly and properly asked a reduction both before that board and before the board of reviewers, the plaintiff company was in a position to have coupled an alternative suit for reduction with its suit for cancellation, and since the case has to be remanded we will, in the interest of justice, allow plaintiff to make an amendment to that effect, so that the case may be tried on the question of reduction as well as on that of cancellation.

The reason why the case must be remanded is that we find ourselves unable to frame a decree in the present condition of the record. The trouble lies in the impossibility for this court to know what deduction is to be made from the \$72,295 on account of the

nontaxable advanced payments which have been assessed in globo with the taxable notes for postponed premiums. The assessment is expressly based on all of the plaintiff company's credits, and therefore includes these advanced payments; but in what proportion it is based on these advanced payments the record does not say.

The judgment appealed from is therefore set aside, and the case is remanded for further trial, with leave to plaintiff to amend. Defendants to pay the costs of appeal, and other costs to await event of suit.

The CHIEF JUSTICE and MONROE, J., concur in the decree.

(125 La.)

No. 18,176.

STATE ex rel. GUION, Atty. Gen., v.
PEOPLE'S FIRE INS. CO. OF
NEW ORLEANS.

In re GUION, Atty. Gen.

(Supreme Court of Louisiana. March 28, 1910.)

(Syllabus by the Court.)

PROHIBITION (§ 10*)—GROUNDS.

Where, in a proceeding by the state to forfeit the charter of a corporation, the property of which is sequestered, a judgment is rendered decreeing the forfeiture, but dissolving the sequestration, and ordering the appointment, with full powers, of receivers named by some of the stockholders, and the state is allowed a suspensive appeal from such judgment, the trial court is thereby divested of jurisdiction of the matter, and prohibition will issue to restrain the making of an inventory, or action upon a rule against the sheriff to surrender the sequestered assets to the persons claiming to be receivers under such order of appointment and subsequent confirmation.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 10.*]

Prohibition by the State, on information and relation of Walter Guion, Attorney General, against the People's Fire Insurance Company of New Orleans. Alternative writ made peremptory.

Walter Guion, Atty. Gen. (R. G. Pleasant, of counsel), for the State. Meyer S. Dreifus, for respondent.

Statement of the Case.

MONROE, J. It appears, from the petition and returns herein, that the state brought suit to forfeit the charter of the defendant company, alleging that the company was doing business without a license and without paid-up capital, as required by law, and that it caused a preliminary injunction to issue, and a writ of sequestration under which the assets of the company were seized by the sheriff. Defendant admitted facts authorizing a judgment of forfeiture, and, among others, that it was organized in 1907, with a nominal capital of \$100,000, fully subscribed,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and of which, when it began business, an amount exceeding \$35,000 had been paid in; that the year 1907 was disastrous, and that within a year from said date (when it began business) it had collected a total of only \$80,000; that on December 30, 1909, its directors approved the action of its president in calling a meeting of its stockholders for January 27, 1910, to vote upon the question of liquidation; that the meeting was held, the liquidation decided upon, and the liquidators named; that the liquidation is governed by Acts 105 of 1898 and 50 of 1902, and not by Act 124 of 1908, which, if applied, will impair the obligations of its contract—being its charter—which provides a method of liquidation. Upon the same day Alexander C. O'Donnell, E. J. Baysset, and W. J. Gillespie, intervened, alleging that they were the liquidators named by the stockholders, and that the stockholders had "resolved" that the court be requested to confirm them, and praying to be confirmed. To this intervention the state excepted and answered. Thereafter evidence was adduced and the case submitted, and on February 16, 1910, there was judgment (which was signed on February 23d) decreeing the forfeiture of defendant's charter and perpetuating the injunction restraining it from doing business, but dissolving the sequestration and ordering the appointment of the interveners as liquidators, upon their taking the oath according to law, and authorizing them to administer. On the following day (February 24th), the Attorney General, on behalf of the state, moved for and obtained an order for an appeal, suspensive and devolutive, and the judge granted the appeal, making it returnable to this court on March 21st, and the transcript was lodged in the clerk's office on March 11th. In the meanwhile, as the state now alleges, on February 23th the judge a quo confirmed his appointment of the liquidators, and the appointees proceeded to obtain an order for an inventory and to rule the sheriff and the Attorney General to show cause why the assets of the company should not be delivered to them, which rule, at the time of this application, had been reassigned for another day, and the state here alleges that it fears that the rule will be made absolute, and that the assets of the company, consisting mainly of cash, will be immediately disbursed by said appointees, unless further proceedings are prohibited pending the appeal. The respondent judge makes a return submitting the matter for the action of this court. The interveners also make a return in which they admit that they have qualified as liquidators under the order of appointment, have obtained an order for an inventory, and have taken the rule as alleged, but deny that the state has perfected its appeal, and say that the question is governed by section 4 of Act 159 of 1898, which requires appeals to be perfected within 10 days.

Opinion.

Act 159 of 1898 provides for the appointment of receivers to corporations upon the application of stockholders or creditors, or both, and for appeals from orders made upon such applications. It does not purport in any way to regulate proceedings instituted by the state for the forfeiture of corporate charters, appeals from judgments in which are governed by the general law upon the subject. Act 45 of 1870 (Ex. Sess.) § 1, provides that:

"All appeals from the parish of Orleans * * * shall be made returnable on the first and third Mondays of each month," etc.

And Act 106 of 1908 provides that:

"Judges throughout the state shall fix the return days, in all cases * * * appealable to the Supreme Court, * * * in the order granting the appeal, which shall not be less than fifteen nor more than sixty days."

The last-mentioned statute has never been held to apply to the parish of Orleans; but, under either law, the return day in this case was properly fixed, as there was hardly time between February 24th and the first Monday in March for the preparation of the transcript. All that has thus been said is, however, somewhat apart from the only question which it becomes necessary here to decide. The district court, having granted the appeal, was divested of jurisdiction, and the question whether the appeal should be dismissed, because the return day was improperly fixed or because (if that had been the case) the appellant failed to lodge the transcript in this court within the delay granted, is one for this court to decide. *Pemberton v. Zacharie et al.*, 4 La. 205; *Fink, Ex'r, v. Martin et al.*, 10 Rob. 147; *State v. Judge*, 8 La. Ann. 434; *State ex rel. Gausson v. Judge*, 21 La. Ann. 45; *State ex rel. Dubuclet v. Judge*, 24 La. Ann. 600; *State ex rel. Railroad Co. v. Judge*, 39 La. Ann. 774, 2 South. 390; *Barrow ex rel. v. Clack*, 45 La. Ann. 481, 12 South. 631. The order for the appointment of the receivers in this case, it may be remarked, in conclusion, does not purport to limit the authority of the appointees to a provisional administration, and hence does not fall within the meaning of Code Prac. art. 580, § 2. Moreover, the judgment appealed from dissolves the sequestration, and the appeal suspends the execution of that judgment, and yet, if the rule which the receivers have taken be made absolute, the sheriff will be divested of the possession of the sequestered property, and it may be disbursed before the case presented by the appeal of the state can be heard. We are therefore of opinion that the writ prayed for should issue.

It is accordingly ordered, adjudged, and decreed that the alternative writ of prohibition, herein issued, be now made peremptory, and that the respondent judge and the parties to the suit of State of Louisiana on the Relation and Information of the Attorney General

v. People's Fire Insurance Co. of New Orleans be prohibited from further proceeding in said suit until the further order of this court.

(125 La.)

No. 17,870.

SMITH v. PARISH BOARD OF SCHOOL DIRECTORS.

(Supreme Court of Louisiana. March 28, 1910.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—ELECTIONS — QUALIFICATION OF VOTERS — WIDOWS OWNING COMMUNITY PROPERTY.

Widows seeking to vote at an election under article 232 of the Constitution, as being owners of one-half of the property of the community between themselves and their husbands, must make their right as such appear by judgment or order of court of no uncertain meaning. Where the community interests are unsettled, and their extent unknown, their vote should be excluded. *Endom v. City of Monroe*, 112 La. 786, 38 South. 681.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 103.*]

2. SCHOOLS AND SCHOOL DISTRICTS—(§ 103*)—ELECTIONS — QUALIFICATION OF VOTERS — SPECIAL TAX ELECTION—INTEREST IN FIRM.

The individual members of a commercial partnership, one holding an interest of three-quarters and the other one-quarter, were allowed to vote at an election held under article 232 of the Constitution upon the firm's assessment, by dividing the assessment and each partner voting upon his pro rata interest in the firm. Their right to have so voted was challenged on contest of the election. *Held*, that the vote was properly allowed.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 103.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—QUALIFICATIONS OF VOTERS—SPECIAL TAX ELECTION — PERSON HAVING SOLD PROPERTY.

A person appearing as owner on the assessment rolls, but who had sold the property at the time an election was held under article 232 of the Constitution, was not entitled to vote thereat.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 103.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—ELECTIONS—CONTEST—GROUNDS.

A party who contests the result of an election held under article 232 of the Constitution on specific grounds is limited to those grounds, and is not permitted, under an allegation "that other illegalities and irregularities than those set out would be shown on the trial of the case," to enlarge the grounds of contest.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 103.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—ELECTIONS — VALIDITY — ILLEGAL PROCEEDINGS NOT AFFECTING RESULT.

The result of an election held under article 232 of the Constitution will not be set aside because the commissioners of election received votes without proper evidence, when it is subsequently shown that the votes so received were

legal votes. *Conant v. Millaudon*, 5 La. Ann. 542.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 103.*]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by Branch E. Smith against the Parish Board of School Directors. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Andrews & Hakenyos, for appellant. Robert P. Hunter & Sons, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff in his petition alleges that the police jury of the parish of Rapides, on what purported to be a petition of certain taxpayers of said Forrest Hill school district of Rapides parish, did by its ordinance (a duly certified copy of which would be produced on the trial) order an election to take the vote of the property tax payers, entitled to vote in such election, as to the levying of a special tax of five mills on the property subject to taxation in said Forrest Hill school district for ten years, the proceeds of said special tax to be used to erect a school building in said town of Forrest Hill, to belong when built to the school board of the parish of Rapides; that commissioners to hold said election on said day were appointed; and that on said day, March 6, 1909, an election was held under and by virtue of said ordinance of the police jury of Rapides parish, and that subsequently, to wit, on the 10th day of March, 1909, the result of said election was canvassed and declared by G. A. Staples, president, William French, and John Andrews, registrar, who constituted the board of election supervisors of Rapides parish, as would be shown by a duly certified copy of their said promulgation of the result of said special election, to be produced on the trial of the case.

That according to said promulgation it was made to appear, according to the returns of said election as made, also by the commissioners of election who held said special election, that in numbers 23 qualified voters who voted at said special election voted for the said special school tax, and 13 voted against said tax; that as to the amount of property, \$10,640 voted for the tax, and \$7,905 voted against the said special tax, giving according to said promulgation a majority in numbers of 10 in favor of said tax, and a majority in amount of \$2,735 in favor of said tax. That said tax would amount to more than \$9,000.

That such was not the true result of said special election so held on said 6th day of March, 1909, as shown by the returns of the commissioners of election and the promulgation of said board of supervisors of elections

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the parish of Rapides, for and because in the conduct and holding of said election a majority of the commissioners holding same permitted a sufficient number of persons who were not entitled to a vote at said election to vote; and he avers that said tax was really defeated as to the amount of property voted.

That during the holding of said special election at the town of Forrest Hill, held on the date and for the purpose above stated, the commissioners who had been appointed to hold the same, being favorable to and anxious for the carrying of said special election, permitted and committed the following named irregularities in the conducting of said special election, which, with others to be shown on the trial of this cause, were more than sufficient to have changed the result of said election, as declared by them, and as promulgated by the said supervisors of election, viz., \$2,735:

(1) That they permitted persons to change their assessment, as shown on the assessment roll of the year 1908, as to the amount and valuation of property assessed to them, and to vote on affidavits as to the valuation of their property on proposed assessments for the year 1909, not then nor even yet made, contrary to law, and with a view of carrying the said election in favor of said tax, when they must have known that it would otherwise have been defeated.

(2) That the commissioners only permitted persons whom they knew would vote for said tax to vote on such affidavits and to change their assessments, and refused to allow others, whom they knew to be opposed to said tax, to change their assessments as shown by the tax roll, or to vote at all by making affidavits.

(3) That the said commissioners deducted \$1,800 from his (petitioner's) assessments as shewn by the tax roll, which was \$5,400, and allowed him to vote against said tax only the sum of \$3,400, and refused to him the privilege of making any affidavit as to the valuation and stipulation in that school district of property valued at \$9,000 for the assessment roll of 1909.

(4) That the said commissioners refused to allow Mrs. J. W. Pitman (widow) to vote against said tax on the whole or any part of property situated in said school district, and assessed for \$3,800, one-half of which belonged then and now as widow in community with her deceased husband, and to which she could then and can now make a perfect and valid title, as the said community of acquets and gains owed no debts.

(5) That they allowed the commercial firm of Shaw & Melder, domiciled in the town of Forrest Hill, and which partnership is expressly forbidden to vote at such election, to pretend to divide up the assets of said partnership and each of said partners to vote the one-half of the amount assessed to said part-

nership. That they would not allow Willie Calhoun, who was assessed for property valued at \$800 situated in said town of Forrest Hill, and who offered to vote against said tax, to vote at all.

Petitioner averred that he had reason to believe that an inspection of the ballot box, poll list, assessment list, list of voters, tally sheets, and tabulation of votes, made and kept by said commissioners holding said special election, and which he is informed were (at the date of the filing of his petition) locked up in the ballot box used by them in holding said election, and which ballot box he was informed was (at the same date) in the custody of D. B. Showalter, parish superintendent of schools for Rapides parish, at his office in the courthouse in Alexandria, La., would show many other irregularities and illegalities in the conduct and holding of said special election, committed by those whose votes were counted in favor of the levying of said special tax, and which were permitted and countenanced by said commissioners, more than sufficient to change the result as certified by said commissioners and as promulgated by said supervisors of elections, and which would, when investigated, show that said tax was in fact and truth defeated, and not carried.

That the school board of Rapides parish, of which Jonas Rosenthal, who is a resident of your said parish of Rapides, is president, would be the beneficiary of said special tax, if it should be levied and collected, and that said school board duly organized under the laws of this state as a political body having corporate existence, and should be made defendant herein.

That according to the laws governing the holding of such special elections to levy taxes for the building of schoolhouses in the school districts of this state and in this parish, and in accordance with the legal votes cast at said special election, he believed it to be true, and therefore charged as being true, that, eliminating the illegal votes cast in favor of the levying of said special tax and counting against the said tax the legal votes which were excluded, and which would have been cast against the levying of said special tax, said tax was really defeated at said special election, and that no tax should be levied or collected in said school district against the will, legally expressed, of a majority in amount of the property tax payers of said school district. That to permit the levying and collecting of said special tax, unless the same had been legally sanctioned by a majority in number and amount of the property tax payers legally entitled at said election, would be to perpetrate upon all those opposed to the levying and collecting of said special tax a grievous injury, it would be the practical taking of their property for public purposes without due process of law, and it would amount to a gross violation of, and a

wanton destruction of, their rights of property and of their citizenship under the protection and sanction of the law.

That outside of the town of Forrest Hill, in said school district, there existed a very considerable opposition to the levying and collecting of said special tax, having for its object and purpose to erect a high school building in the town of Forrest Hill, because a great many of the property tax payers duly qualified to vote at the special election believed that they and their families would derive no benefit from such a building when erected; that there were not enough pupils to support a high school at Forrest Hill; that it would practically be furnishing at the expense of the taxpayers of the school district a much more expensive building than was needed for the grammar school located in the town of Forrest Hill; and while all of those who were opposed and opposing the levying and collecting of this special tax for a building in the town of Forrest Hill were warmly and heartily in favor of public schools, public education, and were also, when it was necessary, in favor of special taxes for the public schools, they were opposed to this tax at this time, because they were of the opinion that such a tax would be more beneficial if it was to be levied in aid of the common schools of this school district, that the children attending them might have better schoolhouses and longer terms of schools in the district. So this honorable court was given to understand that this was no factious contest, but because petitioner believed (as did a great many other taxpayers in that district) that he would be seriously injured and aggrieved if said tax, which was really defeated at the special election, should be permitted to be levied and collected.

That any order or ordinance of the police jury of this parish based on the promulgation of the result of said special election, ordering the assessor, William F. Texada, to assess, and Charles M. Kilpatrick, sheriff, to collect, said special tax, was induced by error, and in ignorance of the fact that said special election was not conducted according to law, and that said tax was really defeated at said special election. He prayed that, after hearing, the court should decree said promulgation of the result of said special election by the supervisors of elections, said ordinance of the police jury ordering and assessing and collecting of said tax (if any such ordinance had been passed by the police jury), and any assessment of said special tax on the tax rolls of said school district, to be null, void, and of no effect, and that Charles M. Kilpatrick, sheriff, if said special tax had been extended on the tax rolls of this parish when such rolls should be made and delivered to him for collection, be prohibited from collecting said tax, and that it should decree that said special tax was really defeated at said special election, and that all proceed-

ings to promulgate the result of said special election as being in favor of the levying and collecting of said special tax, and to levy and collect the same, should be declared to be null and void and of no effect. That no such assessment had or should be made as yet under the law governing assessment of general and special taxes in this state, and that same could not be attempted to be collected by said sheriff before this case should be heard and determined in court as a preference case on the docket of this honorable court, as against the school board of this parish. That the beneficiary of said tax was at that time the only necessary party defendant, and that for that reason he did not then make the said police jury, the said assessor, and tax collector defendants herein; and for the same reason he did not ask for a writ of injunction to restrain the levying and collecting of said special tax, but he reserved the right, in case it should hereafter become necessary to restrain the levying and collecting of said special tax, to make said assessor and tax collector parties hereto, and to obtain such writs of injunction as might be necessary to prevent the levying and collecting of said tax.

In view of the premises, petitioner prayed that the school board of the parish of Rapides, through its president, Jonas Rosenthal, and the board of supervisors of elections of Rapides parish, through its president, George A. Staples, be duly cited to appear and answer hereto; that the parish superintendent of schools for Rapides parish, D. B. Showalter, be ordered and required to produce in open court on the day of the trial of this cause the ballot box, together with the ballots, poll list, list of voters, assessment list furnished the commissioners, the tabulated statement of votes, and all other contents of said ballot box used at said special election held at Forrest Hill, on said 6th day of March, 1900, in order that same might be opened and used on the trial of this cause. And petitioner prayed that, after hearing and due proceedings had herein, it be decreed that said special tax was defeated at said special election; that the promulgation by said board of election supervisors, showing that the result of said election was in favor of the levying and collecting of said special tax, be annulled and made of no force and effect; that any assessment of same on the tax rolls of this parish for said school district be annulled and made of no force and effect; that the sheriff be ordered not to collect the said special tax, if same be extended on said rolls; and he prayed that in case the court should be of opinion that the president of the police jury, the said assessor, and the said sheriff were necessary parties to this suit, that they be cited as defendants, and, if an injunction should be necessary to stop the said assessor from assessing and the said sheriff from collecting said special tax, that his right to apply for said injunction on his mak-

ing oath to the allegations of this petition and furnishing such bond as might be required be reserved to him; and he prayed for all other and further orders and decrees necessary and proper in the premises, and for costs, and for general relief.

Attached to plaintiff's petition was a copy of the petition of property tax payers addressed to the police jury, and the subsequent proceedings and ordinances of that body based thereon. The parish board of school directors answered. After pleading a general denial, they admitted that the election was held as set forth in the petition and resulted as therein stated.

It specially denied that any persons at said election were permitted to change their assessment for the purpose of voting at said election.

It specially denied that persons permitted to change their assessments were known as voters for the said tax, and that no such persons voted on affidavits.

It admitted that a sum was deducted from the total assessment of petitioner, because said petitioner owned property that was assessed to him in 1908 that did not lie within the said school district and would not be subject to said tax. It did not admit, however, that the sum of \$1,800 was deducted therefrom, and only admitted that his assessment was reduced to some extent.

Respondent admitted that Mrs. J. W. Pitman, a widow, was not permitted to vote by proxy, because the assessment on the rolls showed that the property which she proposed to vote on was assessed to the estate of Pitman.

Respondent admitted that the firm of Shaw & Melder did divide the assets of the said partnership as assessed and voted the same, but averred that even if this action was illegal it would not change the result of the election.

Respondent admitted that Willie Calhoun was not permitted to vote, because he had sold the property that was assessed to him in 1898, and did not own it at the time he offered to vote; that the purchaser of the said property was not a legal voter at that time, and was not permitted to vote for that reason, but that, if permitted to vote, he would have voted for the tax.

Respondent, further answering, says that the said election was conducted according to law, and result ascertained and proclaimed all as the law directs.

In view of the premises it prayed that plaintiff's action be dismissed at his own costs and the said election declared as having been properly conducted and legal in form.

The district court, being of opinion that the election attacked in the petition should be set aside for irregularities, and that the result of said election as proclaimed by the

commissioners and election supervisors did not fairly express the will of the majority of the property tax payers entitled to vote at said election for reasons orally assigned, ordered, adjudged, and decreed that the result of the election held in the Forrest Hill school district of Rapides parish, at Forrest Hill, on March 6, 1909, to submit to the taxpayers of that school district the question of levying a tax of five mills for 10 years to build a high school building in the town of Forrest Hill, as announced by the commissioners of election who held said election, and the result of said election as found and proclaimed by the board of election supervisors in and for the parish of Rapides on the 10th day of March, 1909, be annulled, set aside, and made of no force and effect, and said election be and the same be set aside, annulled, and made of no force and effect.

It was further ordered, adjudged, and decreed that defendant pay all the costs of this suit, and that said tax be not levied or collected.

Defendant moved for a new trial for the reasons that:

First. It was contrary to the law, in this: That it was the duty of the court to ascertain, if possible, the true result of an election, and give force and effect to the will of the people as expressed thereat, if the same could be reasonably and fairly done.

Second. It was further contrary to the law, as the court must have held that, by reason of the refusal of the commissioners to permit Mrs. Pitman to vote the assessment made against J. W. Pitman, the court must have decided that she had the right and privilege of voting her community rights in the property. That this was not a correct decision, because there was not one particle of evidence to show the court that Mrs. Pitman was the widow of J. W. Pitman, that she had any community interest of any kind in the property, and, further, if the court was satisfied from the evidence that she did have a community interest, there was no evidence to show that that community interest had ever been judicially ascertained.

It was contrary to the evidence, because the court must have been of the opinion that the evidence established the fact that the plaintiff, B. E. Smith, had the right to vote \$1,800 more than he did vote at the election. That the evidence did not disclose this right under any possible interpretation thereof. It did show that Mr. Smith simply announced that he believed he had a right to vote more than was on the list, which was guiding the commissioners as to the values to be voted at the election. He did not state nor offer any evidence whatever at the time of any specific amount that he was entitled to vote over and above the amount on the list. He made no offer to make affidavit, and made none. He did not show any evidence, and of-

ferred to give no evidence, to the commissioners to show that he was entitled to vote more than was on the list. The commissioners, therefore, could do nothing more than permit him to vote the value on the list, which they did do. If an injustice was done Mr. Smith, it was through no fault of the commissioners who arranged the election, as Mr. Smith admitted in his testimony that he discovered that a portion of his property on the assessment rolls was placed in the wrong township, and did not show from the assessment rolls to be located in the school district.

In view of the premises, defendant urged that the refusal of the commissioners to permit Mrs. Pitman to vote the assessment charged against her husband, J. W. Pitman, be maintained, and the action of the commissioners in regard to the vote of B. E. Smith be also maintained; but, if not, the result would still show majority in number and value voted at said election. That deducting even all of the votes as to values which were claimed by defendant, to wit, \$1,500 voted by C. M. Shaw and J. W. Meld-er, \$80 which Mr. Mizell voted, \$230 that which was voted by Mrs. Peninger, and it would be found that there was a majority in value in favor of the election.

For all of which reasons, the defendant prayed that the judgment rendered be set aside, and a new trial granted.

The motion was refused.

The defendant has appealed.

Opinion.

The specific allegations on which the plaintiff relied for setting aside the special election held in the Forrest Hill district No. 16 of Rapides parish were the following:

1. Voters were permitted to change their assessments from the amounts shown on the rolls of 1908, and vote on affidavits as to the valuation of their assessments on proposed rolls of 1909, not then made.

2. That only such persons as were known to be willing to vote for said tax were so allowed to change their assessments, and the privilege refused to those whom it was known were opposed to said tax.

3. That said commissioners deducted \$1,800 from plaintiff's assessments as shown by the rolls, and allowed him only to vote \$3,400 against said tax, and refused him the right to make affidavit as to the true valuation of his property lying within said school district.

4. Mrs. Pitman was refused the right to vote on proxy on an assessment of \$3,800, one-half of which belonged to her then and now as widow in community with her deceased husband.

5. The commercial firm of Shaw & Meld-er was permitted to divide the assessment against the partnership, and each voted his pro rata interest therein.

6. Willie Calhoun was not permitted to

vote against the tax on an assessment of \$800.

7. An inspection of the ballot box, poll list, tally sheets, and tabulation of votes kept by commissioners would show many other irregularities and illegalities in the conduct of said election, more than sufficient to change result.

Defendants admitted that a sum was deducted from assessment of plaintiff, because a portion of his property did not lie in the school district. But did not admit that this was done by the commissioners of election.

(4) Admitted that Mrs. Pitman was not permitted to vote because the property on which she proposed to vote was assessed to Estate of Pitman.

(5) Admitted that the firm of Shaw & Meld-er did divide the assessment of said partnership, and each partner voted his probate thereof.

(6) Admitted that Willie Calhoun was not permitted to vote because he had sold prior to the election the property for which he was assessed the year before.

They specially denied allegations Nos. 1 and 2 above referred to.

The evidence establishes that the plaintiff voted at the election upon the valuation of his property in the school district as shown in the copy of the rolls furnished to the commissioners. It does not show that the commissioners "refused to allow him the privilege of making an affidavit as to the valuation in that school district of property valued at \$9,000 for the assessment roll of 1899" as alleged. It is quite likely that, had he—when he presented himself in the morning to vote—offered to make an affidavit, he would have been refused that privilege, for the commissioners seem in the earlier part of the day to have considered that they were forced to govern themselves strictly by the extract from the assessment rolls which had been furnished them, but that later they changed their views on that question, although not to the extent that plaintiff alleged, nor for the purpose of altering, in favor of the imposition of the tax, the vote at the election.

The plaintiff was beyond doubt dissatisfied when he found the valuation of his property in the school district upon the assessment rolls of 1908, as appeared on the list furnished the commissioners, was such as it was, and declared at the time that it was wrong, stating that he was entitled to vote on a greater amount of property, and also that, if the vote at the election was announced to be favorable to the tax, he would contest; but he does not seem to have known with certainty at that time what in point of fact should have been the valuation of his property in the district. He was unable to make an affidavit on the subject, and therefore did not attempt to make one. He cast his vote

against the tax on the valuation as appearing in the list, showing the assessment of 1906, \$3,450. He has done what he said he would do; that is, he has contested the result announced by the commissioners. Under the evidence and the circumstances disclosed, we do not think that there was legal ground for plaintiff to complain or to contest.

Plaintiff's complaint that "the commissioners illegally refused to allow Mrs. Pitman to vote against the tax on either the whole or any part of the property in said school district and assessed in the name of J. B. Pitman for \$3,800, one-half of which he alleges "belonged then and now to her as widow in community with her deceased husband, and to which she could then still make a perfect and valid title, as the said community owed no debts," is not, we think, well grounded. The widow's name did not appear on the rolls as a property tax payer, and there was nothing by which the commissioners were informed that the community owed no debts, and nothing to show that she had accepted the community. Mrs. Pitman was not present at the voting place, but was represented by a proxy, who does not appear to have offered to make any affidavit on the subject. In *Endom v. City of Monroe*, 112 La. 786, 36 South. 681, this court was called upon to decide whether widows, claiming to be owners of one half of the community property of the community between themselves and their deceased husbands and as usufructuaries of the other half, should be entitled to vote. The court was of opinion that, where the widow had a well-defined right as surviving widow in community as owner of one-half of the property of that community, her vote on that half should not be excluded; that, in order that such widows might vote, it should, however, be made to appear by judgment or order of court of no uncertain meaning; that where the properties were assessed in the names of the respective successions, and the successions were unsettled, it would be expecting too much of commissioners of election that they should fix the amount of the community interest of the voters; that where the community interests were unsettled, and its extent was entirely unknown, the vote of the widows should be excluded; that the commissioners could not be expected to investigate legal questions to determine whether or not a vote should be refused; that conclusive evidence should be presented.

In the same case it was held by two members of the court (the three other members of the court holding otherwise) that the widow in community as usufructuary of the share of the husband in the community property, was not entitled to a vote as such usufructuary, as she was not the owner of the property on which it was proposed to impress

or impose a property tax. That question is not presented in this case, nor was it necessary in the one cited; but the writer takes occasion to say that he does not adhere to that view of the question. The refusal by the commissioners to allow Willie Calhoun to vote on assessed value of \$900 as upon property belonging to him in the school district was correct. He was not the owner of that property at the time of the election—he had sold the same. The evidence shows that the individual members of the commercial firm of Shaw & Melder were permitted to divide the assessment upon the assets of that firm, and that they each voted in favor of the tax upon his pro rata interest in the firm; the assessment upon the assets of the firm being \$1,500, the interest of Shaw in the firm being three-quarters, and the interest of Melder being one-quarter thereof.

The court is of opinion there was no error in that ruling. Plaintiff being doubtless not informed, at the time of filing his petition, of any specific grounds upon which to base a contest "other than those enumerated alleged, that an inspection of the ballot box, poll list, tally sheets, and tabulation of votes (which he prayed should be brought into court and examined) would show other irregularities and illegalities in the conduct of said election more than sufficient to change the result." Whether upon an allegation of that character, based upon the assumption that illegalities and irregularities in the conduct of election would be found more than sufficient to change the result, plaintiff could predicate a contest, we will refer to later.

It was shown on the trial that Dr. Dean, who lived in Forrest Hill, appeared on the list with which the commissioners had been furnished from the assessment roll of 1906 as assessed for the sum of \$695. Plaintiff's counsel in their brief say as to this:

"He produced his tax receipt, which showed that he had paid \$22.20, and on the simple production of this tax receipt and figuring out what amount of property that amount of taxes called for, and without requiring him to make an affidavit, the commissioners allowed him to vote for the tax on \$1,110 of property. He did make an affidavit as to \$50 worth of property held in common with two others, but not as to his increased vote on his individual property. It was shown on the trial that he was actually assessed for the full amount which he voted, and the complaint as to his vote is, not that any fraud or wrong was committed, but that the commissioners violated the law in not requiring him, as they should have done, to make an affidavit."

It was admitted on the trial that L. H. Mizell voted for the tax on property assessed at \$645, and that he should have voted only on \$580. It was admitted on the trial that Mrs. Lydia Peninger voted for the tax on \$640 of property, and that properly she should only have voted on \$350. Plaintiff

urges that Mrs. Henderson, Mrs. Gunter, and Mrs. Slawter voted by proxy, and that there was no power of attorney in writing annexed to their ballots. The powers of attorney of the parties who cast the votes on their behalf were not attached to the ballots. It is testified that powers of attorney to different proxies were produced to the commissioners, but that the latter did not know what to do with them, and, not thinking they were called on to put them in the ballot box, they left them out. We think they should have been placed in the box; but we cannot presume that the commissioners violated their duty by permitting proxies to vote who had not produced to them evidence of their right to act as such.

We are of the opinion that the plaintiff on the trial of the case was limited in his attack on the result to the grounds of contest specifically set forth in his petition. The defendant insists that if, on the trial of the case, the persons who voted at the election in favor of the tax were shown to have been entitled in fact to have voted as they did, and that the vote cast justified the announcement by the commissioners that the tax was legally carried, no mere error in the commission-

ers in allowing the votes to have been received should have the effect of defeating the actual result. Defendant cites *Duson v. Thompson*, 32 La. Ann. 862, *McKnight v. Ragan*, 33 La. Ann. 398, *Lucky v. Police Jury of Bienville Parish*, 46 La. Ann. 679, 15 South. 89, and *Flores v. Police Jury of De Soto Parish*, 116 La. 428, 40 South. 785.

We are of the opinion that if on the trial of the case, the defendant showed that any particular voter at the election was in fact legally authorized to vote, no mere error of judgment of the commissioners in allowing some of the votes which were cast in favor of the tax to be cast (which might have been excluded for want of sufficient evidence at the time of voting of their right to vote) should furnish ground for setting aside the result of the election. *Conant v. Millaudon*, 5 La. Ann. 542.

We are of the opinion that the judgment appealed from was erroneous, and it is hereby ordered, adjudged, and decreed that the same be and it is hereby annulled, avoided, and reversed, and it is ordered, adjudged, and decreed that plaintiff's demand be rejected, and his suit is hereby dismissed, at his costs in both courts.

(125 La.)

No. 18,039.

SHREVEPORT BRIDGE & TERMINAL CO.
v. STATE BOARD OF APPRAISERS.(Supreme Court of Louisiana. March 23, 1910.
Rehearing Denied April 25, 1910.)*(Syllabus by the Court.)*1. TAXATION (§ 231*)—EXEMPTIONS—TOLL
BRIDGE.

A bridge, built and operated by an independent corporation established for that purpose, is not exempt from taxation as part of a railroad, under the amendment to the Constitution proposed by Act No. 16 of 1904, because used by certain railroad companies, which pay tolls for the running of their trains over it; the earning of such tolls being the sole business in which the corporation owning and operating the bridge is engaged.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 371-378; Dec. Dig. § 231.*]

2. APPEAL AND ERROR (§ 503*)—JURISDICTION
—HOW SHOWN.

The appellate jurisdiction of this court, ratione materiae, should appear on the face of the record, and the lack of such showing cannot be supplied by an ex parte affidavit, of which the opposing litigant has received no notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2310; Dec. Dig. § 503.*]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the Shreveport Bridge & Terminal Company against the State Board of Appraisers. Judgment for defendant, and plaintiff appeals. Affirmed.

Alexander & Wilkinson, for appellant.
Walter Gulon, Atty. Gen. (R. G. Pleasant, of counsel), for appellee.

Statement of the Case.

MONROE, J. Plaintiff is a corporation established under the law of this state, the objects and purposes of which are declared in its charter to be:

"To build, equip, maintain and operate a bridge over and across Red river, at or near the city of Shreveport, within one mile from the upper or lower limits of said city, with all necessary yards, side tracks, switches, main tracks, approaches and appurtenances, and, generally, to do everything that may be necessary to properly operate the said bridge, yards, tracks and approaches thereto, with full power, also, to build, equip, maintain and operate, in connection therewith, such additional lines of railroad, with tracks, locomotives and equipments, as may, hereafter, be desired. The said bridge to be used as a railroad bridge for the passing, or crossing, of trains, locomotives and cars, together with all their passengers and freight, with the right, in addition thereto, to construct on said bridge a roadway for the passage of persons, vehicles and animals, etc., provided that same shall, at any time, hereafter, be deemed advisable, and the consent of the proper municipal authorities be obtained."

To carry out the purposes so declared, the company, between January 1, 1905, and say March 25, 1907, built a bridge, at a cost of \$449,949.36, at the place and of the character

mentioned (save that it is not yet adapted to the accommodation of persons, vehicles, etc.), for the use of which, it at present collects from two railroad companies, and has a contract under which it expects to collect from a third company, tolls to the amount, from each company, of \$12,000 a year. The bridge was assessed for the year 1908 at \$160,000, and, so far as the record shows, no complaint was made. For the year 1909 the company appears to have returned the bridge to the State Board of Appraisers as trackage, at a valuation of \$2,880; but it was assessed at \$160,000, as in 1908. If any complaint was made to the board, or effort to obtain reduction, it is not shown by the record. The object of the present suit is to have the property decreed exempt from taxation and the assessment annulled, or to have it decreed that the State Board of Appraisers is without authority to make the assessment, or to have the assessment reduced to \$5,000. The grounds relied on for the obtention of the relief sought are stated in the petition substantially as follows:

(1) That the bridge is part of a railroad, and, having been begun and completed between January 1, 1905, and January 1, 1909, is exempt from taxation, under the amendment to the Constitution proposed by Act No. 16 of 1904 and adopted in November of that year.

(2) That, if it be not exempt as part of a railroad, the power to make assessments, vested in the State Board of Appraisers, does not extend to it.

(3) That if it be not exempt, and the State Board of Appraisers is authorized to assess it, the assessment, as made, is exorbitant, and in excess of that placed on other property similar in character.

Opinion.

The provisions of the Constitution upon which plaintiff relies read as follows:

"There shall be exempt from taxation, for a period of ten years from the date of its completion, any railroad, or part of railroad, that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909. This exemption shall include and apply to all the rights of way, roadbed, or sidings, rails and other superstructures upon such rights of way, and to all depots, station houses, buildings, erections and structures, appurtenant to such railroads, and the operation of the same, but shall not include the depots, warehouses, station houses, and other structures and appurtenances, nor the land upon which they are erected, at terminal points, and for which franchises have been granted and obtained, whether same remain the property of the present owner or owners or be transferred or assigned to any corporation or corporations, person or persons, whomsoever; and provided, further, that this exemption shall not apply to double tracks, sidings, switches, depots, or other improvements or betterments which may be constructed by railroads now in operation within the state, other than extensions, or new lines, constructed by such railroads."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The obvious purpose of this provision was to encourage the building of new railroads in this state and the extension of the lines of railroads already built; but the further purpose strictly to limit the exemption to such new railroads, or parts or extensions of roads, is made manifest by the specific exclusion therefrom, whether with respect to projected or existing roads, of "depots, warehouses, station houses and other structures, at terminal points, and for which franchises have been obtained and granted," and by the exclusion from such exemption of "double tracks, sidings, switches, depots, or other improvements or betterments which may be constructed by railroads now in operation within the state, other than the extensions or new lines constructed by such railroads."

If the bridge in question could be regarded as part of a railroad, the question which suggests itself is: Of what railroad is it a part? And the record furnishes no answer. It can hardly be a part of either of the roads, the names of which are mentioned in the petition, and by the witnesses, since they each pay \$12,000 a year as tolls for running their trains over it, and neither corporations nor individuals pay for the privilege of using their own property. Upon the other hand, the record shows affirmatively that the bridge is the property ("in fee simple," the petition alleges) of the plaintiff, and that plaintiff is a corporation created for the purpose of building and operating a bridge, to be used for railroad and other purposes, and "in connection therewith, such lines of railroad, tracks, locomotives and equipments as may hereafter be desired." But for an independent company to construct a toll bridge and to furnish it with the equipment needed for the accommodation of its patrons does not identify the company with the business of such patrons, or make the bridge a part of their respective outfits. The bridge remains a toll bridge, no matter who uses it, and is no more part of a railroad, because a railroad company, paying \$12,000 a year for the privilege, runs its cars over it, than it will become an appurtenance of a cotton plantation, when, in the future, a cotton planter may haul his cotton over it in his wagons, though, if it belonged to the railroad company, or the planter, the case would be different. The case of *State (Cent. R. Co., Prosecutors) v. Mutchler, Collector*, 41 N. J. Law, 96, to which we are referred, is inapplicable.

The exemption was there claimed (on a bridge built by one railroad company and leased by it to another, and used by the latter as part of its line) under a statute which granted exemption "to all railroad corporations or companies occupying or using railroads in this state, whether as lessees or otherwise." And the court said:

"The state of the case agreed on shows that the bridge was used by the prosecutor as a rail-

road bridge, and for no other purpose. It was part of the prosecutor's railroad. * * * It was also held and used by the prosecutor, as lessee, within the meaning of the act of 1873."

In the instant case the bridge is shown not to be a part of any railroad, but to be the property of a corporation which was organized to build and operate it, and which charges certain railroad companies tolls for running their trains over it; that being the only business in which it is engaged.

As to the other points presented, there is nothing in the record to show that this court is vested with jurisdiction *ratione materię*; the state not having appeared to have received notice of the filing in this court of the affidavit of plaintiff's counsel on the subject of the amount of the tax involved.

Judgment affirmed.

(125 La.)

No. 17,166.

WEIS v. NEW ORLEANS BOARD OF TRADE, Limited.

(Supreme Court of Louisiana. March 14, 1910.
On Application for Rehearing,
April 25, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 224*)—SUPREME COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

This court has jurisdiction in cases that involve an amount in excess of \$2,000, and the matter of jurisdiction is determined by the value of the right sought to be vindicated, and not by the value of the property out of which the right arises. The damage to the property resulting from the trespass to the right of property, and not the value of the property, is the basis of the jurisdiction of this court.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 491½, 617; *Dec. Dig.* § 224.*]

2. COURTS (§ 224*)—SUPREME COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

There is nothing in the record to show that the right invaded by the defendant is in excess of \$2,000, and so this court cannot take jurisdiction of the case, especially as plaintiff merely prays for an injunction, and does not even ask for a money judgment.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 491½, 617; *Dec. Dig.* § 224.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Fred S. Weis against the New Orleans Board of Trade, Limited. Judgment for plaintiff, and defendant appeals. Dismissed.

McCloskey & Benedict, for appellant. F. S. Weis, pro se.

BREAUX, C. J. The New Orleans Board of Trade, owner of a lot with the building thereon, described in plaintiff's petition, sold it to plaintiff on the 14th day of September, 1904.

The Board of Trade, vendor to plaintiff, claimed the property immediately in the rear, of which it was the owner.

*For other cases see same topic and section NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Reporter Indexes*

There is a passageway between the two properties.

The act of sale under which the plaintiff owns contains the following clause:

"It is agreed that the present right of way from Magazine street to the Board of Trade's building proper, of the dimensions as at present, be granted perpetually to the said New Orleans Board of Trade, Limited."

The contention of plaintiff is that under this right of way the Board of Trade retained a right of way for pedestrians to and from its property, but no other right, as the title is in plaintiff; that, none the less, some time in 1906, the board had the pavement removed in said alley, and a trench, running through the center of the alley, made, in which were placed water pipes in a line from Magazine street to Arcade alley. To lay the pipes, digging the earth was necessary.

The pipes measure two inches in diameter, and begin in the street, cover the sidewalk, and through the alley or passageway.

The complaint is that this was a trespass, for which defendant is liable.

Plaintiff sued for an injunction, which was issued, to restrain the Board of Trade from maintaining these water pipes, and asked that it be made mandatory to the extent of requiring the defendant to remove these pipes in such a manner as not to injure his property, and to replace the earth and pavement in the passageway to the condition they were before the asserted trespass.

Plaintiff in the injunction alleged that the land and improvement were bought from the New Orleans Board of Trade at a price in excess of \$2,000.

Two exceptions were filed—one for want of jurisdiction *ratione materiae*, and the other on the ground of no cause of action.

The defendant thereupon sought to meet the issue tendered by swearing that there is a servitude of drain and passage through this alley, and that it has been used for more than 10 years before the purchase by the plaintiff and continually since; that it (defendant) has a prescriptible title to the servitude, has enjoyed the servitude over 10 years, and, as plaintiff acquired the property subject to this servitude, he is, therefore, without rights of action.

The exception of want of jurisdiction *ratione materiae* was referred to the merits, and the exception of no cause of action was overruled.

The court has no jurisdiction *ratione materiae*. The underground occupation of the passageway is the sole issue. That in itself can be of little value.

About four months after the pipes of defendant had been laid, and the work completed, plaintiff brought this suit.

The petition does not set up that the injury is irreparable, and does not ask for damages.

It is not shown by allegation that the amount in dispute is in excess of \$2,000.

It is not reasonably possible to infer that the right of plaintiff, as relates to the pipes in question, laid as before mentioned, in any way presented, as relates to plaintiff, a value or amount in excess of \$2,000.

Not the least attempt was made during the trial with the view of proving the value of the right; nor has anything been said in the record showing that the amount, as relates to jurisdiction, was in excess of the amount necessary for it to be considered by this court as being within its jurisdiction.

The property itself may be worth thousands of dollars, but the invaded right may be worth very little, if anything.

It is therefore ordered, adjudged, and decreed that the appeal in this case be, and the same is, hereby dismissed, at appellant's costs.

On Application for Rehearing.

The appellant, in its application for a rehearing, refers to an agreement, made by the respective parties, that the right involved in the controversy exceeds in value the sum of \$2,000.

When it is manifest that the court has no jurisdiction *ratione materiae*, such an agreement cannot have the effect of conferring jurisdiction. It might be considered as corroborative, but where there is nothing to corroborate it cannot of itself be considered sufficient to establish jurisdiction.

Appellant's second contention is that it should not be prejudiced by the stipulation in question. That is quite true, if there were evidence before us showing that the Court of Appeal has jurisdiction.

We have found no such evidence, and the appellant has not called our attention to such evidence.

The application for a rehearing is denied.

(125 La.)

No. 17,692.

WILLIAM FRANTZ & CO. v. FINK et al.

In re WILLIAM FRANTZ & CO.

(Supreme Court of Louisiana. Nov. 2, 1909.

On Rehearing, April 11, 1910.)

(*Syllabus by the Court.*)

1. SALES (§§ 205, 235*)—PASSING OF TITLE—"SALE AND RETURN"—DATION EN PAIEMENT.

Plaintiff placed in the hands of one Moss certain jewelry with right to sell the same under an obligation to pay them a certain amount fixed at the time. Moss sold to Fink one set of the earrings and received the price. The other set Moss transferred to Fink under "dation en paiement." Frantz & Co. brought this suit to recover and have delivered to them

the jewelry, and on default of Fink so to do to recover the price fixed between the parties. The Court of Appeal rendered judgment in favor of the defendant. *Held*, "on review of that judgment," that it was correct as to the jewelry which was "sold" to Fink, but erroneous as to the jewelry which was transferred to him under the "dation en paiement." See *Frantz & Co. v. Winehill et al.* (recently decided) 124 La. 680, 50 South. 650.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 559, 681–685; Dec. Dig. §§ 205, 235.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 24*)—"SALE AND RETURN."

A "sale and return" is a sale with the right of the buyer to return the goods at his option within a reasonable time.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 24.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6307.]

On Rehearing.

3. SALES (§ 234*)—PASSING OF TITLE—INDICIUM OF OWNERSHIP—POSSESSION.

The mere possession of movable property is not such indicium of ownership as will enable the possessor to convey a good title as against the true owner.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 660, 661; Dec. Dig. § 234.*]

Action by William Frantz & Co. against Jacob Fink and another. Judgment for defendants was affirmed by the Court of Appeal, and plaintiff applies for certiorari or writ of review to the Court of Appeal. Modified and affirmed.

J. Zach Spearing, for applicant. Charles Rosen, for respondents.

NICHOLLS, J. The plaintiff brought suit in the civil district court for the parish of Orleans, in which it alleged that it was the sole and only owner of one pair of solitaire diamond earrings $3\frac{1}{2}$ carats weight, less $\frac{1}{32}$ of a carat, valued at the sum of \$502.97, and also another pair of solitaire diamond earrings valued at the sum of \$975, making a total of \$1,477.97; that on or about the 13th day of March, 1906, and on or about the 4th day of April, 1906, petitioner delivered the above-mentioned earrings, respectively, to Louis Moss, a resident of New Orleans, for his temporary use, but petitioner did not sell the said earrings nor either of them to the said Moss, nor did petitioner part with the ownership thereof in whole or in part, nor did petitioner authorize the said Moss to sell or dispose of the said earrings in whole or in part or either of them, nor to pledge, pawn, or incumber the same in any manner, shape, or form; that notwithstanding the said Moss had no legal right nor authority to do so, and notwithstanding the sole and only ownership of the said earrings in petitioner, the said Moss in violation of the law and of the right of petitioner did pawn and pledge and deliver all of the said earrings to Jacob Fink, a resident of the city of New Orleans, for a sum of money not known to petitioner, which

said sum of money the said Moss used for his own benefit, and the same did not in any manner inure to the benefit or advantage of petitioner; that petitioner is still the sole and only owner of all of the said earrings, and was entitled to be recognized as such and to have the said Jacob Fink condemned to deliver the said earrings to petitioner, or in default thereof to pay the value of the same to petitioner.

In view of the premises, petitioner prayed that Louis Moss and Jacob Fink be duly cited; that after due and proper proceedings there be judgment in favor of petitioner and against the said Moss and the said Fink, recognizing petitioner as the sole and only owner of one pair of diamond earrings $3\frac{1}{2}$ carats in weight less $\frac{1}{32}$ of a carat, valued at the sum of \$502.97, and of one pair of solitaire diamond earrings valued at the sum of \$975; that they and each of them be ordered and condemned to deliver the said earrings to petitioner within a time to be fixed by this honorable court, or, in default thereof, that there be judgment in favor of petitioner and against the said Moss and Fink in solido for the full and true sum of \$1,477.97, or so much thereof as represents the value of such earrings as may not be delivered to petitioner with legal interest from April 4, 1906, until paid, and costs of court and for all equitable and general relief.

Defendant pleaded a general denial. Further answering, it averred that Louis Moss was a vendor of diamonds and jewelry in the open market of this city, and was well recognized as such by the trade generally and by plaintiff and defendant; that said Louis Moss, being indebted unto defendant in the sum of \$500, did in the course of his business dealings, in order to make a settlement of the said \$500, on or about April 28, 1906, sell to defendant a certain pair of solitaire diamond earrings for the sum of \$965, represented by said debt of \$500, which was thereby extinguished, and the further sum of \$465 paid by defendant to Harry Koritzky of this city for account of said Moss; that said Moss did in the course of his business dealings, on or about March 14, 1906, sell to defendant another pair of solitaire diamond earrings for the price and sum of \$300, which defendant paid to said Moss. And defendant denied that the earrings thus purchased and acquired by him were the property of plaintiff, and defendant averred that he purchased the same and paid for the same in good faith and in open market the full value thereof, and purchased the same from one who was dealer in such articles and recognized by the trade generally and by plaintiff and defendant as such.

Defendant further averred that, so far as defendant was aware, said Moss was the owner of said property and had full power, right, and authority to sell the same to defendant, for which defendant paid the full value in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

good faith and in open market. Defendant further averred that if he be mistaken, and if it be true that said Moss was not the owner of said property, and if it be true that the same was placed in his possession by the said plaintiff, then defendant averred that the same was placed in the possession of said Moss by plaintiff for the purpose of sale, and they are estopped to question the authority of said Moss to sell and dispose of same; and, if there were any litigation on the right of said Moss to sell and dispose of the property, defendant averred that he had no knowledge and no means of knowing thereof, and that he should be protected in the purchase made by him as aforesaid.

In view of the premises, defendant prayed for judgment in his favor rejecting the demand of plaintiff for costs and for full general and equitable relief.

On trial of the suit judgment was rendered in favor of the defendant, and thereupon plaintiff appealed therefrom to the Court of Appeal. That court on hearing of the appeal rendered the following judgment:

"The basis for plaintiff's right to be adjudged the owner of the two diamond earrings and in default of their return to have judgment for the price of said earrings against Fink, who, it may be stated at once, is shown by the evidence to have acquired same in perfect good faith, from a regular and well-known dealer, in open market and for a valuable consideration," is that the earrings were delivered to Moss simply for "temporary use," and absolutely without any authority conferred on him to sell, dispose of, or in any manner to incumber the same.

The testimony of the plaintiff's own witnesses establishes the very contrary:

The earrings were delivered by plaintiff to Moss, who was a dealer in diamonds, known as such to the trade generally and to plaintiff firm particularly, as repeated transactions of a character similar to the transaction in the instant cause were had between plaintiff and Moss, just in the same manner and for the same purpose, and under the same conditions as the plaintiff delivered other jewelry to Moss on actions prior to and subsequent to the instant transaction, and that was the purpose of sale. From the evidence of plaintiff's principal witness, the senior member of the firm, it is apparent that Moss not only had the right to sell these particular goods, but that he obtained them from the plaintiff firm with the knowledge on its part that this was the very purpose of the delivery. He was charged a fixed price for them less than the retail, so that when he sold them a margin of profit could be left to him. The agreement in this and all other similar transactions between Moss and the plaintiff firm was that the former was to have the right either to retain the goods and pay the price agreed on, or to return the goods if he so desired. In his testimony, William Frantz, the senior member of plaintiff's firm, states just how this transaction occurred:

"Q. Will you kindly tell the court the circumstances under which you handed these things over to Mr. Moss, and for which purpose you handed them over to him?

"A. Well, Mr. Moss came into the store, and he told us that he had a customer for a pair of diamond earrings, and so he took them from us for sale.

"Q. Did you sell these diamond earrings to Mr. Moss?

"A. No, sir; we did not sell them to him.

"Q. Well, just tell us what was to be done with them; tell us the whole story with regards to that pair of diamond earrings.

"A. Well, they were delivered to Mr. Moss, and he was either to sell them or return us the earrings; he was to give us back the earrings or the money."

Again he was asked:

"Q. What did he (Moss) state to you?

"A. He stated to us that he had a customer for a pair of earrings.

"Q. And for which purpose did you give this pair of diamond earrings to Mr. Moss?

"A. For the purpose of selling them.

"Q. Selling them generally, or for any one particular customer?

"A. Well, he said he had a particular customer for it. He said he had a customer for a pair of diamond earrings, and so we gave them to him. * * * If the earrings were sold, he was going to bring me the price of them (the money), and, if they were not sold, then the earrings were to be returned to us.

"I charged him a margin of profit on them—on both of them. I did that because he wanted to make a profit on them, and so we thought we would make a very small margin to him."

The price agreed on was \$502.97 for one pair and \$975 for the other pair of the earrings. This the witness says was within 10 or 15 per cent. of the cost, adding:

"This is not the value at which they would have been sold at retail. They would have been sold at retail at more than that. I made a very small price to Mr. Moss at the time because, naturally, he wanted to make something on it himself."

On cross-examination he says:

"Mr. Moss was an operator in diamonds, or a vendor of diamonds, in this city and of jewelry. He was well known among the trade as such. We charged him (Moss) for these goods on a memorandum slip. He was either to return the goods or to give up the price which we had charged against him. We gave him a bill at the time showing the price that he was to be accountable for to us. He was not to sell the goods and charge us a commission for selling them. He was not to account to us for what he might get out of the goods. Anything that he got for the goods, no matter how much it was above the price which we billed, would belong to him.

"Q. And, whether he sold the goods or kept and retained them himself, all that you wanted to get back from him was the amount that you had charged him for these goods, isn't that right, Mr. Frantz?

"A. Yes, sir; that is correct."

He testified that the plaintiff firm had other similar dealings with Moss.

"In these instances he had always paid us the price that we charged him for the goods. We never inquired as to what he had done with the goods, because we had nothing to do with that—what he sold them for."

From the record of the suit No. 4,504 of our docket, instituted by the plaintiff against J. W. Winehill and Louis Moss, this day decided (124 La. 680, 50 South. 650), we hear that plaintiff firm had similar transactions with Moss, one on the 28th of March, and another on the 2d of April, 1906, concerning diamond studs.

This suit is for the exact price charged Moss, which is less than the actual retail value of these articles.

It is evident from the facts above recited that the transactions between plaintiff and Moss concerning the earrings in question evidences a contract of sale subject to the right to recover and return reserved to the purchaser, or what is known to the law as a contract of "sale or return."

Article 2439 of the Civil Code defines the contract of sale as "an agreement by which one gives a thing for a price in money and the other gives the price in order to have the thing," and also provides that:

"Three circumstances concur to the perfection of the contract, to wit, the thing sold, the price, and the consent."

Here all these elements concur. Both parties had consented to the transaction—the price was fixed and binding on both, and the thing was delivered.

The only reservation which was a condition subsequent was that Moss had the right of dissolving the sale by a return of the goods to be made within a reasonable delay after the transaction; no specific time being stipulated.

As we have said, this was a transaction of "sale and return." Under such transactions, the title passes to the vendee.

Mr. Benjamin, in his work on Sales (597), says:

"The bargain called 'sale and return' was explained by the Queens Bench in *Moss v. Sweet*, 16 Q. B. 493 (187)—see *Swain v. Shepherd*, M. & R. 223—to mean a sale with the right on the part of the buyer to return the goods at his option, within a reasonable time, and in that case it was held that the property passes and an action for goods sold and delivered will lie if the goods are not returned to the seller within a reasonable time.

"In that case Lord Chief Justice James said where a party receives goods to sell them at any price he thought fit, and was still only liable to pay for them at a price fixed beforehand without any reference to the price at which he had sold them in a particular month, he was not acting in a fiduciary capacity in respect to these goods.

"*Millish, L. J.*, was of the same opinion, and, after stating that Neville purchased at a fixed price and at a fixed time, said: 'Now, if it had been his duty to sell to his customers at that price payable at that time, the course of dealing would have been consistent with it being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal and to make such a contract as he is authorized to make for his principal, and he is distinguished from other agents simply in this, that he guaranteed that these persons to whom he sells shall perform the contract which he makes with them, and therefore, if he sells

at the price and upon the credit authorized by his principal, and the customer pays according to his contract, then no doubt he is bound like other agents as soon as he receives the money to hand over to his principal. But if the consignee is at liberty to sell at any price he likes, and receives payment at any time he likes, but is to be bound if he sells the goods to pay the consignee for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent in point of law, the alleged agent in such a case is making on his own account a purchase from his alleged principal and is again reselling.'" Benjamin on Sales, p. 597.

Mechem on Sales, after referring to sales of goods to arrive to be shipped on approval satisfactory to buyer, if satisfactory to this party, to be weighed, to be appraised, etc., in which cases he says the title does not pass to the seller, reads:

"That to be distinguished from the cases in the last sections are those in which the option is the opposite, i. e., that the article is purchased and shall be paid for unless it be returned. Here is a present sale subject to a condition subsequent. As is said in one case, an option to purchase if he likes is essentially different from an option to return a purchase, if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once subject to the right to rescind and return.

"A contract of this nature is a present sale subject to be defeated by a condition subsequent until returned. Therefore the title is in the vendee. He may sell the goods as his own, and thus defeat the return; or they may be seized by his creditors with like effect. The risk usually is his also, as the risk follows the title excepting, perhaps, such risks as, where in the very nature of the property, are incident." Page 677.

Delivery of an article at a fixed price under alternative agreement that the article is to be paid for or returned at the option of the party receiving it constitutes a sale. *Crooker v. Gillifer*, 44 Me. 491, 69 Am. Dec. 118.

When the option is with the party receiving to pay for or return the goods received, the uniform current of authority is that such alternative agreement is a sale. *Holbrook v. Armstrong*, 10 Me. 31.

In *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630, it was held that Nason, who received the property having the alternative to return or pay, the property passed to him, and he was at liberty to sell.

In *Baswell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262, the party receiving the article in dispute verbally agreed to pay a certain price or return the same in a given time. "The property," said the court, "in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect."

2. Even should the nature of the transaction between plaintiff and Moss be not that of vendor and vendee, there is one fact which stands out conspicuous in the record, indeed, it is admitted by the plaintiff firm,

and that is that the goods were delivered by it to Moss for the very purpose of resale. This fact alone would as a matter of law preclude recovery from a bona fide purchaser.

"The general rule permitting the conditional vendor, as for instance in cases where the seller retains the title in the goods until the price is paid, to recover against a bona fide purchaser from the latter, very obviously should not and does not apply in these cases in which the goods have been delivered to the conditional vendee for the very purpose of being resold." *Mechem on Sales*, p. 601.

"Merely intrusting goods to another, without knowledge that they were to be kept on sale, would not raise an estoppel; but knowledge that they are to be put on sale and acquiescence in allowing them to be so exposed is equivalent to authority to sell them and may well raise an equitable estoppel. That is a matter of law and a defense now favored both at law and in equity." *Lewenberg v. Hays*, 91 Me. 104, 39 Atl. 469, 64 Am. St. Rep. 215.

And it has been repeatedly held that a pledge of the person thus authorized to sell the goods may claim protection as a bona fide purchaser to the extent of his lien. *Western Union, etc., Co. v. Bank*, 176 Ill. 260, 52 N. E. 30; *Michigan, etc., Co. v. Phillips*, 60 Ill. 190; *Prall v. Tilt*, 27 N. J. Eq. 393; *Williams v. Birch*, 6 Bosw. (N. Y.) 309; *Levy v. Carr*, 85 Hun, 289, 32 N. Y. Supp. 1023; *Parker v. Baxter*, 19 Hun, 40; *Mechem on Sales*, p. 977.

And so any one who in the ordinary course of business makes advances. 24 A. & E. Enc. 575; 8 A. & E. Enc. 840.

The case of *Lallande v. Creditor*, 42 La. Ann. 705, 7 South. 895, does not militate against this proposition, forasmuch as the factor in that case to whom the goods were shipped was authorized to sell only as the agent and representative of the client and for the latter. His relation to the latter was of a fiduciary nature, and therefore the goods were not sent to him under a conditional or any character of sale at all. He was not authorized to sell the goods as his own.

In the cases cited supra the goods were delivered under conditional sales, with authority, however, to resell the same for the account and as the property of the person to whom they were delivered. No fiduciary relations existed there, and none exists in the case at bar. A leading case in which it is held that the general rule permitting the conditional vendor to recover against a bona fide purchaser from the latter does not apply where the goods have been delivered to the conditional vendor for the very purpose of being resold in *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502.

The opinion in that case was delivered by Peckham, J., who subsequently became an associate justice of the Supreme Court of the United States. The facts in that case are on "all fours" with the facts of the instant case. The plaintiff there had delivered to one Miers a pair of diamond earrings, which the latter said he had a customer to whom he

would sell it, and for which he gave the following receipt to the plaintiff:

"New York, April 12, 1879. Received from Alfred H. Smith & Co. by their representative, B. W. W. Plumb, a pair of single-stone diamond earrings 10½ carats of the value of \$1,400, on approval to show to my customers, said knobs to be returned to A. H. Smith & Co. on demand. [Signed] E. Miers."

Miers sold the earrings to Clews, and the plaintiff, not being paid for them by Miers, sued Clews to be declared the owner of the earrings and in default of their return for judgment for their value. In the course of the opinion, the court said:

"Having thus become possessed of the diamonds, Miers, as has been stated, sold them to defendant, and the question is: Did he get a good title as against plaintiff?"

"Taking the undisputed evidence, and reading this receipt in the light thereof, we cannot resist the conclusion that the plaintiff conferred upon Miers the power to sell the diamonds and, of course, to give a good title, and therefore the court should have directed a verdict for defendant. The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of diamond dealer, a seller of the stones to whomsoever he chose. They had on former occasions intrusted through their agent diamonds to Miers, who had sold and accounted for the proceeds of the sale without any fault being found so far as appears on account of lack of authority to sell.

"They were informed by Miers on this particular occasion that he had a customer for a pair of diamond earrings, and these diamonds were then intrusted to Miers by the plaintiffs through their agent, Plumb. Upon taking them Plumb got the receipt spoken of. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds, show them to his customer, and, if approved by the customer, sell them to him? The fact that Miers agreed to return them to plaintiff on demand must be construed with reference to the obvious purpose for which the diamonds were intrusted to him, viz., that of a sale, and, so construed, the plain meaning is that, if not already sold, the plaintiff had the right to demand a return of the diamonds, and Miers would then be bound to return them. The information given to plaintiff by Miers that he (Miers) had a customer for a pair of diamond ear knobs is susceptible of no other interpretation than that he had a customer who wanted to buy a pair.

"Under such circumstances, what could a dealer in diamonds mean by intrusting them to another dealer who had a customer who wanted to buy them, and who came to this dealer for the purpose of being supplied by him with the diamonds of a kind which his customer wanted to buy? Enlightened by these facts, the interpretation of the receipt signed by Miers is an easy matter. It can mean nothing else than an authority to sell the stones to the customer if they met his approval, and, if not actually sold before demand, they should be returned to the plaintiff upon demand.

"This conclusion as to what was the actual authority given to Miers does not in the least affect the propriety of the decision cited by the counsel for the respondents and in the opinion of the court at general term to the effect that one intrusted simply with the possession of personal property with no power to sell or pass title cannot give title to the property given to a bona fide purchaser for value. The question here is simply what was the authority with which the man Miers was clothed, and upon the

undisputed evidence in the case we hold he was an authority to sell."

We have discussed this latter view of the case simply to show that, even if the transaction between plaintiff and Moss be not regarded as a contract of sale, the plaintiff even then could not recover.

We base our decision, however, on the settled conviction that the transaction evidences a perfect sale with a condition subsequent reserved to the vendee only, to rescind the sale and return the goods, and that under such contract the title to the goods passed to Moss.

For this reason the judgment appealed from is "affirmed." The case is before us for a review of that judgment under an order granting the same by this court.

An examination of the testimony in the record as to the relations between Moss and Fink, and the circumstances under which the latter acquired (as he declares) ownership of the articles involved in this suit, shows that Moss made to the defendant Fink a straight sale of the pair of solitaire diamond earrings described in the petition as being valued at \$502.97 for the sum of \$300, and that he paid the price thereof, and the same were delivered to him. That the second pair of solitaire diamond earrings described in plaintiff's petition and valued at the sum of \$975 was transferred by Moss to Fink in payment of a debt due by the former to Fink of \$962, which debt owed its origin to the following state of facts:

The plaintiff had delivered to Moss (who was a maker and repairer of, as well as a vendor of, diamonds) a number of loose stones to be made into a pin. Moss made the pin, but, instead of delivering it to Fink, pledged it to a man named Kell for a loan of \$500. Being pressed by Fink to deliver the pin to him, Moss acknowledged that he had pawned it to Kell for the amount stated. Fink called upon Kell and redeemed the pin from the pledge, paying Kell the \$500 for which it was pawned. He then demanded payment of the \$500 so paid by him from Moss. The latter told him that he had some jewelry pledged to a pawnbroker by the name of Koritzky for a loan of \$462; that it was worth \$975. He proposed to Fink that he should redeem it from Koritzky, and when so redeemed he (Moss) would give it to him "in payment" of the \$500 which had been paid to Kell and the \$462 paid to Koritzky.

The proposition was accepted. The amount due Koritzky was paid him, and the earrings under the agreement to Fink were delivered to him through a dation en paiement. The pair at the time of the trial was still in Fink's possession. The jewelry so given in payment were the earrings referred to in Fink's possession.

This court holds, under the state of facts so shown, that title passed to Fink to the first-mentioned pair of earrings, and the judgment of the district court and the Court of Appeal to that effect should be affirmed.

It holds, however, that the said judgments are erroneous in so far as they recognized and decreed the defendant Fink to be the owner of the second pair of solitaire diamond earrings referred to in plaintiff's petition, and that the said judgments in that respect (under the recently decided case of *William Frantz & Co. v. Winehill et al.*, 124 La. 680, 50 South. 650) should be annulled, avoided, and reversed, and judgment rendered in favor of the plaintiffs as prayed for by them for the recovery of said second pair of solitaire diamond earrings or the value thereof.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the Court of Appeal herein brought up for review and the judgment of the district court (which the Court of Appeal in its said judgment brought up for review affirmed), in so far as said judgments recognized and decreed the defendant Jacob Fink to be the owner of the said second pair of earrings described in plaintiffs' petition and rejected the prayer of plaintiffs' petition in respect to the same, be, and the same are hereby, annulled, avoided, and reversed, and it is now recognized, ordered, adjudged, and decreed that the plaintiffs William Frantz & Co. are the owners of the said second pair of solitaire earrings described in plaintiffs' petition and valued at the sum of \$975; that said pair of diamond earrings are in the illegal possession of Jacob Fink. It is further ordered, adjudged, and decreed that the defendant Jacob Fink do within 10 days from the date of this judgment deliver the said pair of solitaire diamond earrings to the plaintiffs William Frantz & Co., and, in default thereof, it is ordered, adjudged, and decreed that there be judgment in favor of the plaintiffs and against the said Jacob Fink for the sum of \$975, with legal interest thereon from judicial demand until paid.

It is further ordered and decreed that the defendant Jacob Fink pay the costs in the district court, the Court of Appeal, and this court. Except as herein altered, the judgment of the district court and that of the Court of Appeal is hereby affirmed.

On Rehearing.

PROVOSTY, J. Moss, one of the defendants, was a maker and repairer of jewelry. He had an office on the second floor of a building on one of the principal streets of this city, and also a workshop on the third floor of the same building. What this office consisted of, or what he kept in it, the record does not show. In a small way he bought and sold diamonds. The defendant Fink, in answer to the question, "Q. He didn't have any store?" answered, "He used to carry around a little paper of loose goods all the time; yes, sir." From this, and from the evidence generally in the case, we understand that Moss was more of an artisan—a maker and repairer of jewelry and diamond setter—

than merchant; and that he traded only in a small way in jewelry. That he did this, however, was well known among the trade.

The plaintiff firm has a large jewelry establishment in this city. It had had some dealings with Moss in a small way, had sold him "some small things," for which he had duly paid, when the transactions which have given rise to the present controversy took place.

On March 16, 1906, he came into the store of the plaintiff firm, and said he had a customer for a pair of diamond earrings, and asked plaintiff to let him have the goods to show to his customer; and again, on April 4, 1906, he came with another similar request for another pair of diamond earrings; and both times plaintiff complied with his request.

A material point in the case is as to what were the terms and conditions on which the two pairs of earrings were thus put in the possession of Moss. The only witness on that point is the senior member of the plaintiff firm, and his testimony is accepted as true. He says that he fixed a price on the earrings, and let Moss have them on the condition that he should either return them or pay the price; that he did not sell them to him, but fixed the price low enough for him to make a profit in selling them to some one else. On both occasions the witness put this price on a piece of paper, and handed it to Moss, and made a memorandum for himself of what goods he had thus intrusted, and of the price set on them. This price was \$502 on the first pair, and \$975 on the second.

No time seems to have been fixed within which Moss should return the goods or pay for them, and the evidence does not show what was contemplated in that regard. It does show, however, that plaintiffs made inquiries of Moss, and were told that his customers were still deliberating.

As a matter of fact, he had taken the first pair of earrings on the day after he got them to the pawnbroker's shop of the defendant Fink and sold them to him for \$300. This was \$202 less than the low price set upon them by plaintiff.

The second pair of earrings he pledged at the pawnbroker's shop of one Koritzky for \$465. The date of this pledge is not shown.

In the early part of February the defendant Fink had bought some small loose diamonds of Moss, and had left in his hands 171 small diamonds to be set in a pin or brooch. While the work was in progress, Fink kept an eye on his 171 diamonds. In one place he says that he went to Moss' shop every day; at another place he says that he went once or twice a week. After the pin had been apparently completed, Moss would not give it up, saying there was still something to be done to it. He had already been paid the price agreed on for doing the work, \$110. The pin was worth \$1,500. Fink had called at Moss' shop on several consecutive days to de-

mand the pin and not found him in, when, determined to have the pin, he sought him out at his house; and Moss then acknowledged that he had pledged the pin at the shop of one Kell for \$500. He at the same time said that he owned a pair of diamond earrings worth \$975, which he had pledged to Koritzky for \$465, and that Fink could have them if he would redeem them and pay the \$500 to Kell in redemption of the pin. This Fink agreed to do, and on the same day did do.

On the evening of that day, April 28th, a Saturday, Moss came to plaintiff with a story that two armed men had come to his shop and robbed him of the diamonds. Plaintiff did not believe him and had him arrested, and at once instituted, with the aid of detectives, a search among the pawnbrokers' shops of the city. On the first visit to the shop of the defendant Fink he denied that he had had any dealings with Moss. When Moss saw that his tale of robbery would not hold, he confessed; and Fink also, on the second visit to his shop, acknowledged his transactions with Moss, and offered to restore the goods on being reimbursed the several sums which he had paid out, namely, the \$300 to Moss, the \$465 to Koritzky, and the \$500 to Kell.

Plaintiff then brought this suit against Fink and Moss, demanding in the alternative a return of the goods or payment of the price set upon them.

Moss made no defense. Fink contends that the transactions between Moss and the plaintiff were sales; that Moss became owner of the goods, and could convey a valid title to them; that, at all events, the plaintiff firm is estopped in the premises, because it clothed Moss with the indicia of ownership, thereby enabling him to commit the fraud; and that, whenever one of two innocent persons must suffer by the acts of a third, he who enables such person to occasion the loss must sustain it.

The question of whether Moss became the owner of the goods or not depends upon what was the agreement of the parties. The parties had a perfect right to make any agreement they chose in that regard. The rights conferred upon Moss by that agreement were: (1) To become owner of the goods on paying the price set upon them; (2) to sell the goods to some one else at a cash price of not less than that set upon them. The right was not conferred upon him to buy the goods on a credit; or, in other words, to become debtor to plaintiff for the price of the goods. Whatever money he received from the person he sold the goods to was to be plaintiff's money; and, if he failed to account for it, he would be criminally responsible. The goods were not sold to him, and the only way in which he could become the owner of them was by paying cash for them. By the terms of the arrangement Moss could not sell the goods on a credit. Either the goods or the money

would have to be in his hands, to be delivered to plaintiff.

The goods not having been sold to Moss, he could transfer no title to them. *Nemo plus in alium transferre potest quam ipse habet.* 5 Cyc. 207; 24 A. & E. E. 1163.

The learned counsel for the defendant Fink contend that the transaction was of the kind known at common law as "sale and return," and the Court of Appeal took that view. We repeat, the nature of a transaction is what the parties agree that it should be; and the distinct agreement in this case was that the goods were not sold, or agreed to be sold, on a credit to Moss, but that the only way he could become the owner of them was by paying cash for them. For the distinction between such an agreement and what is commonly known as "sale and return," see *Sturm v. Boker*, 150 U. S. 323, 14 Sup. Ct. 99, 37 L. Ed. 1099, and note; *Sturtevant v. Dugan*, 106 Md. 587, 68 Atl. 351, 14 Am. & Eng. Ann. Cas. 679.

Before passing to the consideration of how far plaintiff may be estopped, we will note that the law of agency can play no part in this case. Moss had no mandate to sell the goods at less than the price set upon them, and still less had he any mandate to give them in payment of his debts. And Fink did not deal with him as the agent of the plaintiff firm, but as the owner of the goods.

Coming to a consideration to the estoppel, it is a plain proposition that the mere possession of movable property is not such indicium of ownership as will enable the possessor to convey a good title as against the true owner. If it did, the borrower or hirer of a horse could validly sell it. The owner must have done something more than merely confide the possession of his property to the possessor before the latter can sell it or create a lien upon it. He must have to some extent accredited the title of the possessor—clothed him with more pronounced indicium of ownership than mere possession.

This may be done in various ways, and one way would be what the plaintiff firm did in this case, namely, consent that a vendor of jewelry exhibit the jewels as part of his stock of goods, or as belonging to him.

"If a wine merchant be left in possession of wine, the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it." Per Bramwell, L. J., in *Meggy v. Imperial*, 3 Q. B. D., 717.

The decision in *Conner v. Hill*, 6 La. Ann. 7, is founded upon estoppel, agency, and ratification. From the facts as stated, the grounds of estoppel do not appear; but the writer of the present opinion knows that the flatboats coming down the Mississippi river before the War loaded with western produce were for sale, and that usually, if not always, those in charge of them had authority to sell; so that Anderson, who was in charge of the flatboat in that case, had more than mere possession. He had a possession which,

according to custom, was accompanied by the power to sell. True, the owner had not consented to his being thus clothed with apparent authority to sell, but his son and agent had done so for him. It was upon this the court must have founded the estoppel, in so far as the decision is based on estoppel.

True, Moss was more of an artisan than merchant; but it was in his character of merchant that both plaintiff and Fink dealt with him. Plaintiff consented that he should exhibit the earrings to his customers as belonging to him, and that he should do so in his quality of a trader in jewelry. Fink, knowing him to be a trader in jewels, was justified in buying from him. It follows from this that Fink acquired a good title to the first pair of earrings. Although, we must say, that the great disparity in price gives some room for suspicion even as to that pair of earrings.

With respect to the second pair, Fink is not in a position to invoke equitable estoppel. For him to be in a position to do so, it would be necessary that he should "not only have been destitute of knowledge of the real facts, but should also have been without convenient or ready means of acquiring such knowledge." 16 Cyc. 739. And he must have been led to change his position for the worse. 16 Cyc. 722.

"Notice is to be distinguished from knowledge, and, if the buyer has notice of facts which would put a reasonably prudent man upon inquiry which would have resulted in the ascertainment of the adverse interest sought to be enforced against him, he will be deemed to have taken with notice, and cannot assert the rights of a bona fide purchaser." 26 A. & E. E. 1175.

In so far as the earrings were taken in reimbursement of the \$500 which Fink had to pay to Keil for redeeming his pin, his position was not changed for the worse, since that amount would have had to be paid to Keil even if Moss had never had possession of the earrings, and since it is not pretended that he was deprived of any recourse which he would otherwise have had against Moss. As to the circumstances under which one who has received property in payment of an antecedent debt may be considered to have parted with value, see 26 A. & E. E. 1171, 1173.

By the time Fink came to deal with Moss for this second pair of earrings, Moss had become utterly discredited. He was a confessed embezzler. He was no longer a merchant or trader having valuable goods for sale, but was a diamond setter who had pledged the goods of his employer and stood under the necessity of confessing his crime because of his inability to redeem the pledge. He was not a merchant offering to sell goods out of his stock, but at best an ex-merchant who was proposing to the person whose property he had embezzled that the latter should rescue from the pawnbroker's shop a cer-

tain piece of property and pay himself out of the margin between value of the thing and the amount for which it stood pledged. Fink testifies that he had lost confidence in Moss and would not trust him out of his sight with the \$465 for redeeming the earrings from Koritzky. The fact itself, well known to Fink, that Moss was a diamond setter, to whom valuable jewelry was likely to be intrusted by third persons, was in itself sufficient to put Fink upon inquiry. We cannot help thinking that Fink was a willing victim, and that, if it had not been for the chance of getting back his \$500, he would have dealt with Moss with a good deal less of confidence.

As to this \$465, we put our decision distinctly on the fact that the earrings were not acquired from a merchant having them for sale to the public generally, but were redeemed from a pawnbroker's shop at the request of an embezzler as a means of settlement for the embezzlement.

It is therefore ordered, adjudged, and decreed that our former decree be reinstated and made the judgment of this court.

DAVIDSON et al. v. DAVIS.

(Supreme Court of Florida, Division B. April 2, 1910.)

(Syllabus by the Court.)

USURY (§ 32*) — WHAT CONSTITUTES — CASH AND CREDIT PRICE FOR GOODS SOLD.

Usury can only attach to a loan of money or to the forbearance of a debt. On a contract to secure the price or value of work and labor done, or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done, or of property sold; and the difference between cash and credit in such cases, whether 6, 10, or 20 per cent., must be left exclusively to the contract of the parties, and no amount of difference, fairly agreed upon, can be considered illegal. The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price without violating the usury law, although the per cent. agreed is greater than the lawful rate of interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 75-77; Dec. Dig. § 32.*]

Appeal from Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Bill by J. W. Davis against W. M. Davidson and Ida Davidson. Decree for complainant, and defendants appeal. Affirmed.

T. F. West, for appellants. Daniel Campbell & Son, for appellee.

TAYLOR, J. The appellee filed his bill for the foreclosure of a mortgage in the cir-

cuit court of Santa Rosa county; the mortgage being given to secure the payment of a note for \$1,687.50, payable 12 months after date, to bear interest after maturity at the rate of 12½ per cent. per annum. The defendants answered the bill, alleging that the said note was usurious in this: That the amount really due by them to the original payee in said note was the sum of \$1,500, and that the excess of \$187.50 over said sum of \$1,500 was added to said note as interest thereon from the date of said note for one year thence next ensuing, which they aver was at the rate of 12½ per cent. per annum, and was usurious. Testimony was taken, and upon the testimony the court below rendered a decree for the principal sum of \$1,687.50, without any interest after maturity of said note, and for attorney's fees for the foreclosure of the mortgage, and for costs. From this decree the defendants below have taken their appeal, and assign the said decree as error.

The evidence in the case shows that there was no loan of money by the mortgagee to the mortgagors, and that no indebtedness between them existed at the time of the giving of said note and mortgage, but that, the original mortgagee being the owner of a tract of land in Santa Rosa county that the mortgagor desired to purchase, the said vendor was willing to sell the same for cash at the sum of \$1,500; but the vendee not being able to pay said sum of \$1,500 in cash, and desiring 12 months' time within which to make payment for said land, the vendor agreed to give him such extension of time, provided he would at the end of said 12 months pay him \$1,687.50, instead of \$1,500 (the cash price asked)—the said excess in the price agreed to be paid over the cash price asked being equivalent to interest on the cash price asked at the rate of 12½ per cent. per annum.

The law is well settled that usury can only attach to a loan of money, or to the forbearance of a debt, and that on a contract to secure the price or value of work and labor done, or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done and property sold; and the difference between cash and credit in such cases, whether 6, 10, or 20 per cent., must be left exclusively to the contract of the parties, and no amount of difference fairly agreed upon can be considered illegal. Webb on Usury, par. 72; West v. Belches,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5 Mumf. (Va.) 187; Garrity v. Cripp, 4 Baxt. (Tenn.) 86; Brown v. Gardner, 4 Lea (Tenn.) 145; Ruffner v. Hogg, 1 Black (U. S.) 115, 17 L. Ed. 38. Or as the rule is stated in First Nat. Bank of Johnson City v. Mann, 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565: "The difference between the cash and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price without violating the usury law, although the per cent. agreed upon is greater than the lawful rate of interest." Reger v. O'Neal, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427; Graeme v. Adams, 23 Grat. (Va.) 225, 14 Am. Rep. 130.

Under the law as stated there was no usurious taint in the note herein sued upon, and the court below committed no error in the decree rendered, and the same is hereby affirmed, at the cost of the appellants.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

JONES v. MORGAN et al.

(Supreme Court of Florida, Division B. April 2, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 713*)—RES JUDICATA—QUESTIONS DETERMINED.

The plea of res judicata applies to every objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings of the former one, and might have been presented in it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

2. JUDGMENT (§ 713*)—RES JUDICATA—MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

In an action upon the same claim or demand, the former adjudication concludes parties and privies, not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

Appeal from Circuit Court, De Soto County; W. S. Bullock, Judge.

Bill by John L. Jones against C. C. Morgan and others. Decree for defendants, and complainant appeals. Affirmed.

Treadwell & Treadwell, for appellant. J. W. Burton and H. S. Hampton, for appellees.

TAYLOR, J. This is the second appearance of this litigation in this court. For a complete statement of the facts, see the case of Morgan v. Jones, 52 Fla. 543, 42 South. 242. Since the mandate of this court in the case was sent to the court below, that court, in obedience to said mandate, entered its decree of final dismissal of the complainant's bill. Since that time the same complainant in the former bill, John L. Jones, has again

filed another bill in the circuit court of De Soto county against the same defendants, C. C. Morgan and Hilton S. Hampton, for identically the same cause of action, and praying the same relief as in his first or former bill, adding to the last bill one E. J. Register as a new party defendant. To this last bill the defendants have interposed the plea of res judicata. This plea was sustained by the court below, and the complainant's new bill was dismissed, and from this decree the complainant appeals to this court assigning said decree as error.

There was no error here. The new bill involves identically the same subject-matter and issues as did the former bill, and is between the same parties, with the exception of the new defendant, E. J. Register; and he is shown to be in privity with the two defendants in the former bill, being a purchaser of the property in controversy from them since the adjudication of the former case. Some additional facts are alleged in the last bill that were not contained in the former; but all such matters might have been alleged and litigated therein, and are not sufficient to overturn the propriety of the former disposition of the cause. The plea of res judicata applies to every objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings of the former one, and might have been presented in it. Herman's Law of Estoppel, p. 179.

In an action upon the same claim or demand, the former adjudication concludes parties and privies, not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit. 24 Am. & Eng. Ency. Law (2d Ed.) p. 714.

The decree of the court below in said cause is hereby affirmed, at the costs of the appellant.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

LA FAYETTE LAND CO. v. CASWELL et al.
(Supreme Court of Florida, Division B. April 2, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 233*)—DEMURRER TO BILL.

A general demurrer to an entire bill for want of equity should be overruled, where the case made by the bill entitles the complainant to any substantial relief in a court of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 509; Dec. Dig. § 233.*]

2. EVIDENCE (§ 452*)—CONVEYANCE TO FIRM—PAROL EVIDENCE.

A deed made to a firm by the firm name, instead of the individual members of the firm,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is not for that reason void. It is a latent ambiguity, that may be explained and supplied by parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2093-2101; Dec. Dig. § 452.*]

Appeal from Circuit Court, Taylor County; B. H. Palmer, Judge.

Bill by John E. Caswell and L. A. Knight against the La Fayette Land Company. Decree for complainants, and defendant appeals. Affirmed.

Hendry & McKinnon, for appellant. Hardee & Butler, for appellees.

TAYLOR, J. The appellees filed their bill in equity in the circuit court of Taylor county against the appellant for the removal of clouds upon their title to the standing timber growing upon divers lands in said county, and to enjoin the appellant from trespassing thereon and from harassing the complainants with divers alleged vexatious suits at law in which it is alleged the appellant has undertaken to seize the timber cut from said lands by the appellees. To the bill the defendant below interposed a demurrer on the following grounds:

- (1) There is no equity in the bill.
- (2) The bill shows that complainants have an adequate remedy at law.
- (3) The bill shows that the question of title to said property is being litigated in an action at law.
- (4) The bill states conclusions, and does not set out the facts showing that a reasonable time has expired.
- (5) The bill alleges facts that tend to vary and contradict the terms of a written instrument under seal.
- (6) The bill sets up a contract in relation to said timber, made prior to and contemporaneously with the said written instrument under seal, and in terms contrary thereto.

This demurrer was overruled by the chancellor, and from this order the defendant below appeals to this court, assigning said order as error. There was no error in this ruling.

It is well settled here that a general demurrer to an entire bill for want of equity should be overruled, where the case made by the bill entitles complainant to any substantial relief in a court of equity. Louisville & N. R. Co. v. Gibson, 43 Fla. 315, 31 South. 230. We think the bill sets up a good ground for equitable relief in its effort to remove clouds from the complainants' title, as well also as in its prayer for injunction. It is contended here that the conveyance under which the complainants claim title is void because no grantees are named therein. This contention is based upon the fact that the deed under which the complainants claim, attached as exhibit to their bill, is made to Caswell and Knight, of Taylor county, Fla., as grantees, without giv-

ing either of their Christian names. This does not render said deed void.

A deed made to a firm by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity, that may be explained and supplied by parol. Murray, Ferris & Co. v. Blackledge, 71 N. C. 492; Walker v. Miller, 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805; Morse v. Carpenter, 19 Vt. 613; 1 Jones on Law of Real Property in Conveyancing, par. 244, and cases there cited.

The order of the court below in said cause is hereby affirmed, at the cost of the appellant.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

GOLSON et al. v. BOYETT et al.
(Supreme Court of Florida, Division B. April 2, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1135*)—REVIEW—AFFIRMANCE.

Where a bill in equity for specific performance of a contract for the conveyance of land sets up a proper case for such specific performance, and the proofs sustain the allegations of the bill, a decree awarding such specific performance will be affirmed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1135.*]

Appeal from Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Bill by Margaret Annette Boyett and others, by their next friend, J. E. Boyett, against L. P. Golson, administrator, and others. Decree for complainants, and defendants appeal. Affirmed.

T. F. West, for appellants. Daniel Campbell & Son, for appellees.

TAYLOR, J. This is the second appeal in this case. See Maloy v. Boyett et al., 53 Fla. 956, 43 South. 243. On the former appeal various defects in the bill of complaint were pointed out, and the decree of the court below was reversed, with directions for leave to the complainants to amend their bill for the specific performance of a contract to convey realty. The complainants accordingly amended their said bill, and upon the testimony taken the court below rendered a decree in favor of the complainants, adjudging that the alleged contract between the said parties should be specifically performed. This decree the defendants below bring here for review by appeal. It is now contended that the amended bill, upon which the cause was finally heard and determined, is subject to the same criticisms as the bill stricken down on the former appeal. This contention we cannot sus-

tain. The amended bill now under consideration we think entirely supplies the defects pointed out in the former appeal, and we think presents a sufficient case for specific performance. We think, too, that the proofs abundantly sustain the decree of the court below, and said decree is therefore hereby affirmed, at the cost of the appellants.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

REAVES v. ANNISTON KNITTING MILLS CO.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied Feb. 26, 1910.)

1. PARENT AND CHILD (§ 7*) — INJURY TO CHILD IN EMPLOYMENT—ACTION FOR LOSS OF WAGES—CONTRIBUTORY NEGLIGENCE OF PARENT.

Where the injury to a minor employé was caused by the negligence of her employer in not warning and instructing her as to the dangers incident to her employment, the consent of her parent to her engaging in the dangerous employment was not contributory negligence, barring recovery by the parent for loss of her wages.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 87; Dec. Dig. § 7.*]

2. PLEADING (§ 136*) — PLEAS — EFFECT OF GENERAL ISSUE.

The plea, in an action based on injury to an employé through the master's negligence, that the injury resulted from dangers ordinarily incident to the service, is within the general issue pleaded, and so superfluous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 284; Dec. Dig. § 136.*]

3. MASTER AND SERVANT (§ 226*) — ASSUMPTION OF RISK—DANGERS ORDINARILY INCIDENT TO SERVICE.

Failure of the master to warn and instruct a young and inexperienced employé of the dangers incident to her employment is not a danger ordinarily incident to the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 664; Dec. Dig. § 226.*]

4. PARENT AND CHILD (§ 7*) — INJURY TO CHILD—DANGEROUS EMPLOYMENT—CONSENT OF PARENT—PLEADING AND PROOF.

One suing the employer of his infant child for loss of her wages through injury to her from the negligence of the master in not warning and instructing her as to the dangers incident to her employment, having, though unnecessarily, averred in the complaint nonconsent to the employment, must prove it as a condition of recovery.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 97; Dec. Dig. § 7.*]

5. PARENT AND CHILD (§ 7*) — INJURY TO CHILD IN EMPLOYMENT — CONTRIBUTORY NEGLIGENCE OF PARENT—PLEADING.

Consent of a parent to his infant child engaging in a dangerous employment, in fact not being negligence proximately contributory to the child's injury through the master's negligence in not warning and instructing her as to the dangers incident to her employment, is not rendered so by the complaint averring nonconsent to the employment.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 94, 97; Dec. Dig. § 7.*]

6. DAMAGES (§ 171*)—INJURY TO CHILD—ACTION FOR PARENT'S LOSS—EVIDENCE.

The financial condition of the child, but not the source of any estate it has, is a proper element of inquiry, as bearing on the loss likely to be entailed on the parent from the child's injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 498; Dec. Dig. § 171.*]

7. PARENT AND CHILD (§ 7*) — INJURY TO CHILD—ACTION FOR PARENT'S LOSS—EVIDENCE.

Evidence as to recovery by a child of its employer for injury in his employment is not admissible, over the parent's objection, in an action by the parent against the employer for loss consequent to the injury.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 97; Dec. Dig. § 7.*]

8. PARENT AND CHILD (§ 7*) — INJURY TO CHILD—ACTION FOR PARENT'S LOSS—EVIDENCE.

The disposition made by sisters of plaintiff's injured child of their wages is immaterial in an action for loss to the parent consequent to the injury.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 97; Dec. Dig. § 7.*]

9. PARENT AND CHILD (§ 7*) — INJURY TO CHILD—ACTION FOR PARENT'S LOSS—EVIDENCE.

The matter of settlement of plaintiff's guardianship of his injured child is immaterial in an action for plaintiff's loss from the child's injury.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 97; Dec. Dig. § 7.*]

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

Action by W. P. Reaves against the Anniston Knitting Mills Company for injury to his minor child. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The facts and pleadings are sufficiently set out in the former appeal in this case, reported in 154 Ala. 565, 45 South. 702.

Tate & Walker, for appellant. Willet & Willet, for appellee.

McCLELLAN, J. Counts 1, 2, and 7 as amended were those upon which the testimony was taken upon the trial. The first two rely upon the negligence of defendant (appellee) in omitting to warn and instruct plaintiff's (appellant) nine year old child, inexperienced and immature, in reference to the dangers incident to her employment in defendant's hosiery mill. The seventh count as amended ascribed the injury to the negligent failure of the defendant in respect of an uncovered, exposed shafting, rapidly revolving a short distance above and parallel with the floor of one of the rooms of the mill. This is the second appeal. *Reaves v. Anniston Knitting Mills*, 154 Ala. 565, 45 South. 702.

The main question now presented for review is among those decided adversely to appellee on the previous occasion. It is, under pleas H and I, whether the consent of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

parent, who sues for the loss of the services, etc., of his injured minor child, that the child engage in the hazardous employment in which it is injured, is chargeable with negligence, proximately contributory to its injury, and, hence, be barred of recovery in such action for the loss of services, etc., where the complaint ascribes the injury to the negligence of the master. In deference to the insistence of appellee's counsel, we have carefully reconsidered the question, and, after so doing, feel impelled to reaffirm the former ruling thereon in this case.

Reference to the numerous decisions of this court, cited and pressed upon our attention for appellee, will discover that none of them affirm the proposition that a parent's consenting to the employment of his minor child in a dangerous business includes either the assumption of risk of injury therein or affords the basis for the imputation of contributory negligence on the part of the parent in any action by the parent, where the cause of the injury is ascribable to the negligence of the master. The previous ruling rested, at least in part, upon the theory that the consent of the parent to the employment created a condition merely, and that the proximate cause for the injury was to be found in the negligent failure of the master to instruct and warn the child. The sequence, in cause of injury, cannot be ascribed to the original want of care of the consenting parent, for the reason that, as pleaded in counts 1 and 2, that dereliction of the parent was, if unaided, obviously innocent of damifying result. The consent of the parent to the employment bore the child to a dangerous situation; but injury attended the child in consequence of the master's failure to warn and instruct, and not from the dangerous situation into which the parent had consented that the child be placed. The conclusion then announced, and now reaffirmed, is in accordance with the doctrine prevailing in this court, viz., that the proximate cause of an injury is ascribed to the act or omission subsequent, in order of effect producing the injury, to that want of care, it may be, creating the status upon which the duty last breached is erected.

Plea 3 avers the injury to have resulted proximately from dangers ordinarily incident to the service, and hence was within the general issue pleaded, and might well have been stricken on motion. Counts 1 and 2 could only be sustained by proof of injury in consequence of the negligence charged in them, and the failure to warn and instruct the child were not of the dangers described in the plea.

Pleas H and I would ground contributory negligence upon consent, with knowledge, of the plaintiff that his child engage in the dangerous service described. On the facts averred, these pleas were subject to the de-

murrers interposed. The court erred in overruling the demurrers to pleas H and I.

Counsel for appellee insist that these pleas were apt in reply to the averment of non-consent of plaintiff set forth in the first count. The plaintiff must prove his averment, even though unnecessarily incorporated therein, as a condition to a recovery. *Tenn. C. I. & R. Co. v. Crotwell*, 156 Ala. 304, 47 South. 64. But this fact will not serve to render that proximately contributing negligence, as appellee contends, which, in fact, is not so.

A number of the charges given or refused, and the court's action in respect to them, are assigned as error. What has been before said in reference to pleas H and I will serve to indicate the proper course for the court in dealing with charges touching that phase of the case.

Under the rule declared in *Bube v. Birmingham R., L. & P. Co.*, 140 Ala. 275, 37 South. 235, 103 Am. St. Rep. 33, among other decisions here, the financial condition of the child is a proper element of the inquiry, in order that the jury may determine from the whole evidence the loss likely to be entailed upon the parent in consequence of the child's injury; but this does not render proper an investigation of the source of the child's estate, if such it has.

The testimony in reference to a recovery in another action by the child against this defendant should not have been admitted over plaintiff's objection. Nor did the disposition made of their wages by sisters of plaintiff's injured child tend to shed any light upon the issues in the case.

Nor was the matter of settlement of plaintiff's guardianship of the injured child serviceable on any issue raised by the pleadings. It should not have been admitted over plaintiff's objection.

We are not able to find any tendency in the evidence supporting material averments of count 7 as amended. The court did not err in giving the affirmative charge thereon, as requested by defendant.

The errors indicated require the reversal of the judgment and the remandment of the cause.

Reversed and remanded.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

SCARBOROUGH v. HARRISON NAVAL STORES CO. (No. 14,101.)

(Supreme Court of Mississippi. April 25, 1910.)

1. APPEAL AND ERROR (§ 565*)—FILING STENOGRAPHER'S NOTES—NOTICE TO ATTORNEYS—NECESSITY.

Code 1906, § 797, requires the clerk of the circuit court, as soon as the stenographer's notes are transcribed, to notify each attorney

interested that the notes are on file. *Held* that, where the notes are in fact examined and approved by a party litigant, either in person or by his attorney, the benefit intended by the notice has been conferred.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 565.*]

2. ATTORNEY AND CLIENT (§ 88*)—ACTS OF ATTORNEY—CONCLUSIVENESS.

The acts of an attorney, so far as the procedure in a case is concerned, are always binding on his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 161-163; Dec. Dig. § 88.*]

On suggestion of error. Suggestion sustained.

For former opinion, see 51 South. 274.

SMITH, J. Appellee was represented in the court below by two firms of attorneys, to wit, Messrs. Doty & Elmer and Messrs. Ford, White & Ford. There is a conflict in the evidence as to whether any member of the latter firm was notified, as required by section 797 of the Code, that the stenographer's notes had been filed with the clerk.

The question of notice to the firm of Ford, White & Ford is wholly immaterial, for the reason that on February 3d, within the time required by law, the transcribed notes were handed to Mr. Doty, of the firm of Doty & Elmer, by Mr. E. M. Barber, counsel for appellant, and after an examination of same the notes were by both of these gentlemen approved. This approval is in the following language: "These notes approved on this 3d day of February, 1909. [Signed] E. M. Barber, Attorney for Plaintiff. Doty & Elmer, Attorneys for Defendant." In *Hines v. Shumaker*, 50 South. 564, this court, speaking through Wilbourn, Special Judge, said: "But, conceding that the notice required by the statute was not given, we are further of the opinion that the question of notice or no notice was rendered immaterial by the fact that after the transcribed notes were filed by the stenographer, and examined and approved by appellants, the leading counsel for appellee retained the said notes for the purpose of examination for more than five days, did examine them, returned them to the clerk, and filed no written suggestions of corrections of said notes. Clearly the object of the notice required by the statute is to afford the parties to the litigation an opportunity to inspect the notes and suggest corrections within the time allowed them, and to put them in default in the event they do not exercise the right to the use of the notes, for the purpose of inspection and correction, for the period prescribed by the statute. If the appellee exercises, himself or through counsel, the right to use and inspect the notes for the period allowed the appellee under the statute, and omits to file written

suggestions of corrections, the question of notice becomes just as immaterial as is the question as to whether or not process was issued and served in a suit where the defendant voluntarily appears. The acts of Mr. Flowers were binding on his client, and we think, therefore, that no matter whether the notice was legally sufficient or not, and irrespective of the question of notice, the stenographer's notes became a part of the record by operation of law under the facts of this particular case, without either the signature of the judge or any agreement of counsel, and by the express provisions of the statute itself."

In the case at bar appellee, through its counsel, not only examined the notes, but actually approved same. When the notes are in fact examined and approved by a party litigant, either in person or by his attorney, the benefit intended to be conferred by the notice has been obtained. The acts of an attorney, so far as the procedure in a case is concerned, are always binding on his client.

The suggestion of error is sustained, the judgment heretofore entered, striking the stenographer's notes from the files, is set aside, and the motion to strike said notes from the files is overruled.

DURR et al. v. MASSINGALE et al.
(No. 14,500.)

(Supreme Court of Mississippi. April 25, 1910.)

Appeal from Chancery Court, Rankin County; Norrell, Special Chancellor.

Bill in chancery by James Durr and another against J. B. Massingale and another. Decree for defendants, and complainants appeal. Reversed and remanded.

A bill in chancery was filed in the lower court to set aside a conveyance of a house and lot made by complainants to the appellees. The complainants allege that they thought they were pledging their property as security to the appellees for an amount advanced by them to pay a fine and costs imposed upon Sumpter Durr on account of certain criminal charges against him before a justice of the peace, and that they did not ascertain until afterwards that they had executed a warranty deed. Appellees contend that it was agreed that, if they would "get Sumpter out of the trouble," the conveyance in question would be executed. There was a decree below dismissing the bill, from which this appeal comes.

Carl Stingily, for appellants. Patrick Henry, for appellees.

SMITH, J. It is clear from the evidence that appellants did not understand that they were executing a deed conveying the property in question to appellees, but intended only to secure appellees in whatever amount they might expend in Sumpter Durr's behalf for attorney's fees, etc., on account of certain criminal charges then pending against him.

The decree of the court below is reversed, and the cause remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

PARSHLEY v. GOODBREAD.

(Supreme Court of Florida. March 15, 1910.
Rehearing Denied May 4, 1910.)

(Syllabus by the Court.)

1. WORK AND LABOR (§ 19*)—FAILURE OF CONTRACTOR TO FURNISH LIST OF MATERIAL-MEN AND LABORERS—ACTION ON COMMON COUNTS.

The penalty provided in section 2217, Gen. St., preventing recovery by a contractor who has failed or refused to furnish a list of material-men and laborers, is confined to recovery under that act, and does not apply to an ordinary action on the common counts.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 19.*]

2. WORK AND LABOR (§ 28*)—EVIDENCE.

There was sufficient evidence to sustain the judgment.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 28.*]

In Banc. Error to Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by W. H. Goodbread against E. L. Parshley. Judgment for plaintiff, and defendant brings error. Affirmed.

Carter & McCollum, for plaintiff in error.
Hardee & Butler, for defendant in error.

COCKRELL, J. Goodbread recovered judgment upon the common counts against Miss Parshley in the sum of \$1,192, with interest and costs.

Errors are assigned here upon the sustenance of a demurrer to a plea and upon the denial of a motion for a new trial.

Omitting formal parts the plea reads: "That the said plaintiff ought not to have and maintain his causes of action as set out and described in the second, third, fourth, fifth, sixth, seventh, and eighth counts of plaintiff's declaration, and in each of them, because she says that prior to the 11th day of April, 1908, to wit, on the 9th day of August, 1907, the said plaintiff contracted to and with this defendant, for and in consideration of the sum of \$16,333, to prepare the ground, furnish the material, and to build and construct one two-story brick building as per the plans then and there agreed upon, said building to be located on Parshley Square addition to the city of Live Oak, Fla., fronting on Ohio avenue and extending from Brigue alley to Court street, and extending back 75 feet; that the said plaintiff thereafter entered upon the performance of said contract, and in the construction of said building divers subcontractors, mechanics, and laborers were employed in the building of same by the said plaintiff, and divers and various persons, firms, and corporations furnished materials to the plaintiff for and in the construction of said building, and the said plaintiff has wholly failed to furnish either this defendant, who was the person having the said building constructed, or her authorized agent, a correct and complete list, or any

list whatever, of the names of the subcontractors, mechanics, and laborers employed in the construction of said building, and has failed to furnish, either to this defendant or her authorized agent, the names of all persons who furnished materials for the construction thereof. Defendant avers that each and every of the alleged causes of action named and described in the said second, third, fourth, fifth, sixth, seventh, and eighth counts, and each of the alleged sums of money in the said several counts sought to be recovered, are based upon, and are alleged claims growing out of, and are claimed to be due from this defendant to the plaintiff, on account and by reason of the construction of the building hereinbefore described."

The counts referred to in the plea are the common counts in the statutory forms. The bill of particulars attached consists of numerous items of bills paid for work, cash expended, work done, and materials furnished; also for one mare and certain credits.

The special count, declaring upon a building contract, with allegations that these items were extras outside its terms, which sought the special statutory lien and attorney's fees, was abandoned, and may be eliminated.

The correctness of the ruling upon the demurrer requires a construction of sections 2216-2217 of the General Statutes. Section 2216 makes it the duty of "any person who may contract to build or repair any house * * * to furnish the person or persons having such building constructed or repaired * * * a correct and complete list of the names of the subcontractors, mechanics and laborers to be employed in the building or repair of such house or other buildings, the names of persons who may have furnished materials * * * and all the persons acquiring a lien upon such house, * * * and shall furnish a receipt in full for all claims and demands for work done or material furnished * * * or for a release * * * from any claim. * * *"

Section 2217 reads:

"2217. Failure of Contractor to Furnish Names.—If any contractor or subcontractor fail or refuse to furnish the list of names provided for by above section, such failure or refusal may be plead in bar of such contractor's or subcontractor's recovery against the owner or owners of such building, unless it can be shown that the claims of all subcontractors, mechanics, laborers and material-men, for labor done or materials furnished for the construction or repairs of such building, mill, distillery, manufactory or machinery have been fully paid and discharged."

What is meant by "such contractor's recovery"? To an intelligent understanding we advert to the original act (chapter 4955, Laws of 1901) from which these sections are taken, premising that liens are acquired, by

those not in privity with the owner, only from the service of a written notice of an intent to claim the lien, and then only to the extent of the balance due the contractor. Chapter 4955 is entitled "An act to protect contractors, mechanics, laborers and materialmen and to provide for the summary collection of moneys due them for wages or material furnished. * * * Provision is then made for a most summary procedure, for the acquisition of a special lien, and for attorney's fees, and we are constrained to hold that the "recovery" prohibited by the act is the recovery contemplated and provided for by the act.

It may well be that the Legislature intended that the contractor should lose his lien and the special privilege of having the opposite party pay his attorney's fee unless he comply strictly with the act; but we do not see that it was intended that he should be deprived of the remedies theretofore open to the rest of mankind.

In the action upon the common counts the plaintiff is not suing as contractor, nor is he asking special favors, and the ordinary and usual defenses were open to the defendant. We agree with the circuit judge in holding this special statutory defense and not applicable to a declaration upon the common counts.

The only other plea interposed was the general issue. No objection is made to the admission or rejection of evidence, and the charges of the court are not before us.

It is claimed that the verdict is contrary to the evidence and is excessive. There was a slight remittitur ordered by the trial judge, and it is admitted as to some of the items it was a question solely for the jury. We have been unable to place our finger on sufficient items as to which there was no evidence to reduce the amount below that finally entered into the judgment. There was decided conflict in the testimony on almost every item; but the plaintiff testified as to sufficient items as being ordered or approved by the defendant, and as to the reasonable value of the work done, materials furnished, or the money paid out at her expense. The jury chose to believe him, rather than the defendant; their verdict has been sanctioned, by the court; and we find nothing to justify interference on our part.

The judgment is affirmed. All concur, except TAYLOR, J., not participating.

SPENCER v. SPENCER.

(Supreme Court of Florida, Division A.
April 2, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 367*)—DISMISSAL OF ORIGINAL BILL—EFFECT ON CROSS-BILL.

Where a cross-bill in equity alleges new matter and asks for affirmative relief, the mere

dismissal of the original bill does not of itself dismiss the cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 773, 774; Dec. Dig. § 367.*]

2. APPEAL AND ERROR (§ 970*)—REVIEW—DISCRETION OF TRIAL COURT.

Where no abuse of discretion is shown in extending the time for taking testimony in an equity cause, the appellate court will not reverse the order.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 970.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by C. Lyman Spencer against Marion P. Spencer. From an order extending the time for taking testimony on a cross-bill, complainant appeals. Affirmed.

Geo. U. Walker & Son, for appellant. Kay, Doggett & Smith, for appellee.

WHITFIELD, C. J. This appeal is from an order extending the time for taking testimony on a cross-bill; the original bill in the cause having been dismissed on motion of the complainant. It is urged that there was error in extending the time for taking testimony, because the dismissal of the original bill carried with it the cross-bill. This contention is not tenable, because the cross-bill is not merely defensive in its character, but it alleges new matter, relating in part at least to the same subject-matter, and asks affirmative relief thereon. Therefore the dismissal of the original bill does not of itself dismiss the cross-bill. *Ballard v. Kennedy*, 34 Fla. 483, 16 South. 327; *Price v. Stratton*, 45 Fla. 535, text 547, 33 South. 614. The original bill is for divorce on the ground of desertion. The cross-bill alleges matters upon which is asked a divorce on other statutory grounds, alimony, injunctions as to property rights, and the custody of a child. The propriety of the cross-bill cannot be tested on this appeal. No abuse of discretion is shown in extending the time for taking testimony, and the order appealed from is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

NICHOLS & JOHNSON et al. v. FRANK et al.

(Supreme Court of Florida. April 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 327*)—NECESSARY PARTIES.

In equity appeals the appellants ask for a reversal of the decree appealed from, and they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

should have all interested parties before the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1835; Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§ 327*)—NECESSARY PARTIES.

Where the appellate court is asked to determine the correctness of a decree on the main equities of the cause—e. g., the subjection of the land to the debts of creditors—all who are interested in and benefited by such decree are entitled to be heard, and should be before the court by proper proceedings if they were parties to the cause in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1835; Dec. Dig. § 327.*]

3. APPEAL AND ERROR (§ 336*)—NECESSARY PARTIES—DISMISSAL.

Where all the appellees directly and substantially interested in the main feature of a decree, on which the rights of all the appellees depend, are not before the court, so that complete justice may be done in orderly procedure, the court will decline to consider the merits of the cause, and dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.*]

4. APPEAL AND ERROR (§ 336*)—DEFECT OF PARTIES—DISMISSAL.

Where all the appellees were before the court, but the cause was dismissed as to one of the appellees, the main equities of the cause, on which the rights of all the appellees depend, will not be considered by the court, and the cause will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.*]

In Banc. Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Bill by W. L. Frank and others against Nichols & Johnson and others. Decree for complainants, and defendants appeal. Dismissed.

E. R. Gunby and W. H. Jackson, for appellants. F. M. Simonton, for appellees.

WHITFIELD, C. J. This appeal is from a decree setting aside a conveyance of land and subjecting the land to the debts of a partnership of which the grantor was a member. The appeal was dismissed as to one of the appellees, in whose favor the payment of a claim was included in the decree. Upon taking up the case for final disposition on the merits, it appears that the question to be determined is whether the land was rightly subjected to the payment of the debts of the firm, and not whether the amounts stated in the decree are properly adjudicated in favor of the several appellees.

In determining the correctness of the decree on the main equities of the case, to wit, the subjection of the land to the debts of creditors, all who are interested in and benefited by such decree are entitled to be heard. The appellants ask a reversal of the decree, and they should have all interested parties before the court. Should the decree rendering the land subject to the debts be reversed, it is obvious that either the appellee who is

not here would be injured thereby without a hearing, or else the decree of this court will be anomalous in reversing a decree on which all the claims adjudged depend, except as to one appellee who is not heard, but who has no better right than those who are heard on the appeal.

As all the appellees directly and substantially interested in the main feature of the decree, on which the rights of all the appellees depend, are not before the court, so that complete justice may be done in orderly procedure, the court must decline to consider the merits of the cause, and dismiss the appeal. See 2 Cyc. 764. See, also, *Continental Nat. Building & Loan Ass'n v. Miller*, 41 Fla. 418, 26 South. 725.

It is so ordered.

BALLARD v. COOK.

(Supreme Court of Alabama. Feb. 26, 1910.)

1. PRIVATE ROADS (§ 2*) — APPEAL FROM COUNTY COMMISSIONERS' COURT—WHEN ALLOWED.

Code 1907, § 5776, providing that the owner of lands over which a private road is established, if dissatisfied with the assessment of damages, is entitled to an appeal to the circuit court, and on such appeal to a trial de novo by jury, does not authorize an appeal from the acts of the commissioners of a legislative character, but only authorizes a trial de novo in the circuit court as to the amount of compensation, so that the action of the commissioners' court in confirming the viewers' report, over an objection that the proposed road ran through an orchard in violation of statute, was not reviewable on appeal.

[Ed. Note.—For other cases, see Private Roads, Dec. Dig. § 2.*]

2. PRIVATE ROADS (§ 2*)—PROCEEDINGS TO ESTABLISH—APPEAL—TRIAL DE NOVO—INSTRUCTIONS—EFFECT OF PROCEEDINGS BELOW.

The trial in the circuit court on appeal, as to the amount of compensation awarded in proceedings to establish a private road, being de novo, requested charges on such trial that the case was tried anew, and any assessment of compensation heretofore made by the jury or in the commissioners' court should not control, but the jury should consider only the evidence before them, should have been given.

[Ed. Note.—For other cases, see Private Roads, Dec. Dig. § 2.*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Proceedings to establish a private road by L. F. Cook against B. R. Ballard. Judgment for petitioner, and respondent appeals. Reversed and remanded.

The charges requested by the respondent were as follows: "(1) The court charges the jury that this case is tried anew by them, and any assessment of damages or compensation heretofore made by the jury or the commissioners' court will not control in this case and its determination. (2) The court charges the jury that they pass upon this case from the evidence before them, and not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the assessment of damages made by either the jury or the commissioners' court."

John H. Wilkerson and Claude Riley, for appellant. J. A. Carnley, for appellee.

SIMPSON, J. This case originated in the commissioners' court on a petition filed by the appellee to establish a private road over the lands of appellant. Viewers were appointed and made their report of the route to be established and assessed the damages. Appellee appeared before said court and moved the rejection of the report; one of the grounds being that the route marked out ran through his orchard, garden, or curtilage, contrary to section 5842, Code 1907, which provides that "no road must be opened through any person's yard, garden, orchard, stable lot, ginhouse or curtilage, without his consent." The case was appealed to the circuit court by said Ballard, and the court, over the objections of said Ballard, instructed the jury that the only matter for their consideration was "what would be a fair and reasonable amount to allow respondent as damages for the land actually taken and the injuries to the other and adjoining lands of respondent," and refused to allow testimony as to whether or not the road would pass through the garden or orchard of respondent. The main question, which is argued at length by both appellant and appellee, is whether or not there was error in thus limiting the issue to be tried.

Section 5842 of the Code provides that, "in establishing a private road, the same rules must be observed, and the same proceedings had, as in the case of public roads." Section 5774 provides how the "viewers" shall mark out the route and make the assessment for compensation, and for appointing a day "on which the court will hear any objections to said report, or to any valuation therein shown." Section 5775 provides for the hearing of such objections, authorizes the court to increase the amount of damages assessed by the jury (which was done in this case), provides that "if the court accept the route and confirm the report, and if no appeal is taken from that order and judgment, within the time hereinafter prescribed," the compensation shall be paid, etc. Section 5776 provides that "the owner of the lands, if dissatisfied with the assessment of damages made by the viewers, is entitled, as of right, to an appeal from the judgment of the court of county commissioners confirming the same to the circuit court of the county, and on such appeal to a trial de novo by jury."

This question, as to the construction of this statute, has never been before this court heretofore. Under the old law, and at an early day, when there was no statutory provision for an appeal, the question arose as to whether a writ of error would lie to revise the judgment of the commissioners' court in refusing to lay out a road, and the judgment

of the circuit court refusing to grant the writ was affirmed; the court saying: "The discretion reposed in that court is of so peculiar a nature, in relation to their jurisdiction over roads and many other matters, that it is difficult to perceive for what reason it could be supposed that this or any other court is invested with power to revise its judgments. * * * The Legislature, in committing this species of local legislation to a tribunal emanating immediately from the people of the county, cannot be supposed to have intended their discretion to be subject to revision. Cases may arise in which an improper action by the court of commissioners might be controlled by a court of chancery, if injury was about to result to an individual." *Hill v. Bridges*, 6 Port. 197, 199, 200. In another case, in which the proceedings in the commissioners' court were taken up to the circuit court on a writ of certiorari, this court said: "Upon the question of the expediency of opening or altering a public road, that court exercises a quasi legislative authority, and its decision is not reversible. * * * It does not act alone upon evidence produced according to legal rules, but is guided, to some extent, by its knowledge of the geography of the country, the wants of the people, and the ability of the neighborhood to keep the road in repair." *Commissioners' Court v. Bowie*, 34 Ala. 461, 464, 468. In another case, taken up by certiorari before the enactment of the statute providing for an appeal, this court reaffirmed the quasi legislative authority of the commissioners' court in establishing roads, and declared its acts not revisable, "unless its action is productive of injury to or interference with the rights of property of individuals." *Commissioners' Court v. Hearne*, 59 Ala. 375.

In the case of *Commissioners' Court v. Street*, 116 Ala. 28, 36, 22 South. 629, it is stated that "the judgment should have only declared the amount of compensation assessed by the jury"; but we do not consider that as settling the point now under consideration, as the question in that case was simply whether the judgment should be rendered against the commissioners' court for costs, and the expression used meant only that the court could not add, to the judgment fixing the amount assessed as damages, a judgment against the commissioners' court for the amount. The case of *Barks v. Jefferson Co.*, 119 Ala. 600, 605, 24 South. 505, was since the adoption of the Code of 1886, which is the first one containing this provision for an appeal (Code 1886, § 1394), and the question of the construction of said section was not before the court, as it was an action for damages on account of a defective bridge; but the court quotes with approval the extract from *Commissioners' Court v. Bowie*, supra, to the effect that the act of said court in establishing a public road is legislative, and not reviewable.

While section 5776 might have been more

definitely expressed, yet, with the judicial history before them, we hold that it was not the intention of the Legislature to provide for a review, on appeal, of the legislative work of the commissioners' court, but only for a trial de novo as to the amount of compensation, and there was no error in limiting the issue in this case. If the commissioners' court has gone beyond its jurisdiction in establishing a private road through a man's orchard without his consent, some other remedy must be invoked. As stated, the trial as to the matter of damages was to be de novo, and the appellant had a right to have the jury instructed to that effect, and the court, having properly limited the issue, should have given the charges requested in writing by the respondent.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(125 La.)

No. 17,905.

HAAS v. IRION et al.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

REAL ACTIONS (§ 8*)—PETITORY ACTION—PETITION—SUFFICIENCY.

Where plaintiff, claiming ownership under a chain of title of a tract of land, alleges that the defendant is and has been for a number of years in unlawful possession of the same, and is accountable for rents and revenues, and prays for judgment restoring him to the possession of his property, quieting him in his title, condemning the defendant to pay rents, and for general and equitable relief, *held*, that the action is petitory on the face of the petition, and that the omission to pray for a specific decree of ownership is cured by the prayer for general relief.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 29; Dec. Dig. § 8.*]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; G. H. Couvillon, Judge.

Action by Samuel Haas against Clifford H. Irion and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Coco, Couvillon & Coco, for appellant. Lafargue & Lafargue, for appellees.

LAND, J. Plaintiff's petition was dismissed on exception that the allegations thereof are "vague, uncertain, and indefinite, and do not set up a cause of action." Plaintiff has appealed.

The petition alleges that the plaintiff is the owner of a certain described tract of land, which he acquired from one Michel in 1894, who bought from one Thorpe in 1883,

and that Thorpe purchased from one Dimmons in 1882, and that Dimmons in 1879 acquired his title from Thorpe, by deeds in due form and properly recorded in the parish of Avoyelles.

The petition further alleges that in the year 1899 one Alfred B. Irion, since deceased, did unlawfully, and without title, and without plaintiff's knowledge or consent, take possession of—

"a strip of petitioner's said land situated in the rear of your petitioner's field running from east to west, and bounded on the north by your petitioner's said land, and south by the property of the estate of the said Irion, deceased, said strip of land containing sixty-three and $\frac{66}{100}$ acres and being well worth the sum of three thousand dollars."

The petition alleges that the said Irion remained in illegal possession of said strip of land until his death in the year 1903; that his heirs took and have continued in the illegal possession of said property; that during the possession of said Irion and heirs they used and cultivated about 30 acres of said strip of land, for which the said heirs are justly indebted unto the petitioner in the sum of \$1,450, and in the additional sum of \$150 per annum for such further time as the defendants may remain in possession thereof during the pending of this suit.

The petition prayed for citation of the defendants and—

"that after due proceedings had there be judgment in favor of your petitioner and against the defendants, restoring your petitioner in the possession of his said property, and quieting him in his title thereto."

The petition further prayed for judgment against the defendants for the sum of \$1,450, and the sum of \$750 per annum for the time they may continue in possession of the premises, with interest as alleged, and costs, "and for general and equitable relief."

Our learned Brother below held that the action was possessory according to the prayer of the petition, and that the admitted possession of the defendants for more than one year previous to the institution of this suit bars the action as possessory.

It is true that the general rule is that "it is the prayer of the petition which gives character to the action," as was said in *Carraby v. Le Breton*, 1 Rob. 252, but it is also well settled that:

"A mistake in the special prayer ought not to prejudice plaintiff's right to recover upon the sufficient averments of his petition followed by a prayer for general relief." *Espinola v. Blasco*, 15 La. Ann. 427; *State ex rel. Levett v. Lapeyrolerie*, 38 La. Ann. 915.

The action cannot be considered as possessory, because the petition does not allege any real and actual possession in the plaintiff, or any real disturbance in fact or in law by the defendants. Code Prac. art. 49.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The petition alleges that the plaintiff is owner of the land in the possession of the defendants, and bases all of his rights to relief on his title. The claim of ownership marks the action as petitory. Code Prac. arts. 43, 44.

In the case of *Meeker's Assignees v. Williamson et al.*, Syndics, 4 Mart. (O. S.) 625, the court said:

"In mere actions recuperandæ possessionis, the fact of possession is alone at issue. The plaintiff, proving that he was in possession, and ousted by violence, fraud, or artifice, becomes entitled to recover possession at once; the other party, not being even permitted to say that the plaintiff has no title to the thing. But when the plaintiff puts at issue his right of possession, as when he alleges that he is the owner, and presents his title as the evidence of his possession, the simple fact of possessing is no longer the only question. The defendant is then allowed to dispute the validity of that title, and is maintained in the actual enjoyment of the premises, if the plaintiff fails to make his title good."

In that case the prayer of the petition was for possession and damages; but the court held that the allegation of ownership put plaintiff's title at issue, and on the trial decreed its nullity.

We therefore are of opinion that the exception of no cause of action is bad.

There was no separate exception of vagueness, uncertainty, and indefiniteness; but those grounds were cumulated with that of no cause of action in the same exception, paragraph, and clause. The judge a quo in his written opinion discussed only the ground of no cause of action. We are of opinion that grounds for a dilatory exception should not be cumulated with grounds for a peremptory exception, as both cannot be disposed of by the same judgment.

It is therefore ordered that the judgment below be reversed, and it is now ordered that defendant's exception be overruled, and this cause be remanded for further proceedings according to law, and that defendant pay the cost of this appeal.

(125 La.)

No. 17,783.

HEALY v. SOUTHERN STATES ALCOHOL MFG. CO., Inc.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by Editorial Staff.)

CONTRACTS (§§ 57, 116*)—VALIDITY—CONSIDERATION.

A contract by which the second party agrees to buy the molasses required by the first party for its distillery for the term of one year from date, for a commission of 10 cents per barrel, the second party to have his commission on all molasses which the first purchases of other persons, is a valid contract, binding the second party to furnish his services and the first party to pay him therefor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 345; Dec. Dig. §§ 57, 116.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Hugh R. Healy against the Southern States Alcohol Manufacturing Company, Incorporated. An exception of no cause of action was sustained, and plaintiff appeals. Judgment set aside, and cause remanded.

Clegg, Quintero & Gidlere, for appellant.
Guy M. Hornor and U. Marinoni, Jr., for appellee.

PROVOSTY, J. An exception of no cause of action was sustained in this case. The petition reads as follows:

"To, etc.:

"The petition," etc., "respectfully shows:

"That the Southern States Alcohol Manufacturing Company, Inc. (hereinafter called company), a corporation organized under the laws of the state of New York and carrying on a distillery business in the city of New Orleans, is truly and justly indebted unto your petitioner in the full sum of \$3,000, with 5 per cent. per annum interest thereon from May 24, 1907, for this, to wit:

"Your petitioner carries on the business of dealer and commission merchant in sugar and molasses in the city of New Orleans; that on May 24, 1907, the said company entered into a contract with your petitioner, whereby it agreed that your petitioner should purchase all the molasses required by it for its distillery, for a period of one year from May 24, 1907, upon which molasses it was agreed said company should pay to your petitioner a commission of 10 cents per barrel of 50 gallons; and it was further agreed that, should the said company purchase molasses otherwise than through your petitioner, your petitioner, was nevertheless, to be paid 10 cents per barrel for all molasses purchased by said company from any one during the year commencing May 24, 1907—all of which will more fully appear by reference to said contract, which is hereto annexed and made part hereof.

"And now petitioner shows that, since the signing of the said contract, your petitioner has exerted himself in keeping said company posted as to the condition of the molasses market, and in submitting to them offers of sales of molasses, and in advising them as to the propriety of making purchases of molasses at various times; that the said company, during the year commencing May 24, 1907, has purchased and used in its distillery 30,000 barrels of molasses, of 50 gallons each, on which your petitioner, under said contract, is entitled to receive a commission of 10 cents per barrel, making the total amount due your petitioner the sum of \$3,000, and your petitioner further shows that he has never been paid any part of said commission, and that the whole amount thereof is still due and owing.

"Wherefore," etc. (prayer for judgment).

The contract in question reads as follows:

"It is hereby agreed that Hugh R. Healy shall buy all the molasses required by the party of the first part for their distillery for the term of one year from date, for the commission of ten cents per barrel of 50 gallons.

"The party of the first part to pay all actual expenses incurred by the party of the second part in purchasing their molasses.

"The molasses to be bought in the name of Hugh R. Healy, or of the Southern States Alcohol Manufacturing Co., Incorporated, as desired by party of the first part, at cost price plus ten cents (10¢) per barrel commission.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Hugh R. Healy not to be responsible for short deliveries by planters or parties purchased from, as they often overestimate the amount of their product of molasses.

"The S. S. Alcohol Manufacturing Co. can purchase from others, but they must pay Hugh R. Healy commission of ten cents (10¢) per barrel."

The reasons why this contract is said not to show a cause of action are, first, that it does not mean, as alleged, that plaintiff was to be entitled to a commission on defendant's purchases, whether made through him or not, but means that plaintiff was to have the commission if the purchases were made through him; second, that plaintiff is obligated to nothing, and, hence, that the contract is a nudum pactum; third, that, if interpreted as imposing upon the defendant the obligation to pay plaintiff a commission upon purchases not made by him, the contract is without a cause or consideration; fourth, that, if given that interpretation, the contract is null as being in restraint of trade, since it shuts off the defendant from making purchases from others, and shuts off others from selling to defendant, otherwise than through plaintiff.

By this contract Healy obligates himself to furnish his services to defendant during one year for buying all the molasses defendant may require for its manufactory, in consideration of defendant's binding itself to pay him 10 cents per barrel for every barrel it may thus require, whether the purchases should be made through him or not. This appears to us to be a very simple, and perfectly valid, contract. Plaintiff binds himself to furnish his services, and defendant binds itself to pay him. In consideration of the obligation of plaintiff to furnish his services, the defendant might have agreed to pay a certain fixed amount, say \$3,000, for the year, or \$250 per month. Instead of that, the compensation of plaintiff was placed on a commission basis, so that the amount should be regulated by the work done. The parties were as free to adopt that basis as any other.

Judgment set aside, and case remanded.

(125 La.)

No. 17,914.

PRATT v. MCCOY et al.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL EVIDENCE.

Where, under Act 126 of 1908, a plaintiff examines a defendant "as under cross-examination," he is entitled, thereafter, to introduce testimony in rebuttal of that so elicited from such defendant, and, where the trial judge, of his own motion, rules that no testimony from the defendant is needed, and that plaintiff, who has closed, with the reservation of his right thereto, is not entitled to introduce such rebutting testi-

mony, the case will be remanded, to be proceeded with from the point at, or before, which such ruling was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

Appeal from Civil District Court, Parish of Orleans; W. B. Sommerville, Judge.

Action by George K. Pratt against John F. McCoy and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

See, also, 52 South. 153, and 123 La. 917, 49 South. 640.

James McConnell, Jr., and Howe, Fenner, Spencer & Cocke, for appellant. Hubert M. Ansley and George W. Flynn, for appellees.

Statement of the Case.

MONROE, J. On April 12, 1907, plaintiff entered into a contract with the Concrete Construction & Contracting Company (of which the defendant McCoy was practically owner), whereby he agreed to advance the money required for the execution, by that company, of six drainage and paving contracts, to be awarded to it by the city of New Orleans, and whereby the company, in consideration of such advances, agreed to allow him one-half of the net profits to be earned under the said contracts, and, in the meanwhile, and until there should be an auditing, to transfer to plaintiff said contracts and also the certificates to be issued by the city in settlement thereof; and there are other stipulations which need not be particularized at this time. On August 13, 1908, plaintiff brought this suit, complaining that defendant had failed and refused to transfer the contracts and certain of the certificates to him, as agreed, and praying for writs of sequestration and injunction, for the seizure of certificates, which had been issued, and to restrain defendants from getting, from the city, others which were to be issued, and, further, praying for a mandatory injunction ordering defendant to transfer said contracts and certificates to him. Defendants answered, alleging that plaintiff had defaulted on the contract sued on, by failing to furnish the money as agreed, and in other ways, and praying, in reconvention, that the auditing of accounts, provided for in said contract, be ordered and be conducted under the supervision of the court. Upon the pleadings thus mentioned, the case was called for trial on January 6, 1909, and was, thereafter, heard, from time to time, until March 31st, during which period there were six witnesses examined on behalf of plaintiff, three of them being the president, the vice president, and general manager of the defendant company, who, under Act 126 of 1908, were examined "as under cross-examination"; three others were plaintiff's witnesses, and the seventh was a witness for defendants, who was examined out of turn and before plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff had rested, on account of being about to leave the city. On the date last above mentioned (March 31st), plaintiff having completed the examination ("as upon cross-examination") of defendant's vice president, the following occurred:

"By Mr. McConnell (attorney for plaintiff): That is all. By Mr. Ansley (attorney for defendants): We will cross-examine the witness when we open our case, on redirect examination. By Mr. McConnell: With the reservation of our right to put rebutting testimony in the record, and evidence of that character, we rest here. By Mr. Flynn (attorney for defendants): Does that close the case, Mr. McConnell? By Mr. McConnell: I said: With the reservation of our right to put rebutting testimony in and evidence of that character. By the Court: There will be no opportunity for testimony in rebuttal to be offered. All the testimony offered by, and for, the plaintiff has been considered, and my opinion is that there should be judgment for defendants. In dispensing defendants from the necessity of producing evidence, and declaring the case closed, upon the declaration by counsel for plaintiff that his side of the case be closed, I am actuated by the condition of the case and of the docket of the court. The case has been called for trial on 29 different days, and it has actually consumed 17 entire days in presenting plaintiff's side, only. This has, necessarily, worked great hardship for all other litigants and numerous witnesses who had business before the court and who have been in attendance here. It has had the effect of crowding the docket and delaying other business before the court. It now becomes my duty, after having given to the plaintiff the fullest opportunity to present his case, to interrupt the trial and to relieve defendants from the necessity and expense of placing their 19 witnesses, who are summoned, and others who are not summoned, but who have been in attendance at court every day that the case was called for trial, upon the witness stand. It would, perhaps, take as much time for the defendants to present their side of the case as it has taken plaintiff to present his side of the case. As this additional testimony is altogether unnecessary, it would be wrong for the court to give any more time to the trial of this case, and to thus retard consideration of other business actually pending. Let the case be set down for argument on Monday, April 12th, at 11 o'clock a. m., and, in the meantime, let the testimony be filed."

Thereafter plaintiff moved the court to reconsider the ruling so made, and the motion, after hearing, was denied. Plaintiff then applied to this court for a writ of mandamus to compel the judge a quo to proceed with the trial and to the hearing, at all events, of such testimony as he might desire to introduce in rebuttal of that given by defendants, "as upon cross-examination," under the act of 1908; but it was held that the question was one which would be brought up by an appeal, and the mandamus was refused. It appears from the record that the case was then, on July 5, 1909, set down for argument, and that the trial judge, after hearing argument from counsel for plaintiff, took it under advisement, and some time later gave judgment, dissolving the writs of sequestration and injunction, dismissing plaintiff's suit, at his cost, and in favor of defendants, on their reconventional demand, "directing that a full, final, and

complete auditing and accounting of the contracts between plaintiff and defendants be had, and that Alexander Allison be appointed to audit said contracts and the accounts between the parties and make report to this court of his findings"; the order appointing the auditor "to remain suspended for 10 days after this judgment becomes final, in order that plaintiff (and defendants) may settle their differences without the further assistance of the court." It was further decreed that plaintiff pay all costs. From the judgment so rendered, plaintiff prosecutes this suspensive and devolutive appeal. Defendants have neither appealed nor answered the appeal taken by the plaintiff.

Opinion.

The Code of Practice provides:

"Art. 477. When the plaintiff has closed his evidence, the defendant shall bring his witnesses and produce the proof in support of his defense; the plaintiff may then bring additional witnesses, or his former witnesses, to rebut the testimony adduced by the defendant, or to lessen the weight of such testimony."

"Art. 484. After all incidental questions shall have been decided, and both parties have produced their respective evidence, the argument commences; no witness then can be heard, nor proof introduced, except with the consent of all parties."

Act 126 of 1908 reads, in part, as follows:

"Section 1. * * * That, in all causes pending and untried, or to be hereafter instituted, in any court of this state, the parties litigant shall be entitled to examine their opponent as under cross-examination, and, in such event, the parties thus examining opponents shall not be held as vouching for the credibility of the opponents so placed on the stand, or as estopped from impeaching, in any lawful way, the testimony given as herein provided for."

The word "impeach," as used in the statute thus quoted, and as applied to the testimony to be elicited from opponent, includes all that would be meant if the word "rebut" were added, since, to impeach the testimony of a witness, or to impeach a judgment, means to show that it is erroneous. Cyc. vol. 21, p. 1737. We take it, therefore, that the plaintiff in the case at bar, having examined his opponents, "as under cross-examination," had the same right to rebut the testimony thus elicited as though that testimony had been given by them as witnesses called on their own behalf, and, that being the case, the ruling of the judge a quo, in denying that right, ordering the case to be set down for argument, and deciding it, without affording plaintiff an opportunity to offer such testimony in rebuttal, as, in his opinion, the occasion required, was erroneous. Beyond that, the defendants were allowed no opportunity to offer any evidence at all, and, though our learned Brother may be right in the conclusion reached by him, as predicated upon the evidence which he allowed to be adduced, it might happen that we would disagree with him (though we do

not wish to be understood as intimating any opinion upon the subject, one way or the other), in which event the position of the defendants would be most unfortunate, since, in that event, they would be condemned without having fully presented the facts of their case. As the matter stands, the plaintiff was denied the right to introduce evidence which the law, in terms, gives him the right to introduce. He complained of the ruling so made, which (being interlocutory) is brought up for review by his appeal from the final judgment, and the drift of the argument, in the original brief filed on his behalf, is that the case should be remanded, to be proceeded with, as a summary case, from the point at which that ruling was made. That course, we think, is authorized by the text of Code Prac. art. 906, which provides that, if the court shall think it impossible to pronounce definitely on a cause "either because the parties have failed to adduce the necessary testimony, or because the inferior court refused to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law." And by Rev. St. § 1991, which provides that "injunction cases * * * shall be placed * * * on * * * the summary docket." As, however, the defendants have neither appealed nor answered the appeal, nor, in any way, by pleading, complained of the ruling or judgment here made the subject of review, the costs of the appeal must be borne by them.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this cause be remanded to the district court, to be there proceeded with as a summary case, in accordance with law and with the views expressed in the foregoing opinion, from the point at which counsel for plaintiff made the announcement:

"With the reservation of the right to put rebutting testimony in the record, and evidence of that character, we rest here."

The defendants to pay the costs of the appeal and the costs of the district court to await the final judgment.

(125 La.)

No. 17,698.

CONCRETE CONSTRUCTION & CONTRACTING CO. v. PRATT.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1105*)—PROCEDURE—CONSOLIDATION FOR PURPOSE OF ARGUMENT—WITHHOLDING JUDGMENT.

Where, in independent suits instituted and prosecuted in different divisions of the civil

district court, decided at different times, by different judges, and brought before this court by different appeals, there is no suggestion, in either record, that, being between the same parties and involving the interpretation of the same contract, they should be consolidated, and no ruling upon the subject, and where, in this court, they are consolidated, by consent, only for the purposes of argument, this court will not feel authorized, against the wishes or interest of one of the litigants, to withhold its judgment, in the one, to await the final determination of the other suit, which, the judgment appealed from being annulled, on a question of practice, is remanded for further proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1106.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by the Concrete Construction & Contracting Company against George K. Pratt. From an order dissolving an injunction, plaintiff appeals. Affirmed.

See, also, 52 South. 151.

Hubert M. Ansley and George W. Flynn, for appellant. James McConnell, Jr., for appellee.

Statement of the Case.

MONROE, J. On August 12, 1907, plaintiff (being a company under the name of which John F. McCoy appears to conduct his business) and defendant entered into a written contract reading, as follows:

"This agreement, this day made and entered into between John F. McCoy and the Concrete Construction & Contracting Company, both of the city of New Orleans, parties of the first part, and George K. Pratt, of the city of New Orleans, party of the second part, witnesseth: That, whereas, said Concrete Construction & Contracting Company has bid on certain repaving and surface drainage work, and is about to enter into contracts with the city of New Orleans as follows:

Subsurface drainage contract on Magazine street, from Canal to Julia, about.....	\$32,890 00
Repaving contract on Magazine street, from Canal to Julia, about.....	30,860 50
Subsurface drainage contract on Gravier street, from Canal to Delta, about.....	25,620 80
Repaving contract on Gravier, from Camp to Delta, about.....	12,000 00
Subsurface drainage contract on Common street, from Magazine to Front, about.....	16,558 00
Repaving contract on Common street, from Magazine to Front, about.....	6,400 00
	<hr/> \$124,130 30

"And, whereas, under authority of a resolution of the board of directors of the said Concrete Construction & Contracting Company, adopted May 24, 1907, the said John F. McCoy, has entered into an agreement with the said George K. Pratt, whereby in consideration of the payment to him of one half of the profits which may be derived from said contracts, the said George K. Pratt will finance the said undertaking and advance such moneys as may be necessary for the carrying on of the same.

"Now, therefore, in consideration of the foregoing, the parties of the first and second parts,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

severally, bind and obligate themselves as follows:

"Upon the execution of this agreement, the several contracts above referred to, as well as all certificates and payments in connection with the same, shall be transferred and assigned to said George K. Pratt, or to his order, or to such bank as he may select and designate, as subrogee.

"Upon completion of each of the aforesaid six contracts, accounts shall be audited and the net profit or loss upon the same shall be definitely fixed and determined by the parties to this agreement, reimbursement being first made of all amounts advanced, and, in so doing, the same shall be taken from the proceeds derived from the property owner's portion of certificates when issued and collected, and the balance, if any, out of the city's portion of said certificates, when sold, as hereinafter provided, and written acknowledgment shall be given by and to both parties to this agreement as to the existing conditions after auditing. All certificates and the cash derived from the sale or collection of the same shall remain in the control of the said George K. Pratt until after the completion and auditing of all said contracts, to be used by him exclusively in making payments or in securing funds for the carrying on of said contracts and the work upon the same, or as collateral in connection with the bond required by the city of New Orleans.

"The said George K. Pratt shall have the right, in his discretion, to pledge any and all certificates for advances necessary to carry out this agreement, and he shall further have the right to sell a sufficient amount of certificates, representing the city's portion of payments under said contracts, provided that sufficient funds are not derived from the collection of the property holders certificates for advances made by him; provided, further, that in selling the city's portion of said certificates, both parties to this contract do agree as to the price, or, in the event of disagreement, then, he give written notice to the parties of the first part, designating the particular certificates of the city's portion that he proposes to sell, the price of the same, and the purpose of said sale, and that said parties of the first part, after such notification, do fail within sixty days to procure and produce a bona fide purchaser for said city's portion of said certificates at a higher price.

"All material accounts and labor rolls and other 'necessary incidentals' shall be charged to, and as, expenses.

"In consideration of the time and efforts of the said John F. McCoy, as general manager, being given to the carrying on of the aforesaid contracts and their rapid completion, the salaries of the officers of the Concrete Construction & Contracting Company, and bookkeeper and office expenses, as may be designated by the said John F. McCoy, shall be advanced to him monthly for account of said company by the party of the second part during the running of the said contracts, and until the final completion of the same; provided, however, that the total amount so advanced shall be no more or less than the sum of five hundred dollars per month, and that it shall be reimbursed to said party of the second part, and may be taken by him out of the profit of the parties of the first part, and may be adjusted in the regular auditing following the completion of each contract; and, provided further, that said advances shall in no event be made for a longer period than twelve months.

"The said parties of the first part shall furnish the said George K. Pratt their notes for advances, and for pay rolls, materials and incidental accounts and salaries, etc., monthly, which he may discount or use as he may deem proper, returning the same when, after auditing, it shall appear that sufficient moneys have been realized from the proceeds of said contracts

to meet and pay all expense accounts and indebtedness of said Concrete Construction & Contracting Company.

"In the event of legal services being required in connection with any of the contracts aforesaid, the party of the second part shall have the right of naming and employing the attorney-at-law who shall be engaged for such purpose.

"The party of the second part shall also have the right to appoint one man to act as timekeeper, paymaster and material clerk, at a salary of seventy dollars per month, whose duties shall be the paying of the men employed, receiving of material and the keeping of the men's time. He shall have no authority to hire or discharge and shall be under the supervision of the manager, John F. McCoy, by whom all bills and pay rolls must be approved before payment. The salary of said appointee shall not be paid from the five hundred dollars per month stipulated for above as salaries and office expenses, but shall be charged to the expense account, and said John F. McCoy, shall have the right to discharge said employe if unsatisfactory, and shall, in such case, notify the party of the second part to replace with another appointee.

"Itemized reports of materials received, material used and cost of labor and all other expenses will be furnished the party of the second part daily, duly signed by manager and timekeeper.

"After all contracts have been completed and all expenses paid, the net profit derived from said contracts shall be determined and divided as follows: All claims due and all unused material and tools and implements purchased in connection with said contracts shall be fairly appraised; all certificates still unsold and uncollected shall be duly classified and the amount of the cash balance on hand from the sale or collection of certificates shall be exactly ascertained. One-half of said appraisement and certificates and cash shall be given and belong to said party of the second part under the terms of this agreement, and the remaining half of said appraisement and certificates and cash shall belong to the parties of the first part, subject to reduction for reimbursement to the party of the second part of such amount as may be due him for advances for salaries and office expenses at the rate of five hundred dollars per month, as hereinabove set forth, and of such other sum or sums as the parties of the first part may have, by written acknowledgment, declared to be payable out of their share of the profits to the said party of the second part.

"In testimony whereof, the parties of the first and second parts have hereto signed their names, at the city of New Orleans, this 12th day of August, 1907, in execution of the foregoing agreement, the same being made in duplicate.

Concrete Cons. & Cont. Company,

"William Demoruelle, President.

"John F. McCoy, Sec. and Treas.

"John F. McCoy.

"George K. Pratt.

"Attest:

"John F. McCoy.

"Jas. McConnell, Jr."

In May, 1908, the subsurface drainage contract on Magazine street having been completed, plaintiff received a certificate therefor from the city of New Orleans, for \$32,075.58, and transferred the same to defendant, from whose attorney, it thereafter received two communications, reading as follows:

"New Orleans, June 15, 1908.

"Concrete Construction and Contracting Co., and John F. McCoy, City—Dear Sirs: I am just in receipt of your letter dated June 12, 1908, replying to mine of June 10th. Your let-

ter was delivered at my office this morning. In reply I beg to say that your long delay in answering, coupled with your failure to name a price, can only be taken as an indication of your unwillingness to agree as to the price, or an intention to disagree on any proposition made.

"If I am wrong in this conclusion, I must insist that you answer this letter immediately, stating your willingness and readiness to agree upon a price and naming the same. Failing in this, you are notified hereby, on behalf of Dr. George K. Pratt, that he is unable to agree with you as to the price, as provided in your contract of August 12, 1907, and, on his behalf I now give you written notice that, for the purpose of obtaining advances necessary to carry out his said agreement with you and to make payments required of him thereunder, and, further, for his personal reimbursement for amounts advanced by him, he proposes to sell the City's subsurface drainage certificate, issued for \$32,075.58, and referred to particularly in your letter of June 12, 1908, to which this is an answer; and you are further notified hereby that the price of the same, in the event of such sale, is fixed at eighty cents on the dollar. You are further requested to procure and produce a bona fide purchaser, within sixty days from this notification for said certificate at a higher price.

"And now, in addition to the above, you are further notified that the certificate above described, for any of the purposes above expressed, is proposed to be sold by Dr. George K. Pratt for any price between its par value and the said above mentioned figure of 80 c. on the dollar. In the event of your failure, within sixty days, to procure a bona fide purchaser at a higher price than Dr. Pratt may be able to obtain for said certificate, he proposes to sell the same at any price between the two figures mentioned, viz., 80 c. on the dollar and par.

"Yours truly, [Signed] Jas. McConnell, Jr."

"New Orleans, August 11, 1908.

"H. M. Ansley, Esq., Attorney for Concrete Construction & Contracting Co. and John F. McCoy—Dear Sir: Referring to the city certificate amounting to \$32,075.58, made the subject of my letter of June 13, 1908, addressed to the Concrete Construction & Contracting Co. and John F. McCoy, I, hereby, on behalf of my client, Dr. George K. Pratt, agree not to sell the said certificate until after August 25, 1908, without first obtaining the written consent of your clients.

"Yours truly, [Signed] Jas. McConnell, Jr."

Two days after the date of the letter last above quoted, to wit, on August 13, 1908, defendant brought suit against plaintiff (bearing the number 86,934 of the docket of the district court and being No. 17,914 of the docket of this court), in which a decree is this day handed down (52 South. 151), remanding it to be further proceeded with, according to law and to the views expressed in the opinion, complaining that plaintiff had failed to transfer the city contracts and was refusing to transfer \$45,000 of additional certificates which it had received, and praying for writs of sequestration and injunction and for a judgment for specific performance; the present effect of the suit being that all the certificates called for by the city contracts (the contracts having been, at this time, executed), save the one mentioned, and certain certificates against property holders to the amount of \$6,607.17 (also in the hands of the defendant), are now tied up by sequestration. In this suit (which

bears the number 87,042 of the district court and was instituted on August 24, 1908) plaintiff seeks to enjoin defendant from selling the certificate referred to in the letters quoted, and a preliminary injunction, restraining him from so doing, was issued. Shortly thereafter (on December 7, 1908), plaintiff instituted another suit (No. 88,050 of the docket of the district court), in which it seeks to annul the contract of August 12, 1907, and to recover damages. On the trial (of this suit) it was testified to by plaintiff's president, and not denied, that defendant has advanced, under that contract, between \$70,000 and \$80,000, for which he has received, so far, only the certificate, for \$32,075.58, the sale of which is here sought to be enjoined, and the certificates, amounting to \$6,607.17, to which we have referred.

The same witness also testified that, though, as president of the plaintiff company, he had made the affidavit upon which the injunction was obtained (in effect, that defendant has no right, under the contract, to sell the certificate in question), he had, since, changed his mind, and was, when he testified, of opinion that defendant has that right. The testimony thus referred to was given upon the trial of a rule taken by defendant to dissolve the preliminary injunction, on the grounds: (1) "That the allegation that the said George K. Pratt has no right, under the contract of August 12, 1907, to sell said certificate," is untrue; (2) that the affidavit for the injunction was improvidently made and is at variance with the testimony given by the affiant, in another case. The judge a quo made the rule absolute and dissolved the injunction, and, from his judgment to that effect, plaintiff prosecutes this suspensive appeal, thereby maintaining the injunction in force.

Opinion.

We find in the brief of defendant's counsel what purports to be a copy of the opinion of the judge a quo; but, as we fail to find the opinion in the transcript, we presume that it was, inadvertently, omitted, or that the copy is unofficial. Whether official or unofficial, however, it appears to meet the requirements of the case, and we shall, therefore, avail ourselves of it. It reads as follows:

"There is no merit in that part of defendant's motion based upon the withdrawal of the affidavit, for the president of a corporation has no more right to discontinue its suit, against the wishes of a directorate, by that process than by motion.

"Moreover, there is no question of fact involved, but simply one of construction of a contract, which is the province of the court and not of the witness.

"From the testimony of Mr. Demoruelle, I find that defendant has advanced plaintiff nearly \$80,000, and, from the contract of August 12, 1907, I find that defendant has 'the right in his discretion, to pledge any and all certificates for advances necessary to carry out this agreement, and he shall further have the right

to sell a sufficient amount of certificates, representing the city's portion of payments, under said contract, provided that sufficient funds are not derived from the collection of the property holders' certificates, for advances made by him.

"I find from the answer filed by these plaintiffs in No. 86,934, and their petition in No. 88,050, that all the contracts have now been completed, and there remains only to audit accounts and adjust the rights of the parties.

"I find, from the petition No. 88,050, that on August, 12, 1906, petitioners refused (for reasons satisfactory to themselves) to deliver to defendant any further property holders' certificates other than those which he then held, amounting to about \$6,000.

"On August 24, 1908, petitioners filed this suit, enjoining defendant from selling the other certificate he held, viz., a city certificate for \$32,075.

"And on December 7, 1908 (in No. 88,050), plaintiffs filed a claim for damages and to annul the whole contract, because, on August 29, 1906, defendant failed to furnish more money, although, at the time, he had the city certificate for \$32,075, * * * and it was said Pratt's duty to utilize said certificate in making payments and in securing funds for the execution of said contracts."

"Admitting, for the purpose of the argument, that plaintiffs were justified in retaining and refusing to give defendant the property holders' certificates, the situation is simply this: Here are plaintiffs, who, in two different suits, admit that there is only a question of accounting between them and this defendant (who has advanced more than double the amount of any claim against him, and whose claim against them exceeds any which they may have against him by more than the amount of this certificate), who refuse to give defendant the property holders' certificates, although he had advanced more than double the amount thereof, and who claim damages and seek to annul his contract because of failure to furnish more funds, after being refused new property holders' certificates, and enjoined him from disposing of the only other certificates he had. In the meanwhile, defendant's large advances, already made, are drawing no interest under the contract, whilst he, himself, is, presumably, paying interest on the money (\$20,000 or more) borrowed by him. See petition in 88,050.

"Whatever may be the merits of the claims advanced by these plaintiffs, in the other suits now pending (Nos. 86,934 and 88,050), it is perfectly certain that their position in this case, at this time, especially in view of their judicial declaration that 'it was said Pratt's duty to utilize said certificate,' is utterly inconsistent and unreasonable, and their injunction will be dissolved at their cost.

"P. S. Except Mr. Demoruelle's testimony and the contract, I have proceeded herein entirely upon plaintiff's own judicial admissions. "Rule made absolute."

The contentions of plaintiff's counsel are that, in view of the pendency of the suit, by defendant, to enforce specific compliance with the contract of August 12, 1907, and of defendant's answer and reconventional demand therein, and the pendency of its suit, to annul said contract, the district court should have deferred action on the motion to dissolve the injunction in this case, until the matter shall have been finally decided; the argument being, that:

"The court should not construe one right of Dr. Pratt, under the contract, when such decision might affect the rights of defendant in rule in the position taken by it before other tribunals."

And an argument to the same effect is addressed to this court, as follows:

"And we now urge before this court, because this court can take judicial cognizance of proceedings pending before it, that Judge Sommersville having, in record No. 17,914 of the docket of this court, determined against the pretensions of Dr. Pratt, and having ordered an auditing and accounting between the parties, in order to fix their respective rights, and having determined that Dr. Pratt had actively violated the contract of August 12, 1907, this court should not affirm Judge St. Paul's judgment, in this case, dissolving the injunction asked for by defendant in rule, because, if, upon hearing case No. 17,914 of the docket of this court, this court should be of the opinion that Judge Sommersville's decision is correct, and affirm his judgment, the sale of the certificate, resisted in this case, could not take place, pending the auditing and accounting and final settlement ordered by Judge Sommersville. This court is the conservator of the rights and privileges of all citizens. The laws of Louisiana abhor a multiplicity of suits, and, where it is possible, under one proceeding, to settle, determine, and adjust the rights of all parties, courts will favor that proceeding which looks towards a final settlement of all matters that may arise between parties. We, therefore, respectfully urge that this injunction proceeding, and all matters pertaining to the present matter before the court, should be deferred until a final determination of the proceeding in No. 17,914 of the docket of this court, in order that there may not be a conflict arising when all matters are finally brought up for settlement."

The answer to this argument appears to us to be that, whilst the law abhors a multiplicity of litigation, the same thing is not always true of litigants, who are not readily controlled in that respect. So far as we can see, there was no reason why the present plaintiff should not have included in its reconventional demand, set up in the suit No. 86,934 of the docket of the district court, all that it is demanding in this suit and in the suit to annul the contract of August 12, 1907 (No. 88,050). But it did not think proper to pursue that course, and the result, so far as this suit is concerned, was that the judge a quo had upon his docket a summary case, demanding trial, with no plea to the jurisdiction and no suggestion, in the record, upon which, over the objection of one of the litigants, he could, legally, have based a refusal to proceed with the trial, or could have made an order transferring it to another division of the court.

And the position of this court is much the same. Plaintiff brought this suit after the suit of defendant had been instituted, and prosecuted it, so far as we know, from the record, up to the time of the filing of the brief in this court, as a proceeding, not, necessarily, dependent, for its proper determination, upon any other litigation. There is in the record No. 17,914 a joint suggestion to the effect that the two suits are between the same parties and involve the interpretation of the same contract, and that "it is desired that both be argued and submitted at the same time," followed by a motion, which was granted, "that, for the purpose of argument, this cause be consolidated with

said suit No. 17,698, to be heard and submitted therewith." This action, however, merely emphasizes the fact that the cases were thus joined only "for the purpose of argument," and that, otherwise, they were still regarded, as they have been from the beginning, as independent proceedings, in which the judgments were rendered by different courts, at different times. Under the circumstances thus stated, and, particularly, in view of the fact that the judgment appealed from, in the suit bearing the number (in this court) 17,914, to which counsel for plaintiff refers, is this day annulled, and the cause remanded for further proceedings, upon a question of practice—rendering it uncertain when it will, finally, be decided on the merits—we do not feel authorized to withhold the judgment in the matter now under consideration. The judgment appealed from is, accordingly:

Affirmed.

(125 La.)

No. 18,098.

CHRISTINA v. CUSIMANO et al.

(Supreme Court of Louisiana. April 11, 1910.)

(*Syllabus by the Court.*)

1. REFERENCE (§ 25*)—HANDWRITING—APPOINTMENT OF EXPERT.

Where three persons claim to be the holder of a genuine mortgage note that is the subject of a suit, the court may ex proprio motu appoint a handwriting expert, when deemed necessary, to assist him in determining the genuine note. Code Prac. art. 442; Hennen's Digest, p. 656; Cameron v. Lane and Husband, 36 La. Ann. 716; O'Donnell v. Henry, 44 La. Ann. 845, 11 South. 245.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 42; Dec. Dig. § 25.*]

2. TRIAL (§ 68*)—RECEPTION OF EVIDENCE.

The Code of Practice, art. 484, provides that when both parties have produced their evidence and the argument has been opened, no witnesses can be heard without the consent of the parties, and it was error in this case for the court, after argument and without consent of the parties, to admit letters which had not been sufficiently identified, and to submit them to a handwriting expert for his opinion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 161; Dec. Dig. § 68.*]

Appeal from Civil District Court, Parish of Orleans, by Fred D. King, Judge.

Action by Frank Christina against Theresa Cusimano and others. Judgment for defendants, and plaintiff and William Schroeder, Intervener, and certain of the defendants appeal. Reversed and remanded.

See, also, 52 South. 159.

Frank E. Rainold, for appellant Christina. Philip J. Patorno, for appellants Cusimano. J. Zach Spearing and W. McL. Fayssoux, for appellant Wm. Schroeder. Benjamin R. Forman and Joseph Lautenschlaeger, for appellee Louis Spiro. Meyer S. Dreifus, for curator ad hoc.

BREAUX, C. J. Plaintiff was a mortgage creditor of the defendant for \$3,300 with 8 per cent. interest from July 15, 1909, and attorney's fee, subject to a credit of \$325.

She brought this suit to foreclose her mortgage via ordinaria.

Statement of the Pleadings.

Plaintiff maintains that, to secure the note he holds, the defendant Cantloto Sasarato, alias Salvatore Canteoto, became the vendee of Theresa Cusimano and her husband, Rocco Cusimano, before Robert J. Maloney, notary public, on the 15th day of July, 1907, and made a note for \$3,300. This note was handed to plaintiff in exchange for six past-due notes, due by Theresa Cusimano and Rocco Cusimano, and secured by mortgage on the property which Cusimano and wife purported to sell to Canteoto in order to enable the latter to give a note secured by vendor's privilege to plaintiff in exchange for a prior privilege and note.

The property was owned by Cusimano and wife, and the transaction with their creditor, the plaintiff, was given the form of a sale, in order, as they thought, the better to secure him.

This method was followed under the advice of Maloney, notary and attorney.

That is, Cusimano and wife sold the property to Salvatore Canteoto, and the note given by Canteoto representing the purchase price of the property, and a note paraphed by Maloney, notary, with the act of sale, was handed by him to plaintiff. Whether it was the genuine note of Canteoto is the serious question at issue.

Three notes were made by the notary and paraphed. At least two were forged.

Defendants in their answer aver that they are ignorant; that they do not know how to speak, read, or write English; that they did not sell their property to Canteoto; that they never delivered possession of the property to him; that they received no price; that they never received the six notes for \$500 each, dated April 19, 1906, before described, which plaintiff alleges he delivered to them through Maloney, notary.

It seems that these six notes of plaintiff were kept by Maloney, notary, and were only delivered by him after his downfall and conviction.

Defendants allege that their property stands of record in the name of Salvatore Canteoto, owing to the asserted sale, which was no sale, and that there are outstanding against them the six notes for \$500 each, dated April 19, 1906, and a note for \$3,300, dated July 15, 1907.

They charge that plaintiff had full knowledge of all the facts; that Maloney, the adviser, acted for plaintiff.

That on July 15, 1907, they signed the notes by their marks, and that they are un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able to state whether the note sued on by plaintiff is the note which they signed.

They ask that the sale from Mrs. Theresa Cusimano to Salvadore Canteoto, on July 15, 1907, be decreed a simulation and the note decreed null; that the mortgage and vendor's lien be decreed of no effect; and that Christina be decreed not the owner of the Salvadore Canteoto note for \$3,300 of July 15, 1907.

Louis Spiro intervened in the suit. He alleged that he is owner and holder of a note signed by Salvadore Canteoto, dated July 15, 1907, for the sum of \$3,300, which he filed with his petition of intervention.

That this note was paraphed by Notary Maloney to identify it with an act of sale by the defendants to Salvadore Canteoto of July 15, 1907; that the note is secured by vendor's privilege on the property in question; that the note was renewed by Robert J. Maloney up to July 15, 1908, and interest paid to July 15, 1909; that Maloney had no authority to renew this note.

That he believes that he had the genuine note notwithstanding plaintiff also holds a note.

The plaintiff, answering this intervention, controverts the allegations of the intervenor.

William Schroeder, another intervenor, set up still another note for the same amount, secured by the same lien.

He asks that his mortgage and privilege be recognized.

Plaintiff answered this last intervention denying that this intervenor has any claim.

Statement of the Facts.

There are three outstanding notes dated July 15, 1907, said to be signed by Salvadore Canteoto, as alleged by plaintiff, and identified with an act passed before Robert J. Maloney, notary, on that day.

The act passed before this notary only refers to one note of \$3,300. Three notes have appeared each bearing the notary's paraph, to the end of identifying it with the act of sale and vendor's privilege.

Each of the two intervenors holds one note and plaintiff the other, and each claims that his note is the genuine note.

The holders of the notes and mortgages, as well as the mortgagor, are not suspected of having had anything to do with forging the signatures of the makers of the notes. The act of mortgage is falsified by acts and circumstances so that it can scarcely be deemed that it makes full proof of itself.

One of the intervenors, Spiro, stated that he paid \$3,300 for the note by check on the New Orleans National Bank for the amount. His statement in regard to the check was not borne out by the facts. According to his testimony, at the particular time that he claims to have bought the note, to wit, 2 p. m., the sale before mentioned had not been passed (it was passed at about 5

o'clock the same day), and yet he claims to have received the note at the time that he bought it.

Schroeder, the other intervenor, testified that he had money in the hands of Notary Maloney, which, in accordance with his direction, was applied by this notary to buying the note at its face value.

The forgery charged and the notes issued, and the ignorance of the parties to the mortgages and notes, influenced as they were by a designing person, who availed himself of their confidence to impose upon them, have given rise to different issues.

The judge of the district court thought it advisable to appoint an expert in handwriting to assist in unraveling the tangled skein.

The learned expert appeared as a witness. He also as an expert submitted his report to the court, which was admitted in evidence.

The question whether the expert to examine the signatures on the various notes sued on was timely appointed and sworn is before us for decision.

The objection of all the parties on appeal to the suit, except the intervenor, who is the appellee, is first, that the expert appointed by the court ex proprio motu after the case had been submitted should not have been appointed, and that there was no authority to appoint him after the case had been submitted, except with consent of parties.

In passing upon this objection, we have consulted the different decisions in which similar objection was raised. It has been held, whenever necessary, courts have the power to appoint experts. *Hennen's Digest*, p. 656, No. 7; *Code Prac. art. 442*.

They may be appointed ex proprio motu. *Cameron v. Lane & Husband*, 36 La. Ann. 716; *O'Donnell v. Henry*, 44 La. Ann. 845, 11 South. 245.

Thus far there is no ground upon which to sustain the objections urged.

It is different on the other ground before us.

The expert was appointed after the evidence had been closed and argument heard and the case submitted.

Letters were submitted to the expert through the order of the court, the text of which was not identified nor the signature proven.

We will here state further in regard to these letters: After the case had been submitted, as just stated, the plaintiff offered these letters, purporting to be from Canteoto written to Mrs. Cusimano and Mr. Patorno, in answer to letters written by Patorno and Cusimano, which answers of Canteoto were written in Italy, and mailed to Patorno and Cusimano in this city.

The intervenor, who is one of the appellants, objected to the testimony on the ground that the case had been finally closed. In this objection, he was joined by one of the intervenors, who is the appellee.

The position in support of the ruling ap-

pointing the expert is that in the interest of justice the court at any time can open a case before the judgment has been rendered.

The language of the Code of Practice (article 484) is not as broad. Says that Code:

"When both parties have produced their evidence and the argument (italics ours) has been opened, no witnesses can be heard without the consent of parties."

Here the argument had been closed, and the case under the court's consideration.

Besides, these letters were not admissible in evidence without proof of their genuineness. It was error to admit them.

The expert in his report properly stated that the letters afforded him no assistance, and from the appearance of things before him he considered them only "suspects," and not original. He found that they "are both written and signed by the same person."

Grasping the facts as well as he could, he arrived at a conclusion.

It remains that letters submitted to him as an expert had not been previously sufficiently sustained by proof.

With painstaking care he scrutinized the signatures and made a thorough analysis of the handwriting.

We are of opinion that further inquiry should be made into the facts going to prove who the writer is and into all other facts which may throw light on the forgery of signatures. The act of sale to Canteoto should be corroborated by other evidence. Something more should be ascertained in regard to Canteoto.

The facts of this case render it exceptional, and for that reason we have determined to remand it in order that our learned brother of the district court may again have the opportunity of considering other evidence on the line before suggested.

For reasons stated, the judgment appealed from is avoided, annulled, and reversed, and the law and the evidence being in favor of the appellant it is ordered, adjudged, and decreed that the case be remanded to the district court to be tried in accordance with the views herein expressed; that the costs of appeal be paid by appellee, those of the district court to await final decision.

(125 La.)

No. 18,157.

CHRISTINA v. CUSIMANO et al.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 336*)—PARTIES—OBJECTIONS—DISMISSAL.

Where counsel for the parties to a suit agree in writing that two of the parties are parties to the appeal, the court will consider this agreement binding; and, while it may dis-

miss the appeal ex proprio moto later, it will not sustain their motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 336.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Frank Christina against Theresa Cusimano and others. Judgment for plaintiff, and Cusimano appeals. Reversed and remanded.

See, also, 52 South. 157.

P. J. Patorno, for appellant. J. Zach Spearing, for appellee Schroeder. B. R. Forman, for appellee Spiro. M. S. Dreifus, for appellee curator ad hoc. Frank E. Rainold, for appellee Christina.

On Motion to Dismiss.

BREAUX, C. J. Intervener appellee moved on April 1, 1910, to dismiss the appeal on the grounds:

Because mover has no interest in the appeal.

Because if the intention was to take an appeal in behalf of Rocco Cusimano his name is not mentioned in the order nor in the bond.

That if the motion be construed as referring to Mrs. Theresa Cusimano, who is named as principal in the bond, she has no interest in the appeal, and has not been condemned in the judgment, and has not been authorized by her husband nor the court to prosecute the appeal or to sign the appeal bond, nor has she been joined by her husband. There was no order of appeal in favor of Rocco Cusimano.

We will here state that counsel for the defendant moved for the order of appeal. He stated that he represented defendants.

The order itself, which follows, as part of the motion for an appeal, refers to defendant.

Mrs. Theresa Cusimano signed the bond given in accordance with this order of appeal.

There is another bond not filed, signed by Rocco Cusimano; it comes up as a true copy given by the deputy clerk of the district court.

On the day previous—that is, on March 31, 1910—Philip J. Patorno moved that Mrs. Theresa Cusimano, wife of Rocco Cusimano, and Salvatore Canteoto be made parties to the appeal, and to that motion is appended a copy of an agreement among all the counsel, that Mrs. Theresa Cusimano, wife of Rocco Cusimano, and Salvatore Canteoto be made parties to the appeal in No. 18,098 of the Supreme Court. 52 South. 157.

This agreement, though filed as before stated, was entered into, as shown by the date on the face of the paper, on March 18, 1910.

In the presence of such an agreement we will not stop to consider the objections urged

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the appeal. We must give effect to this agreement. It evidences a consent that parties be made parties to the appeal among counsel that is conclusive and binding.

It only remains for us to overrule the motion.

For reasons stated, intervenor's motion to dismiss the appeal is overruled.

On the Merits.

In the principal appeal it was concluded that in the interest of justice this case should be remanded in order that parties might properly set forth their respective claims and introduce further proof.

The decree remanding the principal suit renders it proper to remand this case also.

For reasons stated, the judgment in this case is annulled, avoided, and reversed; the case is remanded for further proceedings in accordance with law. Appellee to pay the costs of appeal; the other costs to await the final decision.

(125 La.)

No. 17,669.

Succession of SCHMIDT.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

WILLS (§ 55*) — MENTAL INCAPACITY — EVIDENCE.

Proof that within a period varying from 5 to 10 months after the making of a will the testatrix exhibited signs of senile dementia, and that, at the end of, say, 17 months, she was sent, under interdiction, to an insane asylum, is insufficient to support an attack upon the validity of the will, as having been made by a person mentally incapable, where the proof fails to show that the testatrix was insane before, or at the time of, the execution of such will, and where there is nothing in the will itself sounding in folly.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the Matter of the Succession of Charlotte Schmidt. Rushian Johnson and others, proponents of a certain will, appeal from an order probating a will in nuncupative form. Reversed.

Dart, Kernan & Dart, for appellants.
Woodville & Woodville, for appellees.

Statement of the Case.

MONROE, J. The decedent died on May 17, 1906, leaving a nuncupative will by public act of date May 10, 1887, whereby she left three-fourths of her estate to the German Protestant Home for the Aged and Infirm, and the remainder to the Missionary and Educational Association of the Southern German Conference of the Methodist Episcopal Church, constituting those institutions

her universal legatees, which will was ordered to be registered and executed and the legatees sent into possession. Some two months later, Elizabeth and Mary Hartwell presented a petition to the court, with another will executed by the decedent, by public act of date February 25, 1902, whereby she bequeathed all of her property to the petitioners, share and share alike, and they prayed that the probate of the will previously presented be annulled, that the will presented by them be recognized as valid, and that they be put in possession of the estate of the testatrix as her universal legatees. To the petition so filed, the German Protestant Home, etc., and the Missionary and Educational Association, etc., after filing certain exceptions, which were overruled, answered that the instrument, purporting to be the last will of the decedent, presented by the petitioners, has not that character, for the reason that the decedent was of unsound mind, and incapable of making a will at the time that it was executed. At a later date, Elizabeth Hartwell died, and Rushian Johnson, her testamentary executor, was made a party plaintiff, in her stead.

It appears from the evidence that the husband of the decedent died in July, 1886, leaving her without relatives, so far as is known, and also leaving her the owner of some small houses about Eighth and Chestnut streets, in one of which, on the corner of those streets, she lived. The houses, we imagine, were not particularly desirable, and, whether for that reason, or because she found it more profitable and the tenants less exacting, she fell into the way of renting them, by the room, as we infer, to negroes, and before very long, though just when the evidence does not show, she took two elderly negro women—sisters—into her own residence, the one, Elizabeth Hartwell, being a nurse, who at times worked out in the service of private families, and the other, Mary, who did the cooking and housework, and waited on Mrs. Schmidt, the latter, as we understand, getting their services for their board and lodging.

Dr. H. S. Cockram, called as a witness on behalf of the proponents, testifies, in effect, as follows: That he was graduated from the Tulane Medical College in 1891; that he lived, diagonally, across the street from, and knew the decedent, and attended her professionally from that time until 1902, when he left here and was gone about 18 months, during which interval (in August, 1903), she was interdicted and removed to an asylum, and he saw her no more; that, when he last saw her, say, in February, 1902, her mental condition was about what he had known it to be during all of his acquaintance with her.

"Q. Was she simply foolish, or have good sense, or what was her condition? A. I would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

say that she was a woman of moderate intelligence. Q. She had sense enough to know what she was doing? A. I judge so. Q. Would she, in your opinion as a physician, have sense enough to make a will disposing of her estate? A. I think, at that time, yes. That she was in as good a mental condition as any time that I knew her. Q. What was her condition, physically? A. She was always a frail woman; always. Q. Who was she staying with at the time? A. In her own property, which was being taken care of by two women, doing cooking and housework. Q. Do you know their names? A. Two colored women, Lizzie and Mary, I think, Hartwell, but I don't know that. I know it was Lizzie and Mary. They used to work for me. * * * Q. What was their treatment of her? A. Why, unusually kind."

The witness, who disclaimed being an expert alienist, was then subjected to some cross-examination upon the subject of senile dementia, and a hypothetical case was stated with respect to which he said that a person in the condition stated would, in his opinion, be absolutely irresponsible. He was then again examined in chief as follows:

"Q. Did you observe any such condition in Mrs. Schmidt when you last saw her? A. Not when I last saw her. Q. And that was in the latter part of 1901, or— A. I am inclined to believe that it was in February, 1902; that is my impression" (for which he, elsewhere, gives a reason). "Q. And, at that time, she showed no signs of senile dementia? A. She showed no signs—she was an old woman. For 10 years I had known her condition—a woman of average intelligence—and I had been to her home innumerable times and she lived just across the street from me, and those two women took excellent care of her up to that time. Q. You have treated her, personally, during that length of time? A. Ten or 12 years; 10 years to the time I left."

Recross:

"Q. Who would call you in to treat her? A. She would herself. Q. Whom would she send? A. Numbers of times, she generally sent some one of those tenants, there; they had two servants at work there. Q. One of those colored women would come for you? A. Generally, those two that attended her; and the servant that worked at my house attended her; and a number of times—she lived diagonally across the street from me—and most of the time, as I walked out, the old lady would call me from the upper gallery. Many times, she would be at the gate, or in the yard, and called me. Q. You say you treated her since 1891? A. The first time I treated her was in the summer of 1891. Q. How old a woman was she when she died? A. I should judge she was—she looked like a woman about 65—I don't know what her age was at all."

Henry Schomacker and his sister, Theresa, had known the decedent for many years; they lived on the next corner; she visited their mother; they saw her, at intervals, at her (their mother's) house, also in passing, and on the street, etc. Henry Schomacker says (speaking of the period almost up to the time of her interdiction):

"She always had her good sense whenever I saw her. She was a woman—a kind of a woman this way—very sassy. You never could have any conversation with her. She would cut you short, and give you a bad word, perhaps."

Theresa Schomacker, being asked:

"From your general association with her during those last three years" (referring to the years preceding her interdiction) "did she give you the impression of being crazy?"

To which she replied:

"No, sir; no sign of crazy."

Mrs. Sophie Schomacker, the wife of Henry Schomacker, says that the decedent talked intelligently (though not to the witness, who rather avoided her, because, in answer to a question, on one occasion, the old woman had replied: "None of your business; mind your business."). The witness being asked:

"And up to the time that they took her to the retreat, so far as you know, she was perfectly sane and all right?"

To which she replied:

"Well, I never saw her, since the time she went over the river, and I know that she had her own senses then—only childish. I thought she was childish and forgetful, like when you get old. I didn't see anything like being crazy, because she knew everybody."

Frank Helm, an old German carpenter who had known the decedent, and had worked for her off and on for a good many years, did not think she was crazy, and testifies that nobody said so; in other words, she was not so considered by those who knew her. Elizabeth Hartwell (who died after she had testified) says:

"Mrs. Schmidt, to me, was like her brain was weakened down, she loved to walk; she would walk to Louisiana avenue, if you would let her, but Dr. Loeber said she might go on the car track, and her mind might leave her. * * * Q. That was in 1903? A. Yes, sir. Q. How was she in 1902? A. All right, she rang for me one time; she wanted to see me, and I went, and she told me: 'I wanted to make my will.' She said: 'I wanted to do it for a long time.' Q. Did you know her in February, 1902? A. Yes, sir. Q. What was her condition then? A. At that time, I was home with rheumatism. Q. Was she reasonably rational? A. No, sir; always nice (?). Q. Did she know what she was doing? A. Yes, sir; and I went to market with her—she would select what she wanted."

The witness also testifies that, at the request of the decedent, she went with her to the notary's office, when the (now disputed) will was executed. Mr. Jeff C. Wenck, the notary by whom the will was executed, remembers the circumstance quite well, and says that the decedent talked reasonably, and appeared to know what she was doing; that he had interviewed her on several occasions upon the same subject before, and she always persisted in doing the same thing. She said they (the two legatees named in the will) had taken care of her and were attending to her entirely, and they promised, the witness believes, to take care of her the balance of her life. She said they were the only friends she had on earth; she had no other friends. W. W. Girault testifies that he witnessed the will, and that the decedent

seemed quiet and natural and to know what she was doing; that she told Mr. Wenck what she wanted. Mr. Wenck put it down, and read it to them all, and she said that was her will, and that he witnessed it, and went off. W. A. Wenck identified his signature as a witness, but had no particular recollection of the circumstances, having witnessed a great many wills at the request of his brother, the notary. Rushian Johnson, nephew of the proponents, was also a witness to the will, and testifies that he went with the decedent to the notary's office, and that she told the notary that:

"There was two old people that had been with her in all her sickness—been with her since her husband died—and she was alone, and they cared for her all the time, and, in case she died, she wanted to leave them something, because she had no relatives at all."

That, after the will was made, she told Mr. Wenck that she was perfectly satisfied, and paid him for his services. On behalf of the opponents, there were three witnesses called, who testified, in effect, as follows: Dr. F. Loeber was graduated in medicine in 1899. Some time in 1903, he was called, he does not remember how or by whom, to visit the decedent, and found her suffering from weakness and exhaustion.

"I found" (he says) "that she was exhausted from want of nourishment, but it afterwards proved to be senile dementia. Q. What was, then, the condition of her mind—the state of her mind? A. She was crazy. * * * I found the woman in an exhausted condition, as I told you, and that she was not of sound mind. I would ask her a question, and she would just 'Tat, tat, tat, tat'; that was all you could get out of her. She would just chatter. * * * Q. Had you any experience in insanity or dementia at that time? A. Yes, sir; that is why I state I couldn't determine, first, whether it was starvation or other causes. I found out, afterwards, that it was senile dementia. First, it presented a case to me, when I looked at it, like the person was starving, and I afterwards found out it was 'nt starvation, it was senile dementia. * * * Q. How long did you go there? A. I was there, regularly, in attendance for a month—every day. Q. That was about a month before this petition for interdiction was filed? A. Yes, sir."

The doctor further testified that it was at his instance that the petition for interdiction was filed, and that he was one of the physicians upon whose report the interdiction was decreed. He does not profess to be an alienist, and gave no testimony with regard to the probable time during which his patient had been in the condition in which he found her. Mr. Seither is vice president and chairman of the house committee of the German Protestant Home (one of the legatees under the first will), and has been connected with the institution for many years. He knew the husband of the decedent and was on friendly terms with him. After the death of the husband, however, he disapproved, as we infer, of the decedent's manner of life, and, for a number of years prior to her death, saw but

little of her. He says that, about four years before she was sent to the asylum—

"one of the colored women would bring her over to the" (his) "house and say that they wanted to go out and couldn't leave her by herself, so they brought her over to the house, and she always caused my wife to lock the door, because she would try to get away. * * * Q. Do you know why they did that? A. I don't know. Of course, Mrs. Schmidt was in such a state that she would do anything, almost. You couldn't talk to her; she was altogether off."

He says that, happening to meet Mrs. Weber, on one occasion, whilst Dr. Loeber was attending Mrs. Schmidt, and being told by that lady that she was going to Mrs. Schmidt's he went with her; that, prior to that time, he had not called on Mrs. Schmidt for three or four years, though, before that, she was in the habit of coming to his house every Sunday, and going to church with them and taking dinner; that, during the (say) "four years preceding her interdiction, she did not come to his house, save when brought by one of the colored women"; that "they might have brought her over to the house four or five times" within that period; that he could get nothing intelligent from her on those occasions."

Mrs. Angeline Leininger testifies that she borrowed some money from the decedent, and in March, 1900, called on her to pay the interest; that Mrs. Schmidt—

"acted very queer; she didn't know nothing about the money; she didn't know I had any from her; and then, when I paid her the money, I had to get the colored woman—I gave her the money and she gave me my note back, and that was in 1899" (meaning 1900) "in March. * * * Q. How many times did you see Mrs. Schmidt after that? A. About twice I saw her, and then, you know, she got so bad, you know. I didn't go to see her any more. She had a doctor attending to her, and I didn't get to see her any more."

Cross-examination:

"Q. How many times, after 1900, did you see Mrs. Schmidt? A. I seen her about three times. Q. How long after 1900? A. Well, that was a couple months after—about six months after. Q. And then, after that, did you see her? A. After that, I didn't see her no more, because I didn't go out of the house, because I was always at home. Q. And this money you state you paid her, you paid it to one of the colored women? A. In six months, the note was due—that was the interest that I paid her, you know—in six months, the note was due, and I gave it to Mrs. Weber to give it to her and bring me my note. Mrs. Weber brought her the money, and gave me my note."

She says that she had been acquainted with Mrs. Schmidt for about one year prior to the visit when she went to pay the interest on the money that she had borrowed from her, and she proceeds:

"Six months before I paid her the interest, I went to see her, and she was all right. She was in good health and was all around. She took me all over the house, and was very friendly. * * * Q. And when she loaned you the money, she was all right? A. Yes, sir; and when I went to see her again, she

was not all right when I saw her. That was in 1900. She didn't recognize me."

The witness further testifies that, after 1900, she saw the decedent on the street going to Mrs. Weber's; that she knew where she was going, and how she was going, but that she looked "queer"; that she had formerly worn nice clothing, but on the occasions referred to "looked careless and raggedy, you know; didn't look like she knew what she had on."

Mrs. Henry Weber, at the time she testified, was 84 years old; she had known Mrs. Schmidt since 1848. Being asked whether she visited the decedent during the last five or six years of her life, she replied:

"They used to call me—Mary, the colored girl, used to call me—when she would go around the house with a light in the house. * * * She used to go around the house looking for some one, like a man was in the house—scared, and I would talk to her, and she would go back to bed."

The witness said that matters went on in that way for about four years before the decedent was sent to the asylum; that she was sometimes called "twice in a week, and, sometimes, not once in a month; sometimes, often in a week." Her cross-examination proceeds, in part, as follows:

"Q. The night you say you found her with candles, looking for something? A. For a man in the house. Q. For a burglar? A. Yes, sir. Q. She was scared? A. Yes, sir. Q. You soon convinced her there was no burglar? A. Yes, sir; she wanted to talk to me. Q. She got quiet, though, didn't she? A. Yes, sir. Q. Did you stay all night with her, that night? A. No, sir; just as soon as she went to bed, I went home. * * * Q. How long had this old colored servant been up there? A. I couldn't tell you. Q. Can you give us an idea about how many years it was? A. About six or seven years before she was taken away. * * * Q. Did Mr. Seither take any care of Mrs. Schmidt during the last four or five years? A. No, sir. * * * Q. Did he ever bring her any delicacies or call at her house? A. No; I told him once to go there. He told me he would not go; that she mingled with negroes, and she should stay with negroes. Q. In other words, he did not want to have anything to do with her? A. Yes, sir. * * * I am the only one who went to see her; yes, sir. Q. In her last years? A. Why, no church ever looked after her, but for her money. Q. Did the same thing apply to Mr. Seither?" (Objection.) "By the witness: I have nothing to do with that; you only asked me about Charlotte's mind. Q. But this has a bearing on the case? A. Her church was no friend to her, to go to see her."

The witness further testifies that, for two or three years before Mrs. Schmidt was taken to the asylum, she could not—

"talk right; she lost her speech entirely, she could not understand what she wanted; * * * she got silly like; the first commencement was that she could not wash herself, or comb her hair any more, and, if you didn't force her, she would not put on clean clothes. In other words, she got childish in her old age. * * * She could not speak, and you could get nothing out of what she was doing. Q. That was two or three years before her death? A. Four years before her death." (Mem. Her death, it will be remembered, occurred on May 17, 1906.) " * * *

She never was all right; that you could say she was all right. * * * Sometimes she would sit down and act quiet. * * * She could not tell me what she means and what she wants; so I could not make that out. I took her to be silly, like a person who sets down and don't know what they want. * * * I seen her in 1902; that was the worst time she had. They came in and got me that time. Q. In winter time that was? A. Winter and summer; she had not her right mind from 1899 on. Q. That is, her mind was weak, from that time on? A. Yes, sir; she could not speak good, and could not remember anything."

Speaking of the relation between the decedent and the Seither family, the witness says:

"She complained that she could not talk and they put her aside. * * * Q. Charlotte felt put out about it? A. Yes, sir. Q. What do you mean by that? A. That time she could talk yet. Q. About what year was that? A. I could not tell—it was so long and I am so old—it was about ten years ago."

At another time the witness testifies as follows:

"Q. Do you know whether Mrs. Schmidt ever left home? A. Yes, sir; she left home, if I am not mistaken, in 1891." (Mem. We find in the record the figures "1901" in pencil, above those given by the witness.) "She left home and went over the river. Q. Where was she brought when they found her? A. A colored man found her on Harvey's canal, and he took her and put her in jail, and the next morning they got her out. Q. Where was she brought? A. Right to my house, here. Mary, the old colored woman, had to come with her. Q. What was Mrs. Schmidt's condition, then? A. She could not talk; she could not tell where she was, nor what she was doing. She did not have a nickel to come over the ferry. Q. Did she have on any clothes? * * * A. Clothes she had on, but no shawl; it was cold."

Other witnesses fix the time of the excursion "over the river" as about three or four months prior to that at which the decedent was sent to the asylum, or, say, March, or April, 1903.

Opinion.

The evidence leaves no doubt in our minds that the decedent was a proper subject for interdiction at the time that Dr. Loeber was called to see her, say, in June, or July, 1903, and that she was probably in that condition as early as, say, March, 1903, when she wandered across the river, and perhaps earlier, but we find it impossible, upon any theory upon which the testimony of the witnesses can be reconciled, or upon which they can be credited with the intention to testify truthfully, to concur in the conclusion reached by our learned brother of the district court, that she was in that condition, or was incapable, in February, 1902, of making the will here in contest. The testimony in question was taken, at different times, from May to December, 1908, more than six years after the date of the will in question, and was given by witnesses who, with one or two exceptions, had no particular reason for remembering whether the condition to which they testified existed in one year rather than

another, and it was easy and natural that, under such circumstances, they should confuse the conditions and occurrences of one year with those of others—sometimes quite widely separated. Dr. Cockram was guided by certain data which enabled him to fix the period to which his testimony related without difficulty, and with such confidence as to render it extremely improbable that he could have been mistaken. Thus: He was graduated as a doctor of medicine in the spring of 1891; he was then living, and he thereafter lived, across the street from the decedent. He first began attending her, professionally, during the ensuing summer, and his attendance continued until the winter, or, as he thinks, sometime in February of 1902, when he decided to leave the city. He says, in answer to the question:

"How can you be so positive of the year, at this late date?"

"The only way, I was sick myself, and went off; that is the only way. I left the first of June, and the old lady had been sick a few months before—had had the gripe—and I was afraid she would have pneumonia. That is the only way I can state it—by leaving, myself, makes it absolutely positive."

And, up to that time—i. e., when he last saw her before his departure—the decedent, whom he had always known as a woman of "average intelligence," was in as good mental condition as any time during his acquaintance with her. His impression was that he had last seen her in February (the will here in contest having been made on the 25th of that month), but, conceding that it may have been in January, or about Christmas of 1901, his testimony is still the most satisfactory, with reference to the time, and the most authoritative with respect to the condition existing at that time, of any (if we leave out that given by the notary and the witnesses to the will) that we find in the record. The testimony of the other witnesses, as to the condition of the decedent, within one, two, three, or four years of her interdiction, is general in character, and is supported by no data which would have been likely to fix in their memories the relation between the condition and the time, so that, in view of the fact that we have the testimony of a competent medical man, supported by such data, who during the period mentioned, and for some years prior thereto, had been a constant attendant upon the decedent, and had made her "innumerable visits," for the purpose of ascertaining and advising concerning the condition of her health, we feel justified in dismissing the testimony of the other witnesses, with the observation that if those called on behalf of the opponents testify that the decedent was incoherent and irresponsible at any time prior to February 25, 1902, those called on behalf of the proponents testify to the contrary.

Mrs. Weber, we infer (though the evidence to that effect is not direct), was the person

at whose instance Dr. Loeber was called, and was therefore, in a measure, responsible for the interdiction, and she was naturally inclined to justify her interference. We have no reason to doubt that her action in the premises was inspired by the most humane motive, and was entirely proper in itself, but we are of opinion that, in giving her testimony, she has confused the different periods in the mental condition of the decedent, and has attributed to the latter, at a time when she was sane, the same mental incapacity which induced her to call in medical advice, for it is utterly impossible that the decedent being, as Mrs. Weber says she was in 1902, and for several years prior thereto, incapable of speaking, or understanding, etc., could have impressed her constant medical adviser with the idea that she was a woman of average intelligence, or that she could on February 25, 1902, have dictated her will to the notary in the presence of witnesses. Mrs. Weber, it will be recalled, was 84 years of age, and, at one time, admitted that on account of her age she was unable to remember at what time it was that the decedent lost the power of speech. At another time, she stated that the decedent wandered "over the river" in 1891, and, though it may be that she meant to say 1901, the fact, as established by other testimony, seems to be that the wandering in question did not take place until within three or four months, or at most a year, of decedent's interdiction. It may be remarked in that connection that the episode referred to is almost entirely taken as established upon hearsay testimony, the nearest approach to direct testimony on the subject being that of Mrs. Weber, to the effect that the decedent was brought to her house by the old woman, Mary, who told her (Mrs. Weber) that she (Mrs. Schmidt) had wandered across the river, etc. We think, however, that the story may be accepted as true, and it appears to us that the incident may, perhaps, be regarded as indicating the approaching end of the decedent's mental life. We are still, however, confronted with the facts (as we estimate the evidence) that it is not proved that, prior to or at the time of the making of the will here in question, the deceased testatrix was affected with any mental disorder. Conceding that she was suffering from senile dementia in June or July, 1903, or, even at a period as far back as August, 1902, the evidence adduced does not authorize the conclusion that she was so incapacitated on the 25th of February, 1902. It can hardly be said that there is any authoritative information in the record upon the subject of senile dementia, since neither of the physicians who were examined professed to be expert alienists, and we are not disposed to exploit any original views upon that subject. We may remark, however, that we imagine that senile degeneration (of the organs, vessels, and tissues of the body) pre-

cedes senile dementia, and that there may be a long interval of time between the beginning of senile degeneration and either the mental or physical death in which it may end. However that may be, our conclusion is that the opponents have failed to show that the testatrix was, either at any time before, or at the time of, the making of the will which they are contesting, incapable of making her will. The will itself contains nothing sounding in folly. The testatrix was a woman of the domestic servant class, from the continent of Europe, who came to this country when she was young, and who, by reason of her vocation, was probably thrown during the greater part of her life with negroes. In her old age, she was left alone, and, whether by reason of her own temperament or from other causes, became alienated from the people of her race and church, and confined her intercourse mainly to the two negro women whom she had taken into her house, and, who, from the uncontradicted testimony in the record, served and nursed her faithfully, until she was taken from them by the decree of the court. She told the notary that they were her only friends, and her statement is corroborated to the extent that no one else, save Mrs. Weber, has appeared in these proceedings pretending to the contrary. Whose fault it was we are unable to say. The fact remains. We do not find it surprising under such circumstances that she left her property as she did, and we think it ought to go as she intended.

It is therefore ordered, adjudged, and decreed that there be judgment in favor of the proponents, Rushlan Johnson, testamentary executor of Elizabeth Hartwell, deceased, and of Mary Hartwell, and against the defendants the German Protestant Home for the Aged and Infirm and the Missionary and Educational Association of the Southern German Conference of the Methodist Episcopal Church, vacating and annulling the judgment heretofore rendered by the civil district court for the parish of Orleans, probating the instrument presented as the last will of Charlotte Schmidt, deceased, executed, in nuncupative form, by public act, before John Bendernagel, late notary, on May 10, 1887, and decreeing said instrument to be void and of no effect. It is further adjudged and decreed that the last will and testament of said Charlotte Schmidt, executed in nuncupative form before Jeff. C. Wenck, notary, on February 25, 1902, and herein presented by said proponents, be received, registered, and executed as the last will of said testatrix, and that the said proponents be recognized as the universal legatees of said testatrix and sent into possession of her estate, share and share alike, as provided in said will, and that the right be reserved to said proponents to take such other and further proceedings in the

premises as justice and nature of the case may require. It is further decreed that said defendants pay all costs.

(125 La.)

No. 18,118.

STATE v. ROSE.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 211, 968, 1031*)—HABEAS CORPUS (§ 27*)—AFFIDAVIT—SUFFICIENCY—ALLEGATIONS ESSENTIAL TO JURISDICTION.

An affidavit upon which a criminal prosecution, in a court of limited jurisdiction, is based, must set forth the facts and circumstances essential to the jurisdiction; otherwise, the question may be raised by motion in arrest of judgment, on the appeal, or by writ of habeas corpus.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 211, 968, 1031; * Habeas Corpus, Dec. Dig. § 27.*]

2. INFANTS (§§ 18, 20*)—SUFFICIENCY OF AFFIDAVIT—JURISDICTION OF JUVENILE COURT.

The jurisdiction of the juvenile court in the parish of Orleans is strictly limited to matters concerning and offenses against neglected and delinquent children, as defined by Act No. 83 of 1908, and no children are neglected or delinquent, for the purposes of such jurisdiction, save those who fall within the classification established by that statute. Hence the affidavit on which this prosecution is based, setting forth that defendant permitted certain children to perform on the stage of a theater, contrary to the prohibition contained in Act No. 301 of 1908, whilst, perhaps, charging an offense under the statute last mentioned, charges no offense cognizable in the juvenile court, by which defendant has been convicted, since it fails to charge that the children, so permitted to perform, are neglected or delinquent, within the meaning of Act No. 83 of 1908.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 18, 20; Dec. Dig. §§ 18, 20.*]

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Lew Rose was convicted of willfully and unlawfully permitting minors to perform on a stage, and he appeals. Conviction annulled, and sentence arrested.

See, also, 124 La. 526, 50 South. 520.

Arthur B. Leopold, for appellant. St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

MONROE, J. Defendant having been charged, by affidavit, with having, willfully and unlawfully, permitted certain minors to "perform" on the stage of the Winter Garden Theater, and having been convicted and sentenced, presents his case to this court by means of five bills of exception, which, in effect, bring up for decision two propositions of law, as follows: He excepted to the overruling of a motion (called "demurrer") to dismiss the affidavit, as setting forth no offense against the law of this state, and he, subsequently, excepted, on the same ground,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the overruling of his objection to the introduction of testimony, and of a motion to strike out testimony which had been admitted, in support of the affidavit; the basis of the motions and objections being that, whereas the law (Act No. 301 of 1908) makes it an offense to permit a minor, under the age of 14 years, to "labor or work" in a theater, the affidavit charges the defendant with having permitted such minors to "perform" on the stage of a theater. Another exception was taken to the overruling of a motion in arrest of judgment, in which, defendant alleges, *inter alia*, "that it is nowhere charged that the children, who were permitted to perform and play in the Winter Garden Theater were either 'delinquent' or 'neglected' children," and hence that the juvenile court was without jurisdiction in the premises. As we find the bill last mentioned determinative of the case here presented, we shall devote our attention to its consideration, to the exclusion of the others.

Act No. 83 of 1908 is entitled:

"An act regulating the care, treatment and control of neglected and delinquent children, seventeen years of age and under, and providing for the trial of adults charged with the violation of laws for the protection of the physical, moral and mental well-being of children. * * *"

Section 9 of the act provides:

"That the juvenile court * * * shall have jurisdiction of all neglected and delinquent children, and of all persons charged with contributing to the neglect or delinquency of *such* children, or with a violation of any law now in existence or hereafter enacted for the protection of the physical, moral and mental well being of *such* children, not punishable by death or at hard labor, and of all cases of desertion or non support of children, by either parent." (Italics by the court.)

It will be seen from the foregoing that the text of the statute is not as broad, in some respects, as the title, since the title describes an act "providing for the trial of adults charged with the violation of laws for the protection of the physical, moral and mental well-being of *children*," whilst the text confers jurisdiction only for the trial of "*neglected and delinquent* children and persons charged with contributing to the neglect or delinquency of *such children*, or with a violation of any law * * * enacted for the protection of * * * *such children*." (Italics by the court.) The jurisdiction of the court is, therefore, confined to matters and offenses relating to "neglected and delinquent" children, and does not extend to offenses against, or which concern, children who are neither neglected nor delinquent. And, apparently, to clinch the matter, the statute quoted, in the paragraphs (of section 9) immediately following that which confers the jurisdiction, defines the terms "neglected" and "delinquent" as follows:

"The term 'neglected' child shall mean any child, seventeen years of age and under, found

destitute or dependent on the public for support or without proper guardianship, or whose home, by reason of the neglect, cruelty or depravity, or indigence, of its parents, guardians or other persons, is an unfit place for such child, or having a single surviving parent undergoing punishment for crime, or found wandering about the streets, at night, without being on any lawful business.

"The term 'delinquent' child shall mean any child, seventeen years of age and under, not now or hereafter inmates of a state institution, found begging or receiving alms, or being in any street, road, or public place for the purpose of begging or receiving alms, or peddling any articles, or singing or playing on any musical instrument, in any street, road, or public place, for alms, or accompanying any person so engaged; or found living in any house of prostitution, or with any vicious or disreputable person, or frequenting the company of reputed criminals, or prostitutes, or visiting any saloon or place of entertainment where spirituous liquors or wines or intoxicating or malt liquors are sold, exchanged or given away; or found in any policy shop, pool room, bucket shop, race track, or where any gambling game or gambling devices is operated; or found habitually wandering around any railroad tracks or yards, or jumping, or attempting to jump, on any moving train or street car, for the purpose of stealing a ride, or entering any car or engine without any lawful authority; or found to be incorrigible or habitually using vile, obscene, or indecent language, or guilty of immoral conduct in public places or around school houses, or growing up in idleness and crime; or, who, without the consent of parents or guardians or custodians, absents itself from its home or place of abode, or runs away from any state institution of charity to which it may be confined, or violates any law of the state or any ordinance of any village, town, city or parish of the state."

Act No. 301 of 1908, § 1, provides:

"That * * * it shall be unlawful for any person * * * to require or permit * * * any child, under the age of 14 years, to labor or work in any mill, factory, mine, packing house, manufacturing establishment, workshop, laundry, millinery or dress making store or mercantile establishment in which more than five persons are employed, or in any theatre, concert hall, or in or about any place of amusement where intoxicating liquors are made or sold. * * * Any violation of this provision shall be punishable by a fine of not less than \$25 or more than \$50 or by imprisonment," etc.

The statute thus quoted applies to children, generally under the age of 14 years, and, if the defendant had been prosecuted, in a court of general criminal jurisdiction, for permitting a minor to labor or work in his theater, it is evident that an affidavit which failed to state that such minor was under the age of 14 years would have charged no offense. As it is, the state has gone into a court, the jurisdiction of which is strictly limited to matters and offenses concerning and against "neglected and delinquent children," and has prosecuted defendant under an affidavit which sets forth that he "did * * * willfully and unlawfully permit one Sam Bonart, a minor child aged 13 years, one Alice Guevin, a minor child, aged 12 years, * * * to perform on the stage of the Winter Garden Theater," but which does not set forth that the children

so permitted to perform are either neglected or delinquent, within the meaning of Act No. 83 of 1908. For aught that appears, therefore, they are neither neglected nor delinquent children, within the meaning of the act, and hence, for aught that appears, the juvenile court was without jurisdiction of the charge preferred by the affidavit, since that court is vested by the law of its creation with no other than the authority to deal with matters concerning, and offenses against, neglected and delinquent children, and no children are neglected or delinquent, for the purposes of its jurisdiction, save those who fall within the classification established by the law which confers the jurisdiction.

"The record of the court of limited jurisdiction must show, affirmatively, such facts as confer jurisdiction, and, generally, no presumption is indulged in favor thereof." Cyc. vol. 12, p. 228.

"The objection that a court has no jurisdiction of the subject-matter is not waived by plea, or going to trial, and may be raised on motion in arrest of judgment, on appeal, or by petition for writ of habeas corpus." Id., p. 229.

Indictments, under statutes, must set forth with certainty all the facts and circumstances essential to constitute the crime, so as to bring the accused within the provisions of the statute. If any one of the ingredients of which the offense is composed be omitted, or misstated, it is ground for a motion in arrest of judgment. *State v. Stiles*, 5 La. Ann. 324; *State v. Read*, 6 La. Ann. 227; *State v. Sheppard*, 33 La. Ann. 1217; *State v. Delerno*, 11 La. Ann. 648; *State v. Palmer*, 32 La. Ann. 585.

Conceding, for the purpose of the argument, that defendant is charged with an offense under Act No. 301 of 1908, nevertheless, not having been charged with any offense cognizable in the court by which he was convicted, his position, quoad the question to be here decided, is the same as though he had been charged with no offense at all. We may say in conclusion that the question here decided has not heretofore been considered.

For the reasons thus assigned, it is ordered, adjudged, and decreed that the judgment of conviction herein rendered be annulled and avoided, and the sentence thereon arrested.

(125 La.)

No. 18,130.

STATE v. ROSE.

(Supreme Court of Louisiana. April 11, 1910.)

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Lew Rose was convicted of willfully and unlawfully permitting minors to perform on a stage, and he appeals. Conviction annulled, and sentence arrested.

Arthur B. Leopold, for appellant. St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

MONROE, J. This case presents the same features as are presented in the case, bearing the same title and the number 18,118, this day decided, and has been submitted on the same arguments, oral and written. For the reasons assigned in the case entitled *State of Louisiana v. Lew Rose* (No. 18,118, this day decided) 52 South. 165, therefore, it is ordered, adjudged, and decreed that the judgment of conviction herein rendered be avoided and annulled, and sentence thereon arrested.

(125 La.)

No. 18,129.

STATE v. ROSE.

(Supreme Court of Louisiana. April 11, 1910.)

Appeal from Juvenile Court, Parish of Orleans; Andrew H. Wilson, Judge.

Lew Rose was convicted of willfully and unlawfully permitting minors to perform on a stage, and he appeals. Conviction annulled, and sentence arrested.

Arthur B. Leopold, for appellant. St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

MONROE, J. This case presents the same features as are presented in the case, bearing the same title and the number 18,118, this day decided, and has been submitted on the same arguments, oral and written. For the reasons assigned in the case entitled *State of Louisiana v. Lew Rose* (No. 18,118, this day decided) 52 South. 165, therefore, it is ordered, adjudged, and decreed that the judgment of conviction herein rendered be avoided and annulled, and the sentence thereon arrested.

(125 La.)

No. 17,820.

WILLIAMS v. W. R. PICKERING LUMBER CO. et al.

(Supreme Court of Louisiana. March 14, 1910. Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Where plaintiff, a brakeman riding on a skeleton car of a logging train, was thrown beneath the wheels and badly injured, by the sudden and violent stopping of the train by the engineer, without warning or notice, the question whether he was guilty of contributory negligence in riding in an unsafe position on the car is one of fact, peculiarly within the province of the jury, and after a review of the evidence we are not prepared to say that the finding is against the preponderance of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1124; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT — NEGLIGENCE — UNFORESEEN ACTS.

Plaintiff cannot be considered as guilty of contributory negligence for failing to foresee and guard against a sudden and unexpected emergency stop, which no one anticipated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 754; Dec. Dig. § 240.*]

3. MASTER AND SERVANT (§§ 198, 216, 226*)—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER AND SUPERINTENDENT.

Plaintiff cannot be considered as assuming the risk of the negligence of the railroad company or of its conductors, or engineers acting as conductors.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 501-505, 570; Dec. Dig. §§ 198, 216, 226.*]

4. MASTER AND SERVANT (§ 240*) — NEGLIGENCE OF SERVANT—ASSUMING DANGEROUS POSITION.

As the evidence tends to show that the position of the brakeman on the car would have been safe under ordinary circumstances, he cannot be considered as guilty of contributory negligence for assuming such a position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 752; Dec. Dig. § 240.*]

5. MASTER AND SERVANT (§§ 137, 141*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

The emergency stop was the immediate cause of the injury, but the necessity for such a stop was created by the negligence of the superior servants of the railroad company in leaving the switch open, contrary to custom, and in not inspecting the switch before attempting to use it, and by the negligence of the management in not making and enforcing proper rules for the operation of the switch.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 137, 141.*]

6. MASTER AND SERVANT (§§ 137, 141*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

But from any point of view, the efficient cause, the causa causans, was the negligence of the company and of its servants for whose fault it is answerable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 137, 141.*]

7. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE AMOUNT.

As far as possible, some reasonable uniformity in awards of damages should be observed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 381; Dec. Dig. § 132.*]

Monroe, J., dissenting.

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So Relle, Judge.

Action by Claude Williams against the W. R. Pickering Lumber Company and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Palmer & Williamson, for appellants. Blanchard, Barrett & Smith and Monk & Kay, for appellee.

LAND, J. Plaintiff sued for damages in the sum of \$20,078 for personal injuries sustained by him while working as brakeman on the Louisiana Central Railroad. The W. R. Pickering Lumber Company and the Pickering Land & Timber Company were made codefendants on the allegations of common connection, co-operation, and privity of interest.

The petition alleged, in substance, that the plaintiff was employed and commenced work

on March 10, 1908, as brakeman on the log train of the railroad operating in the vicinity of Cravens, for the purpose of logging the mill at that place.

That on the next day that plaintiff, while in the discharge of his duties as brakeman, was thrown from the last of 18 skeleton log cars, by the sudden stopping of the locomotive by the engineer on the "pond track," at or near a connecting switch on the main line of the defendant railroad; and, in consequence, plaintiff was terribly injured, losing an arm and a leg, and sustaining other painful wounds.

That the conductor of a train on the said main line carelessly and negligently left said switch open at the point of connection with the "pond track."

That the engineer of the log train moving carelessly out of the "pond track," when very near said open switch, without notice or warning, reversed his engine, and caused a sudden stoppage of the locomotive, whereby the slack between the cars was taken up with a mighty jolt or lurch, and in consequence the plaintiff was pitched headlong down under the car.

That defendants were negligent in not furnishing safe places to work and to ride, safe appliances, air brakes or other sufficient brakes, a proper switch, suitable equipments, and did not exercise due care and diligence in the manner the trains were operated by those placed in charge.

Defendants pleaded the general issue; that if the plaintiff was injured as alleged the injury was occasioned by his own gross negligence; that the risk, such as might have existed, was apparent, and was accepted by the plaintiff when he entered defendant's employ; and that the injury, if caused in the manner alleged, was occasioned by the negligence of the plaintiff's fellow servants.

After a very protracted trial before the court and jury, there was a verdict in favor of the plaintiff for the full amount claimed. The defendants have appealed.

A record of nearly 1000 pages attests the zeal and industry of counsel. The evidence is so voluminous and conflicting that it is impossible to condense even its substance within the limits of an ordinary opinion.

The Louisiana Railroad Company, as a common carrier, operates its main line from Pickering to Cravens, a distance of about 19 miles. The W. R. Pickering Lumber Company has its plant at Pickering, and that of the Pickering Land & Timber Company is located at Cravens. A regular train for passengers and freight is operated once a day on the main line, which is also used by a number of logging trains in the transportation of logs to the two mills. At the mill near Cravens there is a large pond for the reception and handling of logs. A track leading from the pond to the main line, several

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hundred yards distant, is called the "pond track." A logging train going out to the woods follows this track to the main line, is switched thereon, and then takes the main line until the woods track is reached. The logging train at Cravens usually made three or four trips per working day. Hence the switch on the main line near the mill pond was used by the logging train three or four times as often as it was used by the regular train. This being so, it was customary to keep the switch lined up with the "pond track" in order to save time in the operation of the more important branch of the business.

The railroad company had a local superintendent at Cravens, who at the same time superintended the mill there operated. The railroad company had no written or printed rules for the guidance of its employees. The logging train was run by a man named Benner, who was both engineer and foreman or conductor. In the running of the train Benner was aided by a fireman and two brakemen. Plaintiff was one of the brakemen.

On March 11, 1908, after making one trip to the woods, Benner gathered up 18 empty skeleton cars on the "pond track," and pulled out for the switch. When within about 90 feet of the switch, Benner saw that the switch points were open or against his train, and immediately reversed his engine, and succeeded in stopping the locomotive on the points of the switch. Benner gave no signal warning to his crew before reversing this engine, but made an emergency stop as in case of sudden danger. Benner handed in a report blaming the crew of the regular train for leaving the switch open. Benner, an experienced engineer, supposed that the crew of the regular train had performed the customary duty of closing the switch. The switch was a ground switch, and Benner could not tell from its position whether it was open or closed. Benner testified that on one or more occasions he had run his locomotive into the same switch. We gather from the testimony of several other witnesses that it was the duty of the crew of the regular train to close this switch. The local superintendent did not testify on this subject. Benner seems to have had full control and management of his logging train. None of the crew of the regular train testified in the case. The matter of the closing or opening of this switch seems to have been left to the crews of the two trains. According to Benner and his fireman, sometimes the crew of the regular train passed and left the switch open. If this be true, it was negligence in Benner not to send one of his crew ahead of the train to inspect the switch every time he had occasion to use it.

The superintendent was negligent in not making and enforcing proper rules and regulations for the safe operation of this switch. After the accident a rule was adopted making it the special duty of the conductor or

engineer in charge of the regular train to see that this switch was not left open or against the "pond track."

Under the conditions existing on March 11, 1908, Benner, knowing that the switch might have been left open by the crew of the regular train, and knowing that the switch had no sufficient warning signal device, was guilty of negligence in not sending one of his crew forward to inspect and close the switch if necessary. The engineer was also guilty of negligence in reversing the engine without warning. See *Bell v. Lumber Co.*, 107 La. 725, 31 South. 994. Benner, having sole charge of the operation of the logging train, represented the railroad company, and was not a fellow servant of the brakeman; nor were the crews of the two trains fellow servants. *Weaver Case*, 116 La. 468, 40 South. 798; *Town's Case*, 37 La. Ann. 630, 55 Am. Rep. 508; *Mattise Case*, 46 La. Ann. 1535, 16 South. 400, 49 Am. St. Rep. 356; *Payne's Case*, 117 La. 983, 42 South. 475; *Dobson's Case*, 52 La. Ann. 1134, 27 South. 670. If the superintendent of the defendant company was negligent, the fellow servant doctrine has no application. *Ferringer v. Oil & Mineral Co.*, 122 La. 441, 47 South. 763.

Benner did not give the customary sudden stop signal to his crew, but, according to his report, it was a case of emergency, and he reversed the engine to save the open switch. According to Benner's testimony and report, he did not take the safety of the crew into consideration. Nor do we find in the record any evidence tending to show that the railroad company ever instructed or warned the crew as to the proper precautions to be taken to avoid the constant dangers attending the operation of the logging trains. The crews were left to their own devices to safeguard themselves not only against the ordinary, but the extraordinary, hazards of an occupation, dangerous even under the best conditions.

The emergency stop in question caused great excitement and commotion. As the cars began to bump together, cries of "Look out!" "Look out!" were heard. At this moment the plaintiff was standing on the rear portion of the last car of the train. This particular car was jerked violently forward, and the plaintiff was hurled head foremost beneath the car. He was run over and injured in the manner already stated. The rear trucks of the car left the rails. Whether this derailment was caused by the sudden stopping of the locomotive, or by its running over the leg or arm of the plaintiff, is one of the disputed, but not essential, issues of fact in the case.

The answer does not even hypothetically admit that the railroad company or any of its representatives was guilty of negligence. Hence, technically, the averments of the answer do not raise the question of contributory negligence. This issue, however, was

presented by the evidence, and was considered by the jury under the charge of the court.

On this issue the burden of proof rests on the defendant railroad company. *Buechner v. City of New Orleans*, 112 La. 589, 36 South. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455.

On the day of the accident, the plaintiff was acting as rear brakeman and flagman. His proper place was on the rear car. His duty was to watch the cars, and to flag the engineer if anything went wrong. As a matter of fact, on that occasion, the rear car was not properly coupled, and the plaintiff flagged the engineer, who thereupon stopped the train, and backed to make the required coupling. This was done, and the train proceeded toward the switch on the main track.

It is defendant's contention that thereupon the plaintiff got on the rear car, and was standing erect in the most dangerous position that could be assumed when the emergency stop was made, and therefore was guilty of contributory negligence.

It is plaintiff's contention, on the other hand, that he was not standing in that position, but in a much safer one, and would not have been injured except for the emergency stop made without notice or warning to him.

Before considering the testimony on this issue, it is necessary to briefly indicate the make-up of the skeleton logging car in question. Such a car may be described in general terms as an open framework of heavy timbers resting on very low trucks. The main component parts are two reaches or stringers extending lengthways through the center of the car, and from 8 to 12 inches apart. These stringers are longer than the body of the car, and project in the front and rear so as to be used as parts of the coupling device. The sidebar is a piece of timber on each side of the car. The bunk is a large piece of timber that extends across the car at each end, for the purpose of holding the longer logs. The false bunk, of the same nature, is intended to hold the shorter logs. The oil box is a covered metal receptacle for oil waste on the outside of the trucks. This box has a groove on the top sufficiently wide to afford a footing for brakemen.

The proper way for the rear brakeman to mount the rear car is to put one foot on the oil box, his hands on the bunk, and then to place the other foot on the stringer. Plaintiff testified that he got on the car in this manner, and remained in this position with both hands braced against the bunk until he was thrown forward by the sudden and unexpected stop of the train.

Buford, the other brakeman, went to Texas after the accident, and his deposition was taken in behalf of the defendant. From his answers it is impossible to tell how the plaintiff was standing. The tenth answer is that plaintiff "was standing with one foot

on the stringer and the other on the box." Again asked to describe the position of the plaintiff, the witness made the same answer by reference to his first answer. In a subsequent answer the witness stated that plaintiff "had just been on the bunk half a moment," and in his last answer described plaintiff as "standing perfectly straight with one foot on the bunk and the other on the stringer of the car." The answers of this witness were so unsatisfactory to the defendants that they induced Buford to attend the trial and give his testimony before the jury. Buford explained that his answers had not been correctly taken down by the officer in Texas. On the trial Buford testified that the plaintiff was standing erect with one foot on the stringer and one on the bunk at the moment of the accident.

C. B. Smith, an employé of the defendant, testified that on the night of the accident or the next night Buford told him that the plaintiff was standing with one foot on the oil box, the other on the stringer, and was leaning over with his hands on the bunk. An attempt was made to impeach Smith by showing that he made contradictory statements about the declarations made to him by Buford. A colored witness who supported Buford's version was successfully impeached by proof of contradictory statements. Besides, this witness was flatly contradicted on another point by the local superintendent of the defendant.

On the other hand, plaintiff's version is sustained throughout by the testimony of a colored man who was with defendant's colored witness, and is corroborated to some extent by Embry, a reputable witness, who attracted by the noise and shouting, looked out of the window and saw a man standing behind the bunk of, the rear car with his hands extended just before the lurch. This witness could not say that plaintiff's hands were resting on anything or state the position of the feet, as he saw him just a moment. He testified that the car bounced a few times, and plaintiff went over the side. It is significant that the local superintendent who described the position of Buford, the head brakeman, at the time of the accident, did not testify as to the position of the plaintiff, the rear brakeman, who was nearer to the witness.

Considering this evidence as a whole, we cannot say that the preponderance is against plaintiff's version of his position at the moment of the accident. The deposition of E. K. Kehoe directly sustaining the testimony of the plaintiff on this point was ruled out on the technical objection that the notary had not sealed the envelope containing the deposition transmitted by mail to the clerk of the court. This objection was sustained although the notary appeared in court and testified that the deposition had not been tampered with in any respect. The additional objection that the witness was not duly

sworn was also sustained. We do not, however, consider that the exigencies of this case make it necessary for us to pass on the exclusion of this deposition.

Accepting as true the plaintiff's version of his position at the time of the accident, the next question is whether the assumption of such a position was contributory negligence under all the facts and circumstances of the case. A jury of the vicinage, doubtless familiar with the usual operation of logging trains, after hearing the evidence and inspecting similar skeleton cars, reached the conclusion that the plaintiff was not guilty of contributory negligence. What a prudent brakeman should or should not do under given circumstances is a question peculiarly within the province of the jury. See Thompson's Commentaries on the Law of Negligence (Revised) vol. 5, §§ 5617, 5626. In one of the cases cited by said writer, a brakeman was riding on a flat car between two tiers of logs, and in another a brakeman was sitting on the rear bolster of a skeleton car, and attempting to light a cigarette, instead of being at his post as brakeman.

The same writer states the tests by which to determine whether there has been a want of ordinary care, as follows, viz.:

"It must here be remembered that what is termed ordinary care is not an absolute, but a varying, circumstance, depending upon the existence of each particular case, always proportionate to the risk to be avoided. The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment, or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action, and what would under some circumstances be want of reasonable care might not be such in others; but it is to consider whether a prudent person, in the same position and having the knowledge possessed by the one in question, would do the negligent act. * * * On the other hand, an instruction that the plaintiff must be *entirely free from any negligence that helped to bring about the accident*, in order to recover, is erroneous, because it exacts of the plaintiff a higher degree of diligence than the law requires. It is said in another case that contributory negligence is not imputable to a person for failing to look for danger, when under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended." *Id.* vol. 1, § 173.

In the case at bar the plaintiff had no reason to apprehend that the crew of the regular train would negligently leave the switch open or against the "pond train," and that the engineer of the latter train, confronted unexpectedly with the danger of running into the open switch, would make an emergency stop, without notice or warning. If the plaintiff had been injured by one of the ordinary dangers accompanying the operation of logging trains, the question would be different. But it is going too far to say that the plaintiff should have anticipated the negligent conduct of the servants in charge of both trains.

It is shown by the evidence, and indeed is not seriously disputed, that plaintiff's posi-

tion on the rear car would have been a safe one for the short run between the pond and the switch if the emergency stop had not been made. There was no apparent danger of any accident to the train in running that distance. The danger that did arise was not anticipated by the experienced engineer in charge of the train, or by the local superintendent then present, or by any member of the crew. To hold that plaintiff was guilty of contributory negligence would be tantamount to the declaration that every trainman is bound to anticipate all possible dangers and to take all possible precautions against them.

There is an immense mass of expert testimony as to the safest manner of riding on skeleton cars. As usual, the experts differ. They agree that riding standing without brace or support is the most dangerous mode. One suggests that the safest way is to sit on a sidebar, and hold on the bunk with the feet. Others advocate sitting on the stringers and holding on with both hands. It is not explained how a rear brakeman, sitting down as suggested, could very well watch the train, and flag the engineer in case of emergency. The truth seems to be that there is no safe position for a brakeman on a skeleton car. In the case at bar, the car had no flooring and no handholds or other safety devices. It is bad enough to subject brakemen to the usual hazards of life and limb attendant on their rough and dangerous occupation. To hold, further, that the brakeman must at his peril anticipate and guard against the negligence of others would be contrary to established principles of law as well as the dictates of justice and humanity.

In the light of the surrounding circumstances as they appeared to the plaintiff at the time, his position was a reasonably safe one, and the evidence shows that a great many brakemen ride that way. We agree with the jury that there was no contributory negligence.

The last contention that the plaintiff assumed the risk of the injury is unfounded. In *McGinn v. McCormick*, 109 La. 396, 33 South. 382, the court held that an injured servant is not to be considered as having assumed the risk of injury to be incurred from the negligence of the master or from the negligence of the master combined with that of a fellow servant. See also, *Moses v. Grant Lumber Co.*, 114 La. 933, 38 South. 684. It is equally well settled that the servant does not assume the risk of injury from the negligence of those for whose conduct the master is responsible, or of those not in law his fellow servants. Thompson, *supra*, vol. 4, §§ 4618, 4619. In this state, a conductor, or an engineer performing the duties of a conductor, is not a fellow servant of a brakeman on the same train, nor are the servants on one train the fellow servants of a brakeman on another train operated by the same company. Under the facts of this case, the

injury of the plaintiff was occasioned by the combined negligence of the defendant railroad corporation and its conductors, or engineers acting as such.

The evidence shows that the W. R. Pickering Lumber Company and the Pickering Land & Timber Company are separate and distinct corporations, and have a traffic agreement with the Louisiana Central Railroad Company. It therefore follows that the judgment must be reversed as to the two first-named corporations.

We think that the verdict is excessive in amount. While there is no standard for the measure of damages in the case of a loss of one or more limbs, some reasonable uniformity in the awards in like cases should be observed. The loss of earning capacity is an important factor in many cases. The following Louisiana cases have been cited by counsel for the plaintiff: *Barksdull v. R. R. Co.*, 23 La. Ann. 180 (where a boy lost both legs, and the award was \$15,000); *Choppin v. R. R. Co.*, 17 La. Ann. 19 (where a young man lost his leg, endured long months of physical suffering, and was deprived of his employment—nature not stated—there was an award of \$25,000); *Ketchum v. R. R. Co.*, 38 La. Ann. 777 (where a verdict for \$10,000 for the loss of an arm was affirmed); *Nelson v. R. R. Co.*, 49 La. Ann. 491, 21 South. 635 (where a child lost both legs, a verdict for \$30,000 was reduced to \$20,000).

In *Black v. R. R. Co.*, 125 La. 101, 51 South. 82, plaintiff, who had previously lost all the fingers of his right hand, except the thumb and a twisted little finger, was run over by a locomotive and lost his left arm at the shoulder, a part of one ear, and was injured in the face and more seriously in the back, and as a result was rendered unable to perform any physical labor, a verdict of \$17,000 was affirmed, without discussion of the question of quantum.

On the other hand, the counsel for defendant cite cases where verdicts of from \$2,000 to \$6,000 for the loss of a limb have been affirmed. We freely admit that the cases cited cannot be reconciled, and that there are no rules of law on the subject-matter. But a person who has lost both arms or both legs is in a worse position than a person who has lost one arm and one leg, and is entitled to greater damages for the maiming. Hence, the plaintiff in this case should receive less damages than a person who has lost both limbs.

We are of opinion that the verdict and judgment should be reduced to \$12,000.

It is therefore ordered that the verdict and judgment below be amended by reducing the amount thereof to the sum of \$12,000, and by dismissing plaintiff's suit against the W. R. Pickering Lumber Company and the Pickering Land & Timber Company, with costs occasioned by their joinder in this suit,

and it is further ordered that, as thus amended, the said verdict and judgment be affirmed, and that the plaintiff pay the costs of appeal.

MONROE, J. I dissent.

(126 La.)

No. 17,759.

ECKHARDT v. MATERNE et al.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR (§ 792*)—DISMISSAL—EX PROPRIO MOTU.

In the absence of a judgment in the transcript, the Supreme Court is bound to dismiss the appeal ex proprio motu.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3137-3141; Dec. Dig. § 792.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by John Eckhardt against E. A. Materne and others. Judgment for defendants, and plaintiff appeals. Dismissed.

J. W. Baker and Thomas Kleinpeter, for appellant. Young & Plauche, for appellees.

PROVOSTY, J. This is a suit in nullity of judgment. Pleas of res judicata and estoppel were interposed. From an entry on the minutes informing us that these pleas were sustained, and from the fact that plaintiff appeals, we infer that plaintiff's suit was dismissed; but there is no judgment in the transcript. In the absence of a judgment from the transcript, this court is bound to dismiss the appeal ex proprio motu. *Carondelet Canal Co. v. City of New Orleans*, 44 La. Ann. 394, 10 South. 871.

Appeal dismissed.

(126 La.)

No. 18,111.

TOWN OF FRANKLINTON v. POLICE JURY OF PARISH OF WASHINGTON.

In re POLICE JURY OF PARISH OF WASHINGTON.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 426*)—SIDEWALK ASSESSMENTS—EXEMPTION OF COURTHOUSE SQUARE.

The exemption of a courthouse square from taxation does not extend to a special assessment for paving sidewalks levied against all abutting real estate under the provisions of Act No. 147, p. 261, of 1902.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1036; Dec. Dig. § 426.*]

Action by the Town of Franklinton against the Police Jury of the Parish of Washington. An order dismissing plaintiff's suit was reversed by the Court of Appeal, and judgment rendered for plaintiff, and defendant applies for certiorari or writ of review. Judgment affirmed.

Reid, Purser & Reid, for applicant. Magee W. Ott, for respondent.

LAND, J. This is a suit to enforce a local assessment for sidewalk purposes against the defendant and against a certain square, belonging to the parish of Washington, on which the courthouse is located.

Plaintiff's suit was dismissed in the district court. The Court of Appeal reversed the decree of the lower court, and rendered judgment in favor of the plaintiff as prayed for.

Act 147, p. 261, of 1902, empowered cities, towns, and parish sites to levy and collect special taxes and local contributions against all real estate abutting sidewalks and curbs for the purpose of paying the costs of paving the same. Under this statute the authorities of the town of Franklinton constructed concrete pavements around said courthouse square at a cost of \$548.10. The police jury of the parish of Washington refused to pay on the ground that the said square is public property and therefore exempt from local assessment.

The Court of Appeal held to the contrary in a well-considered opinion which is directly supported by the case of *Adams County v. City of Quincy*, reported in 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, in which it was held that the exemption from taxation of the property of a kind used solely for public purposes does not extend to a special tax for public improvements such as the paving of a street on which the premises front.

In *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96, the same question was considered from the standpoint of Louisiana jurisprudence. Inter alia the court said:

"The argument is that public property, being exempt from taxation, is also exempt from these assessments; but the authorities have long recognized a distinction between general taxes, which are for the benefit of the public generally, and which in the nature of things the public must directly or indirectly pay, and special assessments for the benefit of particular property, which are a charge upon the property benefited. If this be private property, then each of such property pays its share; if it be public property, the city pays it as the agent of the entire body of its citizens, who are assumed to have been benefited to that extent. *Charnock v. Levee Co.*, 38 La. Ann. 323."

The court cited other Louisiana cases as holding that public property must bear its just proportion of the burden of paving streets. This case is cited by a recent author as holding that:

"Public property in Louisiana is liable to assessment for public improvements." *Hamilton, Law of Special Assessments*, p. 233.

The same writer further says that:

"A city may levy a special assessment for improving the street in front of a courthouse square within the city, and, if the board of county commissioners do not consent to and pay the same, the court may adjust the matter."

Citing *Commissioners v. Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396, and *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; and also *Scammon v. Chicago*, 42 Ill. 192, to the effect that a public park or square is subject to assessment.

Act 147 of 1902 embraces in its sweep all abutting real estate. This act specially empowers "parish sites," necessarily including within their limits the parish courthouse and grounds, to levy special assessments on all abutting real estate for sidewalk purposes. It follows, as a necessary implication, that the lawmaker, as he did not except, intended to include, courthouse squares, without which parish sites cannot exist.

We can perceive no good reason in law or in equity why the cost of the paving of the courthouse square should be saddled on the inhabitants of the parish site.

The complaints of the defendant on other points were correctly disposed of by the Court of Appeal.

It is therefore ordered that the judgment of the Court of Appeal be affirmed, and that the defendant pay the costs of this proceeding.

(126 La.)

No. 17,811.

CARRICK v. JOACHIM.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

ASSAULT AND BATTERY (§ 19*)—CIVIL ACTION—COMPENSATION.

Where one man (and he much the heavier of the two), without provocation, assaults another upon the street, and, in a voice which is heard half a square away, applies to him, the vilest epithets in the English language, the injured party ought not to be denied such compensation for the wrong done him as money can afford.

[Ed. Note.—For other cases, see *Assault and Battery*, Dec. Dig. § 19.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Alexander J. Carrick against Jacob Joachim. Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered.

Arthur J. Peters, for appellant. Meyer S. Dreifus, for appellee.

MONROE, J. Plaintiff demands damages for injuries alleged to have been sustained by reason of the fact that defendant, on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

morning of September 13, 1908, repeatedly applied to him vile epithets and struck him, all on the public street and in the presence of third persons.

Defendant pleaded the general denial, and added a reconventional demand, which latter has since been abandoned. The suit was dismissed by the trial judge, and plaintiff has appealed.

The case, disclosed by the testimony in the record, is as follows: Defendant is about 45 years old and weighs over 200 pounds; he is, or was engaged in the business of putting up electrical fixtures; and, having married plaintiff's sister, took plaintiff into his shop and kept him, off and on for some 12 or 13 years, until he was about 24 years of age. During that period he sold plaintiff a house, and, for the price, plaintiff gave a note which was to mature on September 15, 1908; but there was a verbal agreement between them that plaintiff was to pay it in installments of \$3 a week, and those payments were made at defendant's shop, so long as plaintiff worked there. Plaintiff, however, left defendant's employ about April, 1908, after which, the payments were made, generally, at defendant's house, every Sunday. On Sunday, September 6, 1908, he failed to make the payment due that day, and on Sunday September 13th, he called with \$6 to make both payments. Defendant happened, at the moment (say, between 9:30 o'clock and 11:30 o'clock, in the morning), to be standing at the corner, nearby, talking to a friend, who called his attention to the fact that plaintiff was at his gate. He walked to the gate, and plaintiff handed him the \$6 folded in a receipt which was prepared for his signature. According to his own testimony (which, in that respect, does not materially differ from that of plaintiff), he said to plaintiff:

"It is a fine name you have made for yourself; your note was due on the 15th, and I want you to take it up."

Plaintiff replied:

"That was not the agreement you made with me, verbally."

Defendant, by way of rejoinder, said:

"That is the agreement, now."

Or (as he testifies):

"Agreement or no agreement, I don't want to have a d— thing to do with you any more; I am done with you forever"

—which was followed by a vile epithet, and a blow, from the force of which, or in the effort to escape which, plaintiff stumbled and fell, and in attempting to recover himself was struck again, and defendant then made towards him with a piece of a shrub or young tree, which plaintiff had broken in falling, and plaintiff went to the other side of the street and got out of his way. A little later plaintiff returned to get his receipt,

which defendant gave him, and plaintiff then walked off, but, as it appears, turned his head and looked back, when defendant, again, as he had several times before, applied vile epithets to him, and told him not to look back. Defendant's version of the matter is that, when he told plaintiff that he wanted him to pay his note on the 15th, whether it had been previously so agreed or not, plaintiff struck at and applied an epithet to him, and that it was then that he struck him—admitting that he struck plaintiff twice—and that he once used an epithet attributed to him. His version is overborne by the testimony of four witnesses who saw him striking plaintiff, and heard him repeatedly using language towards plaintiff which is not generally heard in polite society, but which, on that occasion, was heard by witnesses who were as much as 175 feet distant. Several witnesses were introduced on behalf of defendant, who testified to some things that had happened while plaintiff was in defendant's employ—going back as much as three years. Other witnesses testified that plaintiff had said things about defendant which they had repeated to him; but as defendant himself does not attempt to justify his assault and bad language by saying that those were the things which irritated him, and as plaintiff had been calling at his house and paying him \$3 every Sunday for six months or more, the cause of his sudden outbreak remains unexplained.

In such cases, the injured party can choose between submitting to a wrong, resenting it by force and violence, resorting to a criminal prosecution, or, as plaintiff has done, appealing to a civil court for redress.

If, in pursuing such course, he should obtain no redress, he might very well conclude that the law expects him to redress his own grievances in his own way. Whilst, therefore, we agree with our learned Brother of the district court that, in the case of an ordinary street brawl, in which the parties are equally to blame, neither should be allowed to recover damages, we are decidedly of the opinion that, where, as in this case, one man (and he much the heavier of the two), without provocation, assaults another upon the street, and applies to him, in a tone that can be heard more than half a square away, the vilest epithets in the English language, the injured party ought not to be denied such compensation for the wrong done him as money can afford. Plaintiff is not shown to have suffered physically from the blows received by him, but he is entitled to damages for the indignity and for the slander, and we fix the amount at \$300. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that there now be judgment in favor of plaintiff, Alexander J. Carrick, and against the defendant, Jacob Joachim, in the sum of \$300, with legal interest thereon from the

date at which this judgment shall become final until paid, together with all costs.

PROVOSTY, J., thinks the judgment should be for \$500 at least.

(126 La.)

No. 17,837.

Succession of BURBANK.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by Editorial Staff.)

1. EXECUTORS AND ADMINISTRATORS (§ 314*)— RIGHT TO POSSESSION OF PROPERTY OF SUCCESSION.

A petition by some of the heirs for a judgment putting the heirs in possession of the property of the succession on a compliance with Rev. Civ. Code, arts. 1012, 1671, denying to the heirs the right to take the seisin from the executor without leaving in his hands a sum sufficient to pay the movable legacies and giving bond to meet the claims of creditors of the succession, cannot be defeated on the ground that the only way in which the amount which the executors must be left in possession of can be ascertained by the executors filing an account; for, though Code Prac. art. 1000, imposes on the executors the obligation to file an account, it does not impose on the parties the expense of a settlement in court, when they can effect one out of court, and where the unpaid legacies and claims against the succession are known, and the only dispute is over the proper amount to allow inheritance taxes and fees, the court should order the executors to retain an amount sufficient to pay the claims as made and the legacies and the highest possible amount that may be due for taxes, and then put the heirs in possession of the remainder of the property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274–1297; Dec. Dig. § 314.*]

2. EXECUTORS AND ADMINISTRATORS (§ 314*)— RIGHT TO POSSESSION OF PROPERTY OF SUCCESSION.

Executors cannot by agreement among themselves divest their seisin as executors, and turn the property over to themselves as heirs, and with or without such an agreement the court may not divest the seisin of the executors without a compliance on the part of the heirs with Rev. Civ. Code, arts. 1012, 1671, and with or without such an agreement the right of the heirs to be put in possession on compliance therewith is absolute.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274–1297; Dec. Dig. § 314.*]

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Petition by T. Scott Burbank and others, children and legal heirs of Edward W. Burbank, deceased, against Nellie G. Burbank, for judgment putting the heirs in possession of the property of the succession. From the judgment, all parties appeal. Reversed and remanded.

Alfred E. Billings and Charles S. Rice, for plaintiffs. J. Zach Spearing, for defendant.

PROVOSTY, J. Three of the children and legal heirs of the de cujus, two of whom are also executors under his will, filed a pe-

tition in the succession proceedings asking that their sister, coheir and coexecutrix, be cited, and that there be judgment recognizing the parties as the legitimate children and sole heirs of the de cujus, and putting them in possession of the property of the succession, upon their complying with articles 1012 and 1671 of the Code. These are the articles which deny to the heirs the right to take the seisin from the executor without leaving in his hands a sum sufficient to pay the movable legacies and giving bond to meet the claims of the creditors of the succession.

The defendant contends that the only way in which the amount which the executors must thus be left in possession of can be ascertained is by the executors filing an account. We know of no law which so requires. Article 1000 of the Code of Practice imposes upon the executors the obligation to file an account when required; but it does not impose upon the parties the trouble and expense of a settlement in court when they can just as well effect one out of court. *Succession of Duffy*, 50 La. Ann. 795, 24 South. 277.

In the present case the assets amount to \$380,570. The unpaid legacies and claims against the succession are as well known now as they ever will be. They are a \$100 legacy for the care of the tomb of the de cujus, and the fees of the notary who took the inventory, and of the attorney of the defendant executrix, and possibly a few dollars of inheritance tax. The real and only trouble between the parties is over the proper amount to allow for the said fees. The trial court should have ordered the executors to retain an amount sufficient to pay the claims as made and the legacy and the highest possible amount that could be due for taxes, and have put the heirs in possession of the remainder of the property.

The petition also alleges an agreement on the part of the defendant coheir and executrix that the heirs should be put in possession at once, and we find that there was such an agreement; but we do not see what it has to do with the case, unless as a general waiver on the part of the defendant of any right she might have had as heir to demand an account of her coexecutors—a barren right, since there would have been nothing to account for. The said agreement cannot be given any greater effect than this; for the executors cannot by agreement among themselves divest their seisin as executors and turn the property over to themselves as heirs. *Townsend v. Sykes*, 38 La. Ann. 859; *Succession of Kate Townsend*, 37 La. Ann. 405. With or without such an agreement, the court is powerless to divest the seisin of the executors without compliance on the part of the heirs with articles 1012 and 1671,

supra; and with or without such an agreement their right to be put in possession upon compliance with said articles is absolute.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded, with instructions to the lower court to proceed in accordance with the views expressed in the foregoing opinion.

(126 La.)

No. 18,160.

STATE v. BROWN.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW—QUESTION OF LAW.

A complaint that the corpus delicti was not proven beyond a reasonable doubt raises no question of law for review.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

2. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF COUNSEL—ARGUMENT.

A verdict of the jury will be set aside on account of the remarks of prosecuting counsel only in cases where such remarks were not only improper, but were well calculated to influence the verdict of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. § 1171.*]

3. COURTS (§ 42*)—ORGANIZATION OF CRIMINAL DISTRICT COURT.

The constitutionality of Act No. 98 of 1880, providing for the organization of the criminal district court of the parish of Orleans, is too well settled for further controversy.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 42.*]

Appeal from Criminal District Court, Parish of Orleans; Joshua G. Baker, Judge.

John Brown was convicted of crime, and appeals. Affirmed.

Harold A. Moise, for appellant. St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., Asst. Dist. Atty., for the State.

LAND, J. Defendant was indicted for having carnal knowledge of a female below the age of consent, and pleaded not guilty. Two days later the defendant filed a so-called demurrer, which seems to be a motion to compel the district attorney to dismiss an affidavit charging a like offense against the same female on another date. This motion was overruled by the court, and the case was tried. The defendant was found guilty as charged, and after his motion for a new trial and motion in arrest were overruled, was sentenced to imprisonment at hard labor for a term of five years. Defendant has appealed.

The demurrer, so called, raises no question of law for our consideration, and the overruling of the same worked no prejudice to the accused.

The indictment negatived prescription, and

there is nothing in the record to show what evidence was adduced on the subject.

The complaint that the corpus delicti was not proven beyond a reasonable doubt raises an issue of fact which this court cannot review.

The complaint that the jurors were influenced by prejudice and outside clamor is not disclosed by the record.

We agree with the trial judge that the remarks of the district attorney on the trial were based on the evidence, and were within the bounds of legitimate argument.

The motion for a new trial raises no question of law for our consideration. The filing of an assignment of errors for the consideration of the trial court is not warranted by any rule of criminal procedure. The attack in the motion in arrest on the constitutionality of Act No. 98 of 1880, providing for the organization of the criminal district court of the parish of Orleans, is repelled by the decisions of this court in State v. Crowley, 33 La. Ann. 783; State v. Dalon, 35 La. Ann. 1141; State v. Murray, 47 La. Ann. 1424, 17 South. 832.

Judgment affirmed.

(126 La.)

No. 17,769.

WHITNEY v. PARISH OF VERNON.

(Supreme Court of Louisiana. March 28, 1910.)

Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

1. COUNTIES (§ 113*)—CONTRACTS.

Where a police jury passes an ordinance for the erection of a courthouse and provides that the payment for the same shall be made in installments, no member or officer of the police jury has a right to change the contract so as to discharge the contract by a cash payment. The sole authority for the contract is the ordinance of the police jury, and the contract sought to be made cannot go beyond its terms, and, when it does, the contract is null, as it is not within the power of a building committee to set aside a plain provision of the lawmaking body.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 113.*]

2. COUNTIES (§§ 124, 152, 164*)—CONTRACTS—WARRANTS—ESTOPPEL.

A contract for the building of a parish courthouse may provide for its payment in cash, or from funds to be realized from certificates. Murphy v. St. Mary, 118 La. 401, 42 South. 979; Dupuy Case, 116 La. 785, 41 South. 91; Bienville Parish Case, 48 La. Ann. 333, 19 South. 282. No warrant can be issued unless sufficient funds have been laid aside to meet it, and plaintiff must have known, when the committee provided for a cash payment, that they had exceeded their authority, since no revenues had been laid aside to meet the payment, and no provisions made to raise the funds. He must be held to a knowledge that the second ordinance, which provided for levying a three-mill tax, was void, and it is well settled that the parish cannot be estopped and concluded by this ordinance.

[Ed. Note.—For other cases, see Counties, Dec. Dig. §§ 124, 152, 164.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. COUNTIES (§§ 47, 124*)—POWERS OF POLICE JURY—RATIFICATION OF VOID ORDINANCE.

A police jury possesses only delegated powers, defined by statutes, and are not free to act as individuals, and it is not within the scope of their authority to ratify that which originally had no existence, such as a void contract. Therefore the second ordinance did not have the effect of giving vitality to the first.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. §§ 47, 124.*]

4. DAMAGES (§§ 30, 40*)—REPUTATION—PROFITS FROM CONTRACT.

Where one claims damages, and the evidence shows merely a difference of opinion as to a contract, this is not sufficient to sustain a judgment for damages to one's reputation. As regards the profits which would have been made by the plaintiff, a judgment in a round sum in favor of the plaintiff will be awarded only where the facts show that it is reasonably certain that he would have realized the amount claimed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. §§ 30, 40.*]

5. JUDGMENT MODIFIED AND AFFIRMED.

Judgment in favor of plaintiff in reconvention reduced, with interest on that amount, as heretofore allowed, and judgment otherwise affirmed.

Monroe, J., dissenting.

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So. Relle, Judge.

Action by William C. Whitney against the Parish of Vernon. Judgment for defendant, and plaintiff appeals. Affirmed.

Palmer & Williamson and Pujo, Moss & Sugar, for appellant. Sidney I. Foster and Ponder & Ponder, for appellee.

BREAUX, C. J. Plaintiff brought this suit against defendant for defendant's alleged breach of contract, and asked for judgment in the sum of \$12,692.19 actual damages, and \$17,150.24 profits' loss on the contract; and he claims, in addition, \$15,000 as damages to his reputation.

He entered into a contract with the parish of Vernon on the 4th day of May, 1908, to provide material and build the courthouse as per plan and specifications. He claims that he was to have all of the materials in the old courthouse building.

The amount originally agreed upon to build the courthouse was \$88,000.

Some time after the contract had been entered into, an additional amount of \$2,121.70 was agreed upon to be paid for an asserted change in the foundation of the building.

There was some delay before he began to do the work, which occurred, as he represents, on the request of defendant. He began the work on the 7th day of March, 1907.

Plaintiff states that on the 10th day of August, 1908, without cause, the police jury adopted an ordinance declaring the contract in question an absolute nullity.

The defendant, on the other hand, denied

all indebtedness to plaintiff, and averred that the contract was a nullity from the first.

Defendant claimed \$6,000 for materials taken from the old courthouse to erect the jail, which plaintiff had contracted to build at the same time that he contracted to build the courthouse.

The defendant charged the plaintiff and the architect with fraud and collusion to the amount of about \$1,000 in matter of the jail, and charges that plaintiff and this architect were preparing to defraud the parish in matter of the contract to build the courthouse.

The defendant claimed an amount of \$6,000 in reconvention, to wit, \$1,000 paid by the parish in error brought about, defendant alleged, by false representations of the plaintiff, and \$5,000 for materials belonging to the defendant used by plaintiff, to which he had no right.

At defendant's instance, a writ of sequestration was issued, and the material which the plaintiff was removing was seized.

The judge of the district court rejected plaintiff's demand and gave defendant judgment in reconventional demand for \$10,000 instead of \$6,000, prayed for.

There was patent error, as relates to \$4,000, owing to an oversight of the court, as the defendant had only asked for \$6,000 in reconvention.

The defendant entered a remittitur for said amount.

The police jury adopted an ordinance regularly on the 5th day of August, 1907, and made provisions for erecting a courthouse. The ordinance contained all that was essential. In addition, specifications were adopted and plans prepared. An architect was selected, and a superintendent of the work employed.

Plaintiff was awarded the contract which the ordinance authorized to be made.

The police jury directed its president to sign the contract in accordance with the ordinance.

He departed from the terms and conditions of the ordinance and contracted on a cash basis, not provided for in the ordinance, instead of a contract on a credit basis, as had been ordained by the police jury.

The ordinance in question provided for paying the contractor and builder in 10 equal installments, represented by 10 certificates of indebtedness, which were to be delivered over to the contractor.

The president did not choose to follow this provision of the ordinance. Instead of contracting to pay for the building in 10 years, as authorized by the ordinance, the contract stipulated that the payment would have to be made in about one year; that is, about the time it would take to complete the building.

We will here state, in a transaction involving the payment of a large amount even

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

between private individuals, the terms of payment are of importance.

In a private transaction, if a person directs an agent to enter into a contract, the consideration for which is to be paid in 10 years, the agent would be greatly at fault if he sought to bind his principal to pay in a shorter time.

The contractor began work on the building when the police jury awakened to the necessity of finding the cash necessary to pay the whole amount due without awaiting the delay provided for in the ordinance. They took steps to find a lender. No one could be found to make the loan on a cash contract, to which we have referred, based on a credit ordinance.

Financiers generally have some idea of the congruity. They evidently were not attracted by a credit ordinance and a cash contract based thereon. The result was that there was an absolute failure on the part of the police jury to find the money. The police jury did not have it, and there were no prospects in the future to realize an amount sufficient.

The police jury, in addition to the ordinance to which we have referred, sought to obtain the amount by an ordinance setting aside a three mills' tax to pay the contractor.

The terms were changed from 10 to 4 years within which the parish would pay the amount.

This also signally failed.

The police jury, about the same time, sought to make it appear that the intention in adopting the credit ordinance was to adopt a cash ordinance.

This expression of the intention at the time that the ordinance was drawn could not prevail against the plain expressions of the ordinance providing for credit payments in equal installments in 10 years' time. The terms of the ordinance were too plain to admit of an intention to the contrary on the part of those by whom it was adopted.

This attempted interpretation of the ordinance influenced no one; no one would lend money to the parish.

The ordinance could not be changed by subsequent declaration.

We have before stated that there was some delay. During that delay, differences arose between the contractor and those in charge of the parish interests.

The officers of the parish and others, looking on while the foundation of the building was being laid, were not favorably impressed. There were complaints.

There was an election for police jurors held about that time, and new and different members of the police jury were elected.

It afforded an opportunity to the defense in argument on the trial to argue that the change in the membership of the police jury grew out of the unwillingness of taxpayers to retain in office members who had not been

sufficiently careful in entering into a contract of great local importance.

But be that as it may. If the witnesses for the plaintiff are to be believed, the contractor's work was excellent and all that the contractee had a right to expect. If the witnesses for the defendant are to be believed, it is quite to the contrary, as we have already had occasion to state above.

After the police jury had failed to realize an amount to meet payment, as above stated, that body inquired of the contractor in regard to his intentions. His reply was that he was willing to continue with his work under his contract; that he would make no change and expected the cash as stipulated in the contract. Whereupon the police jury presented a written contract, drawn in accordance with the ordinance first above mentioned, containing all that the ordinance provided in regard to credit payment, and offered to deliver certificates to be met by amounts which the police jury had bound itself to provide in order to meet these certificates.

The contractor positively refused to sign this contract and reiterated that he would stand by the original contract. He stopped with the work and instituted this suit.

The defendant in its answer made averments for a sequestration and prayed for that writ to issue and for sequestration of the material, consisting of the debris of the old building, of which plaintiff had possession and part of which he had used.

In our opinion, the contract was null. It had not been drawn in accordance with any provision of law and gave the plaintiff no right of action as his contract had no validity; it never had any validity.

The police jury is a body having delegated powers to adopt ordinances. A record is kept of them. If legally adopted, they are binding and cannot be set aside by subordinate authority. It is not in the power of a building committee to set aside the plain expression of an ordinance, nor the president of the police jury.

The next question presented is whether the police jury could ratify this contract and estop itself.

The affirmative proposition in answer to the foregoing is not sustained by authority.

Above we said that the act of a private agent could not be binding upon his principal when the agent exceeded his authority.

The principal in a private contract who enters into a contract through an agent can ratify the act of his agent, but a police jury, whose powers are defined by the Legislature, has to follow the statutes. They are not free to act as in the case of private individuals. They cannot go beyond the scope of their authority by attempting to ratify that which originally had no existence. They cannot do indirectly that which they have not the authority to do directly.

In this instance, at the time, there remained one of two things to do; that was for the contractor to sign the contract drawn in accordance with the ordinance, or start anew.

The building of a courthouse may be paid from the estimated surplus of the parish revenues. The contract may be made on cash realized or to be realized from certificates.

This view was expressed in *Murphy v. St. Mary*, 118 La. 401, 42 South. 979; also in the *Dupuy Case*, 116 La. 785, 41 South. 91, and in *Blenville Parish Case*, 48 La. Ann. 353, 19 South. 282. Neither was done in this instance.

The contractor, according to the ordinance, was to receive the certificates themselves. It was different in the contract; only cash was the consideration. He (plaintiff) positively refused all the conditions of the ordinance. Without regard to surplus or parish revenues to be laid aside and other provisions to raise funds, the plaintiff insisted upon cash in direct violation of the provisions of law that no warrant shall be issued unless provision has been made to meet it by laying aside sufficient fund.

The contractor cannot be considered as a third person in matter of this contract.

He is not a third person under the law.

He must be charged with knowledge of the fact that the police jury had entered into a contract entirely beyond the scope of its authority.

It is well settled by repeated decisions that under the circumstances here the parish cannot be estopped and concluded.

It follows from the foregoing that plaintiff has acquired no right, either under the original contract or under the attempted ratification.

We extend our inquiry further.

This brings us to the demands of plaintiff for payment for particular items.

The first is for damages to his reputation.

Even if the contract had been entirely legal, there would have been scant ground to recover damages. The testimony is entirely too general. It does not appear in what respect he has been damaged in his reputation. It was a matter of difference of opinion between the parties, and a failure to follow the terms of an ordinance, such differences as may arise in matter of the execution of a contract.

If we were to conclude that there was liability, we do not find that it was by the parish, but by the individuals who had gone beyond the scope of their authority while officers of the parish.

As relates to profits (another claim of plaintiff), which plaintiff would have made had the cash been found in accordance with the contract, we will state that, had the contract been found legal, the amount claimed for this item is speculative and problematical. Beyond general asseverations, there is

no evidence upon the subject such as required to sustain a judgment. A demand for a round sum cannot be granted unless it is shown by reference to facts that it is reasonably certain that plaintiff would have realized the amount he claims.

This was not done.

The third and last item was for work performed and materials furnished, including \$1,000, which plaintiff has received on the contract.

We will state in the first place that the argument for the defendant brought up the subject of the new jail.

This is an independent contract and presents no issue before us to determine except as relates to the old material taken from the courthouse and used in building the jail. This was the property of the parish.

Of the material from the old courthouse, we have found items to the amount of \$3,644. Also he must be charged with the \$1,000 received by him. Amount allowed in reconventional demand, \$4,644.

This plaintiff owes to the parish.

The movable property in the yard from the old courthouse remains the property of the defendant.

The law and the evidence being in favor of defendant and against plaintiff, the judgment of the district court is amended by reducing the amount allowed in the reconventional demand to \$4,644, with interest on said amount as heretofore allowed on similar amount.

In all other respects, the judgment is affirmed.

The appellee to pay the costs of appeal.

MONROE, J. I dissent.

(126 La.)

No. 17,883.

INTERSTATE TRUST & BANKING CO. v.
POWELL BROS. & SANDERS CO.,
Limited, et al.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by the Court.)

CORPORATIONS (§ 432*) — MORTGAGES — AUTHENTIC ACT—EXECUTORY PROCESS.

Executory process on a notarial act of mortgage executed by the president of a private corporation will not lie, in the absence of authentic proof of the president's authority to act in the premises. A paper purporting to be a copy of a resolution passed by a board of directors, and certified as a correct copy by a person styling himself as secretary, but not bearing the seal of the corporation, cannot be considered as an authentic instrument.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 432.*]

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So Relle, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by the Interstate Trust & Banking Company against the Powell Brothers & Sanders Company, Limited, and Thomas C. Wingate, as its receiver. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 124 La. 624, 50 South. 605.

D. M. Sholars and Alexander & Wilkinson, for appellants. Howe, Fenner, Spencer & Cocke, and W. B. Williamson, for appellee.

LAND, J. The defendant receiver has appealed from an order of seizure and sale sued out by the plaintiff as the holder of a certain note for \$25,000, signed "Powell Bros. & Sanders Co., Ltd., by W. H. Powell, Pres't," secured by notarial act of mortgage executed in the name of the corporation, by "W. H. Powell, Pres't."

The act of mortgage recites that William H. Powell appears in his official capacity and under special authorization of the board of directors of the corporation, "as per authority hereto attached." We find in the transcript a paper purporting to be a copy of a resolution adopted by the said board of directors signed by "W. H. Powell, Pres't," and "W. J. Powell, Secretary," on April 10, 1905, authorizing W. H. Powell, president, to borrow of the Crescent Lumber Company the sum of \$30,000 and to secure the loan by mortgage of certain timber and real estate as described in the act of mortgage to the Crescent Lumber Company of date April 20, 1905. This copy is certified as follows, to wit:

"I hereby certify that the above is a true and correct copy.

"[Signed] W. J. Powell, Secretary."

The contentions of the appellant are, first, that the purported copy is not identified with the notarial act of mortgage; and, second, that said copy is not authentic evidence of the action and proceedings of the board of directors in the premises.

It is to be noted that the certificate is not dated, and is not identified with the act of mortgage by the notary's paraph or by descriptive words. The vague terms used by the notary might well cover any document purporting to authorize the president of the corporation to borrow money and execute a mortgage. But we think that the real question before the court is whether the purported copy, presented to the judge below, furnished authentic evidence of the alleged resolution of the board of directors.

Authentic evidence is essential to support an order of seizure and sale, without a previous citation of the debtor. Where a notarial act of mortgage is executed by an agent, authentic proof of the agent's authority must be made to obtain executory process. In *Crescent City Bank v. Blanque*, 32 La. Ann. 265, the court, speaking through Mr. Justice White, said:

"That such evidence was necessary is no longer an open question. [*Nichol v. De Ende*] 3 Mart. (N. S.) 315; [*Rowlett v. Shepherd*] 7

Mart. (N. S.) 515; [*Dosson v. Sanders*] 12 Rob. 238; [*Chambliss v. Atchison*] 2 La. Ann. 491."

The authentic act, as relates to contracts, is that which has been executed before a notary public, or other officer authorized to execute such functions, in presence of two competent witnesses, or of three witnesses, if the party be blind. Civ. Code, art. 2234.

Where authentic evidence is impossible from the nature of the case, other competent evidence has been held admissible for the purpose of proving the appointment of curators and syndics, and other collateral facts. Code Prac. art. 732, *Garland's Notes*, F.

But, as already stated, our laws require a power of attorney to execute a mortgage to be in authentic form.

The ordinary rules of evidence have no application to executory process, as such a proceeding is unknown to the common law. That certain kinds of evidence are admissible in ordinary cases to prove the acts and proceedings of corporations does make such evidence authentic, if it be not of that kind.

It has been held in other jurisdictions that copies of the acts and proceedings of private corporations, verified by the oath of the proper officer, are admissible in evidence. 17 Cyc. 404, notes. Yet no one will contend that an ex parte affidavit is equivalent to authentic proof. It is a general rule of evidence that the acts and proceedings of a corporation, authenticated under the corporate seal and certified by the secretary of the company, are admissible, and make prima facie proof of the facts recited. 17 Cyc. 403, 404, note 48.

This doctrine was also affirmed in the case of *Jackson R. R. Co. v. Lea*, 12 La. Ann. 389. Yet such a certificate, in the absence of statute, is not authentic evidence.

In *Snow v. Trotter*, 3 La. Ann. 268, the mortgage was granted to secure notes for the purchase price, and in the act of mortgage the defendants recognized the agent's capacity, and the mandate under which he acted was specially recited. *Bouyer v. Carroll*, 47 La. Ann. 768, 17 South. 292, was not a suit by executory process, and the power of attorney had been acknowledged before a United States consul. In a similar suit, *Succession of Lehmann*, 41 La. Ann. 992, 7 South. 33, the power of attorney was authenticated in judicial proceedings. The question in this case is whether an unverified copy of a purported procuration makes full proof against the mortgagor.

It appears, however, that in cases of railroad companies the Revised Statutes of Louisiana provide that copies of books, records, etc., certified by the secretary, under the seal of the company, shall be received in evidence. Section 694. An act or copy which proves itself may be considered as authentic. But there is no similar statutory provision as to the books, records, etc., of other private corporations. Such a statutory provision, however, would not cover the case of a copy cer-

tified by the secretary, without the seal of the company.

The argument that the copy in question was authenticated by being attached to the notarial act of mortgage confuses the identification of the instrument with its authentication, and, moreover, rests on the false premise that an agent by his own declarations before the notary can authenticate a paper purporting to be a copy of a power of attorney certified by another person.

It is impossible to evade the conclusion that the record contains no authentic proof of the alleged agency of the president of the company in the matter of the execution of the mortgage in question.

It is therefore ordered that the order of seizure and sale below be annulled, avoided, and reversed, and it is now ordered that the executory proceedings sued out in this case be dismissed, at the cost of the plaintiff in both courts.

(126 La.)

No. 17,795.

ESTRADE et al. v. KAAOK.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

**1. EXECUTORS AND ADMINISTRATORS (§ 377*)—
SALE OF DECEDENT'S LAND—WAIVER OF IR-
REGULARITIES.**

Plaintiffs are the heirs of Mrs. Joseph Estrade and sue to recover from defendant property purchased by him in the succession of their mother on the allegation that the sale contained grounds of nullity. *Held*, that these nullities were cured by effect of law, as the plaintiffs were in the parish where the judgment ordering the sale was made and where it was effected and suffered the judgment to be executed without opposition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1543; Dec. Dig. § 377.*]

**2. EXECUTORS AND ADMINISTRATORS (§ 377*)—
SALE OF DECEDENT'S LAND—ESTOPPEL OF
HEIRS.**

The sale of property at succession sale has different, and, in some respects, more extended, effect than the sale of property at the instance of a mortgagee, or vendee, particularly if the estate be insolvent. Cross on Successions, p. 439. A competent court is an agency delegated to dispose of property on the best terms, to the end of paying creditors and of distributing the residue among the heirs, and in case of illegality it behooves the heirs to file objections in time. The heirs received the benefit of the price of this property, as it was included in the tableau of distribution and became the tenants of this property under defendant, and so they are committed to the validity of the title which they now attack.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1543; Dec. Dig. § 377.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by John Estrade and others against John Henry Kaack. Judgment for plaintiffs, and defendant appeals. Reversed.

Albert Voorhies, for appellant. B. Ory and George W. Moore, for appellees.

BREAUX, C. J. The action is petitory.

Plaintiffs, who are the heirs of the late Mrs. Pauline Jacquet, deceased wife of Joseph Estrade, brought this suit for the recovery of certain property in the possession of defendant.

They contend that the defendant is in possession in bad faith, as he had knowledge of the nullity of the title, and they ask for rents at \$10 per month on the property since January, 1892, the date the defendant went into possession.

The defendant answers and insists that he has title, having acquired the property, he asserts, at public sale in the succession of Mrs. Pauline Estrade. He denies the bad faith charged.

His contention is that he has improved the property to an amount of \$3,500; that the plaintiffs were residents in the immediate vicinity wherein the property is situated; that they knew of the proceedings for the sale of the property, which resulted in the adjudication to him; that they also knew that he paid the price of adjudication; that the price was applied to the payment of the debts, and despite their full and complete knowledge, in regard to all that was done in matter of the adjudication of the property and the other facts before referred to, they did not in the least object; that, therefore, they are estopped from questioning defendant's title.

Defendant also pleads the prescription of 10 years.

He maintains in the alternative if the suit is decided against him that he is entitled to his improvements.

Our learned brother of the district court overruled the plea of estoppel and maintained the plea of prescription as to Emile Estrade, Emanuel Estrade, and Mrs. Josephine Estrade, and overruled it as to the other plaintiffs, to wit, Pierre Estrade, Leon Etienne Estrade, Miss Leonie Julia Estrade, and Mrs. Blanche Adeline Estrade, wife of Charles Perigo.

Judgment was rendered in favor of John Henry Kaack, the defendant, and against the plaintiffs, Emile and Emanuel Estrade and Mrs. Josephine A. Perigo, Leonie Julia, and Leon Etienne Estrade.

Defendant, averring that he is aggrieved by the judgment rendered against him in favor of the two plaintiffs, Pierre Estrade and Mathilde Miriam Estrade, moved for an appeal, which was allowed.

Suggesting that he is aggrieved by the final judgment herein rendered against him in favor of the two plaintiffs, Pierre Estrade and Mathilde Miriam Estrade, and that he wishes to appeal from said judgment so rendered against him and in their favor, but

that he is satisfied with the judgment casting the other six coplaintiffs, and, therefore, does not appeal from same.

It follows from the foregoing that defendant has no ground of complaint against the other heirs above named, against whom he has obtained judgment.

These six heirs have not appealed.

The property belonged to the community dissolved by the death of Mrs. Josephine Estrade. The number of the children were eight; six minors, and two of age.

The judge of the district court decided against the heirs who were minors at the date of the sale and maintained the ratification which had been made by a family meeting, held subsequent to the sale. The court decided in favor of the two major heirs who were of age at the date of the sale.

Opinion and Judgment.

There were serious defects in the proceedings which led up to the sale. There are grounds of nullity beyond all question. But it was a sale which could be ratified. Indeed, it was ratified by the effect of the law, for it is provided that in matter of a judgment rendered against a party without his having been cited, or in matter of a judgment rendered by an incompetent judge, if the one interested be within the limits of the parish, he can be held bound by the adjudication to which not the least objection was offered. In such a case, the informality, though of fatal nature, can be cured if the defendant were present in the parish and yet suffered the judgment to be executed without opposition.

The heirs in this instance were present. They were residents of the parish of Orleans. In fact, we have before noted that they resided near the property.

Besides, the heirs, immediately after the sale, became the tenants of the defendant and appellant. They remained in the dwelling house for a few months, paid rent. This, we must hold, has the effect of committing them to the validity of the title.

Furthermore, the succession was heavily indebted; insolvent, we have reason to infer. The amount realized from the sale was applied to the payments of the debts.

Years have since elapsed. Time may have settled the debts and the succession free from all claims owing in part to the effect of time and in other respects to the price which was realized and applied to the payment of the debts.

The two plaintiffs and appellees conveniently, were they to succeed in the suit, would enter upon the possession and ownership of the property free from the debts.

This is a right they would have only in case it clearly and conclusively appeared that they are entitled to that benefit.

The purchaser has made valuable improvements on the property. The appellees lived

in the neighborhood, saw the defendant making the improvements, and never at any time intimated that they intended to claim the property. These improvements, under the circumstances, cannot be deemed theirs. They have no right to them at any price.

Further, the sale was made by the order of a court of competent jurisdiction. It was the act of a court. The proceedings of the sale were disbursed among the creditors under the order of the court.

We have every reason to infer that the heirs received due notice of the tableau of distribution, which included the price of the property now claimed by the heirs. If they knew (we infer that they knew) that part of the amount distributed, as made to appear by the tableau homologated, was the proceeds of this sale, they have scant ground upon which to stand to recover judgment.

The court had jurisdiction beyond all question, and had authority to decide the issues.

The appellees contend that the defendant was in bad faith.

We are unable to agree with that view, for we have seen that the property was sold under order of the court.

The sale of property at succession sale has different, and, in some respects, more extended, effect than the sale of property at the instance of a mortgagee or vendee, particularly if the estate be insolvent. Cross on Successions, p. 439.

The competent court is an agency delegated to dispose of property on the best terms to the end of paying creditors and of distributing the residue among the heirs.

In case of an illegality it behooves the heirs to file objection in time.

The heirs are not, as to their rights, considered as if third persons. They in time and under the circumstances have become parties to the proceedings conducted in settling the succession.

Learned counsel cites the Higginbotham Case, 120 La. 464, 45 South. 392. In this cited case, the court held that the tutor administering the estate was bound as an administrator.

The cited case was preceded by the Dumesire Case, 40 La. Ann. 573, 4 South. 328, in which the court said that the point was well settled by repeated decisions.

In other respects there is no analogy at all between this case and the Higginbotham Case.

The estate was solvent in the Higginbotham Case; here it is insolvent.

There was no question of prescription or estoppel. Nor was there collusion and fraud charged in the Higginbotham Case.

For reasons stated, it is ordered, adjudged, and decreed that as to the two plaintiffs, whose case is before us, and who are appellees, their petition and prayer are denied, rejected, and dismissed; the judgment appealed from is avoided, annulled, and reversed

at their costs in both courts; and the claim of plaintiffs and appellees is rejected, and the title of defendant and appellant is recognized and decreed legal.

(126 La.)

No. 18,065.

MORRIS MCGRAW WOODEN WARE CO.,
Limited, v. GERMAN FIRE INS. CO.
OF PITTSBURG, PA.

In re MORRIS MCGRAW WOODEN WARE
CO., Limited.

(Supreme Court of Louisiana. April 11, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§§ 73, 96*)—AGENT REPRESENTING INSURER.

An insurance agent to whom a merchant makes a request for insurance, and who, acting as broker, procures all, or part, of such insurance through agents of other companies, not represented by him, may be the agent of the insured. *Parrish v. Company*, 140 Cal. 645, 74 Pac. 312. The mere fact that he receives "a commission from a company which he does not represent for placing the insurance with it does not make him the agent of that company." *United Firemen's Insurance Company v. Thomas*, 92 Fed. 127, 34 O. C. A. 240, 47 L. R. A. 450; *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 126; Dec. Dig. §§ 73, 96.*]

2. INSURANCE (§ 229*)—CANCELLATION OF POLICY—NOTICE TO INSURER.

Where the insured notifies his insurance broker to cancel a policy, and the broker fails to do so, the policy will remain in effect, as the insurance company must be notified of the cancellation in order to make it effective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 503; Dec. Dig. § 229.*]

3. INSURANCE (§ 73*)—AGENTS—EXISTENCE OF RELATION.

The fact that the agent of one insurance company has an agreement with the agent of another company to share commissions is without effect to constitute each agent the agent of both companies.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 73.*]

Action by the Morris McGraw Wooden Ware Company, Limited, against the German Fire Insurance Company of Pittsburg, Pa. Judgment for plaintiff was reversed by the Circuit Court of Appeal, and plaintiff applies for certiorari or writ of review. Denied, and petition dismissed.

H. L. Favrot and W. S. Parkerson, for applicant. Clegg, Quintero & Gidlere, Gustave Lemle, and John C. Hollingsworth, for defendant.

BREAUX, O. J. The question is whether plaintiff's stock in trade, at the time its store was destroyed by fire, on April 5, 1908, was insured for \$75,000 or \$67,500.

The amount of plaintiff's loss, to wit, \$61,106.02, was adjusted satisfactorily to all parties concerned.

Plaintiff states that at the time of the fire, on the 31st day of March, 1908, the whole insurance on the stock (and prior to that date) was \$75,000; that it was reduced, on March 31, 1908, or prior thereto, to \$67,500.

Defendant, on the other hand, seeks to maintain that the policies amounting to \$7,500 were never canceled, and that at the date of the fire the insurance was \$75,000, and that that amount ought to be made to bear the loss instead of the \$67,500.

The following are the companies that would be released from paying the amount opposite each name if plaintiff's position were maintained:

Illinois National.....	\$2,000 00
Norwich Union.....	2,000 00
Cosmopolitan	2,500 00
Western	1,000 00
	<hr/>
	\$7,500 00

We have before noted that the amount of the loss was \$61,000 and some odd dollars.

The difference, as relates to plaintiff, would be that it would collect the amount of its loss from 37 companies instead of 33 companies. It must be paid its loss in either event; it cannot lose. It is contending, as we see it, for an abstract right.

It is true the plaintiff directed Rocquet & Co., a local insurance company, to reduce the amount of its insurance to the sum before stated, viz., \$67,500. A Mr. Rudolph of Rocquet & Co. had been ordered whenever a policy of the McGraw Company expired to renew it. In fact, the agency just named had charge of the insurance of the plaintiff company's stock. The insurance remained, however, under the supervision and control of the plaintiff.

In effecting the insurance of plaintiff's stock, the Rocquet Agency, as the amount was large, divided with other companies, represented by other local agents (of which Rocquet & Co. were not at all the agents).

The companies in which the agency placed this insurance other than their own are named above. We will none the less name them again: Illinois National, Norwich Union, Cosmopolitan, and Western.

A few days before the fire, which destroyed the stock of plaintiff, Rocquet & Co. called on McGraw Company and handed them policies to the amount of \$25,000. They retained these and others to the amount of \$67,500.

The agency was ordered to cancel, at that time, all policies over and above that amount without naming the companies whose policies were to be canceled. The selection of the companies whose policies were to be canceled was left to the agency.

The fire occurred without any notice having been given of the cancellation to the companies above specially named.

The clerk of the agency fell sick, and that accounts for the want of notice or the oversight by the agency before named in not returning the policies to the companies above specially named.

It will be borne in mind that Rocquet & Co. were not the agents of the companies before specially named. They were represented by other local agents in the city of New Orleans, through whom the insurance was effected and with whom Rocquet & Co. divided commissions.

We will state, before closing our statement of facts, that plaintiff was insured in 33, if it be correct in its construction of the law, or in 37 companies, if defendant be correct in its position.

The defendant, the German Fire Insurance Company, is one of the 33 companies according to plaintiff, and 37 companies according to defendant. The policy it issued was for \$1,500. It paid \$1,222.12, leaving a balance due of \$135.79, on plaintiff's assumption that the policies had not been canceled, for which plaintiff brought suit, and that 37 companies are the amount lost by fire.

The judge of the district court rendered an elaborate opinion in which he held that the amount of plaintiff's insurance was \$67,500 in 33 companies.

An appeal was taken to the Circuit Court of Appeal. The last-mentioned court reversed the judgment of the district court and rendered judgment in favor of defendant, dismissing plaintiff's suit, and substantially held that plaintiff was insured by 37 companies.

The case is before us on an application for a writ of certiorari.

If Rocquet & Co. was in any way the agent of the defendant insurance companies, it (this defendant company) is liable for the amount claimed. If it is not liable for the amount claimed, it, and other sums to the amount of \$7,500, should then be prorated among the 37 companies.

We have not found it possible to agree with the theory that the agency of Rocquet & Co. was the agent of these companies, nor have we succeeded in finding that the policies had been canceled, although, as before stated, Rocquet & Co. had been ordered to cancel these policies.

These companies, we have noted, had local agents of their own who were authorized to act for them. Rocquet & Co. were not authorized to act for them.

Rocquet & Co. did that which other agents do frequently. It applied to other local agents for policies in order to assist it (Rocquet & Co.) in carrying the large amount of its insurance for McGraw & Co.

The local agents applied to, obtained the policies, and delivered them to Rocquet & Co., as is the custom.

The evidence shows that it is the custom, whenever insurance is effected by one agency

through another agency, these agencies divide commissions.

The insurance companies deal directly with their respective agents. They do not recognize as their agents the agents of other companies who have entered into an agreement with their agents. We understand that each company mails its policies to its own local agent, who in some instances delivers them to the local agents of another company in case of insurance made as above mentioned by the agent of another company. The accounting is made by each agent with the company he represents. He is charged with the policies, and not the agent through whom the policies are delivered to the insured.

One of the propositions of plaintiff through learned counsel is that the intermediary between an insurance company and a person seeking insurance is the agent of the applicant in procuring the policy, but after the policy has been issued he ceases to be the agent of the assured and becomes the agent of the insurance company for completing the contract, by delivery of the policy and collection of the premium.

We have found no authority to sustain the position.

There is precedent for holding that the local agency was the agent of the insured; to be explicit, that in those instances Rocquet & Co. were the agents of the insured. It looked after the plaintiff's insurance business, as before stated.

In a case wherein the facts were somewhat similar, that conclusion was arrived at in a lengthy opinion. *Stone v. Franklin Insurance Co.*, 105 N. Y. 543, 12 N. E. 45.

In another case it was held that the agency acted as a broker and exercised some discretion in selecting the companies.

It was the agent of the insured. *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470.

The following is directly in point: It is unanswerable, we think.

Though a duly appointed agent of an insurance company must, as relates to that company, be regarded as the agent of the insurer, yet as to other companies, as in the case in hand (as to the Rocquet Company) in which he procures insurance for a property owner, he may be considered as the agent of the insured. *Smith & Wallace Insurance Co. v. Prussian Mutual Insurance Co.*, 68 N. J. Law, 674, 54 Atl. 458.

In another decision it was held that one who was intrusted with keeping the property insured became the agent of the insured. *Johnson v. North British Insurance Co.*, 68 Ohio St. 6, 63 N. E. 610.

An insurance agent, to whom a request for insurance is made, and who, acting as broker, procures all or part of such insurance through other agents of companies not represented by him, is the agent of the insured.

Parrish v. Company, 140 Cal. 645, 74 Pac. 312.

Though, under special circumstances, a broker may be the agent of the insurer, it was decided the mere fact that he receives a commission from the insurer, for placing the insurance with him, does not change his character as agent of the insured. *United Firemen's Insurance Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; *East Texas Fire Insurance Co. v. Brown*, 82 Tex. 631, 18 S. W. 718; *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825; *American Fire Insurance Co. v. Brooks*, 83 Md. 822, 34 Atl. 373.

If the facts in the case in hand were different from that which they are in the cited cases, our conclusion would be different, for it is in great part a question of fact. The facts are as positive in favor of the position that the broker represents the insured as they are in the cited cases.

It is beyond question in this case that the insured did not notify the companies before expressly named.

There was a contract of insurance between plaintiff and all of the insurance companies in which it was insured. It was not possible to put an end to it without regular cancellation made in accordance with the conditions and terms of the policy.

Learned counsel for plaintiff have cited two decisions on this point in which it was held that, no notice of cancellation having been given by the company, the rights of the insured were not affected by the attempt to cancel. The broker was not considered the agent of the insurer. *Standard Leather Co. v. Northern Assurance Co. (C. C.)* 156 Fed. 689; *Grace v. American Insurance Co.*, 109 U. S. 282, 3 Sup. Ct. 207, 27 L. Ed. 932.

Nor was the broker considered the agent of the insured in the cited cases. As *Rocquet & Co.* was not the agent, notice to it was no notice.

In the case next cited by plaintiff, to wit, *Nabors v. Insurance Co.*, 51 South. 432, not yet published in our reports, this court held that a company ought not to undertake to cancel a policy without notice to the insured or to a qualified agent.

That rule is equally as applicable to the insurer who should not undertake to cancel a policy without notice to the insurance company or to one of its agents authorized to receive notice.

Here we have seen that *Rocquet & Co.* was not authorized to receive notice.

Learned counsel for plaintiff invite our attention to the law of the state regulating insurance as sustaining their contention.

We will begin by stating that there is no evidence showing that the insurance companies paid *Rocquet & Co.* a commission or any stipend for its services.

The local agents divide the commission among themselves. This is a division of commission with which the insurance companies have naught to do.

The law in question (Act No. 105 of 1898) is directed against unauthorized agents and has for object the imposition of a penalty for acting as such. It prohibits the payment of brokerage, commission, or rebate to any but authorized agents, and it has for further object to regulate generally the insurance business.

The division of commission among agents is not an act of the company, nor is it an act for which a company not in the least concerned can be made to answer. No such penalty can be imposed upon company entirely innocent in matter of dividing commission among the agents.

For reasons stated, the rule nisi is recalled and discharged, applicant's demand is rejected, and the petition dismissed.

(126 La.)

No. 18,047.

STATE v. KINCHEN.

(Supreme Court of Louisiana. March 28, 1910.
On Application for Rehearing, April 25, 1910.)

(Syllabus by Editorial Staff.)

1. HOMICIDE (§§ 83, 309*)—ACCESSORY BEFORE THE FACT—CHARGE ON MANSLAUGHTER.

Notwithstanding Rev. St. § 972, provides that the punishment of the accessory shall be the same as that of the principal, and under section 785, providing that there shall be no crime known as murder in the second degree, but on trials for murder defendant may be found guilty of manslaughter, it is necessary in all cases of murder that there be given a charge, though not requested, that the jury may bring in a verdict of manslaughter, such a charge need not be given on a prosecution for being an accessory before the fact to a murder; as there cannot be an accessory before the fact to manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 109, 649-656; Dec. Dig. §§ 83, 309.*]

2. CRIMINAL LAW (§ 107*)—VENUE.

Const. art. 9, providing that trials shall take place in the parish in which the offense was committed, controls any statute to the contrary.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 219; Dec. Dig. § 107.*]

3. CRIMINAL LAW (§§ 737, 791*)—VENUE—SUBMISSION OF QUESTION TO JURY.

Though on a prosecution for being an accessory before the fact to a murder the only acts of counseling and procurement directly testified to were located by the witness in a parish other than that of the trial, yet evidence that defendant was seen in the company of the murderers near the scene of the murder, in the parish of the trial, within an hour of its commission, authorized the submission of the question whether there had been any counseling and procurement by defendant in the latter parish; but

the jury should also have been told that if they found no acts of counseling and procurement were committed in the latter parish, but did find such acts had been committed in another parish, they should so report and find no verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1708-1706; Dec. Dig. §§ 737, 791.*]

4. WITNESSES (§ 326*)—IMPEACHING IMPEACHING WITNESS.

Refusal to permit defendant to impeach a material witness for the prosecution testifying for the first time in rebuttal of evidence adduced by defendant, which evidence was offered to contradict and impeach the sole witness by whom defendant was directly connected with the crime, was reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1174; Dec. Dig. § 326.*]

5. CRIMINAL LAW (§ 31*)—INCONSISTENT DEFENSES.

Defendant, on a prosecution for being an accessory before the act, cannot occupy the inconsistent position of denying the procurement, and at the same time contending that he repented and countermanded it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 31.*]

6. CRIMINAL LAW (§ 73*)—ACCESSORY BEFORE THE FACT—COUNTERMANDING ORDER.

Evidence for defendant on a prosecution for being an accessory before the fact to a murder, which was committed by two men, both of whom, if either, had been counseled and incited by him to commit the crime, that he had countermanded his order with one of them could be of no avail, in the absence of evidence that he had countermanded it with the other.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 73.*]

7. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Evidence, on a prosecution for being an accessory before the fact to a murder, that on the day of the murder defendant had said he did not wish deceased harmed is evidence of a self-serving declaration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Ben Kinchen appeals from a conviction. Reversed and remanded.

W. B. Kemp, Thomas P. Sims, Alonzo P. Gill, and Chandler C. Luzenberg, for appellant. Walter Guion, Atty. Gen., W. H. McClendon, Dist. Atty., and Morphy & Miller (R. G. Pleasant, of counsel), for the State.

PROVOSTY, J. The defendant, Ben Kinchen, was indicted, tried, and convicted on the charge of having been an accessory before the fact to the murder of John O. Breland by Garfield Kinchen and Avery Blount.

Section 785, Rev. St., provides that:

"There shall be no crime known under the name of murder in the second degree, but on trials for murder the jury may find the prisoner guilty of manslaughter."

And section 972, Rev. St., provides that the punishment of the accessory shall be the same as that of the principal.

In *State v. Thomas*, 50 La. Ann. 148, 23 South. 250, and other cases it was held by this court that the judge must in all cases of murder, even in the absence of any request to that effect from the defendant, charge the jury that they may bring in a verdict of manslaughter.

In the instant case the defendant contends that this charge should have been given, even though no request was made for it, because the punishment of murder and of accessory before the fact is the same, and hence the two crimes are the same, and, as a consequence, the same charge should be given upon the trial for both.

We do not agree with that view. The Legislature has had no intention by section 785 to obliterate the distinction between murder and manslaughter; but simply to classify with manslaughter the crime known at common law as murder in the second degree. The manifest intention was to say that in all those cases of murder which at common law would have been murder in the second degree—i. e., cases of merely imputed malice—the jury may find the prisoner guilty of manslaughter. If the intention had been to obliterate the well-recognized distinction between murder and manslaughter, the several statutes recognizing the two crimes as distinct and different, and denouncing a widely different punishment for them, would have been taken off of the statute book. To the legal mind, the distinction between willful murder, or murder in the first degree, and manslaughter, is as clear and broad as between murder and larceny; and, to the legal mind, to say that in a case of assassination the jury may find manslaughter is as contradictory and absurd as to say that in a case of murder the jury may find larceny. The statute does, however, in explicit terms say that on trials for murder the jury may find manslaughter; and the courts have had no choice but to apply the statute as it is written. In like manner, if a statute said that on trials for murder the jury might find larceny, the court would have no choice but to enforce the statute as written. But the courts are not required to carry the statute beyond its terms, and, not content with advising juries that they may stultify themselves to the extent of finding manslaughter in a case where the facts are contradictory of manslaughter, go on a step further and advise them, beyond the express terms of the statute, that they may stultify themselves even to a greater extent by finding for manslaughter in a case of accessory before the fact. A charge of murder may, in a sense, be said to include that of manslaughter, on the principle of the greater including the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

less; but a charge of accessory before the fact not only does not include that of manslaughter, but is in principle exclusive of it. "There cannot be an accessory before the fact to manslaughter, for the offense, in its nature, cannot be premeditated." 1 Hale, 615; Archbold's Crim. Proc. and Pl. (Waterman's Notes, 8th Ed.) vol. 1, p. 14. We conclude that the judge properly abstained from giving the charge.

Defendant's next contention is that, inasmuch as the only acts of counseling and procurement sought to be proved against him are said by the only witness who testified to them to have been committed in the parish of St. Helena, the court of that parish alone had jurisdiction of his case. The judge says, in his per curiam, that as the defendant was seen in the company of the murderers near the scene of the crime within one hour of its commission, the question of whether there had been any counseling and procuring by the defendant within the parish of Tangipahoa was left to the jury. This was the proper course if the jury were at the same time informed that in case they found no acts of counseling and procurement to have been committed within the parish of Tangipahoa, but did find that such acts had been committed in another parish, they should so report and abstain from finding any verdict. The record does not show that any instructions were given in that connection. As there will have to be another trial, we will add that the contention that an accessory before the fact cannot be tried in a parish other than that in which the acts of counseling and procuring were done, is well founded. To that effect was the common law. 1 Whart. Crim. Law, par. 287; 1 Am. & Eng. E. of L. 271; State v. Moore, 26 N. H. 448, 59 Am. Dec. 354. True, the courts have held that the common law was changed in that respect by statute (7 Geo. IV, c. 64, § 9), adopted in this country by most of the states, including Louisiana (section 1058, Rev. St.; Arch. Crim. Proc. and Pl. [Waterman's Notes, 6th Ed.] p. 15; 12 Cyc. 238); but that statute stands in opposition to article 9 of the Constitution of this state, according to which "Trials shall take place in the parish in which the offense was committed." It can therefore have no operation. For the same reason the statute which gives jurisdiction over crimes committed within 100 yards of the boundary of the parish for which the trial court is sitting has been held to be null. State v. Montgomery, 115 La. 155, 88 South. 949. It is well settled that the situs of the crime of accessory before the fact is the place where the acts of counseling and procuring were done. 12 Cyc. 208.

Bill of exception No. 21, reads:

"Be it known and remembered that, on the trial of the above case, the state had introduced one Walter Averett, who had testified that, on the night before the killing of the deceased,

about dark, he had heard the defendant at the Little River depot say to and urge one Avery Blount and Garfield Kinchen to murder the deceased (and this was the only witness who testified to anything said by the defendant that might be construed as counseling or consenting to the murder of the deceased).

"Now, be it remembered that, on behalf of the defendant, a witness, Elmour Stewart, did testify, and the wife of the said witness, Mrs. Elmour Stewart, did testify, that at the time (about dark) the said witness Walter Averett had sworn he heard the defendant urge and counsel Avery Blount and Garfield Kinchen to kill and murder the deceased, the said Walter Averett was not at the place—i. e., the Little River depot—where he claimed to have heard the defendant so urge the death of the deceased, but he, the said Walter Averett, was at his (Walter Averett's) house, at least a mile distant from the said depot; that they reached the said house a little after sundown, about dark; that Walter Averett was there when they arrived; that they remained until half past 9 or 10 o'clock; that Walter Averett was there all the time they were there.

"And be it further remembered, that, after the defendant had closed his case, the state offered in rebuttal the witness Rob Rogers, who had not previously testified in the case, and who testified that, on the day in question (after sundown), he, the witness, was with Elmour Stewart at least half a mile from Walter Averett's house; that, when Elmour Stewart left him, it was too dark for him (Rogers) to see to load his wagon; that Elmour Stewart left walking and had no horse.

"And be it remembered that, for the purpose of impeaching this witness, counsel for the defendant asked this witness on cross-examination if the witness had not stated the evening before he testified, in a conversation with the defendant Kinchen, in the presence of W. B. Kemp and T. P. Sims at the parish jail, that he (the witness) did not know why he had been summoned; that it was about Elmour Stewart, but that Elmour Stewart left him (the witness) in plenty of time to reach Walter Averett's house before sundown. And the witness answered 'No' to the question, and denied he had ever made such a statement.

"Now, be it further remembered that, after the state had closed its case, the defendant, through his counsel, offered to contradict this witness Rob Rogers, and tendered W. B. Kemp and T. P. Sims as witnesses to that effect, and to testify that Rogers did make the statement at the time and place set forth in the question—that he did not know why he had been summoned, that it was about Elmour Stewart, but that Elmour Stewart left him in plenty of time to reach Walter Averett's house before sundown. And the court refused to admit this testimony and to permit the witness for the defendant to be sworn.

"And the defendant makes the stenographic notes taken at the time, and the reasons of the court contained in said notes, a part of this bill.

"And after tendering this bill to the district attorney for inspection, the defendant now hands it to the court to be signed."

"At the request of Mr. Chandler O. Luzenberg, one of the counsel for defendant, I permitted this document to be filed on November 29, 1909. Upon examination it seems to have been filed November 20th, at which time I was in the parish of Livingston, holding a session of the court. Mr. Luzenberg was not of counsel or present at the trial, and appeared first at the argument of the motion for a new trial. No such bill as this was reserved at the time. The bill No. 21 which I have signed this day, bearing date Monday, November 15th, at its caption, represents all that transpired. It will be observed that the district attorney has indorsed on this paper the words 'This document does

not belong in the record,' and has signed said document officially.

"Robt. S. Ellis, District Judge.
"December 9, 1909."

"Filed November 20, 1909.

"A. R. Lewis, Clerk of Court."

Indorsement:

"No. 21.

"This document does not belong in record."

The document made part of this bill reads as follows:

"State of Louisiana v. Ben. Kinchen. 1,619.

"No. 21.

~~"Be it known and remembered on the trial of the above entitled and numbered case the following transpired: (N. B. These erasures appear in the original.)~~

"Mr. Sims: The state having closed its rebuttal testimony, the defendant now offers to introduce the testimony of Robert Holton, whom the court has called, and who is absent, and W. B. Kemp, Thomas P. Sims, Mr. A. R. Lewis, clerk of the court; and the record, conveying Walter Averett's property to a man by the name of W. W. Sullivan, for the purpose of attacking the credibility and impeaching the testimony of Walter Averett in rebuttal; and the testimony of Rob Rogers, offered in rebuttal; and the testimony of W. W. Sullivan, offered in rebuttal; also for the purpose of attacking the credibility and impeaching the testimony of Henry Averett, who was sworn by the state in rebuttal; also Will Reed, whose testimony we expect to impeach, and also to impeach and contradict the testimony of W. W. Sullivan, who was sworn by the state, in rebuttal. We now tender these witnesses, and ask the court's permission to swear them before the jury.

"By the Court: The court refuses the request, and rules that the defendant is not entitled to put on testimony, as the state closed entirely, under the circumstances of this case, and for the reasons to be fully set forth in the court's per curiam. This note, and all the testimony set out to be introduced, and statement of the court have been taken out of the presence of the jury.

"By the Court: The court now states that this case has been on trial since Wednesday, November 3, 1909; that the state closed on Monday following, which was the 8th; the defendant then had numerous witnesses, and occupied the time of the court until Saturday, November 13th, at about 11:30 o'clock a. m., that these matters upon which the defendant now desires to offer testimony were all brought out on the direct examination and cross-examination of the witnesses of the defendant, and that only rebuttal testimony by the state has been permitted to be offered; that no objection has been made by the defense to any testimony offered by the state in rebuttal, on the ground that it was not in rebuttal of the testimony offered by the defendant.

"Mr. Sims: The defendant now excepts to the ruling of the court, and asks the court's permission to incorporate in his bill of exception the date of the summons issued to W. W. Sullivan, Dade Stevens, and Henry Averett.

"By the Court: If you desire it the court permits it to go in as to the witness named by you.

"By the Court: Let the dates on those summonses named by the defendant be made part of the bill of exceptions, or let certified copies of the original summons, with the date of issuance thereon and the name of the witnesses, be attached to and made a part of this bill."

The trial judge was under the impression that the bill of exception set forth in the first of the foregoing documents had not been reserved, and that the said document had not been prepared and filed at the same time as

the other bills of exceptions in the case, and that it was the second and not the first of these two documents which constituted defendant's bill of exception on the point in question; and that the first of these documents was subsequently gotten up by an afterthought.

In all this, our Brother was manifestly laboring under a misapprehension. The bill was duly reserved, as the stenographer's notes, made part of it, show; and the date of the filing of said first document shows that it was prepared and filed at the same time as all the other very numerous bills of the defendant. In the case of State v. Miller, 51 South. 190, cited by the state, the record did not show, as it does in this instant case, that a bill had been reserved, and that the judge was mistaken in the statement contained in his per curiam.

We think it is equally clear that the exclusion of said evidence was error; and since its effect, if believed by the jury, would have been to discredit the witness who had discredited the witnesses whom defendant had offered for the purpose of contradicting and impeaching the sole witness by whom it is contended the defendant had been directly connected with the crime, we think the error is prejudicial and vitiates the verdict.

Bill of exception No. 12 has reference to evidence which the state was allowed to introduce in rebuttal touching the killing of one Joe Averett by the defendant. The judge says in his per curiam:

"Ben Kinchen, while on the stand in his own behalf, testified that on January 19th he shot John and Walter Averett and killed Joe Averett; that Joe Averett struck him with a spade first, and then he shot Joe Averett; and that John, about the same time, struck him with a shovel. The evidence objected to seemed to me to be rebuttal."

Accepting the judge's statement of the matter, as we must do, the ruling was correct.

The defendant next complains that he was not allowed to prove that, on the day of the murder, he had said to Garfield Kinchen that he (defendant) did not wish any of the Brelands or Averetts, or any of their kindred, harmed. The purpose was to show that the defendant had repented, and had countermanded the counsels theretofore given by him. The evidence was ruled out as being a mere self-serving declaration. And the argument is now made in behalf of the state that repentance and countermand presupposes an admission of the counseling and procuring, whereas the defendant in this case denies that he had any connection whatever with the crime. We agree with the view that a defendant cannot be allowed to occupy the inconsistent position, as the defendant in this case attempts to do, of denying the procurement, and at the same time contending that he repented and countermanded it. And, in the second place, even if such paltering were allowable, the charge against the defendant is, and the evidence shows, that the

crime was committed by two men—Garfield Kinchen and Avery Blount—and that both of them, if either, had been counseled and incited by defendant to commit the crime. Under these circumstances, of what avail could it be to defendant to show that he had countermanded his order with one of these two men, unless he at the same time offered to show that he also countermanded it with the other man? And, moreover, this proffered evidence impresses us, as it did the trial judge, as being more in the nature of a self-serving declaration than a bona fide countermand. True, the evidence might tend to disculpate the defendant by showing absence of malice on his part, but it is not for that reason any the less a self-serving declaration, and inadmissible.

"Self-serving declarations are excluded not because they might never contribute to the ascertainment of the truth, but because, if received, they would most commonly consist of falsehoods fabricated for the occasion." 12 Cyc. 427.

Judgment and verdict set aside, and case remanded to be proceeded with according to law.

MONROE, J. I concur in the decree, but dissent from the views expressed in the opinion on the last bill considered.

On Application for Rehearing.

LAND, J. The record in this cause has been confused by the inclusion of two bills of exception covering the same subject-matter, and bearing the number "21." For convenience we shall designate the bill first filed as No. 1, and the other No. 2, and for the purposes of the discussion shall give to No. 2 no force or effect, except as to the facts therein admitted by the trial judge.

It appears from the recitals of bill No. 1 that when the prosecution closed in rebuttal the defendant offered several witnesses to impeach the testimony and credibility of Walter Averett, Rob Rogers, W. W. Sullivan, Henry Averett, and William Reed, all sworn in rebuttal in behalf of the prosecution; that the evidence of the witnesses so tendered by the defendant was ruled out by the trial judge because the state had closed its case. In the per curiam of bill No. 2, the trial judge states that bill No. 1—

"truly represents all that occurred at the trial, except that, while on the stand witness Robert Rogers was asked if on the day previous at the jail in Amite City, La., he did not make statement to Ben Kinchen in the presence of his attorneys, W. B. Kemp and Thomas P. Sims, at variance with his sworn statements on the witness stand, to which he answered in the negative."

The trial judge adds that at the time Rogers was not put on his guard that the defendant would contradict him, nor was any notice given to the judge of defendant's intention to offer surrebuttal testimony.

That the testimony offered by the defendant to impeach the credibility of Rogers, who had testified in favor of the prosecution in rebuttal, on a material point, was pertinent and relevant is not disputed.

The result is that the trial judge refused to permit the defendant to impeach a material witness for the prosecution testifying for the first time in the cause in rebuttal of evidence adduced by the defendant.

We cannot approve a ruling which would in every criminal case leave it discretionary with the trial judge to refuse to permit the accused to impeach the witnesses for the prosecution called to rebut the evidence adduced in behalf of the defendant.

It is the duty of this court to see that every person accused of crime shall not be deprived of the legal right to introduce relevant evidence in his defense.

It is therefore ordered that the application for a rehearing be refused.

CHENAULT v. W. T. ADAMS MACH. CO. (No. 14,550.)

(Supreme Court of Mississippi. April 25, 1910.)

1. EXCEPTIONS, BILL OF (§ 40*)—STENOGRAPHER'S NOTES—TIME TO FILE—STATUTES—CONSTRUCTION.

Code 1906, § 797, requires the stenographer's notes to be filed within 90 days from the end of the term. Section 4790 makes it the duty of the stenographer, on demand of either party, within 20 days from the conclusion of the trial or from the time of demand, to transcribe the notes and file them with the clerk. Section 4791 provides that the judge may grant a reasonable extension of time in which the stenographer shall make out and file the notes. *Held*, that sections 4790, 4791, relate wholly to the duties of the stenographer, and not to the duty of the parties to the action, and where the court allowed 90 days for the filing of the stenographer's notes, and before that time had expired allowed 20 days additional, and the notes were not filed until after 90 days had elapsed from the adjournment, they were filed too late.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 40.*]

2. EXCEPTIONS, BILL OF (§ 42*)—STENOGRAPHER'S NOTES—TIME TO FILE—INDORSEMENT—RIGHT TO OBJECT—WAIVER.

An indorsement upon a stenographer's notes, to the effect that the moving party's attorney had carefully examined the notes and found them correct, was not an agreement that the notes could be filed out of time, and did not refer to a waiver of the right to object to the filing of the notes.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 42.*]

Action between C. H. Chenault and the W. T. Adams Machine Company. From the judgment, Chenault appeals. Heard on motion to strike out the stenographer's notes, because filed after the time allowed by law. Motion sustained.

Lockett & Guyton, for the motion. Flow-
ers, Fletcher & Whitfield, opposed.

MAYES, O. J. There is a motion filed in this cause to strike out the stenographer's notes, because filed after the time allowed by law. We may say in the outset that after the most careful inspection of this record we have failed to find where the stenographer's notes were ever marked "Filed"; but, since counsel on both sides seem to agree that the notes were filed on the 27th day of December, 1909, we waive this question, and consider the case as if it appeared that the notes were filed on above date.

This case seems to have been tried at the September term of the circuit court of Attala county and the court seems to have adjourned on the 23d or 25th day of September. If the court adjourned on the 23d day of September, then it was 94 days from the date of adjournment until the notes were filed; and if it adjourned on the 25th, then it was 92 days from the date of adjournment until the filing of the stenographer's notes. In either case, if section 797 of Code of 1906 controls, the notes were not filed until after the expiration of the maximum time allowed by that section for the filing of the notes. After the trial of the case, a motion for a new trial was duly made, and in overruling this motion the court allowed 90 days for the preparation and filing of the stenographer's notes, which action of the court is authorized by section 797 of the Code. After this was done, and long after the adjournment of the court, but before the expiration of the 90 days already allowed, the judge undertook to still further extend the time, and an order was made on the 20th day of December, 1909, allowing 20 days' additional time for filing the stenographer's notes; the extension of time to date from the expiration of the time already allowed. In short, under the time allowed by the trial judge on the overruling of the motion for a new trial, plus the time allowed by the order made on the 20th day of December following, 110 days are allowed the stenographer in which to transcribe and file the notes.

It is claimed that section 4791 of the Code is controlling in this case, and that this section gives the judge the power attempted to be exercised by him. In order to properly understand and construe section 4791, it is necessary to examine the chapter under which this section is found, and to keep in mind the subject it deals with and the object intended to be accomplished by it. When this is done, it will be readily seen that there is no conflict between sections 797 and 4791. Each stands independent of the other, and each accomplishes, without conflict, the purpose of its enactment. It cannot be doubted that a time limit should be fixed for the preparation and filing of stenographer's notes when an appeal is taken. If there was no

time limit for this, much confusion and injustice would be the result. When section 797 is examined, there can be little doubt but that this time limit is fixed, definitely and beyond doubt. The time limit is fixed by section 797 at 60 days from the end of the court, if there be no order of the judge giving further time; but the judge may extend the 60 days to 90, under the provisions of this statute, but no longer. This section—that is to say, section 797—is the statute which fixes the limit of time to control both the judge, the parties, and the stenographer as to what time may be allowed for filing stenographer's notes. Of course, it is needless to say that parties may agree among themselves for further time; but the judge cannot grant further time than 90 days from the end of the term as a matter of official power. The judge derives his powers from the statute, and the exercise of the powers are limited by it.

In order to understand section 4791, let us review, to a limited extent, the chapter under which it is found and the object of the chapter. The chapter is dealing not with the procedure in reference to completing the appeal by dealing with the stenographer's notes. This subject is settled by section 797. The chapter under which this section is found is chapter 135, and its object and purpose is to regulate the stenographer himself. The purpose of the chapter is to provide the manner of appointment of the stenographer for the court, prescribe his oath, fix the term of office, require bond, and prescribe his duties. In short, the whole object of this chapter is outside of any purpose sought to be accomplished by section 797. When section 4791 is read in this light, and construed in connection with section 4790, all doubt as to the meaning of section 4791 is cleared up. By section 4790 it is made the duty of the stenographer, on demand of either party, within 20 days from the conclusion of the trial or from the time of demand, to transcribe the notes and certify, sign, and file with the clerk. Let it be noted that under this section no provision is made for any excuse on the part of the stenographer; but this section peremptorily commands that he transcribe and file the notes 20 days after demand. In many cases this might be impossible. Appreciating this fact, the Legislature made provision for the relief of the stenographer by section 4791, wherein it is provided that the judge may, when he deems it proper, grant a reasonable extension of the time in which the stenographer shall make out and file the notes.

This section (4791) is dealing with the stenographer and his duties, and does not in any way bear on the time fixed by section 797 for the filing of the notes. The previous section has just said that the stenographer shall transcribe the notes in 20 days after demand made, and section 4791 merely means that the judge may allow the stenographer longer than 20 days if he deems proper; but in no

case can the judge allow the stenographer a longer time than is fixed by law as the limit of time for the filing of the stenographer's notes. The notes may be transcribed in 20 days, but neither party is compelled to file them under section 797 until some time before the expiration of the time fixed by that section. In other words, suppose the trial judge allowed 90 days under section 797 for the preparation and filing of the stenographer's notes, and afterward a party should demand the stenographer to transcribe the notes under section 4790, and the stenographer should do so within 20 days after adjournment. It would not be necessary for the party making the demand and receiving the notes to file immediately, but he could file at any time within the 90 days. This clearly shows that these sections are independent and intended to accomplish different purposes.

If the case of Louisville R. Co. v. McDonald, 79 Miss. 641, 31 South. 417, 418, has any bearing on the question in this case at all, it supports the view of the court as expressed herein. In the above case it appears that the court granted 60 days for the preparation of the stenographer's notes at the time the motion for a new trial was made. Afterward, and before the expiration of the 60 days, the court granted an additional 30 days, making ninety in all. This court merely held that the trial judge had the power to extend the time to 90 days, if the additional 30 days was granted before the expiration of the 60-day period allowed in the original order. But this court has never held, under the facts of this case, that a longer period than 90 days may ever be granted.

But it is contended that this motion should be overruled at all events, because on the 11th day of January, 1910, counsel for party making the motion to strike out made the following indorsement on the notes, to wit: "We have carefully examined the above notes and find them correct as amended and corrected by us." We do not think that the above agreement can be given any other meaning than the plain language used authorizes. It is a statement that the notes are correct, but it is not in any sense an agreement that the notes may be filed out of time. The above agreement has no reference to a waiver of the right to object to the filing of the notes because the time limit has expired. The facts of this case make it different from either of the cases cited by counsel in support of their contention; that is, the case of Sanders v. State, 74 Miss. 531, 21 South. 299, or State v. Spengler, 74 Miss. 129, 20 South. 879, 21 South. 4. The motion in this case addresses itself to the filing of the notes after the time limit, not to the proper authentication of the notes, as was the case in both of the above cases.

We do not deem it necessary to further comment on contention of counsel appearing

against the motion, since it is our view that the other provisions of the statute relied on by them have no application to this case. It is quite true that it is provided under section 797 that "if the stenographer should die, resign, refuse, or be unable from any cause to furnish a typewritten copy of his notes, forty days' additional time shall be allowed for the substitution of the bill of exceptions," etc. It is manifest that the above clause has no application for the reason that it only applies in a case where it becomes necessary to make a substitution, and no such case is here made. The stenographer did not die, resign, or refuse to supply the notes, nor was he unable to furnish the typewritten copy; but, on the contrary, he did furnish the copy. There was no cause for substitution, and therefore this part of the statute does not apply. It cannot be used for the mere purpose of gaining more time than is specifically allowed by the first part of the statute. The other and following portion of section 797, which provides that "in case of the death of the stenographer before filing a copy of the notes of the evidence and proceedings in any case, or of his failure to file the same within forty days after the end of the term of the court, or within any extended time, the party taking the appeal may within forty days after the forty, sixty, ninety, or other extended time, prepare and present to the judge a bill of exceptions," etc., applies only in case of the death of the stenographer, and is not in point here.

The motion is sustained, and stenographer's notes ordered stricken from the record.

BUTLER v. STATE. (No. 14,459.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Perry County; W. H. Cook, Judge.

Peter Butler was convicted of manslaughter, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

MOBILE, J. & K. C. R. CO. et al. v. STATE ex rel. STIRLING, Atty. Gen.

(No. 14,297.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Chancery Court, Pontotoc County; J. Q. Robbins, Chancellor.

Action by the State, on the relation of J. B. Stirling, Attorney General, against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Chicago Railroad Company. From an order finding defendants guilty of contempt of court, and imposing a fine, they appeal. Affirmed.

Flowers, Fletcher & Whitfield, for appellants. S. S. Hudson, Atty. Gen., and Frank Roberson, for appellee.

PER CURIAM. Affirmed.

**MERCHANTS' & PLANTERS' BANK v.
KERVIN.** (No. 14,084.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Covington County; R. L. Bullard, Judge.

Action between the Merchants' & Planters' Bank and M. W. Kervin. From the judgment, the bank appeals. Affirmed.

M. U. Mounger and J. A. Ramsay, for appellant. McIntosh Bros., for appellee.

PER CURIAM. Affirmed.

CLINTON et al. v. STATE. (No. 14,444.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Eugene Clinton and George Dickens were convicted of grand larceny, and appeal. Affirmed.

J. T. Garraway, for appellants. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

TATE v. STOCKSTILL et al. (No. 14,335.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Chancery Court, Pearl River County; T. A. Wood, Chancellor.

Action between Morris A. Tate and George W. Stockstill and others. From the judgment, Tate appeals. Affirmed.

Huddleston, Talley & Napier, for appellant. Gex & Harrison and W. W. Stickstill, for appellees.

PER CURIAM. Affirmed.

WARMACK v. PRUDEN. (No. 14,475.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Action between William Warmack and W. T. Pruden. From the judgment, Warmack appeals. Affirmed.

Holmes & Holmes, for appellant. E. L. Brown, for appellee.

PER CURIAM. Affirmed.

POSTAL TELEGRAPH CABLE CO. v.

WILLIS. (No. 14,452.)

(Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between Floyd Willis and the Postal Telegraph Cable Company. From the judgment, the Cable Company appeals. Affirmed.

See, also, 93 Miss. 540, 47 South. 390.

W. R. Harper, for appellant. Watkins & Watkins, for appellee.

PER CURIAM. Affirmed.

HARBY v. FLORIDA EAST COAST HOTEL CO.

(Supreme Court of Florida, Division A. May 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1004*) — REVIEW — PERSONAL INJURIES—AMOUNT OF DAMAGES.

Compensatory damages may be recovered from the negligent party for personal injuries and physical pain suffered, as well as for expenses and losses incurred by another as a proximate result of a negligent injury. Expenses and losses may be capable of reasonably certain ascertainment, but personal injuries and physical pain cannot be measured by any standard of pecuniary value; and the law makes it the province of the jury to ascertain the amount of damages to be awarded in the latter classes of cases, subject to such powers of review as are known to the law to prevent abuses of the discretion given to juries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. APPEAL AND ERROR (§ 1004*) — REVIEW — PERSONAL INJURIES—DAMAGES.

The amount of damages awarded by a jury is within their peculiar province, and will not ordinarily be disturbed by the trial court or by an appellate court on the ground that the damages allowed are too small, where there is legal evidence to support the finding, unless it clearly appears that some rule of law has been violated, or that the jury were not governed by the evidence in fixing the amount of the damages allowed. But the trial court or the appellate court may ordinarily interfere to prevent injustice that would otherwise be done through an abuse of the proper discretion of the jury in the particular case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

3. APPEAL AND ERROR (§ 1004*) — REVIEW — PERSONAL INJURIES—DAMAGES.

Conceding that in appropriate proceedings the appellate court may review questions of the inadequacy of compensatory damages awarded in actions ex delicto where the inadequacy relates only to personal injury and physical pain, it does not appear from the evidence that the jury as reasonable men could not have fairly placed upon the injury and suffering shown the compensating value stated in the finding and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Hocker, J., dissenting.

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by Marie Harby against the Florida East Coast Hotel Company. Judgment for plaintiff for less than the amount claimed, and she brings error. Affirmed.

Bryan & Bryan and C. E. Davis, for plaintiff in error. Kay, Doggett & Smith, for defendant in error.

WHITFIELD, C. J. A writ of error was taken by the plaintiff below to a judgment awarding her damages for personal injury

and expenses caused by defendant's negligence; and the sole question presented is the inadequacy of the damages awarded. The bill of exceptions contains a portion of the evidence adduced at the hearing, and the trial judge states in the bill of exceptions that "there was no other evidence as to the measure of damages."

Special rule 1 of the Supreme Court rules (37 South. x) provides that, "unless it shall be necessary to insert" in the bill of exceptions all the evidence introduced at the trial "to enable the plaintiff in error to have reviewed some ground relied on for reversal in the assignment of errors, it shall not be necessary to insert in such bill of exceptions all the evidence introduced at the trial, but only so much and such parts thereof as is necessary to enable the appellate court to properly review the rulings of the trial court mentioned in the assignment of errors." As only compensatory damages were sought in this action, the evidence as to the circumstances under which the injury was received, or as to any other feature of the case, does not appear to be essential in determining the inadequacy of the damages, and the statement of the trial judge in verifying the evidence contained in the bill of exceptions that "there was no other evidence as to the measure of damages" sufficiently indicates that the bill of exceptions contains "so much and such parts" of the evidence "as is necessary to enable the appellate court to properly review" the amount of damages awarded.

Compensatory damages may be recovered from the negligent party for personal injuries and physical pain suffered as well as for expenses and losses incurred by another as a proximate result of a negligent injury. Expenses and losses may be capable of reasonably certain ascertainment, but personal injuries and physical pain cannot be measured by any standard of pecuniary value; and the law makes it the province of the jury to ascertain the amount of damages to be awarded in the latter classes of cases, subject to such powers of review as are known to the law to prevent abuses of the discretion given to juries. The amount of damages awarded by a jury is within their peculiar province, and will not ordinarily be disturbed by the trial court or by an appellate court on the ground that the damages allowed are too small where there is legal evidence to support the finding, unless it clearly appears that some rule of law has been violated, or that the jury were not governed by the evidence in fixing the amount of the damages allowed. But the trial court or the appellate court may ordinarily interfere to prevent injustice that would otherwise be done through an abuse of the proper discretion of the jury in the particular case. See Phillips v. London & South Western Railway Company, L. R. 5 Q. B. Div. 78; Benton v.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33, and notes.

Damages were awarded in the sum of \$500. It was shown without contradiction that the physician's bills incurred because of the injury amounted to \$236, which left \$264 for the personal injury and physical pain.

Conceding that, in appropriate proceedings, the appellate court may review questions of inadequacy of compensatory damages awarded in actions ex delicto where the inadequacy relates only to personal injury and physical pain, the evidence on which the finding was made will be considered. The plaintiff fell down the shaft of an elevator at a hotel of defendant and was rendered almost unconscious from the fall, had pains in her side, and dislocated her right wrist. As the setting of the dislocated bones of the wrist was not successful, she had to undergo two operations, and suffered great pain for six or more weeks. The wrist became swollen, stiff, and deformed, while the hand was somewhat livid, and very painful. The necessary treatment of the injury gave great pain. Good use of the hand and wrist might be regained after one to three years. The injury is probably a permanent one.

On this evidence could the jury as reasonable men have found a verdict of only \$264 for the personal injury and physical suffering shown? Does the small amount allowed for the injury and pain shock the judicial conscience? Does a fair consideration of the evidence show clearly that the jury was influenced by passion, prejudice, partiality, corruption, or other matter outside of the evidence? Does it plainly appear that the jury were not governed by the evidence in fixing the amount of damages stated in the verdict? We think not. It is the duty of the plaintiff in error to make the error assigned clearly to appear. While it is true the damages allowed seem to be rather small for the injury complained of, yet the jury who saw and heard all the witnesses including the plaintiff, and whose peculiar province it was to ascertain the damages to be allowed, obviously considered the amount proper compensation for the injury and pain suffered by the plaintiff, and there is nothing in the evidence or in the finding to clearly indicate that the jury were not governed by the evidence, or that they abused their discretion in rendering the verdict. The only expenses proven are the doctor's bills as above. Loss of earning capacity or the like is not shown. It does not appear that reasonable men could not have fairly placed upon the injuries and suffering sustained the compensating value stated in the finding. See *Pensacola Electric Co. v. Bissett* (decided this term) 52 South. 367. It must be assumed that the trial judge properly charged the jury upon the elements of damage to be consid-

ered, and the finding as made has been approved by the trial court in refusing a new trial asked for on the specific grounds that "the jury ignored the charge of the court as to the measure of damages," and that "the damages assessed are manifestly and clearly inadequate."

No reversible error has been made to appear, and the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR and PARKHILL, JJ., concur in the opinion. HOCKER, J., dissents.

HINSON v. STATE.

(Supreme Court of Florida. March 4, 1910.
Headnotes Filed May 19, 1910.)

(Syllabus by the Court.)

1. WITNESSES (§ 37*) — COMPETENCY — EVIDENCE OF REPUTATION. — KNOWLEDGE OF WITNESS.

While a witness is not competent to testify to the reputation of another person, unless he can say he believes he knows the general reputation of such person in the community, yet one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about, were it the subject of comment, and who has never heard it questioned, may testify to the good reputation of such person. Such a witness may testify to good reputation by saying that he has never heard anything said against the person.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 84; Dec. Dig. § 37.*]

2. WITNESSES (§ 268*)—EXAMINATION—CROSS-EXAMINATION AS TO SOURCE OF KNOWLEDGE.

The inquiry should be whether the witness knows the general reputation of the person whose character is in issue in the given community, and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness, is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 932; Dec. Dig. § 268.*]

In Banc. Error to Criminal Court of Record, Duval County; J. S. Maxwell, Judge.

H. F. Hinson was convicted of grand larceny, and brings error. Reversed.

Bryan & Bryan and I. L. Farris, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

PARKHILL, J. The plaintiff in error was convicted in the criminal court of record for Duval county of grand larceny, and alleges error.

G. W. Russell testified that he had known the defendant about four years; E. N. Gasque had known him eight years; E. P. Douglass, city marshal, had known him in Jacksonville since 1880; and W. S. Seward had known him there eight or nine years before his arrest. We think these witnesses ought to have been permitted to testify as to general reputation of the defendant for honesty and integrity in the community where he lived prior to his arrest upon this charge, even though they admitted that they had never heard any one discuss the defendant's reputation prior to that time.

A witness is not competent to testify to the reputation of another person, unless he can say that he believes he knows the general reputation of such person in the community. While the knowledge of the witness must extend to the other's general reputation, one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about, were it the subject of comment, as seems to be the case with the witnesses here, and who has never heard it questioned, may testify to the good reputation of such person. Such a witness may testify to good reputation by saying that he has never heard anything said against the person. 3 Ency. of Ev. 43; 2 Wigmore on Ev. pars. 1612, 1614; People v. Van Gaasback, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745, text 750, where will be found a comprehensive note.

In *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293, the court points out that the absurdity of the rule against negative testimony becomes more apparent when it is remembered that the more unsullied and exalted the character, the less likely it is ever to be called in question, or spoken of, and consequently more difficult to sustain than characters of a far less worth, because the latter had been the subject of conversation and speculation in the community, while the former had not.

We observe that in several instances, after the witnesses had answered the preliminary question, and before saying what the reputation of the defendant was, they were cross-examined as to the grounds for their belief that they had such knowledge. We notice, also, that sometimes the witnesses were asked if they knew the reputation, not the general reputation, of the defendant in the community for honesty.

The inquiry should be whether the witness knows the general reputation of the person whose character is in issue in the given com-

munity, and as to the trait or quality in question. When the witness answers that question in the affirmative, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness, is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief. *Nelson v. State*, 32 Fla. 244, 13 South. 361.

The judgment is reversed. All concur, except TAYLOR, J., absent on account of illness.

JOHNSON v. LOUISVILLE & N. R. CO.
(Supreme Court of Florida, Division A. April 12, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 169*)—DIRECTION OF VERDICT.

If no evidence is adduced at the trial of a civil action upon which a verdict for the plaintiff may be lawfully predicated, the court may direct a verdict for the defendant; or if a fair consideration of the whole evidence, or the application of controlling provisions or principles of law to the evidence, adduced at the trial of a civil action, precludes a verdict for the plaintiff, the court may direct a verdict for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 351-359; Dec. Dig. § 169.*]

2. TRIAL (§ 139*) — QUESTION FOR JURY — WEIGHT OF EVIDENCE.

The court should not direct a verdict for the defendant unless it is clear that there is no evidence whatever adduced that could in law support a verdict for plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue, the case should be submitted to the jury for their finding of fact on the evidence, and not taken from them and passed upon by the court as a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

3. TRIAL (§ 139*)—DIRECTION OF VERDICT—POWER OF COURT.

The court should not direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the other party can be sustained. The power of the court to direct a verdict on the evidence should be cautiously exercised.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

4. RAILROADS (§ 282*)—NEGLIGENCE (§ 101*)—INJURY TO PERSONS ON TRACK—BURDEN OF PROOF—DUE CARE.

Where injury by the running of a railroad company's locomotive is established, the statute places the burden upon the railroad company to "make it appear that their agents * * * exercised all ordinary and reasonable care and diligence" to prevent the injury; and the statute also provides that, "if the complainant and

the agents of the company are both at fault, the former may recover, but the damage shall be diminished or increased by the jury in proportion to the amount of default attributed to him."

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282; * Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. § 101.*]

5. RAILROADS (§ 282*)—INJURY TO PERSON ON TRACK—DIRECTION OF VERDICT.

Where there is testimony from which the jury could lawfully infer at least some negligence on the part of the fireman of a railroad locomotive in notifying the engineer that the person injured was approaching the track with an apparent purpose to cross ahead of the train, a peremptory charge for the defendant should not have been given.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by Bessie Johnson, by her next friend, David Johnson, against the Louisville & Nashville Railroad Company. There was a directed verdict for defendant, and plaintiff brings error. Reversed and remanded.

Reeves & Watson, for plaintiff in error. Blount & Blount & Carter, for defendant in error.

WHITFIELD, C. J. In an action in two counts for damages for personal injuries alleged to have been received by the plaintiff by reason of the negligent operation of the defendant's train, and also by the negligence of the defendant company in not having a reasonably safe approach to its depot, by reason of which the plaintiff stumbled and fell on the track and was injured by the negligent and careless running of defendant's engine and train of cars, the court directed a verdict for the defendant, and the plaintiff took writ of error.

In section 1496 of the General Statutes of 1906 it is provided that if "upon the conclusion of the argument of counsel in any civil case, after all the evidence shall have been submitted, it be apparent to the judge of the circuit court, or county court, that no evidence has been submitted upon which the jury could lawfully find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party." If no evidence is adduced at the trial of a civil action upon which a verdict for the plaintiff may be lawfully predicated, the court may direct a verdict for the defendant; or if a fair consideration of the whole evidence, or the application of controlling provisions or principles of law to the evidence, adduced at the trial of a civil action, precludes a verdict for the plaintiff, the court may direct a verdict for the defendant. Errors committed in admitting or excluding proffered evidence are remedied by appropriate procedure under controlling rules of law. *Bass v. Ramos*, 58 Fla. —, 50 South. 945; *Bruner v. Hart*, 59 Fla. — 51 South. 593; *Wade v. Louisville & N.*

R. Co., 54 Fla. 277, 45 South. 472; *Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 South. 507; *Pensacola Bank & Trust Co. v. National Bank of St. Petersburg* (decided this term) 52 South. 294.

The court should not direct a verdict for the defendant, unless it is clear that there is no evidence whatever adduced that could in law support a verdict for plaintiff. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue, the case should be submitted to the jury for their finding of fact on the evidence, and not taken from them and passed upon by the court as a question of law. *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910.

The court should not direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the other party can be sustained. The power of the court to direct a verdict on the evidence should be cautiously exercised. *C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 South. 878.

Sections 3148 and 3149 of the General Statutes of 1906, are as follows:

"3148. Liability of Railroad Company.—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

"3149. When Recovery of Damages Forbidden.—No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

The injury by the running of defendant's locomotive being established, it was by the terms of the statute incumbent upon the railroad company to "make it appear that their agents * * * exercised all ordinary and reasonable care and diligence" to prevent the injury; and "if the complainants and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

The plaintiff testified that she was 18 years old, and was run over by a train of defendant, and both her feet were injured; that one foot

had to be amputated because of the injury; that, carrying a suit case, a cloak, and a purse or handbag, she endeavored to cross defendant's track at a station just ahead of an approaching train; that "I could have crossed the track before the train passed, if I had not fallen"; that where she fell the soil, or slag, or rock was loose, it would shift, it caused her to fall; that "the heel of my shoe stepped on it, and the heel was rather high, and it turned and caused me to fall"; that she was a little late, and was running when she fell. One of the defendant's witnesses testified that he was fireman on the engine "when the engine struck" plaintiff; that when the train was "going into Brent station, about making a stop, I saw a lady coming out near the track, running as though she wanted to cross, and I told" the engineer "somebody wanted to cross, he had better stop as quick as he could"; that he first saw her about 40 feet from the track; that he called the engineer's "attention to it when she was about 20 feet from where she was going to cross"; that the engineer already had the brakes on, and "he put on the emergency, reversing the engine"; that "I told him to stop when she was in 20 feet of the track, and then is when he applied the brakes; she was then about 40 feet from where she was going to cross;" that "I was about 80 feet, or two car lengths, up the track when I first saw the young lady come out the gate." "It was about 40 feet from the gate to the track." "When she came up with the grips in her hand, I knew she was going to try to cross to get to the depot. I knew she did not have time to cross, and supposed she would stop. I did not call the engineer's attention until she was in about 20 feet of the track." The engineer in the main corroborated the testimony of the fireman, and himself testified that he was approaching the station with the train under full control to stop, and that he did everything possible to avoid the accident when his attention was called to the approach of the lady to the track; he being on the opposite side of the engine and could not see the lady approaching.

There is testimony that the gate through which plaintiff passed was 50 feet from the track, and that when the plaintiff came out of the gate, running towards the station, at which point the fireman says he saw her, the train was 400 feet or more from the station, and that the train was not stopped as quickly as it should have been. For the purposes of this decision, it is perhaps not necessary to state more of the evidence at length.

From the evidence it appears that the fireman saw the lady 40 or 50 feet from the track, and knew, from the articles she carried and her conduct in running towards the depot on the opposite side of the track, that she intended to cross the track ahead of the train to reach the depot in time to become a passenger on that train, yet he did not call the attention of the engineer to the lady until

she was within 20 feet of the track. Whether, if the fireman had called the attention of the engineer to the lady's approach as soon as he saw her, 40 or 50 feet away, and knew her intention to cross the track, the train could have been stopped before it reached the place where the accident occurred, or whether the speed would have been lessened so that she could have gotten off the track before the train reached her, cannot be determined on this record. The testimony of the fireman tends to show at least some negligence on his part in failing to promptly notify the engineer of the lady's approach and her apparent intention to cross the track ahead of the train. Conceding that the plaintiff's own testimony shows negligence on her part, as there was some evidence tending to show negligence in the fireman, the case should have been submitted to the jury to determine the liability of the defendant, if any, and, if damages are allowed, to diminish them "in proportion to the amount of default attributable to" the plaintiff.

The facts of this case, calling for the exercise of all ordinary and reasonable care and diligence of the fireman and engineer, are essentially different from those in *Seaboard Air Line R. Co. v. Barwick*, 51 Fla. 309, 41 South. 70, where the plaintiff on a dark night stepped on the track within 3 feet of an approaching engine and train of cars that she knew to be present and approaching, and the evidence showed without contradiction that the servants of the defendant company were guilty of no negligence that in any way contributed to the injury, and that the injury resulted solely from the plaintiff's own negligence. The facts here are also materially different from those in *Atlantic Coast Line R. Co. v. Miller*, 53 Fla. 246, 44 South. 247, where the engineer and fireman, though keeping a careful lookout ahead of the engine, did not see the injured person approaching the track until the engine was within less than 75 yards of the crossing, when the engineer and fireman saw the party drive his horse and buggy upon the track; it then being too late to stop the train. The evidence here is conflicting in some particulars; but there is testimony, that, when the engine was 400 feet or more from the place of the injury, the plaintiff came out of a gate 40 or more feet from the track, that the fireman then saw her and from the articles she was carrying and from her running he inferred that she was endeavoring to cross the track at the station ahead of the train to reach the depot for the purpose of becoming a passenger on that train, at a time when the train should have been under full control to stop at that depot, and that the fireman did not warn the engineer of the plaintiff's approach until she was only 20 feet from the track, notwithstanding he saw her 40 or more feet from the track and knew she intended to cross the track ahead of the train. Under these conditions, and conceding the negligence of the

plaintiff, it cannot be fairly said there is no evidence whatever tending to show negligence in the fireman that contributed proximately to the injury, and therefore the evidence should have been submitted to the jury for their finding as contemplated by the statutes above quoted.

The judgment is reversed, and the cause is remanded for further proceedings.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

SIMS v. STATE.

(Supreme Court of Florida, Division A. April 12, 1910. Rehearing Denied May 3, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 698*)—OBJECTIONS TO EVIDENCE—WAIVER.

Where evidence is admitted without objection, it is regarded as having been received by consent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1651; Dec. Dig. § 698.*]

2. CRIMINAL LAW (§ 695*)—TRIAL—OBJECTIONS TO EVIDENCE.

The grounds of objection to testimony should be specifically stated in the objection, and general grounds that the proffered testimony is irrelevant or immaterial will not avail, if the evidence is admissible for any purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1634; Dec. Dig. § 695.*]

3. CRIMINAL LAW (§§ 693, 696*)—EVIDENCE—FAILURE TO OBJECT—MOTION TO STRIKE.

If evidence is admitted without objection, or if a question propounded to a witness is not objected to on proper grounds before it is answered, it is then too late to merely object on any ground to the evidence, or to the answer to the question. In such cases a motion may be made to strike the evidence, if the motion is based upon some ground of irrelevancy, immateriality, or legal inadmissibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1630, 1639; Dec. Dig. §§ 698, 696.*]

4. CRIMINAL LAW (§ 451*)—EVIDENCE—OPINION EVIDENCE.

The physical or mental condition or appearance of a person, or his manner, habit, or conduct, may be proved by the opinion of an ordinary witness, founded on observation. Therefore in a criminal prosecution it is not error to permit a witness to testify that upon observation the defendant "appeared like he was a pretty mad man."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1041; Dec. Dig. § 451.*]

5. CRIMINAL LAW (§ 696*)—EVIDENCE—MOTION TO STRIKE.

A motion to strike all the testimony of a witness is properly denied, when some of the testimony was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1643; Dec. Dig. § 696.*]

6. CRIMINAL LAW (§ 696*)—EVIDENCE—MOTION TO STRIKE—GROUNDS.

A motion to strike out testimony that had been admitted must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that it is not sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. § 696.*]

7. CRIMINAL LAW (§ 383*)—EVIDENCE—ADMISSIBILITY.

The admissibility of testimony does not depend upon its sufficiency to prove the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 849; Dec. Dig. § 383.*]

8. HOMICIDE (§ 174*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, testimony that, after the defendant ran off from the scene of the homicide, he called to a companion who was present to "come on," is not wholly irrelevant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 359; Dec. Dig. § 174.*]

9. CRIMINAL LAW (§ 517*)—EVIDENCE—CONFESSION.

In a prosecution for murder, a confession freely and voluntarily made by the defendant is admissible, as in other criminal cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1146; Dec. Dig. § 517.*]

10. CRIMINAL LAW (§ 517*)—EVIDENCE—CONFESSIONS.

Where a homicide is shown, testimony as to a voluntary confession made by the accused is admissible to show the defendant's connection with the crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 517.*]

11. CRIMINAL LAW (§ 519*)—CONFESSION—ADMISSIBILITY.

Before a confession is admitted in evidence, it should appear that it was freely and voluntarily made, uninfluenced by any threat, promise, hope, or other inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163, 1164; Dec. Dig. § 519.*]

12. CRIMINAL LAW (§ 519*)—CONFESSIONS—ADMISSIBILITY.

If a confession comes from a mere sense of guilt, it is admissible as evidence of the guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1163; Dec. Dig. § 519.*]

13. CRIMINAL LAW (§ 531*)—CONFESSION—BURDEN OF PROOF.

When it appears prima facie that a confession was freely and voluntarily made, the burden is upon the defendant to show that it was in fact not a voluntary confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1212; Dec. Dig. § 531.*]

14. CRIMINAL LAW (§ 519*)—CONFESSIONS—ADMISSIBILITY.

Whether a confession was voluntary or not may be shown by circumstances. A confession made while under arrest or in custody is admissible, if it was voluntarily made and was not influenced by any inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1167; Dec. Dig. § 519.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

15. CRIMINAL LAW (§ 736*)—CONFESSIONS—ADMISSIBILITY.

The admissibility of a confession is for the court to determine. When it appears that a legal foundation was laid for admitting a confession as having been freely and voluntarily made, uninfluenced by the attending circumstances or by inducements, the confession is admissible in evidence; its probative force being for the jury to determine in the first instance.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1219, 1702; Dec. Dig. § 736.*]

16. CRIMINAL LAW (§ 1045*)—APPEAL—OBJECTIONS TO CROSS-EXAMINATION.

A mere objection to the manner of conducting the cross-examination, with no ruling and exception, cannot be considered by the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2652; Dec. Dig. § 1045.*]

17. HOMICIDE (§ 307*)—INSTRUCTIONS—DEGREE OF CRIME.

A requested instruction that "the court instructs the jury under the evidence the only offense which you can convict the defendant of in this case is that of manslaughter, if you should find him guilty of any offense," is properly refused, when there is evidence upon which the jury could predicate a verdict of murder.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 307.*]

Error to Circuit Court, Polk County; J. B. Wall, Judge.

Edward Sims was convicted of murder, and brings error. Affirmed.

H. K. Olliphant, M. A. Wilson, and D. B. Summers, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. This writ of error was taken to a judgment of conviction for murder in the first degree. Most of the assignments of error are upon the admissibility of evidence.

Where evidence is admitted without objection, it is regarded as having been received by consent. The grounds of objection to testimony should be specifically stated in the objection, and general grounds that the proffered testimony is irrelevant or immaterial will not avail, if the evidence is admissible for any purpose. If evidence is admitted without objection, or if a question propounded to a witness is not objected to on proper grounds before it is answered, it is then too late to merely object on any ground to the evidence or to the answer to the question. In such cases a motion may be made to strike the evidence, if the motion is based upon some ground of irrelevancy, immateriality, or legal inadmissibility. *Sims v. State*, 54 Fla. 100, 44 South. 737.

It appears that about 5 or 6 o'clock in the afternoon the defendant met the deceased on the railroad track and cut him with a knife. Death resulted some days later.

A witness for the state testified that about

9 or 10 o'clock in the morning, before the fatal cutting in the afternoon, the defendant came to the house where witness was boarding and asked for Mr. Doak; that defendant had his hand in his right pocket, and kept it there all the time, and said: "There is a hell of a disturbance over here at No. 5. Mr. Redd has fired me, and I want to see Mr. Doak." The witness, referring to the defendant, testified that: "He appeared like he was a pretty mad man. He looked like a mad man to me." Objection was made by the defendant to the last-quoted testimony, after it was given, "on the ground that it is immaterial and irrelevant and highly improper." In reply to a question from the court, the witness said: "He appeared to be an angry man to me. He had his hand in his pocket, and kept it there all the time." The objection was overruled, an exception was noted, and error is assigned thereon. As it appears from the bill of exceptions that the testimony was in before it was objected to, such testimony was not then subject to a mere objection. *Williams v. State*, 58 Fla. 138, 50 South. 749; *Dickens v. State*, 50 Fla. 17, 38 South. 909.

The physical or mental condition or appearance of a person, or his manner, habit, or conduct, may be proved by the opinion of an ordinary witness, founded on observation. Therefore it was not error to permit the witness to testify that upon observation the defendant "appeared like he was a pretty mad man." *Higginbotham v. State*, 42 Fla. 573, 29 South. 410, 89 Am. St. Rep. 237; *Fields v. State*, 46 Fla. 84, 35 South. 185; *Mitchell v. State*, 43 Fla. 584, 31 South. 242. The witness did not state that the defendant's apparent anger was directed against the deceased; but this did not affect the admissibility of the testimony as to the defendant's appearance at a stated time on the day of the homicide, when the defendant referred to his discharge by the deceased.

A motion was made to strike "all of the testimony of this witness, for the simple reason that the evidence of the witness shows no conduct or acts sufficient to show that the defendant in this case had any ill will or intention to hurt or murder the deceased." At least some of the testimony of the witness was clearly admissible, and the motion to strike all of it was therefore not well taken. *Lewis v. State*, 55 Fla. 54, 45 South. 998; *Platt v. Rowland*, 54 Fla. 237, 45 South. 32; *Baldwin v. State*, 46 Fla. 115, 35 South. 220; *Fields v. State*, 46 Fla. 84, 35 South. 185.

A motion to strike out testimony that had been admitted must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is not sufficient. *Lewis v. State*, supra; *Maloy v. State*, 52 Fla. 101, 41 South. 791.

The admissibility of testimony does not depend upon its sufficiency to prove the issue. *Bass v. O'Berry* (decided at this term) 51 South. 597.

A witness testified that, after the defendant ran off from the scene of the homicide, he called to a companion who was present to "come on." This was objected to after its admission, but no motion was made to strike it. If this was not properly a part of the *res gestae*, it is admissible as one of the circumstances attending the homicide, that cannot be said to be wholly irrelevant.

Testimony as to an alleged confession of the defendant was received without objection. After its admission as evidence the defendant moved "to strike out the alleged confession as narrated by the witness * * * on the ground that, admitting the whole statement or testimony of the said witness, it does not show that the alleged confession was made freely and voluntarily."

In a prosecution for murder, a confession freely and voluntarily made by the defendant is admissible as in other criminal cases. Where a homicide is shown, testimony as to a voluntary confession made by the accused is admissible to show the defendant's connection with the crime. Before a confession is admitted in evidence, it should appear that it was freely and voluntarily made, uninfluenced by any threat, promise, hope, or other inducement. If a confession comes from a mere sense of guilt, it is admissible as evidence of the guilt. When it appears *prima facie* that a confession was freely and voluntarily made, the burden is upon the defendant to show that it was in fact not a voluntary confession. Whether a confession was voluntary or not may be shown by circumstances. A confession made while under arrest or in custody is admissible, if it was voluntarily made and was not influenced by any inducement. *McNish v. State*, 47 Fla. 69, 36 South. 176; *Daniels v. State*, 57 Fla. 1, 48 South. 747.

The ruling of the court on the motion to strike the alleged confession is as follows: "The witness * * * having testified affirmatively that the statement made by the defendant was made not only freely and voluntarily, but was made after he had told the witness that he need not make any statement unless he desired, or that it was with him whether he made any statement, the motion is denied." As the confession was clearly not immaterial or irrelevant to the issue being tried, the motion to strike it was properly denied, unless the confession was legally inadmissible. There is evidence to support the statement and ruling of the court, and the evidence is not contradicted. The admis-

sibility of the evidence was for the court to determine. It appears that a legal foundation was laid for admitting the confession as having been freely and voluntarily made, uninfluenced by the attending circumstances or by inducements. *Gantling v. State*, 40 Fla. 237, 23 South. 857; *Green v. State*, 40 Fla. 474, 24 South. 537; *McNish v. State*, 47 Fla. 69, 36 South. 176. Whether the confession was damaging to the defendant, or whether it "simply created an impression on the part of the jury that the alleged confession was that of murder," as urged by the defendant, is not a consideration in determining the legal admissibility of the confession.

A mere objection to the manner of conducting the cross-examination, with no ruling and exception, cannot be considered by the appellate court.

The requested instruction that "the court instructs the jury under the evidence the only offense which you can convict the defendant of in this case is that of manslaughter, if you should find him guilty of any offense," was properly refused, since there was evidence upon which the jury could predicate a verdict of murder.

There is evidence to sustain the verdict, and it does not appear that the jury were not governed by the evidence in rendering the verdict.

The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

RICHARD et al. v. STEINER BROS.

(Supreme Court of Alabama. Feb. 3, 1910.
Rehearing Denied Feb. 26, 1910.)

1. JUDGMENT (§ 788*)—LIEN—PRIORITIES.

Under Code 1907, § 3383, making all conveyances of real property void as to judgment creditors without notice, unless recorded before the accrual of the right of such judgment creditors, a deed of land executed prior to the obtaining of a judgment against the grantor, but which was not recorded until after a judgment was obtained, is void as to the judgment, unless it is shown that the judgment creditor had notice of the deed; and the burden is upon the grantee to show notice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1368, 1369; Dec. Dig. § 788.*]

2. JUDGMENT (§ 787*)—LIEN—PRIORITIES—PRESUMPTION OF SATISFACTION FROM LAPSE OF TIME.

Code 1907, § 3383, makes all conveyances of real property void as to judgment creditors without notice, unless recorded before the accrual of the judgment creditors' right. Section 4154 provides that "if ten years have elapsed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the rendition of the judgment or decree without issue of execution, or if ten years have elapsed since the date of the last execution issued, the judgment or decree must be presumed satisfied, and the burden of proving it not satisfied is upon the plaintiff." Land was conveyed, but the deed was not placed on record, and subsequently a judgment was obtained against the grantor in 1891, and an execution issued thereon, which was returned in April of the same year nulla bona. In August, 1901, the grantee conveyed to complainants, and in 1903 the judgment was revived and execution levied on the property in question. *Held* that, while the original deed was inoperative as against the judgment, when complainants purchased the property they had the right to presume that the judgment was satisfied, and that their title thereto was prior to the judgment lien, so that it was unaffected by the subsequent revival of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1363; Dec. Dig. § 787.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Rudolph Richard and another to quiet title against Steiner Bros. Judgment for defendant, and complainants appeal. Reversed and rendered.

The facts seem to be that in 1891 B. & S. Steiner, a firm, recovered judgment against the Birmingham Ensley Land & Improvement Company in the sum of \$1,882, and had execution issued thereon, which was returned in April of the same year nulla bona. At the time of the recovery of the judgment, Jones, who afterwards conveyed to the complainants, held an unrecorded deed to himself from the Birmingham Land & Improvement Company conveying the land in question. The judgment became dormant for failure to issue execution until March, 1903, when it was duly revived, and execution was levied on the lots in question, which were sold, and the appellant corporation became the purchaser. The other facts sufficiently appear in the opinion.

Henry F. Reese and Ivey F. Lewis, for appellants. A. Latady, for appellee.

ANDERSON, J. The complainants' grantor, Jones, had a deed from the Ensley Company, prior in date to the judgment of Steiner Bros. against said Ensley Company; but said deed was not recorded until March 5, 1891, some time subsequent to the judgment, which was rendered January 17, 1891. The deed would, therefore, be void as to the judgment, under the statutes of registration (section 3383, Code of 1907), unless it was shown that the judgment creditor had notice of same, and the burden is upon the grantee in said deed to show notice. Rankin Mfg. Co. v. Bishop, 137 Ala. 275, 34 South. 991; Center v. P. & M. Bank, 22 Ala. 756. The complainants attempt to charge notice of the fact that these lots had been sold to B. Steiner before the rendition of the judgment by a familiarity with the condition of affairs of the Ensley Company, growing out

of his dealings therewith and the filing of a certain bill by his firm against said company, prior to the rendition of said judgment. We do not think that the facts shown were sufficient to charge the plaintiffs to the judgment with notice that the lots had been sold or that Jones had purchased them before they obtained their said judgment.

This court, in construing the statute above cited, has held that the purchaser at a judgment sale is protected as against an unrecorded deed of which the judgment creditor had no notice, whether the lien was subsequently kept alive or not. Wood v. Lake, 62 Ala. 489. This case, however, presents a question which seems to never have been pointedly decided by this court. The respondents invoke the doctrine of purchaser without notice as against Jones, the grantee in the unrecorded deed; and these complainants invoke the doctrine of bona fide purchaser as against the respondents, upon the theory that, while the judgment may have been superior to the Jones deed, respondents permitted the record to remain in such condition that Jones' title was clear when they bought from him, and that they had no notice that there was a live and subsisting judgment, superior to the Jones deed, which was on record when they bought from him. In other words, while the record showed that the judgment was rendered prior to the registration of the Jones deed, yet the Jones deed was on record when they bought, and the judgment was in such condition at the time of their said purchase from Jones that the law presumed that it was satisfied. Counsel for the appellees admit, in brief, that the judgment lay dormant from January, 1891, until March, 1903, except as a recorded judgment, but which said recordation seems to be conceded as insufficient as a lien, and which under the statute does not survive for over 10 years, even if properly recorded so as to keep up the lien.

Section 4154 of the Code of 1907 is as follows: "If ten years have elapsed from the rendition of the judgment or decree without issue of execution, or if ten years have elapsed since the date of the last execution issued, the judgment or decree must be presumed satisfied, and the burden of proving it not satisfied is upon the plaintiff." The judgment in question was rendered in January, 1891. No execution seems to have been issued thereupon within 10 years prior to the time complainants bought from Jones, August 14, 1901, more than 10 years after the rendition of the judgment, and prior to the revival of same in 1903. We therefore hold that, notwithstanding the Jones deed was inoperative as against the judgment in question, when these complainants bought from Jones the record of said judgment was in such condition that they had the right to presume, under the statute, that it was sat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

issled, and not, therefore, superior to any title they would acquire from Jones. The subsequent revival of the judgment would doubtless mean that it was not satisfied, but this would not effect intervening rights. *Leonard v. Brewer*, 86 Ala. 390, 5 South. 308. We are not unmindful of the fact that this court has often held that the title of a purchaser under an execution sale, whether the lien had been kept alive or not, got a superior title to the grantee under a prior unrecorded deed; but none of them hold that an intervening purchaser from the grantee would not be protected after the judgment had lain dormant long enough for the record to disclose a presumptive satisfaction of same. If the respondents can profit by the failure of Jones to record his deed prior to the rendition of the judgment, these complainants can also profit by the action of the plaintiffs to the judgment in permitting the record to get in such a condition that the law presumed that it was satisfied when complainants bought the land from Jones.

The complainants not only showed constructive possession under a superior title, but that they were in the actual possession, through their agent, Lewis, when the bill was filed. The chancellor erred in dismissing the complainants' bill, and the decree must be reversed, and one is here rendered adjudging the complainants the true owner of the lots in question.

Reversed and rendered.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

CITY OF NORTH BIRMINGHAM v. STATE ex rel. SPARKS et al.

(Supreme Court of Alabama. Jan. 12, 1910.

Rehearing Denied Feb. 26, 1910.)

1. QUO WARRANTO (§ 8*)—GROUNDS—EXTENSION OF CITY LIMITS.

Code 1907, § 5450, authorizing quo warranto to vacate charters of corporations other than municipal on specified grounds, does not apply to municipal corporations, and does not justify quo warranto to test the validity of the extension of the corporate limits of a municipality.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 9; Dec. Dig. § 8.*]

2. QUO WARRANTO (§ 3*)—GROUNDS—EXERCISE OF CORPORATE POWERS.

Code 1907, § 5453, authorizes quo warranto where any person intrudes into any public office, or where any public officer has done any act by which he forfeits the office, or when any association acts as a corporation without being duly incorporated. *Held* that, though quo warranto lies to test the right to the exercise of particular franchises not embraced within the charter, it does not lie against the legal officers of a municipal corporation because they assume to exercise corporate powers beyond the territorial limits of the municipality, but the remedy is by injunction.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 4; Dec. Dig. § 3.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Quo warranto by the State, on the relation of G. W. Sparks and others, against the City of North Birmingham and its officers, to test the validity of the extension of the corporate limits of the town made by an order and decree of the probate judge of Jefferson county. From a judgment for relator, defendants appeal. Reversed and rendered.

The petition alleges that on the 18th day of November, 1905, a petition was filed in the probate court of Jefferson county by at least 10 male inhabitants of the town of North Birmingham, but not of the character described as being included in the boundaries as enlarged, proposing an alteration or change in the boundary line of the town of North Birmingham; that the election was held, and on the return the majority was in favor of the incorporation, and on January 9, 1906, a petition purporting to be signed by more than 100 owners of real estate situated within the extension heretofore described was also filed in the office of the judge of probate. It is further alleged that the relator was resident and owner of real estate within the extension proposed, and that he was opposed to said alteration or change. It is alleged that there was not obtained, as required by the statute, the consent in writing signed by two-thirds of the owners of the real estate situated within the extension. It is further alleged that a great many who signed the petition above referred to were not owners of real estate, and that a great many of the names were obtained by fraud. It is further alleged that the defendants are seeking to make all the laws and ordinances governing said town of North Birmingham apply to the territory sought to be included, and that efforts are being made to enforce collection of taxes and license and privilege fees for those doing business in the territory sought to be incorporated, and that notice has been issued that if taxes were not paid the property would be sold, etc. Then follows the prayer, seeking to declare the proposed extension inoperative and void, and to exclude the defendants from the offices and franchises they are usurping and attempting to hold in the territory sought to be included.

C. B. Smith, for appellants. Frank S. Address, for appellee.

ANDERSON, J. Section 5450 of the Code of 1907, as to quo warranto, has no application to municipal corporations, and this proceeding must have been attempted under section 5453, which provides for the action in the cases there enumerated. Subdivisions 2 and 3 can have no bearing on the present case, and the relator must be proceeding under subdivision 1 of section 5453. This subdivision provides that the action may be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

brought in the following cases: "(1) When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state." The information and proof shows that the respondents are legal officers of North Birmingham, and it does not appear, by averment or proof, that they are exercising any franchise or powers not authorized by the charter. It does not appear that the things they are doing or attempting to do are not authorized by the charter of North Birmingham.

The only complaint against the respondents is that they are exceeding their jurisdiction by doing or threatening to do charter or franchise acts beyond the legal limits of North Birmingham. This would not be the unlawful holding or exercise of a public office, or the unlawful holding or exercise of a franchise. They are properly in office, and the franchise that they are using is not questioned, nor are the acts complained of unauthorized. They are merely charged with going beyond the limits of jurisdiction in the exercise of an office or franchise. Section 5453 was not intended to correct a mere abuse or excessive use of an office or franchise, but to remove a usurper from an office, or to prevent the use of a franchise which did not exist. It may be that an abuse of power might forfeit the charter of a business corporation under section 5450; but, as we have observed, this section does not apply to municipal corporations. We are borne out in the correctness of this conclusion by section 5465, which fixes the character of judgment as to the unlawful use of a franchise and which requires an exclusion from the office or franchise. The manifest purpose of the present information is to test the validity of the annexation of certain territory to North Birmingham and to restrain the respondents from exercising acts over same—not to oust them from the exercise of a franchise. Indeed, the judgment rendered does not comply with the statute. It excludes the respondents from the franchise, but in effect merely restrains or enjoins them from doing certain things in this newly acquired territory. If the respondents are exceeding their jurisdiction or authority, this may be checked by an appropriate proceeding, but not by a quo warranto to test their title to an office or right to a franchise. Here the franchise exists, and the respondents are only charged with an excessive use of same, and are sought to be enjoined from using same in a certain way, and not that they be ousted from said franchise.

Quo warranto is the proper remedy to test the right to the exercise of particular franchises not embraced within those granted by the charter, and to oust the corporation from the exercise of such franchise. *Uniontown v.*

Glass, 145 Ala. 473, 39 South. 814; 17 Am. & Eng. Encyc. of Pl. & Pr. 396; *Spelling on Extraordinary Relief*, 1801. The act complained of in the *Glass Case*, supra, was the exercise of a franchise not given by the charter, and not the excessive use of a chartered right. On the other hand, it seems well settled, by the great weight of authority, that where city authorities assume to exercise mere corporate powers beyond the territorial boundaries of the corporation, the remedy is not quo warranto, but injunction. *Spelling on Ex. Relief*, § 1802; *High, Ex. Remedies*, § 618; *Stultz v. State*, 65 Ind. 502; *People v. Whitcomb*, 55 Ill. 172; *Delphi v. Startzman*, 104 Ind. 344, 3 N. E. 937. The Indiana statute on quo warranto, considered in the *Stultz Case*, supra, was identical to subdivision 1 of section 5453 of the Code of Alabama of 1907. *Leigh v. State ex rel.*, 69 Ala. 261.

The circuit judge erred in giving the relator relief, and the judgment must be reversed, and one is here rendered dismissing the information.

Reversed and rendered.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

WHITLEY v. STATE.

(Supreme Court of Alabama. Feb. 3, 1910.
Rehearing Denied Feb. 26, 1910.)

INDICTMENT AND INFORMATION (§§ 33, 34*)—
SIGNATURES AND INDORSEMENTS.

Where an indictment is not indorsed "A true bill," and signed by the foreman of the grand jury, as required by Code 1907, § 7300, it is not valid.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 137, 139; Dec. Dig. §§ 33, 34.*]

Appeal from Circuit Court, Winston County; J. J. Ray, Judge.

Eliza Whitley was convicted of an offense, and appeals. Reversed and remanded.

Curtis & Blanton and M. L. Leith, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

EVANS, J. The transcript of the record in this case shows no valid indictment. There is no indorsement on the indictment, as required by section 7300 of the Code of 1907, to wit, "A true bill," signed by the foreman of the grand jury. Until an indictment is so indorsed, there is no valid indictment. *Mose v. State*, 35 Ala. 425, 426; *Winston v. State*, 52 Ala. 420.

No valid indictment having been shown, it is useless to consider the other rulings of the court.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

SOUTHERN RY. CO. v. STOLLENWERCK.

(Supreme Court of Alabama. Nov. 24, 1909.
On Rehearing, Feb. 26, 1910.)

**1. RAILROADS (§ 297*)—ACCIDENTS TO TRAIN
—DEATH OF ENGINEER—NEGLIGENCE—CON-
TRIBUTORY NEGLIGENCE—WANTONNESS—
QUESTION FOR JURY.**

In an action for death of a railroad engineer in a collision at a crossing of another railroad, evidence held to require submission to the jury of the questions of negligence, contributory negligence, and willfulness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 949, 950; Dec. Dig. § 297.*]

**2. RAILROADS (§ 297*)—ACCIDENTS TO TRAINS
—JOINT OR SEVERAL NEGLIGENCE—PLEAD-
ING.**

In an action for death of a railroad engineer in a collision with a train belonging to another railroad at a crossing, the complaint charged that intestate's death was caused by the negligence of defendant's employes, who were operating defendant's train, in the management thereof, and another count charged that it was due to the willful negligence of defendant's employes in charge of such train in running it forward into collision after discovering decedent's train on the crossing, etc. Held, that the complaint did not charge joint negligence on the part of the conductor and operating employes of the colliding train, and that proof of negligence of any one of them would comply with the averments.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 297.*]

**3. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING
ISSUES.**

Where a complaint in an action for wrongful death alleged wantonness as well as simple negligence, and there was evidence justifying the submission of both to the jury, a request to charge, directing a finding for defendant as to the entire complaint on proof of contributory negligence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

**4. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING
PLEADINGS.**

Where a complaint alleged both negligence and wantonness, and there was evidence of both for the jury, a request, directing a finding for defendant if there was no wantonness, was erroneous as ignoring the simple negligence count.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

**5. EVIDENCE (§ 471*)—CONCLUSIONS—DECREE
OF COURT.**

Question, asked of a witness as to whether he looked and listened "carefully" before traversing a railroad crossing, was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by E. F. Stollenwerck, as administrator de bonis non of the estate of Charles M. Bryan, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count alleges: That the Southern Railway and the Louisville & Nashville Rail-

road cross each other on grade in North Birmingham, known as the "North Birmingham crossing." That her intestate was an engineer in the service or employment of the Louisville & Nashville Railroad Company, and had charge of an engine to which cars were attached on a branch of the Louisville & Nashville known as the "Birmingham Mineral," and just as the engine which plaintiff's intestate was running got upon said crossing one of defendant's trains, consisting of an engine and several cars, came along on said defendant's railroad towards Birmingham, and ran into and collided with the engine which was being operated by plaintiff's intestate, so wounding and scalding plaintiff that he died. Plaintiff avers that the death of her intestate was caused by the negligence of defendant's employes, who were operating the defendant's said train, in the running and management of said train. The fourth count is similar to the first as to the statement of facts, and alleges the negligence as follows: "Plaintiff avers that defendant's employes in charge of defendant's said train discovered the said Louisville & Nashville train moving over said railroad crossing; but, owing to the willful, wanton, or intentional negligence of said employe in charge of defendant's train, the said train ran forward without stopping until it ran into and collided with the engine upon which plaintiff's intestate was riding, causing the injuries to plaintiff's intestate as heretofore set out, and causing his death." For the facts in the case, see former report of the case, referred to in the opinion.

The following charges were refused to the defendant: (6) "There can be no wantonness on Mosby's part, under the evidence, unless Bryan failed to stop his engine within 100 feet of the crossing." (7) "There is no evidence of wantonness in this case, if you believe from the evidence that Bryan's engine stopped for the crossing, and proceeded across the crossing as testified to by plaintiff's witnesses." (12) "There can be no wantonness on Mosby's part in going on the crossing, under the evidence in this case, unless Bryan failed to stop his engine within 100 feet of the crossing." (8) "I charge you that, under the evidence in this case, you must find that plaintiff's intestate was guilty of contributory negligence." (9) "Under the evidence in this case, plaintiff's intestate was guilty of contributory negligence, which was the proximate cause of the injury which is alleged to have caused his death, and plaintiff cannot recover under the first count of the complaint." (11) "It was the duty of plaintiff's intestate to know that the crossing was clear before he undertook to cross, and not to proceed until he knew the way was clear; and if he failed in this duty, and was thereby injured, he was guilty of contributory negligence, and plaintiff cannot recover in this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

suit." (13) "If the jury believe from the evidence that defendant's engineer was not aware of the proximity of the Louisville & Nashville train until it was so close to him as to be about to strike him, and that as soon as he discovered the peril he applied the emergency brake and did all he could to avoid the injury, he was not guilty of wanton, reckless, or intentional negligence, and the plaintiff cannot recover in this suit." (14) "I charge you that, before you can find a verdict in favor of the plaintiff, you must be reasonably satisfied from all the evidence in this case that defendant's engineer, Mosby, ran his train against the engine upon which plaintiff's intestate was riding with the consciousness that the act which he was committing would likely result in death or injury to the plaintiff's intestate or some other person on the train or engine of the Louisville & Nashville Railroad Company."

Weatherly & Stokely, for appellant. Frank S. White & Sons, for appellee.

ANDERSON, J. This is the third appeal in this case, it being reported first as Southern R. R. Co. v. Bryan, Adm'r, 125 Ala. 310, 28 South. 445, and the second time as Southern R. R. Co. v. Bonner, Adm'r, 141 Ala. 517, 37 South. 702. The only counts considered by the jury, upon the trial from which the present appeal is had, are 1 and 4, as all others were eliminated by pleading or special instructions. It was held on the second appeal (141 Ala. 517, 37 South. 702) that there was evidence sufficient to submit both counts to the jury, and that the general charge should not have been given as to either count, because of a failure of proof, or as to the first count because of proof beyond dispute of the plea of contributory negligence thereto. After a careful consideration of the argument of appellant's counsel and the evidence, we are of the opinion that the former holding is sound, and find no such change of the facts upon the last trial as would justify the general charge for the defendant as to either count, either upon failure of proof as to the allegations or because of undisputed proof of contributory negligence.

It is insisted, among other things, by appellant's counsel, that defendant was entitled to the general charge as to the first count because of a variance; that the count avers that intestate's death was caused by the negligence of defendant's employes, who were operating defendant's said train, while the proof fails to show negligence on the part of the conductor or all of the employes who were operating said train. We do not think that the complaint charges joint negligence, and that proof of negligence of any one of them would be a compliance with the averment. The cases cited by counsel are not in point as to fact or principle.

Assignments 6, 7, and 12, relating to unnumbered refused charges, which we number 6, 7, and 12 for convenience, are without merit, and comment is useless.

There was no error in refusing charges 8 and 9, requested by the defendant. They charged that the intestate was guilty of contributory negligence, and under the evidence it was a question for the jury.

Charge 11, requested by the defendant, was properly refused. If not otherwise bad, it instructed a finding for the defendant, as to the entire complaint, upon the proof of contributory negligence, and therefore ignores the wanton count of the complaint.

Charge 13, refused the defendant, was properly refused. If not otherwise bad, it instructs a finding for the defendant if there was no wantonness, and ignores the simple negligence count. Charge 14 is subject to the same criticism.

We do not think that the trial court erred in permitting counsel to ask the witness Lawrence the question, "State whether you listened carefully or not, when you stopped at the crossing," and, "State whether or not you looked carefully." They did not call for such an opinion or conclusion as to render them improper. Nor do they have to be justified under the theory of a shorthand rendering of facts. They call for the mere bald statement of a fact, and to which any witness with the God-given senses can testify without having to resort to an opinion or conclusion. Some of the courts have gone very far in holding witnesses down to the narration of details, and have in many cases discounted the statement of a result from concurrent or collective facts, to the extent of delaying and complicating, if not defeating, justice. The rule, however, has gone its limit in this state, and we are not disposed to extend it to a condemnation of the present questions, which we think were legitimate and proper. In laying a predicate for proof of lost documents, it is natural and proper to ask if diligent and careful search was made, and we think any witness should be allowed to testify that he looked carefully, or listened carefully or attentively.

The case of L. & N. R. R. Co. v. Bouldin, 110 Ala. 200, 20 South. 325, comes nearer being an authority against these questions than any we find, unless it may be the case of Springfield v. Ooe, 166 Ill. 22, 46 N. E. 700, and which said last case is severely criticised by Mr. Wigmore. Note to section 1951, p. 2593, vol. 3, Wigmore on Evidence. This Bouldin Case, supra, may be differentiated, however, from the case at bar upon the idea that the question in that case called for the opinion of the witness as to what constituted ordinary care during the day. It did not ask if the witnesses were looking carefully at a given time or for a particular object, but whether or not they kept an ordinary lookout that day.

The trial court did not err in refusing the motion for a new trial.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

On Rehearing.

ANDERSON, J. As stated in the original opinion, the Bouldin Case, *supra*, comes nearer being an authority against the two questions asked the witness Lawrence than any Alabama cases cited, and which, we think, can be and was differentiated from the present case. We will not undertake to comment on the cases cited in appellant's original brief, but repeat that none of them go as far as the Bouldin Case in support of appellant's contention.

The question in the case of Birmingham R. R. v. Martin, 148 Ala. 8, 42 South. 618, called upon the engineer to testify as to whether or not he carefully discharged his duties in and about the handling of the engine as he went along by and left Twenty-Fourth street; not whether or not he used his sense of sight and hearing at a particular time. The question condemned in the case of Birmingham R. R. v. Baylor, 101 Ala. 498, 13 South. 793, called for the mere opinion of the witness as to the safety of the switch, and not whether or not he carefully looked at it. The question in the case of Tanner's Ex'r v. Louisville & N. R. Co., 60 Ala. 621, called upon the witness to state that he used all the means he had to stop the train; in other words, whether or not, and how, he discharged his duty.

The question here merely called for the personal observation of the witness—whether or not he looked carefully and listened carefully at a particular place and particular time. It was not even a shorthand rendering of collective facts, based upon personal observation, and which has been justified by this court (A. G. S. R. R. v. Yarbrough, 83 Ala. 242, 3 South. 447, 3 Am. St. Rep. 715), but was the mere narration of a single fact that he looked carefully and listened carefully at a particular place and time. If he did not look or listen carefully, he could have been and was tested upon the cross-examination. Moreover, he had already stated, upon the direct examination as to the surrounding conditions and the directions, that he looked, and we do not think the trial court committed reversible error in permitting him to state that he looked and listened carefully after his train stopped and before proceeding to cross the defendant's track. This was a fact which the plaintiff had the right to prove, and there was no other or better way to have done so.

The application is overruled.

WHITE v. LEE (No. 14,551.)

(Supreme Court of Mississippi. May 2, 1910.)

1. BROKERS (§ 96*)—AUTHORITY TO COLLECT PURCHASE PRICE.

Where an agent is employed merely to negotiate a sale of real estate, with no power to convey, he has no authority to collect any part of the price, although he is instructed by his principal to fix the trade so that the purchaser could not back out.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 138; Dec. Dig. § 96.*]

2. PRINCIPAL AND AGENT (§ 150*)—LIABILITY OF PRINCIPAL.

A principal cannot be made liable for the act of his agent, unless such act is within the ordinary and usual scope of the actual or apparent authority of the agent, and an agent cannot enlarge his authority by unauthorized acts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 557; Dec. Dig. § 150.*]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action by J. H. Lee against J. M. White and another. Judgment for plaintiff, and defendant White appeals. Reversed and remanded.

Bourdeaux & Venable, for appellant. Bas-kin & Wilbourn, for appellee.

MAYES, C. J. J. H. Lee brings this suit against J. M. White and N. J. Sheely for the purpose of recovering the sum of about \$200. While the suit is nominally against both, it is really a suit against White. The substantial facts are about as follows:

It seems that J. M. White owned a life interest in a certain tract of land located in Alabama, near which place Mr. Lee lived. It is claimed by Lee that White authorized Mr. Sheely to act for him as his agent in negotiating a sale of his interest in this property, and it is claimed by Lee that Sheely did act as agent, and contracted to sell the property to him for a certain price and on certain terms, agreed upon and consented to and ratified by White. The testimony shows that at or about the time Sheely negotiated the trade with Lee, claiming to act as agent for White, he collected from Lee the sum of \$200 as a payment on the purchase price. This \$200 was appropriated by Sheely to his own use, and it is claimed by him that it was done with the consent of Mr. White, and was a part of the commissions agreed to be paid to him by White for negotiating the sale. White denies he knew that Sheely had collected the \$200, and denies that he had ever given Sheely any authority either to collect the \$200 or to represent him in negotiating a sale of the property. In short, White denies the agency of Sheely in toto. White refused to complete the trade negotiated by Sheely, whereupon Lee sues both White and Sheely to recover the \$200. All transactions were shown to be verbal, and it is also shown that Sheely is insolvent.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The testimony in the case is conflicting, and the jury might have found a verdict in favor of either party. In this condition of the testimony, the court gave the seventh instruction, which is as follows, viz.: "The court charges the jury that every agent is impliedly authorized to do all acts that are usual and customary to effectuate the real purpose of the agency; and if the jury believe from the evidence that White desired and requested Sheely to fix the trade so Lee could not back out, and that in collecting the \$200 and receipting for it Sheely was acting in good faith, for and on behalf of White, with a view of binding the trade, and that the collection of the \$200 was a reasonable precaution on the part of Sheely in the interest of White, then Sheely was authorized to collect it, in law, whether expressly authorized by White or not."

This instruction does not correctly announce the law. If it be conceded as a matter of fact that White had employed Sheely to act as his agent, the record conclusively shows that no power of attorney had been given Sheely to make any conveyance of the property, either for cash or on credit. If Sheely had any authority to act for White, as the record now stands, it was a mere oral authority to negotiate the sale, which in itself did not carry with it any right impliedly to collect any part of the purchase money. In order to make a binding contract of sale, it was not necessary for Sheely to collect any part of the purchase money, and, even if White had directed Sheely to fix the trade so as to be binding, unless he had given him authority to collect a part of the purchase money, such an instruction would not have included this authority. Where one appoints an agent to sell lands merely, it seems to be well settled by the authorities that such agency does not carry with it any implied authority to collect payments. The mere fact that one employs an agent to sell lands does not imply any authority to collect the purchase money or to make the conveyance. Such authority must be expressly given. An agent can make a binding contract for his principal to convey, without authority to either collect the purchase money or make the actual conveyance. Again, the owner of land may be willing to trust an agent to negotiate a binding trade, but at the same time be unwilling to trust the agent to collect the purchase price or make the conveyance. Such rights must be left in the principal, unless expressly delegated to the agent. See 31 Cyc. 1368, and authorities.

The seventh instruction is totally wrong in its announcement of the law, even if White did desire Sheely to make a binding trade, and so instructed Sheely. This instruction and desire was no warrant for Sheely's act in collecting any part of the purchase money. The instruction practically tells the jury

that it does not make any difference whether White had authorized Sheely to collect this money or not, yet if Sheely did exceed his authority and collect it anyway, believing that such course was necessary in order to make a binding trade, then Sheely had a right to collect it, and if he misapplied it White is responsible. No agent can increase and enlarge his authority by unauthorized acts. The principal cannot be made liable for the act of the agent as regards third persons, unless the act of the agent is within the ordinary and usual scope of the actual or apparent authority of the agent. When the agent is employed merely for the purpose of negotiating a sale of real estate, with no power to convey, such agency carries with it no apparent authority to collect the purchase price. It would seem that the mere fact that it must necessarily have been known to Lee that Sheely had no power of attorney to convey was bound to put him on notice of the fact that he could not collect the purchase price.

Reversed and remanded.

SOUTHERN R. CO. v. PITTMAN et al. (No. 14,470.)

(Supreme Court of Mississippi. May 2, 1910.)

1. RAILROADS (§ 400*)—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—LAST CLEAR CHANCE—QUESTION FOR JURY.

Where an engineer in rounding a curve sees a man on a trestle 315 yards ahead of him, the trestle being 248 feet long and from 12 to 20 feet high, and the engineer blew his whistle, and the person on the track attempted to reach the end of the trestle, where he could leave the track, and the engineer did not apply the emergency brakes until the engine had reached the approach to the trestle, and less than 248 feet from where the person was subsequently killed by the engine, the question whether the engineer exercised reasonable care after discovering the peril was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1375; Dec. Dig. § 400.*]

2. RAILROADS (§ 390*)—NEGLIGENCE—LAST CLEAR CHANCE.

The servants of a railroad company are not bound to keep a lookout for trespassers; but if they see one, and appreciate his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, then they, in turn, must exercise reasonable care to prevent injury to him.

[Ed. Note.—For other cases see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

Appeal from Circuit Court, Montgomery County; G. A. McLean, Judge.

Action by Zilpha Pittman and others against the Southern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Catchings & Catchings, for appellant. Hill, Knox & Willburn, for appellees.

MAYES, O. J. There can be no disputing the fact that this old negro, 73 years of age,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was guilty of negligence in venturing on a railroad trestle 248 feet long and from 12 to 20 feet high. Had accident resulted to him solely because he went upon the trestle, undoubtedly he could not have recovered therefor. But we do not conceive that to be the question in this case. Even trespassers on railroad tracks cannot be recklessly or wantonly injured; but, when seen in a position of danger, reasonable care must be exercised by the railroad to prevent the injury. Without attempting a rehearsal of all the facts in this case, we will review a few points indisputably shown by the testimony, in order that we may determine whether or not it was a question for the jury to determine whether such reasonable care was exercised by the railroad company.

The engineer running the train that killed Jesse Pittman had been on that road for 19 or 20 years. He knew of this trestle, which was 248 feet long and from 12 to 20 feet high. He saw the deceased on this trestle as he turned the curve, some 315 yards away. The train was running at 35 or 40 miles an hour. To use the exact language of the engineer, he says: "As I rounded the curve (shown by the testimony to be about 315 yards distant) I realized that he was on the trestle. I blew my whistle to let him know I was coming. He had his back to me, and when I blew my whistle he mended his gait. He did not run, but kind of hopped along; kind of trotted. He did not exactly run, and I thought he was trying to make the end of the trestle, and in my judgment I did not think he could make it, and I then applied my emergency brakes." It fully appears in other testimony that the emergency brakes were not applied until the engine had reached the approach to the trestle, and less than 248 feet from where deceased was killed; it being impossible to come to a stop in less than 300 feet. In short, although the engineer first saw deceased 315 yards from where he was killed, on a trestle from 12 to 20 feet high, and running for no purpose, apparently or rationally, but to seek a place of safety, no effort was made to stop the train until it was manifest that the old man could not reach the end and in this way gain a place of safety; it then being too late to stop before striking him.

The question in this case is, In view of all the facts in this record and known to the engineer, did he exercise reasonable care to avert the accident? That the position of the party killed was a perilous one all mankind will agree. That the engineer knew of this position is testified to by him. Then the question is, Did he exercise reasonable care? We think this question should have gone to the jury, and, since their finding is against the idea that reasonable care was exercised, we do not feel warranted in disturbing their

finding. The case of *Christian v. Railroad Co.*, 71 Miss. 237, 15 South. 71, is directly in point and controls this case. In cases of this character the court says: "The true rule is that the servants of the company are not bound to keep a lookout for trespassers; but if they see one, and appreciate his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, then they, in turn, must exercise reasonable care to prevent injury to him; and what is such reasonable care is a question of fact, determinable by the circumstances. *Jamison v. Railroad Co.*, 63 Miss. 33; *Railroad Co. v. Cooper*, 68 Miss. 368 [8 South. 747]; *Railroad Co. v. Williams*, 69 Miss. 631 [12 South. 957]; *Railroad Co. v. Watly*, 69 Miss. 145 [13 South. 825]."

Affirmed.

VICKSBURG WATERWORKS CO. v. FORD. (No. 14,233.)

(Supreme Court of Mississippi. May 2, 1910.)

1. JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—AMOUNT IN CONTROVERSY—SPLITTING DEMANDS.

One cannot split up a single demand, exceeding \$200, and therefore in excess of the jurisdiction of a justice's court as limited by Const. 1890, § 171, into several sums, so as to give jurisdiction to a justice's court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 168, 169; Dec. Dig. § 44.*]

2. JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—AMOUNT IN CONTROVERSY—ABANDONMENT OF PART OF CLAIM.

Where a waterworks company presented to a customer an account for \$199.44 for water rentals and \$3.50 for repairs of water meter, and the item for repairs was stricken from the account in acknowledgment of the justice of the claim of the customer that he did not owe it, the act of the company amounted to an acquittance of its demand for \$3.50, so that the account was within the jurisdiction of a justice's court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 170; Dec. Dig. § 44.*]

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

Action by the Vicksburg Waterworks Company against E. Ford. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded.

The Vicksburg Waterworks Company, appellant, sued the appellee, E. Ford, in the court of a justice of the peace for \$199.44 for water rentals, covering a period from June 30, 1903, to July 24, 1907. There was a judgment by default for the amount sued for, with costs. From this judgment, Ford appealed to the circuit court of Warren county. On the trial of the cause in the circuit court, it developed in the testimony that on the same day suit was brought before the justice of the peace, and perhaps a few hours before, the appellant presented this account to the appellee for payment, at which time the

amount of the account was \$202.94; that the last item on the account was \$3.50, repairs for the water meter, by which the water was measured which went into Ford's house; that this item increased the amount of the account from \$199.44 to \$202.94; that Ford disputed this item strenuously, claiming that the meter did not belong to him and he was not liable for repairs to it. This item for repairs to the meter was then stricken off of the account, leaving the amount \$199.44, for which the suit was brought. Mr. Crumpler, the manager of the waterworks, gives as a reason (which is undisputed) for striking this item off of the account that Ford strenuously denied liability, and because Mr. Willis was the owner of the house, and of the meter which was repaired, and perhaps liable for the repairs to the meter, instead of Ford. The court, after hearing the testimony, dismissed the suit in the circuit court, because the justice of the peace was without jurisdiction, on the idea that the real claim or demand sued for was \$202.94, instead of \$199.44. From that judgment the Vicksburg Waterworks Company prosecuted this appeal.

Bryson & Dabney, for appellant. S. S. Hudson, for appellee.

ANDERSON, J. (after stating the facts as above). Section 171 of the Constitution, which provides for a competent number of justices of the peace, their qualifications, term of office, etc., contains this language: "The jurisdiction of justices of the peace shall extend to causes in which the principal amount in controversy shall not exceed the sum of \$200," etc. It is settled in *Pittman v. Chrisman*, 59 Miss. 124, and many other cases by our court, that a plaintiff cannot split up a single demand into several sums, so as to thereby give the justice's court jurisdiction of its several parts. In *McLendon v. Pass*, 66 Miss. 110, 5 South. 224, the court used this language: "One may have a single right of action embracing many items, or he may have a separate right to sue for each of several demands. In one case, he must recover in one action; in the other, he may sue in separate suits for each demand." The justice's court is without jurisdiction where the right of action or demand is more than \$200. A plaintiff will not be permitted, in order to defeat the jurisdiction of the circuit court, to split up his cause of action or demand, so as to give the justice's court jurisdiction.

It is contended on behalf of the waterworks company the striking from the account sued on the item of \$3.50 for repairs to meter was not a splitting of the cause of action, because this was a separate and independent transaction from the balance of the account, which was for water rentals. In our view it is unnecessary to decide this question. The uncontradicted testimony shows that the item

of \$3.50 for repairs to the meter was stricken from the account in acknowledgment of the justice of the claim by Ford that he did not owe it. It amounted to an acquittance by the waterworks company of that much of their demand against Ford. Under the circumstances of this case, another suit could not afterwards be brought for this \$3.50. There was left in controversy in this case only \$199.44.

Reversed and remanded.

MALAGA PACKING CO. et al. v. THREEFOOT BROS. & CO. (No. 14,573.)

(Supreme Court of Mississippi. May 2, 1910.)

SALES (§ 418*)—SALES F. O. B.—DISREGARDING SHIPPING ORDERS—LIABILITY OF SELLER.

Though the purchaser of goods, bought f. o. b. at place of shipment, has the right to direct the route over which they shall be shipped, the seller, disregarding his directions and shipping over another line, is liable only for the consequent increase in freight, and not for delay in transportation; there being no evidence that the goods would have reached destination sooner, had they been shipped over the line directed, but rather to the contrary.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.*]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action by Threefoot Bros. & Co. against the Malaga Packing Company and others. Judgment for plaintiffs. Defendants appeal. Reversed and remanded.

Appellant, the Malaga Packing Company, at the time of the transactions involved in this suit, was engaged at its place of business in Malaga, Cal., in the sale of fruits. The appellees, Threefoot Bros. & Co., were wholesale grocery merchants at Meridian, Miss. On the 25th day of May, 1907, Threefoot Bros. & Co. bought from the Malaga Packing Company a lot of raisins, and on July 24, 1907, they bought a lot of prunes. These purchases are evidenced by written contracts, which are identical, except as to the fruits bought and the dates. These contracts provide that the goods shall be shipped "on or before October 20, 1907," and contain this further stipulation: "Seller not liable for nondelivery of goods on this contract, if caused by destruction of packing house or other unavoidable casualties. It is further stipulated that, should seller be delayed in the fulfillment of all or any portion of this contract by strikes among employes, or inability to secure cars from Southern Pacific Railroad Company for use at Malaga, or by the elements, then the time herein fixed for the fulfillment of this contract shall be extended for a period of time to that lost by reason of any or all of the causes aforesaid." The price was "f. o. b. coast common shipping points."

In compliance with these contracts as to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

date of shipment, the Malaga Packing Company on October 20, 1907, shipped the goods over the Santa Fé Railroad. It is shown that the usual time between Malaga, Cal., and Meridian, Miss., under ordinary conditions, is from 15 to 20 days. However, this shipment did not reach Meridian until about December 2, 1907. Threefoot Bros. & Co. show that some time before October 20, 1907, they wrote the Malaga Packing Company, directing them to make this shipment over the Southern Pacific Railroad to New Orleans, and thence by the New Orleans & Northeastern to Meridian. This letter the Malaga Packing Company deny receiving. Threefoot Bros. & Co. claim that they had resold these goods to their retail customers, and on account of the delay could not carry out their contracts with them, and were damaged in the sum sued for. There was a verdict and judgment in favor of Threefoot Bros. & Co. for \$343.55, from which this appeal is prosecuted.

Testimony was introduced on behalf of the Malaga Packing Company, which was not controverted, showing that during the months of October and November, 1907, the business on the Southern Pacific and other railroads leading out of Malaga, Cal., was so congested, and cars were so scarce, and their movement so slow, that the time of shipment between that place and points east of the Mississippi river was from 40 to 50 days, and sometimes longer; that from October 3 to October 25, 1907, they were able to procure only four cars from the Southern Pacific Railroad for the shipment of goods, two of which were shipped to Memphis, Tenn., and were about 40 days en route; that on October 20, 1907, when the goods in question were shipped to Threefoot Bros. & Co., and for some time prior thereto, cars could not be procured from the Southern Pacific Railroad; that in order to ship these goods within the time provided by the contract they had to cart them something over two miles to the Santa Fé depot, and ship them over that railroad, the expense of which they paid themselves, amounting to about \$15. There is nothing in the record to show that if these goods had been shipped over the Southern Pacific Railroad, instead of the Santa Fé, they would have reached Meridian earlier than they did. In the plaintiffs' bill of particulars of the amount sued for, is an item of \$81.76, overcharge in freight. Mr. Threefoot, a member of the firm of Threefoot Bros. & Co., testified that he paid this amount of freight more than he would have been required to pay had the goods been shipped according to his directions over the Southern Pacific Railroad, instead of the Santa Fé; that he knew the freight tariffs over that road, and the freight on these goods would have been that much less, had his routing instructions been obeyed.

F. V. Braham, for appellants. Baskin & Wilbourn, for appellees.

ANDERSON, J. (after stating the facts as above). Assuming everything to be true, favorable to appellees' case, which the testimony tends to establish, still the court should have given a peremptory charge to the jury to return a verdict for the appellants, except as to the item of \$81.76, the alleged overcharge or difference in freight rates over the Southern Pacific and Santa Fé Railroads.

Undoubtedly the purchaser of goods, bought f. o. b. cars at place of shipment, has the right to direct the route over which such goods shall be shipped. How were Threefoot Bros. & Co. damaged by a failure on the part of the Malaga Packing Company to comply with the instructions to route these goods over the Southern Pacific Railroad? It is clear from the testimony that the delay in transit was not caused by a violation of these instructions. The undisputed testimony shows that the goods were shipped at the time provided for in the contract, and that at that time it was impossible to procure cars from the Southern Pacific Railroad, and the only way open to ship was over the Santa Fé. There is not only no testimony in the case to show that the goods would have reached Meridian sooner via the Southern Pacific, but, on the contrary, the uncontradicted testimony of appellants tends to show that, had the shipment been delayed until cars could be gotten over that road, the delay would have been longer than it was. There was no issue of fact for the jury to pass on, except the question of difference in freight. That question alone, on another trial, should be submitted to the jury.

If Threefoot Bros. & Co. instructed the Malaga Packing Company to route these goods via the Southern Pacific Railroad, and they failed to do it, and it is shown that the freight on the goods was more via the Santa Fé than via the Southern Pacific Railroad, then they would be entitled to recover that difference.

Reversed and remanded.

BRATTON v. HOWARD. (No. 14,533.)
(Supreme Court of Mississippi. May 2, 1910.
Suggestion of Error Overruled
May 16, 1910.)

CONTRACTS (§ 245*)—MERGER OF NEGOTIATIONS IN CONTRACT.

Plaintiff submitted a bid of \$3,820 to do work according to plans and specifications calling for a building and grading, the bid specifying that he would include therein all grading, if not exceeding a certain number of yards, and that if it exceeded or was less than that quantity he was to receive or make an allowance of a certain amount per yard for the excess or deficit, as the case might be. The bid was not accepted at the time, but a month later a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

written contract was made for his doing the work for \$3,829, not incorporating his bid, and making no stipulation as to quantity of grading. *Held*, that the negotiations were merged in the contract, and the provision of the bid as to the number of yards of grading did not become part of it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

Appeal from Circuit Court, Warren County; H. O. Mounger, Judge.

Action by Richard B. Howard against Theodore D. Bratton, President, etc. Judgment for plaintiff. Defendant appeals. Reversed and dismissed.

Dabney & Dabney, for appellant. S. S. Hudson, for appellee.

MAYES, C. J. We do not deem it necessary to restate the facts of this case to any great length. In brief, the facts stated in the declaration are about as follows: The Trustees of the Protestant Episcopal Church of the Diocese of Mississippi, the appellant being the president of same, owned a certain tract of land in Warren county, Miss., and desired to build a schoolhouse. To this end the trustees had an architect prepare plans and specifications of same, together with certain designations as to some grading and fills necessary to get the surface of the ground as desired. On the 22d day of May, 1908, in answer to the notifications of the trustees to contractors to appear and submit bids for the work, appellee on that day submitted a bid for the work at the price of \$3,829. In the bid submitted on above date appellee specified in the bid that he would include in the bid all grading to be done, provided it was not more than 1,200 yards cut and 1,500 yards fill, and concluded the bid by stating that, if the cuts and fills fell short of the above quantity or exceeded it, he was to receive 22 cents per yard for any excess, and, if it fell short of the above quantity, then the trustees were to receive credit on the amount of the above bid for 22 cents per yard for all that it lacked. This bid was not accepted at the time it was made, but about a month later appellee signed a contract with appellant, agreeing to do the work for the above amount; but in this contract nothing is said as to any quantity of grading to be done or cuts to be filled, further than the plans and specifications provide for, and no attempt is made to place in the contract any such stipulations as to quantity of grading as was contained in the proposal of May 22d. The appellee completed the work according to plans and specifications, and after doing this, and receiving the \$3,829 named in the contract as the price to be paid for the work done, demanded of appellant an additional sum of \$629.42, claiming that the dirt he was required to deal with in making the grading and fills amounted to 2,861 yards above the amount

specified in the bid of May 22d. Appellee, therefore, alleges that the bid made on the 22d day of May became and was a part of the contract of June 22d, and sues for above amount; that is to say, for \$629.42, being the amount that 2,861 yards of dirt would amount to at 22 cents per yard for removal.

The declaration stating the above facts was demurred to, and demurrer overruled. There was other pleading in the cause; but we deem it unnecessary to follow further the course of the pleading, since under our view the demurrer settles the case. All previous negotiations became merged in the contract of June 22d, and, since the particular feature of the negotiation contained in the bid of May 22d was not included in the contract, it is just as if it had never occurred. The contract alone speaks all the enforceable provisions of same, and all liability on account of this contract must be determined under it. The liability here claimed grows out of the claim that the bid became a part of the contract, though the bid was made a month before the contract was signed, and never incorporated in it. This contention has no merit.

The demurrer to the declaration should have been sustained, and declaration dismissed; and this order is directed to be made here.

Reversed and dismissed.

GUEST v. STATE. (No. 14,455.)

(Supreme Court of Mississippi. May 2, 1910.)

1. HOMICIDE (§ 340*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the sole issue was whether accused or a third person inflicted the fatal wound, the error in an instruction that, if accused killed decedent without authority of law and not in necessary self-defense, he was guilty of manslaughter as charged, arising from the omission of the words "without malice" and "in the heat of passion" in defining the offense defined by Code 1906, § 1236, was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. HOMICIDE (§§ 11, 14, 35, 39*)—"MURDER"—"MANSLAUGHTER"—DISTINCTION.

The chief distinction between "murder" and "manslaughter" is deliberation and malice in murder, and the want thereof in manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 19, 56, 59; Dec. Dig. §§ 11, 14, 35, 39.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727; vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

3. CRIMINAL LAW (§ 699*)—TRIAL—ARGUMENT OF PROSECUTING ATTORNEY.

District attorneys are as subject to restraint by the court in their argument as other members of the bar.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1655; Dec. Dig. § 699.*]

4. HOMICIDE (§§ 203, 213, 214*)—DYING DECLARATIONS—ADMISSIBILITY.

A dying declaration, to be admissible, must have been made under the realization of im-

pending death, and must have been the utterance of a sane mind, and must be restricted to the homicide and the circumstances immediately attending it and forming a part of the res gestae.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430, 443, 448-450; Dec. Dig. §§ 203, 213, 214.*]

5. HOMICIDE (§ 215*)—DYING DECLARATIONS—ADMISSIBILITY.

A dying declaration, or a part of it, is not admissible, unless it would be competent and relevant if it were the testimony of a living witness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456; Dec. Dig. § 215.*]

6. HOMICIDE (§§ 216, 218*)—DYING DECLARATIONS—ADMISSIBILITY.

As a preliminary question, the admissibility of a dying declaration is determined by the court, and the degree of proof required to establish that the declarant realized he was in extremis is such as to exclude all reasonable doubt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 457-459; Dec. Dig. §§ 216, 218.*]

7. HOMICIDE (§ 203*)—DYING DECLARATIONS—ADMISSIBILITY.

Where one stabbed with a knife between the third and fourth ribs, about two inches above the heart, died 14 days thereafter from the wound, and during his entire sickness he had a fixed conviction that he would die, and never expressed any hope of recovery, and he was during his sickness of sane mind, his statement as to the infliction of the wound was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 432; Dec. Dig. § 203.*]

Appeal from Circuit Court, Chickasaw County; Jno. H. Mitchell, Judge.

Vester Guest was convicted of manslaughter, and he appeals. Affirmed.

Knox & Busby, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

McLAIN, C. At the October term, 1909, of the circuit court of the Second district of Chickasaw county, the appellant, Vester Guest, was tried, convicted, and sentenced to the state penitentiary for a term of 15 years, upon a charge of manslaughter, from which judgment and sentence he prosecutes this appeal. To have a clear conception of the questions of law presented by this appeal, we deem it necessary to give a brief statement of some of the facts.

On July 4, 1907, Jim Ward, the deceased, and his brother, Ben Ward, along with their families were returning home from a picnic, and while en route the two brothers, Jim and Ben Ward, became involved in a fist fight, and before the fight ceased Vester Guest, the appellant, a brother-in-law to Ben Ward, came upon the scene, and at a certain stage of the difficulty it is alleged that he ran up behind the deceased, Jim Ward, at a time when the two brothers seem to have been separated, and stabbed him with a knife, striking him between the third and fourth ribs, in the left side, about two inches above the heart. About 14 days thereafter, Jim Ward, the deceased, died from the result of

this wound. There is much conflicting testimony by the witnesses in giving their version of this difficulty; but we deem it wholly unnecessary to go into the details of it, further than to say that the appellant, Vester Guest, stoutly denied that he was the party who stabbed Jim Ward. Upon the trial of this case his chief effort was to show that the fatal wound was not inflicted by him, but, on the contrary, was done by Ben Ward, the party who was engaged in the fist fight with Jim Ward, the deceased. This was the sole issue in this case before the jury.

We have thoroughly considered the record in this case, and so far as the facts are concerned the jury was, in our opinion, fully warranted in returning a verdict of guilty. While appellant assigned many errors, there are only three that are seriously pressed and discussed in counsel's brief.

Appellant earnestly and seriously contends that the instruction, the only one asked by the state, is fatal error. The instruction reads: "The court charges the jury that if you believe from the evidence beyond a reasonable doubt that the defendant stabbed and killed the deceased, without authority of law and not in necessary self-defense, you should find the defendant guilty as charged." All of the instructions for the defendant are the converse of the state's instruction. One of the instructions for the defendant charges "that if there is any possibility from the evidence that Ben Ward, or any one else than the defendant, stabbed the deceased, Jim Ward, then a reasonable doubt as to his guilt does appear, and under these circumstances it is the duty of the jury to find the defendant not guilty, and the jury under such circumstances should return a verdict of not guilty." The sole issue of this case before the jury was whether Ben Ward or Vester Guest inflicted the fatal wound. The criticism made upon the instruction of the state is that it leaves out the words "without malice" and "in the heat of passion" as defined by section 1236 of the Code of 1906. It is true a man may kill another without authority of law, and not in necessary self-defense, and still not be guilty of manslaughter. As an abstract proposition the instruction is open to criticism, but as applied and interpreted in the light of the facts of this case we do not think the defendant is prejudiced or harmed by the instruction. The chief distinction between murder and manslaughter is deliberation and malice in murder, and the want of deliberation and malice in manslaughter. We cannot conceive how the defendant was harmed or prejudiced by the state's instruction, by leaving out the words "without malice" and "in the heat of passion," when considered in the light of the facts of this particular case.

Complaint is made against some of the expressions used by the district attorney in his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

argument before the jury. District attorneys are subject to restraint by the court as other members of the bar; but upon an investigation of this record it is clear the district attorney did not abuse his privilege in the argument, and it is manifest that he did not exceed the bounds of legitimate debate.

It is contended by the appellant with much zeal that the trial judge committed a fatal error in admitting as evidence the dying declaration of the deceased, to the effect that defendant cut him. When objection was made by the appellant to the introduction of this evidence, the court caused the jury to retire with a view to ascertain and determine for itself whether or not the declaration would be admissible. For this purpose the court examined Dr. Evans, the attending physician, who testified that deceased thought he was severely hurt all the time and claimed that he was going to die. Not at any time did he hold out any hope of recovery, and did not think he was going to get well. He suffered severely all the time, except when under the influence of opiates. Deceased had difficulty in breathing. During his sickness he was conscious and was at himself. Mrs. Mabel Ward testified that, after he was stabbed, "he suffered like he couldn't stand it. He never talked to me like he could get well. He told me several times during his sickness that he was going to die." The court also examined R. A. Ward, who testified that deceased said to him "that he never could get well"; "I am bound to die." He asked deceased, "Do you realize that you are going to die?" and he said, "I am bound to die." He stated, further, that the deceased never at any time expressed any hope of recovery, from the time he was stabbed to the hour of death. It was further shown to the court that the day before he died, on the suggestion of friends to call in another doctor, the deceased stated that it was no use; that he could not do any good; that he was bound to die.

Under this showing, the court, over the objection of the appellant, admitted the dying declaration to the jury. Mrs. Ward and R. A. Ward testified that the deceased told them that appellant stabbed him. The rules governing the admission in evidence of a dying declaration have been announced by this court time and again, and especially are they thoroughly discussed in the case of *Lipcomb v. State*, 75 Miss. 559, 23 South. 210, 230. The recognized rules are: "They must have been made under the realization and solemn sense of impending death. They must have been the utterances of a sane mind. They must be restricted to the homicide, and the

circumstances immediately attending it, and forming a part of the *res gestæ*. A declaration, or a part of it, is not admissible, unless it would be competent and relevant if it were the testimony of a living witness; and great caution should be observed in the admission of dying declarations, and the rules which restrict their admission should be carefully guarded." This court has held, further, "that as a preliminary question the admissibility of a dying declaration is determined by the court, and the degree of proof required to establish that the declarant realized he was in extremis, is such as to exclude all reasonable doubt."

Tested by the foregoing principle, we are of the opinion that the judgment of the court below was right in holding that the foundation was sufficiently laid to admit as evidence the dying declaration of the deceased. Three witnesses testified that deceased had, during his entire sickness, a fixed conviction that he was going to die, and one witness testified that he said, "I am bound to die." There is positive testimony that the deceased, during the entire time of his sickness, was sane. Indeed, it is nowhere hinted or suggested in the record that the deceased was not of sane mind; nor is it suggested in the record anywhere that the deceased, at any time during his illness, had or expressed any hope of recovery. Taking this in the light of the nature and extent of his wound, his physical state, his evident danger, his conduct, the occurrence of death soon thereafter, and all other circumstances connected therewith, we are of the opinion that the trial judge committed no error in admitting as evidence the dying declaration of the deceased.

Taking the record upon the whole, we are of the opinion that the defendant had a fair and impartial trial as guaranteed to him by the laws and Constitution of the state, and we accordingly affirm the judgment.

PER CURIAM. For the reasons set out in the foregoing opinion of the Commissioner, the judgment is affirmed.

HAYNES et al. v. McCASKILL. (No. 14,422.) (Supreme Court of Mississippi. May 2, 1910.)

Appeal from Circuit Court, Noxubee County; Jno. L. Buckley, Judge.

Action between W. N. Haynes and others against A. P. McCaskill. From the judgment, Haynes and others appeal. Affirmed.

T. W. Brame, for appellants. Charles Strong, for appellee.

PER CURIAM. Affirmed.

(126 La.)

No. 17,728.

LEE v. POWELL BROS. & SANDERS CO.,
Limited, et al.

(Supreme Court of Louisiana. April 11, 1910.)

*(Syllabus by Editorial Staff.)***1. APPEAL AND ERROR (§ 1098*)—REVIEW—SUBSEQUENT APPEAL—RES JUDICATA—PERSONS CONCLUDED.**

The judgment on the first appeal of a cause is not res judicata on a subsequent appeal as to one not a party to the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4369; Dec. Dig. § 1098.*]

2. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Where, in an action for injuries to an employé in a sawmill, struck by a log carriage suddenly caused to move, the circumstances showed that the steam was let into the engine moving the carriage, by the lever having been moved, and that the lever moved because the sawyer failed to lock it or locked it imperfectly, the juridical cause of the injury was the negligence of the sawyer and the chain of causation need not be followed beyond that negligent act, unless there was an intervening voluntary act of some person, responsible for his act, but the mere unintentional or accidental act of a third person would not break the chain of causation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 129.*]

3. NEGLIGENCE (§ 56*)—LIABILITY—INTERVENING VOLUNTARY ACT.

One who creates a danger which sooner or later will cause injury, is responsible for the injury resulting, for the juridical cause is the creation of the danger, unless an intervening voluntary act of some person responsible for his act is shown.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

4. MASTER AND SERVANT (§ 245*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant is relieved of the imputation of contributory negligence from obeying an order of his master or the foreman which exposes him to danger unless the risk is so great or the danger so obvious that no prudent person would undertake it even though ordered to do so by his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

5. MASTER AND SERVANT (§ 245*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries to an employé in a sawmill, struck by a log carriage, suddenly caused to move, because of the negligence of the sawyer, the evidence showed that several times, every day, workmen under precisely similar conditions stood in the place where the employé stood, and that the employé occupied the position he did pursuant to the express orders of the foreman, and that no duty devolved on the employé to see that the carriage would not be moved, but that such duty devolved on the foreman, the employé was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

6. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A servant in a sawmill was run over by a log carriage. His hand was badly torn, his right leg was so injured that it was amputated above the knee, his left leg was broken, and

there was little or no hope of that ever being of any service to him, on the ground that the bones would not knit. The bones in both thighs were badly torn. Held, that a verdict for \$15,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 327-385; Dec. Dig. § 132.*]

Appeal from Twelfth Judicial District Court, Parish of Vernon; J. B. Lee, Judge.

Action by Nathaniel E. Lee against the Powell Bros. & Sanders Company, Limited, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 122 La. 639, 48 South. 134.

D. M. Sholars and James R. Monk, for appellant T. C. Wingate. McCoy, Moss & Knox and J. Zach Spearing, for appellants Powell Bros. & Sanders Company, Limited. E. W. Sutherland and T. C. Barret, for appellee W. B. Williamson.

PROVOSTY, J. Plaintiff, 41 years old, had charge, as engineer, of the engine room of the sawmill of the defendant company. The engine room is on the ground floor, below the main floor, on which are the saw and other machinery. The mandrel of the saw having gotten out of order, the small whistle was blown for the engineer to stop his engine, and the large whistle was blown for the mill to shut down for the day. The foreman thought of sending the mandrel to the neighboring town by a train then shortly due. He went downstairs into the engine room, and directed the plaintiff to come upstairs with him and remove the mandrel for shipment. Plaintiff took up the necessary tools and followed. It was no part of his regular work; which was confined to the engine room. To remove the mandrel he had to stand between the two rails along which runs the heavy car by which the log is held and carried to and from the saw. This log carriage is operated by twin engines, one of which serves for its forward movement, and the other for its backward movement. The log carriage is of the type known as "gun-shot," because of the suddenness with which it starts, and the rapidity with which it moves when a full head of steam is turned on. It starts gradually and moves slowly when the steam is fed gradually to the engines. The valve which controls the steam is itself controlled by a lever in the hands of the sawyer. This lever stands out of the floor a few feet from the saw, and is four feet high, and consists of a flat steel bar about half an inch thick and two inches broad, with a wooden handle at the top, and moves back and forth through a slot in the floor. To cut off steam altogether, the lever is put at neutral, and it can be locked there; and all movement on its part, and on the part of the engines and of the log carriage, be made impossible by means of a steel flap hinged to the side of the slot

through which the shank of the lever moves back and forth. The locking with this flap is done by lifting the flap with the hand and putting it in position; and the unlocking by lifting it in the same manner and throwing it back. This flap, when entirely, or properly, on, cannot possibly come off, without being lifted off; for it lies horizontally and therefore is held in position by its own weight; and, furthermore, it fits snug on three sides of the shank of the lever. The plaintiff was standing on the track of the log carriage, where, as already stated, he had to stand for doing the work which the foreman had brought him there to do, and was stooping over the saw, with the foreman at his side, when steam got into the engine in some way, and the car started. It started so suddenly and moved so swiftly that before any one could have cried, "Lookout!" it had passed over both men, knocked away the bump posts and shot out of the mill; and, in its course, had flung the foreman to one side, and dragged plaintiff out of the mill. Plaintiff describes his injuries, as follows:

"It knocked me down and I don't know anything else about it, I don't know when it hit me. Q. What injury was inflicted upon you? A. It broke both my legs and crushed them. My hand was badly torn up all over, you might say. My head was also crushed, and the scalp bruised. It was probably two weeks before I knew how bad I was hurt. I never knew anything when they amputated my leg. Q. Your right leg has been amputated? A. Yes, sir. Q. And what injury was done to your hand? A. The flesh on my right forefinger was cut off from the bone. My finger was drawn back and the flesh between my thumb and forefinger was torn. My cheek bone was also bruised, and the bones in both thighs were badly torn up above the break in my leg. Q. Where was the break in your leg? A. In the left leg it was about seven inches above the knee, say. You might say it is half way between my knee and hip joint. Q. And the right leg was amputated just above the knee? A. Yes, sir. Q. Can you walk at all now? A. No, sir; I can't bear any weight on my leg at all."

At the date of the trial—two years and one month after the injury—plaintiff was still unable to go about otherwise than in a wheel chair; and the evidence shows that there is little or no hope of his remaining leg ever being of any service to him. It seems the bones will not knit. By a first operation the ends were tied together with catgut. About a year later, the bones not having knit, the ends were sawed off for getting a fresh surface, and the two surfaces tied together with wire; with no better success. The wire has had to be removed. A third or fourth operation might prove successful, but the chance is but slender; and, if it should fail, the leg would have to be amputated. Every movement of the limb, or even touching it, causes pain.

Plaintiff sues for \$20,000 damages. The jury awarded \$15,000.

The present appeal is the second in the case. Plaintiff pleads the judgment on the first appeal as *res judicata*.

Clearly there is no *res judicata*, since the defendant company was not a party to the first appeal. See the case reported in 122 La. 639, 48 South, 134.

The negligence charged is in the failure of the sawyer to lock the lever, or to lock it properly, and in the imprudence of the foreman of the mill in exposing plaintiff to the danger.

The defenses are that no one can account for the steam getting into the twin engine, and that no presumption of negligence arises from the bare fact itself, because the doctrine of *res ipsa loquitur* does not apply as between master and servant. And, secondly, that until the steam was shut off entirely at the boilers the track of this car was notoriously a most dangerous place, and that by going upon it without having first shut off the steam at the boilers plaintiff was guilty of contributory negligence.

There is no occasion in this case for having recourse to the doctrine of *res ipsa loquitur*. The circumstances leave no room for any reasonable doubt that the steam was let into the engine by the lever having moved, and that the lever moved because the sawyer failed to lock it, or locked it imperfectly. True, no one saw this; but no other way is conceivable how the steam could have gotten into the engine. Leakage of the valve is suggested; but had the engine been fed by leakage it would have moved slowly, and the movement of the log carriage would have been correspondingly slow, whereas the car started and moved as under a full head of steam. Moreover the valve would thereafter have been found defective, which was not the case. It is further suggested that the valve may have been turned by some shock or disturbance, such as might have resulted from the breaking of a sill or the sinking of the foundation; but as no shock or disturbance of that kind is shown to have occurred, there is not much use of wasting time on that theory. The sawyer had left for parts unknown (with another man's wife) by the time of the trial, and hence did not testify.

The leaving of the lever unlocked would have been so grossly imprudent that it is almost inconceivable that the sawyer should have done it, and the probability is that he went through the movements of putting on the flap, or lock, and thought he had done so, but that he put it on imperfectly; and this is all the more probable from the fact that sawdust had accumulated around there, which may have interfered with the perfect adjustment of the flap, or lock.

What caused the lever to move, after having been left unlocked or insecurely locked, no one knows. The probability is that some one of the workmen, of whom there were several around, clearing away the sawdust and debris, may have inadvertently brushed against, or struck it; or possibly thrown sawdust against it. Indeed, it was so easy to move that for all we know it may have

moved by gravity, if left slightly out of perpendicular. What caused it to move is immaterial. The chain of causation by which responsibility is to be fastened upon the defendant company need not be followed beyond the negligence of leaving it in a condition in which it might move at any time from a thousand accidental causes, or perhaps of its own weight, so that its movement might be expected at any moment. So much so, indeed, that we dare say not one of the workmen knowing it to be in that condition would have been willing to venture to stand upon the track, but would have considered that it was as much as his life was worth to do so. One who creates a danger which thus, as it were, hangs by a thread, and may at any time fall, which is bound sooner or later to fall, is responsible for the consequences of its fall. The efficient or juridical cause of the injury in such a case is the creation of this danger.

For severing the legal connection between the negligence by which such an imminent danger was created and the injury that has resulted from it the intervening voluntary act of some person responsible for his acts would have to be shown. For instance, in the present case, that some one of the workmen, noticing that the lever was unlocked, or insecurely locked, had maliciously pushed it. Nothing of that kind is shown, or even suggested. The mere unintentional, or accidental, act of a third person would not suffice for breaking the chain of causation:

"Nor when a negligence subsequent to that of the defendant is the agent by which the defendant's negligence proves injurious can the subsequent negligence be a bar to the plaintiff's recovery if such subsequent negligence was likely, in the usual and natural order of things, to follow from the defendant's negligence." Wharton, *Negligence* (2d Ed.) par. 145.

But whether the lever was left unlocked or not, and whatever may have caused it to move—unless it should have been the malicious, voluntary act of some person responsible for his acts (and that theory, we repeat, is not suggested)—the defendant company is responsible; for, if we assume that the breaking away of the log carriage was purely accidental (no one responsible for it), the imprudence of going upon the track without having first cut off the steam at the boilers then becomes the proximate or juridical cause of the injury, and for that cause the defendant company is responsible. There can be no question as to the imprudence, or negligence, of the act. Indeed, defendant contends that the danger was so great and evident that plaintiff should not have exposed himself to it even by order of the foreman. Such being the case, the only question must be as to whether the responsibility for having incurred it rests upon plaintiff or upon the foreman, and, through the foreman, for whose acts the defendant

company is responsible, upon the defendant company. The rule in such cases is that the servant is relieved of the imputation of contributory negligence for obeying an order of his master, or of his master's representative, which exposes him to danger, "unless the risk is so great, or the danger so obvious or glaring that no prudent person, in a like situation, would undertake it, even when ordered to do so by his employer." Thompson, *Com. Neg.* (2d Ed.) § 5379. The risk was not so great, or the danger so obvious and glaring, in the present case, that no prudent person would have undertaken it when ordered to do so; for the evidence shows that several times every day, for changing the saw, the workmen of the mill, under precisely similar conditions—that is to say, without the steam having been cut off at the boilers—stand in precisely the place where plaintiff was standing.

The evidence shows conclusively that it would have been much more prudent to have seen to it that the steam was cut off at the boilers. But we think that the duty of doing so devolved upon the foreman, and not upon plaintiff. It was no part of plaintiff's duty. He had nothing to do with the boilers or around them. They were in a separate building. He was under no legal obligation to give thought to the matter. It was the foreman's part or duty. Had plaintiff thought of the matter at all, he would have been perfectly justified in assuming that the steam had been cut off, inasmuch as the signal for its being done had been given. Indeed, his reminding the foreman of the danger, and suggesting to him the advisability of making sure that the steam had been cut off, would have smacked of a lesson to the foreman. The mandrel had to be sent off by the train then shortly due, and it was no time to be standing and considering.

The verdict is perhaps somewhat large, but we could assign no positive reason for reducing it. The injuries are of the gravest character, and are permanent; and, besides, the sufferings have been very great, and plaintiff is destined to continue to suffer.

Judgment affirmed.

(126 La.)

No. 18,033.

STATE v. TENSAS DELTA LAND CO., Limited.

(Supreme Court of Louisiana. March 28, 1910.
On Application for Rehearing,
April 25, 1910.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR (§ 878*)—REVIEW—APPEAL FROM JUDGMENT OF DISMISSAL.

Where plaintiff appeals from a judgment of dismissal, and defendant files no answer asking that the lower court's action in entertaining jurisdiction be also reviewed, such question can-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be considered, and the only subject open to review is the correctness of the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. § 878.*]

2. LEVEES (§ 11*)—DISTRICT LANDS—IMPROPER SALE—SUIT TO AVOID—PARTIES.

Const. art. 239, authorizes the Legislature to create levee districts and to provide for levee commissioners to have charge of the levees of the district. Act No. 59 of 1886 created the Tensas Basin levee district, and provided that lands within the district "shall be and hereby are given, * * * conveyed and delivered" to the board of commissioners thereof, and that a deed thereof should be made to the board upon the registry of which the title to such lands with possession thereof should vest absolutely in the board of commissioners, its successors or grantees, with power to sell or otherwise dispose of such lands. The board was also given power to sue and be sued as to all matters relating to their trust. *Held*, that the board of commissioners could sue to annul an alleged fraudulent sale of such lands by the members of the board and other district officers, and it not appearing that the board had failed or was unwilling to sue, and no co-ordinate power being given the Governor or Attorney General to sue respecting such lands, a suit for such purpose in the name of the state was unauthorized.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 11.*]

Breaux, C. J., and Nicholls, J., dissenting.

Appeal from Seventh Judicial District Court, Parish of Richland; John R. McIntosh, Judge.

Action by the State against the Tensas Delta Land Company, Limited. Judgment of dismissal, and plaintiff appeals. Affirmed.

Walter Gulon, Atty. Gen., and C. J. Ellis, Dist. Atty. (George Wesley Smith and R. G. Pleasant, of counsel), for the State. Farrar, Jonas, Goldsborough & Goldberg and Potts & Bernstein, for appellee.

PROVOSTY, J. Article 214 of the Constitution of 1879 (article 239 of the present Constitution) authorized the Legislature to create levee districts, and to provide for the appointment or election of levee commissioners, who should have charge of the levees of the district; and article 46 of said Constitution (article 48 of the present Constitution) provided that the prohibition against the creation of corporations by special act should not apply to the organization of levee districts. By Act 59 of 1886, the Legislature created the Tensas Basin levee district; that is to say, provided that certain territory, whereof it fixed the limits, should constitute a levee district by that name. And it provided for the appointment of a board of levee commissioners to have charge of the affairs of said levee district; constituted said board a corporation, with all the powers usual to corporations, such as to make contracts, to sue and to be sued, etc.; endowed it with certain special powers, such as to levy taxes, to issue bonds, etc.; and made it a donation of all the public, or state, lands

within the limits of the district, specifying that the donation was made for the purpose of providing the district with funds wherewith to carry out the purposes of its creation. The language of the act is that the lands "shall be and hereby are given, granted, bargained, donated, conveyed and delivered" to the said board of commissioners, and that the State Auditor and the Register of the State Land Office shall make out a deed to the lands in favor of the board, and that upon the registry of the said deed "the title to said lands, with the possession thereof, shall from thenceforth vest absolutely in said board of levee commissioners, its successors or grantees." The act provided further:

"Said board shall have the power and authority to sell, mortgage, pledge or otherwise dispose of said lands in such manner and at such times and for such prices as to said board shall seem proper."

The present suit has been brought by the Attorney General in the name of the state.

The petition, after very full allegations of the provisions of said act, proceeds to allege that the commissioners of said district and certain of the other officers of the district (not named) and the defendants (nine in number, all of them alleged to be nonresidents of this state) entered into a fraudulent conspiracy, whereby all the lands of the said district should be sold to the defendants for a nominal consideration; and that, in furtherance of said conspiracy, the defendants organized, under the laws of the state of Michigan, a limited liability partnership by the name of the Tensas Delta Land Company, Limited; and, in consummation of said conspiracy, the said levee board, on November 9, 1898, executed a deed in favor of said company to all the lands of said levee district—some 885,000 acres—for \$130,000, although the said lands were worth at that time at least \$500,000.

The petition alleges further that:

"By the said fraudulent and corrupt dealings the inhabitants, citizens, and property owners of said levee district and your petitioner have been injured and damaged, and that it is the duty of the Attorney General to take appropriate action through the courts to annul the said fraudulent sale, and to recover for the inhabitants, citizens, and taxpayers of the said levee district, and for your petitioner, the said lands."

The petition further alleges that the said Tensas Delta Land Company has sold to third persons certain of said lands (describing them) and has received the price of said sales, amounting to \$83,355. That there yet remains unsold in the hands of said company 569,680 acres of said lands (describing them), worth fully \$8 per acre.

The petition further avers that the said sale of said lands to the Tensas Delta Land Company, besides being fraudulent, corrupt, and illegal, was a mere disguised donation,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and is null for that reason, and for the further reason of lesion beyond moiety.

The prayer is for citation of the Tensas Delta Land Company, and of the individuals composing said company, through a curator ad hoc, and for judgment annulling the said sale to said company and "decreeing and recognizing the state of Louisiana to be the owner" of all of said lands yet remaining unsold in the hands of said company, and condemning said company to pay petitioner \$83,355, being the price received by said company for those of said lands of which it has disposed, with 5 per cent. per annum interest, etc.

And, in the alternative, should said sale to said company be held not to have been fraudulent, that the same be annulled as having been a disguised donation; and, in further alternative, should said sale be held not to have been a donation, that the same be annulled for lesion beyond moiety.

And for general relief.

To that petition the defendants filed the following exceptions and answer:

"Now, comes James D. Lacey, S. Wood Beal, Thomas Hume, Thomas Friant, Joseph J. Tucker, T. Stewart White, James R. Wylie, Charlotte O. Luce, Morton H. Luce, each and all citizens of the state of Wisconsin; Anton G. Hodenpyl, a citizen of the state of New York; George N. Garvey, a citizen of the state of Tennessee; Gregory M. Luce, a citizen of the state of Alabama; and Victor Thrane, a citizen of Illinois—associated and doing business together as a limited partnership under the laws of the state of Michigan, and under the name and style of 'Tensas Delta Land Company, Limited,' and by such designation made defendants in this cause, and being now and at the time this suit was brought the sole and only members of said partnership, and make this appearance simply and solely for the purposes of this exception, and for exception to so much of the petition of the plaintiff as asks for the appointment of a curator ad hoc, and to the order of the court appointing T. H. McGregor curator ad hoc to represent these defendants; and, without submitting themselves to the jurisdiction of this court for any other purpose whatsoever for ground of such exception, say that these appearers are now, and always have been, since 1898, represented in the state of Louisiana by an agent and attorney, Hon. F. G. Hudson, whose domicile is in the parish of Ouachita; that since that date these defendants have maintained, and now maintain, an office for the transaction of their business in the town of Monroe, in the parish of Ouachita; that public notice of the establishment of this agency and of this office has been published in the official journals of every parish embraced in the Tensas Basin levee district; that these facts were well known to the plaintiff; and that the averment in said petition that these defendants are absent and unrepresented in this state were falsely and fraudulently made for the purpose of giving this court jurisdiction of this cause.

"Wherefore, defendants pray that this exception may be maintained and the appointment of said T. H. McGregor as curator ad hoc to represent these defendants may be canceled, and the services upon him as the representative of these defendants may be quashed and declared null and void.

"And in case the above exception is overruled, and not otherwise, these defendants, under protest and reserving the benefit of said exception and the limited appearance therein made, except and say:

"First. That they cannot be brought into this

court and made defendants by substituted service to answer the demand set up in the petition for the recovery of the sum of \$83,355.03, with 5 per cent. annual interest, being the price alleged to have been received by these defendants for the lands sold by them, because said demand is a personal demand against these defendants, and the prosecution of such a demand against these nonresident defendants by substituted service is in violation of the fourteenth amendment to the Constitution of the United States.

"Second. That if the state has any right, power, interest, or authority to prosecute and maintain this action herein instituted against these defendants, which right defendants deny, then such prosecution can be had and maintained, not in her sovereign capacity and for her purpose as a sovereign state, but only for the sole use and benefit of the 'Board of Levee Commissioners of the Tensas District,' a corporation organized under the laws of the state of Louisiana, and as such a citizen of the state of Louisiana and an inhabitant of the Western district of Louisiana; and that in such capacity the state is merely a nominal party, and the real party in interest is the said 'Board of Levee Commissioners of the Tensas Basin Levee District.'

"And defendants aver that this suit is sought to be prosecuted by the state as a nominal party for the sole use and benefit of said Board of Levee Commissioners of the Tensas Basin Levee District, and aver that it cannot have and maintain such an action in such capacity for the following reasons, to wit:

"(a) That the state has not tendered or offered for and on account of said board to repay to defendants as condition precedent of this action the \$130,000 and interest at 5 per cent. per annum from the date of each payment of the installments thereof paid by these defendants as the purchase price of said lands, nor the taxes and the interest thereon at 5 per cent. per annum from date of the payment thereof, paid by these defendants for the past 11 years to the state, to the board aforesaid, and to the parishes and school districts in which said lands are situated, the amount of which taxes and interest are well known to the state, and which exceed in amount the sum of \$300,000, nor the necessary expenses of preservation of said property, and defendants plead this want of tender in bar of plaintiff's demand.

"(b) That said action is barred by the prescription of one and of ten years in regard to so much of said action as seeks to annul said sale for fraud and as a disguised donation, and by the prescription of four years as to so much of said action as seeks to set aside said sale for lesion beyond moiety, and defendants plead said prescription in bar of plaintiff's demand.

"And in case all of the above exceptions are overruled, and not otherwise, defendants, with full reservation of all of their rights as above set forth, and particularly their limited appearance, and under protest, further plead and say:

"First. That, if it is claimed that this action is brought by the state in her sovereign capacity, then she has no right, power, or authority to prosecute and maintain this action in such capacity, and her petition sets forth no cause of action.

"Second. That, if the state has any authority to prosecute this action in her sovereign capacity as a state, then the Board of Levee Commissioners of the Tensas Basin Levee District is an absolutely necessary party to this action.

"Third. That the state, having created the corporation known as the Board of Levee Commissioners of the Tensas Basin Levee District, and given it full power to sue and be sued, and vested in it full title to the lands granted to it, and full power to sell and dispose of said lands sold by the said board to these defendants, thereby authorized the said board to contract with these defendants in regard to said lands and to sue to recover the same, and, such contracts being made

subject to and in accordance with the powers so granted by the state, it is a violation of that clause of the Constitution of the United States which prohibits any state from impairing the obligation of a contract, and also a violation of the fourteenth amendment of the Constitution of the United States, inasmuch as this defendant is deprived of its property without due process of law, for the state to bring this action in her sovereign capacity as a state, disregarding and violating the charter of the said Board of Levee Commissioners of the Tensas Basin Levee District, and the rights and remedies of these defendants growing out of the contract made by these defendants with said board, by which action of the state these defendants are cut off from the following material and complete defenses to any action brought under the contract aforesaid by said board to set aside the sale of said lands, to wit:

"(a) The prescription of one and ten years against the action to annul said sale for any alleged fraud or as a disguised donation.

"(b) The prescription of four years against so much of said action as seeks to set aside said sale on the ground of lesion beyond moiety.

"(c) The right to demand of their vendor as a condition of any action to annul said sales the tender of the \$130,000 paid as the purchase price of said lands, with interest from the date of the payment, and the tender of the taxes paid by defendants on said land with interest, which taxes and interest exceed the sum of \$300,000.

"(d) The right to demand from their vendor the necessary expense of preservation of said property, which necessary expenses exceed the sum of \$25,000.

"(e) All other defenses personal and peculiar to the relations between the parties as vendor and vendee.

"Fourth. That the action of the state in bringing this suit in her sovereign capacity, if she claims that it is so brought, to recover the lands at issue herein, without tendering or offering to repay to these defendants the \$130,000, with interest, admitted to have been paid by the defendants to the said levee board, the taxes and interest thereon paid by these defendants to the state and to her subordinate divisions, and the necessary costs of preserving the property, is a taking of defendant's property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

"And in case all of the above exceptions are overruled, and with full reservation of all their rights under the said exceptions, and particularly their limited appearance, defendants aver and plead that the plaintiffs' allegations of fraud, misconduct, collusion, and evil-doing set up in the said petition in respect of said sale are so vague, general, insufficient, and inadequate that defendants cannot be called on to answer the same.

"Wherefore, defendants pray that these exceptions may be considered maintained in the respective order in which they are filed, and that the appropriate judgment may be entered accordingly as they are maintained."

On the same day, and at the same time at which the above exceptions were filed, the defendants filed the following petition to remove the cause to the United States Circuit Court for the Western District of Louisiana:

"The petition of James D. Lacey, S. Wood Beal, Thomas Hume, Thomas Friant, Joseph J. Tucker, T. Stewart White, James R. Wylle, Charlotte C. Luce, Morton H. Luce, each and all citizens of the state of Michigan; John C. Ruge, a citizen of the state of Wisconsin; Anton G. Hoenpyl, a citizen of the state of New York; George N. Garvey, a citizen of the state of Tennessee; Gregory M. Luce, a citizen of the state of Alabama; and Victor Thrane, a citizen of the state of Illinois—associated and doing business

together as a limited partnership under the laws of the state of Michigan and under the name and style of 'Tensas Delta Land Company, Limited,' with due respect sheweth:

"That your petitioners are now, and were at the time this suit was brought, respectively citizens of the states of Michigan, Wisconsin, Illinois, New York, Alabama, and Tennessee, as above particularly and in detail set forth, and nonresidents of the state of Louisiana.

"That this action, while prosecuted in the name of the state of Louisiana, is prosecuted for the sole use and benefit of the 'Board of Levee Commissioners of the Tensas Basin Levee District,' a corporation created by Act No. 59 of the Acts of the Legislature of the State of Louisiana for the year 1886, and as such a citizen of the state of Louisiana, and domiciled at Rayville, in the parish of Richland, in the jurisdiction of the Circuit Court of the United States for the Western District of Louisiana, at Monroe, and an inhabitant of said district, which is the district covering the parish of Richland, in the courts of which this suit has been brought, and is now pending. That, being so prosecuted, the state of Louisiana is a nominal party, and the real plaintiff in interest is the said Board of Levee Commissioners of the Tensas Basin Levee District.

"That the object of said suit is to recover from your petitioners, for the sole use and benefit of said levee board, a large body of land, situated in the parish of Richland, sold to petitioners by said levee board, which had full and complete ownership of said lands and power to sell the same, and to recover large sums of money received by your petitioners from the sale by them of part of said lands so bought from the said levee board; the said suit constituting a civil suit, and the amount in dispute exceeding the sum of \$2,000, exclusive of interest and costs.

"That said suit is prosecuted by the state of Louisiana in her own name on causes of action arising out of the contract of purchase and sale of said lands, which causes of action accrue only and solely to said levee board (that board and your petitioners being the sole parties to said contract of sale), and is so prosecuted by the state for the wrongful and fraudulent purpose of attempting to deprive your petitioners, who are citizens of states other than the state of Louisiana, of which state the said levee board is a citizen, of the right to remove said cause into the courts of the United States, where they have a legal and constitutional right to have the said cause heard, and also of the right to make defenses to the said action, which would defeat the same if brought in the name of said levee board, in violation of paragraph 1 of section 10 of article 1, and of the fourteenth amendment of the Constitution of the United States.

"That said suit not only is a civil controversy or suit between citizens of different states, which would originally have been brought in the Circuit Court of the United States for the Fifth Circuit and Western District of Louisiana at Monroe, but the said civil controversy is a case arising under the fourteenth amendment to the Constitution of the United States and under paragraph 1 of section 10 of article 1 of the Constitution of the United States, and that on either or both of these grounds your petitioners are entitled to remove said cause into the Circuit Court of the United States for the Fifth Circuit and Western District of Louisiana at Monroe, and desire so to remove the same.

"Wherefore, your petitioners herewith offer bond in the sum of \$1,000 with good and sufficient security for the entering in said Circuit Court of the United States on the first day of its next session a copy of the record in this cause, and for paying all costs that may be awarded by said Circuit Court if said court shall decide that the case was improperly removed thereto; and your petitioners pray that this honorable court will proceed no further herein, except to make an order for the removal of this

cause to the Circuit Court of the United States, and to accept said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States for the Fifth Circuit and Western District of Louisiana at Monroe; and your petitioners will ever pray."

This petition was sworn to by the resident agent of the petitioners, and was accompanied by a bond for \$1,000.

On November 16th the judge of the court entered an order in these proceedings, approving and accepting the bond and taking the order for removal under advisement.

The defendants filed a copy of the record in the United States Circuit Court, and on December 6, 1909, the Attorney General, acting for the state, appeared in that court and filed a motion to remand the cause to the state court; and on December 15, 1909, filed an amended motion to remand.

On December 16, 1909, the state appeared in this cause in the state court and filed its protest and objection to the removal of said cause to the federal court, and prayed the court to refuse to enter an order of removal, to retain its jurisdiction, and to proceed to trial.

On the same day the Attorney General was heard on this protest, and the court entered an order refusing the order of removal. The court then, over the protest of the defendants, ordered the exceptions taken up, and, after argument by the Attorney General, maintained the exceptions to the right of the state to bring the suit, declining to pass on any of the other exceptions, and reserving the defendants' rights to all of such exceptions. The state has appealed.

In this court the defendants and appellees have filed the following motion to dismiss:

"Now comes the defendants and move the court to dismiss the appeal of the state in this cause, and for ground of dismissal aver:

"That this court has no jurisdiction of said appeal for the reason that this cause was removed by the defendants into the Circuit Court of the United States for the Fifth Circuit and Western District of Louisiana on the 15th day of November, 1909, by the filing in the Seventh judicial district court, for the parish of Richland, a petition and bond for a removal, which bond was approved by the said court.

"That thereafter on December 6, 1909, after the transcript in said cause had been filed in the said United States Circuit Court, the state of Louisiana appeared in said United States Circuit Court in said cause and filed a motion to remand said cause to the state court, and thereafter on December 15, 1909, appeared in said cause and filed an amended motion to remand, all of which will more particularly appear by certified copies of said motions to remand, hereto annexed and made part of this petition for reference and proof in support of this motion.

"That on December 16, 1909, after the appearance aforesaid in the United States Circuit Court, the state, through the Attorney General, appeared in the said Seventh judicial district court and filed a protest and objection to the removal of this cause to the United States Circuit Court aforesaid, and prayed the said Seventh judicial district court to refuse to enter an order removing this cause to said Circuit Court and to retain its jurisdiction of this cause.

"That thereupon the said court, against the protests of defendants, entered an order refusing to transfer this cause to the United States, and took up and tried one of defendants' exceptions, i. e., 'to the right of the state to bring this action,' and dismissed the suit of the state.

"That the whole action of the court in this matter after November 16, 1909, was coram non judge, and void, and this court has no jurisdiction to entertain an appeal from said action by the said Seventh judicial district court.

"Wherefore, defendants pray that this appeal may be dismissed."

A certified copy of the motion of the Attorney General in the United States Circuit Court to remand the cause to the state court is made part of this motion to dismiss. It reads as follows:

"And now comes plaintiff, the state of Louisiana, through the Attorney General of said state, Walter Guion, Attorney General, her attorney and solicitor, and moves and petitions this honorable court to remand this cause to the honorable Seventh judicial district court for the state of Louisiana, in and for the parish of Richland, from which court it was attempted to be removed, for the reason that said cause has been, and is, improperly removed to this honorable court, because this court has no jurisdiction of this suit and action under said attempted removal, and is without jurisdiction to hear and determine the same, for that said suit is a suit brought by the state of Louisiana, the real and actual plaintiff and the party in interest, as plaintiff, and because as such plaintiff, the state of Louisiana, a sovereign state, cannot be brought into, impleaded in, or made a party to this or any suit or cause in this honorable court or any other court of the United States.

"Second. Because this suit is not prosecuted for the use and benefit of the Board of Commissioners of the Tensas Basin Levee District, which is not interested as a plaintiff therein, and which has no pecuniary, proprietary, or other interest in any of the matters and issues involved in said suit as plaintiff, and is, in no way, concerned with, or interested as plaintiff in, the demand contained in the petition filed in said suit in the honorable Seventh judicial district court for the state of Louisiana and parish of Richland.

"Third. That this suit is not one arising under the Constitution of the United States, and that it does not appear by or from the allegations contained in the petition filed herein by plaintiff, and in the statement of the cause of action and claim of plaintiff therein set out, that this suit arises, or that it involves a controversy, under the Constitution of the United States or the amendments thereto.

"Fourth. Because it appears by the record in this case that defendant, the Tensas Delta Land Company, Limited, did, on the same day that it filed in the Seventh judicial district court for the state of Louisiana and parish of Richland the petition filed by it to remove this suit to this honorable court, to wit, the 15th of November, 1909, file certain exceptions to that suit in the aforesaid state court, which, if the same should be maintained by that court, would cause the dismissal of said suit and absolutely defeat the action and suit of plaintiff, the state of Louisiana, and that by filing the same, as was done, defendant accepted and acknowledged the jurisdiction of the aforesaid state court, and by filing said exceptions estopped itself from asking to remove this cause to this honorable court, even if it had a right to do so, which is denied.

"Fifth. That defendant, the Tensas Delta Land Company, Limited, cannot remove this suit to this honorable court on the ground, as

contended by it in its petition for removal, that the Board of Commissioners of the Tensas Basin Levee District is and ought to be the real and actual plaintiff herein, for the reason that said Board of Commissioners of the Tensas Basin Levee District could not be heard in this, or any other court, to bring a suit, such as is the present suit, for the reason that the averments of the petition in said suit set out that said Board of Commissioners of the Tensas Basin Levee District was guilty of fraud and corruption, and that it colluded and connived with defendant, the Tensas Delta Land Company, Limited, in bringing about the sales sought to be set aside by plaintiff, in, through, and by means of said suit, and that it could not be heard to allege the grounds for setting aside said sale and for the relief asked by plaintiff, the state of Louisiana, which are fully set out in the petition filed by plaintiff in the Seventh judicial district court of the state of Louisiana for the parish of Richland.

"Sixth. That if it be necessary that said Board of Commissioners of the Tensas Basin Levee District should be made parties to this suit, which, however, is denied, they should be made parties thereto as defendants as contended for by defendant, the Tensas Delta Land Company, Limited, in the exceptions filed in the district court for the state of Louisiana, and forming a part of the record filed in this honorable court, and, if so, said board would be a necessary and indispensable party defendant, and being a resident and citizen of the state of Louisiana, and the members thereof being all citizens and residents of the state of Louisiana, no removal of this suit could be accomplished, since defendant, the Tensas Delta Land Company, Limited, and the members thereof, are all citizens of other states than the state of Louisiana, and, therefore, this honorable court could not hear and determine the same.

"Wherefore, plaintiff prays that this cause may be remanded to the honorable Seventh judicial district court for the state of Louisiana in and for the parish of Richland, to be there proceeded with according to the practice governing such cases."

In support of the motion to dismiss, the learned counsel for appellee argue that the lower court ceased to have jurisdiction as an effect of the proceedings for removal, and that therefore this court has no jurisdiction. The present appeal was taken from the judgment dismissing the suit. Thereby only one question was brought up to this court for review, namely, the correctness, *vel non*, of the action of the lower court in dismissing the suit. No other question having been brought up, none other is presented for decision. Appellee might have enlarged the scope of the appeal by filing an answer asking that the action of the lower court in entertaining jurisdiction should also be reviewed; but appellee has not done so. Argument on that question, therefore, is not to the purpose; the question not being before the court.

On the merits, the Attorney General insists in his brief, as he had previously done in his motion to remand, filed in the United States Circuit Court:

"That said suit is a suit brought by the state of Louisiana, the real and actual plaintiff and the party in interest. * * * And is not prosecuted for the use and benefit of the Board of Commissioners of the Tensas Levee District, which is not interested as a plaintiff therein, and which has no pecuniary, proprietary, or

other interest in any of the matters and issues involved in said suit as plaintiff, and is, in no way, concerned with, or interested as plaintiff in, the demand contained in the petition filed in said suit."

If so, then the defendants' exception of no cause of action was properly sustained, because, most assuredly and beyond all question, the Legislature has divested the state absolutely of all beneficial interest in said lands, and transferred same to the said board of levee commissioners. It is impossible to read the said act 59 of 1886 hereinabove quoted, and come to any other conclusion.

The argument that the said board is nothing more than a mere agency or instrumentality of the state, and that therefore the state may sue in every case where the said board might sue, contains a manifest non sequitur. Every city, town, and parish of the state is a mere agency or instrumentality of the state; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the state, any cause of action which any of them might have.

The legislative control over corporations of the character of this levee board is much more complete than over municipal corporations proper and parishes—it made them, and can at any time abolish them, so long as the obligations of their contracts are not thereby impaired—but these corporations have their existence and exercise their functions by and under the Constitution and statutes of the state, and so long as these established laws remain in force it is they which must regulate the property and other rights of said corporations and their modes of action, and the disposition of their property, and their rights to sue and to be sued. If one of these corporations has a right of action, the proper functionary to enforce same is the governing body of the corporation, and not the Attorney General, or the state.

Again, it is true that if the governing body of one of these corporations fails in its duty to bring a suit which clearly it ought to bring, the courts may (only, however, under highly exceptional circumstances) allow any citizen or taxpayer of the district to bring the suit; and, in such a case, the same privilege might for the same reason be extended to the state; but nothing of that kind is pretended in this case. There is no suggestion that the board of commissioners of the district has failed to bring suit, or is unwilling to do so. In fact, this court knows the contrary from the public prints.

Moreover, the prayer of a suit of that kind would have to be that the property be returned to the levee board to be disposed of as directed by the Legislature; whereas, the prayer of the present suit is, distinctly, that the property be decreed to belong to the state and be delivered to the state, and the

prayer has been given that form designedly—so the Attorney General informs the court. The effect of granting this prayer would be to take away these lands from their legitimate custodian and owner, the corporation to which the Legislature has given them and under whose control the Legislature has provided they shall be, thereby frustrating and nullifying an admittedly valid statute; in fact, practically repealing the statute.

The argument of the learned Attorney General that the board of commissioners of said district could not bring the suit because said board could not be listened to in an endeavor to undo its own fraudulent act confuses between the persons who happened to be commissioners at the time the fraud in question is alleged to have been committed and the corporation itself. The fraud in question is alleged to have been committed against, not by, the corporation. To say that a corporation cannot sue to be relieved from the fraud of its officers because a litigant cannot be heard to urge his own infamy can hardly be seriously contended by the learned Attorney General.

We note, in conclusion, that the membership of this levee board can be changed at any time by the Governor without his having to assign any reason, and that therefore the Legislature has provided ample remedy for the protection of the people of the district who are the real parties in interest.

Judgment affirmed.

The CHIEF JUSTICE and NICHOLLS, J., dissent.

On Application for Rehearing.

LAND, J. The able brief filed by the Attorney General in support of plaintiff's application for a rehearing has had our attentive consideration, but on a reconsideration of this cause we see no good reasons to change our conclusions.

The Legislature vested the absolute title to the lands in controversy in the Board of Commissioners of the Tensas Levee District, with full power to sell the same on such terms as the board might deem proper. The Legislature also vested in said board full power to sue and be sued, and to stand in judgment, in all matters relating to their gestion and trust. The board of commissioners could have brought the present suit to annul the alleged fraudulent sale and recover the lands. The Governor of the state, with his power of appointing and removing members of levee boards, can compel them to bring such suits as he may deem proper in the interests of levee districts.

The General Assembly has the power at any time to authorize the Attorney General to institute actions for the use and benefit of the taxpayers and people of any particu-

lar levee district. But as the General Assembly has vested the power to sue and be sued in the Board of Commissioners of the Tensas Levee District, and has vested no such co-ordinate power in the Governor or Attorney General, we are of the opinion that the institution of this suit in the name of the state is unauthorized.

It is therefore ordered that the application for a rehearing be refused.

BREAUX, C. J. (dissenting). I dissent from the opinion handed down on application for a rehearing on grounds which prompted me from dissenting from the original opinion.

The complaint is that the land in controversy was sold for an inconsiderable price, to say the least. The state placed the title of the property in the name of the "levee board" for the purpose stated. It was a serious purpose. The state was not thereby stripped of all authority to inquire into the validity of the title, upon the grounds alleged.

(126 La.)

No. 17,897.

BARNETTE SAWMILL CO. v. FT. HARRISON LUMBER CO.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by Editorial Staff.)

1. SALES (§ 176*)—CONTRACTS—PERFORMANCE.

A buyer of the merchantable output of a sawmill for a specified period may insist on the seller properly performing the work in the future, though he has acquiesced in and settled past failures so to do.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 176.*]

2. SALES (§ 116*)—CONTRACTS—RIGHT TO TERMINATE.

A buyer of the merchantable output of a sawmill for a specified period is not warranted to terminate the contract because of past failures of the seller to perform the work, where such failures have been acquiesced in and settled, and from the assumption therefrom that the seller will continue to fail to perform the work, without a prior putting in default.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 116.*]

3. SALES (§ 175*)—CONTRACTS—PERFORMANCE.

A seller of the output of a sawmill for a specified period need not, in order to recover under the contract, continue sawing and delivering lumber after the buyer directed the seller to cease sawing and delivering, but was entitled to the benefits which would have resulted had the sawing and the delivering been continued to the end of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. § 175.*]

4. SALES (§ 175*)—CONTRACTS—PERFORMANCE.

Where a buyer of the output of a sawmill for a specified period terminated the contract without grounds, that the seller had up to the time of the termination made no profits, and that after that date it was so financially em-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

barrassed that it would have been unable to complete the contract, did not affect the right of the seller to recover for the breach; he having the right to assume that the buyer would pay for the lumber contracted for, and thus furnish the means necessary to carry on the business.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. § 175.*]

5. SALES (§ 384*)—CONTRACTS—DAMAGES.

Where a contract for the sale of the output of a sawmill for a specified period fixed the price of the lumber, and the evidence showed that the seller could have sawed without difficulty a specified quantity, that the stock on hand was sufficient to keep the sawmill employed during the period of the contract, and that the seller could have made a specified sum as profits by completing the contract, the seller was entitled to recover loss of profits for the buyer's wrongful breach of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 384.*]

Appeal from Third Judicial District Court, Parish of Bienville; W. U. Richardson, Special Judge.

Action by the Barnette Sawmill Company against the Ft. Harrison Lumber Company. From a judgment for plaintiff, defendant appeals, and plaintiff prays that the judgment be increased. Affirmed.

Stubbs, Russell & Theus, for appellant. Dorman & Reynolds and Richardson & Richardson, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff, representing itself to be a commercial partnership domiciled in the parish of Bienville, alleged: That said firm made and entered into a written contract to sell and deliver to the Ft. Harrison Lumber Company, a commercial firm running and operating an establishment at Briceland, La., as manufacturers and wholesale dealers in yellow pine, hard wood, and shingles, all lumber cut by them classing as No. 2 and up at the price and sum of \$12 per thousand, which said lumber the Ft. Harrison Lumber Company agreed to accept and pay for on the 20th of each month commencing December 20, 1906, and the last payment to be made January 20, 1908, said contract being entered into November 26, 1906, and to run and extend to January 1, 1908, all of which would more fully appear from a duplicate of said contract annexed and made a part of its petition.

That they faithfully complied with said contract and delivered to the said company all lumber grading from No. 2 up sawed by them up to July 23, 1907, and the said Ft. Harrison Lumber Company accepted all lumber delivered up to said July 23, 1907, and paid for all lumber delivered to July 20, 1907. That on July 22d, three loads of lumber were delivered worth \$25 that was paid for at that time. That on July 23d, they delivered to the said Ft. Harrison Lumber Company two loads of lumber in accordance with the terms of said contract which the said Ft. Harrison

Lumber Company would not receive and refused to accept, although under the terms of their contract it was their duty to accept said two loads of lumber, being worth \$18, and that at the time that they refused to accept said two loads of lumber they ordered your petitioners not to send any more lumber on the contract as they would not accept same, thereby actively violating said contract.

That by said active violation of said contract the said Ft. Harrison Lumber Company had greatly damaged petitioners, and that they were justly and legally indebted unto petitioners for the full amount of all damages caused them by said active violation. That they had at much trouble and expense gotten their sawmill plant in good running and operating condition with the object and purposes of complying with said contract. That they were prepared to cut and deliver, and would have cut and delivered, to said Ft. Harrison Lumber Company at least 12,000 feet of lumber per day under said contract. That the cost of cutting and delivering said lumber was and is about \$8 per thousand, making a damage to petitioner of \$4 per thousand and profits of said lumber, and that they were unable to sell said lumber to other parties for more than \$8 per thousand. That the amount of lumber petitioners could and would have delivered per month would have amounted to at least 312,000 feet per month, making the damage caused to petitioners by the said active violation of said contract by said Ft. Harrison Lumber Company amount to \$1,248 each month, and, as said contract had five months before it expired, the entire damage caused to petitioners would amount to \$6,240.

That said active violation of said contract by the Ft. Harrison Lumber Company was willful, malicious, and in bad faith, and done, for the reason among others, that they had gotten their own mill in operation and in running order, and were no longer needing the service of petitioners and their mill, having used practically all the lumber received by them from petitioners' mill in building their mill buildings, sheds, tramways, dollways, etc., and for the further reason that the price of lumber had fallen considerably below what it was at the time the contract was made, and that said Ft. Harrison Lumber Company should be mulcted in the sum of \$1,000 punitive damages for said violation of said contract.

That they filed suit on August 8, 1907, against the said Ft. Harrison Lumber Company, praying for judgment against said lumber company, ordering it to accept, receive, and pay for, at the rate of \$12 per thousand, all lumber cut by petitioner grading No. 2 and up to the 1st day of January, 1908, according to the terms and conditions of said written contract, and further prayed that, in case the Ft. Harrison Lumber Company did not spe-

cifically perform and carry out all the terms and conditions of said contract, then, in that event, that petitioners have judgment against them for the sum of \$6,240, with 5 per cent. per annum interest from judicial demand and for \$1,000 punitive damages with 5 per cent. per annum interest from judicial demand and for the above-mentioned sum of \$25 for three loads of lumber with 5 per cent. per annum interest from judicial demand, all of which would more fully appear from their said petition filed in suit of Barnette Sawmill Co. v. Ft. Harrison Lumber Co., No. 2093, on docket of the court, made a part of their petition by reference.

That upon the trial of said suit judgment was rendered in favor of petitioners for said sum of \$25, and that a judgment of nonsuit was rendered against the petitioners upon their demand for damages. That said sums of \$6,240 and \$1,000 damages are still due petitioners and unpaid, although amicable demand has been made.

In view of the premises, petitioners prayed for service and citation on the Ft. Harrison Lumber Company, and that after final hearing had they have judgment against it for the sum of \$6,240 as actual damages and 5 per cent. per annum interest thereon from August 8, 1907, as punitive damages, and for costs and general relief.

Defendant, after pleading first a general denial, admitted the execution of the contract sued on, and its partial execution, and averred: That whatever violation there was of said contract was brought about solely by the fault of the plaintiff. Defendant averred that the lumber to be delivered to it under the terms of said contract was intended to be finished into a manufactured product and resold, except such portions of said lumber as were to be used in the construction of defendant's buildings, etc., at its sawmill site, which lumber to be used by defendant was not required to be finished and of a first-class merchantable grade of lumber to meet its needs. That at and prior to the alleged violation of the contract it had completed its buildings, and therefore could no longer use the output of plaintiff's mill except in the usual course of trade to be sold on the market, and that, on account of the inferiority of the lumber delivered and offered to be delivered under the contract, defendant was compelled to refuse same, as it was wholly unmerchantable, and could not be sold on the market as merchantable lumber, and could not be finished in the planer and other machines of defendant, all of which were and are first class, so as to make the same a good grade of merchantable lumber, and that the refusal of defendant to accept any portion of the output of plaintiff's mill was due solely to plaintiff's fault in actively violating the contract by tendering inferior and unmerchantable lumber.

Defendant specially denied that it at any time ever violated the terms of the contract

by refusing to accept any lumber tendered or offered coming up to the classification and grades as specified in said contract, and offered in accordance with the contract, but, on the contrary, was willing and anxious at all times to receive all of the merchantable lumber sawed by plaintiff in accordance with the stipulations and terms and grades as specified in the contract, and repeatedly requested the plaintiff to saw and deliver lumber in accordance with the contract, which requests and demands were refused by the plaintiff.

In view of the premises, defendant prayed that the demands of the plaintiff be rejected at its cost and for general relief.

The district court rendered judgment in favor of plaintiff and against defendant for the sum of \$3,120 for actual damages and 5 per cent. per annum interest thereon from date of this judgment and all costs.

Defendant appealed. Plaintiff prays that the judgment be increased to \$4,500.

The contract referred to by plaintiff reads as follows:

"Briceland, La., Nov. 26th, 1906.

"For and in consideration of the sum of one dollars cash in hand paid, the receipt of which is hereby acknowledged and other valuable considerations, hereinafter specified, we, the Barnette Sawmill Co., composed of W. C. Barnette, J. S. Pryor, and G. W. Myers, do hereby grant, sell, and convey unto Fort Harrison Lumber Co., Limited, our entire mill cut, consisting of merchantable yellow pine lumber all grades from No. 2 up, and saw into such dimensions as the Fort Harrison Lumber Company may require from logs 12 to 20; said lumber to be delivered on the yards of the Fort Harrison Lumber Company not later than 48 hours from time of sawing unless the roads are in such condition that wagons cannot be hauled over them, in which case, we, the Barnette Sawmill Co., agree to stack the lumber on narrow strips and use every precaution to prevent same from blueing, afterwards delivering stacked lumber to the yards of the Fort Harrison Lumber Co., without any additional charge. It is understood and agreed to by us that this contract is in force from date until January 1st, 1908, and the price of said entire mill cut of 32 and up is \$12.00 per thousand delivered at the yards of Fort Harrison Lumber Co., to be paid as follows: November delivering due Dec. 20th, * * * the balance for each month due 20th of the succeeding month from date until Dec., 1907, which is due January 20th, 1908."

Opinion.

At the time of entering into the contract of November 28, 1907, the plaintiff company had erected a sawmill at about five miles from Bryce Station, in Bienville parish, and owned timber in the immediate vicinity which it proposed to saw and to sell.

At that time the defendant company owned a large quantity of timber in the same neighborhood which it also proposed to saw and to sell. It had, however, no plant by means of which it could carry out its purposes, no sawmill, and none of the buildings needed for entering upon business. The situation was one which each party had great interest in taking advantage of. Out of it sprung the contract that has been copied on

another page. Plaintiff commenced to execute the contract at once by sawing lumber and making delivery under it, the defendant receiving and using the lumber furnished. This continued up to July 22, 1907, on which day Mr. Pierson (defendant's president) wrote to the plaintiff the following letter:

"Mr. Beard—Dear Sir: Your people have violated your contract in more than one way and can't get you to cut out and haul lumber in shape we can handle it, and have given the boys much trouble since I have been gone and shut down when you got ready without notice so you need not bother about hauling any more lumber for it must be checked."

Plaintiff sought by conference to adjust the differences between the parties, but failed to do so, and this action, so far as it (the defendant) could do so, terminated the contract, although by its terms it was to continue until January 1, 1908.

On the 20th of July, 1907, two days before the letter just referred to was written, Mr. Pierson had written to Mr. Beard, as follows:

"Our Mr. Hearne advises us that you have been putting in a lot of very bum stuff and not in accordance to the contract. We can't stand for you to send such material as you have been and in such manner now as we have got our mill going. We also gave you a very important bill and you stopped sawing without notice to us. You have given us trouble all along, and if you want to play quit we will release you from all responsibility as far as your contract is concerned."

Referring to the contract and the question as to whether it had been violated and by whom, the district court in its opinion in the case says:

"In this connection some comment on the terms of the above-quoted written contract in evidence is proper. While the contract provided that 'the plaintiff would deliver to defendant its entire mill cut of merchantable yellow pine lumber all grades from No. 2 up, and sawed into such dimensions as defendant might require from logs 12 to 20; said lumber to be delivered on the yards of defendant not later than 48 hours from time of sawing unless the roads were in such condition that wagons could not be hauled over them, in which case, the plaintiff agreed to stack the lumber on narrow strips and use every precaution to prevent same from blueing, afterwards to deliver this stacked lumber to the yards of defendant without any additional charge,' there is nothing in the contract fixing any specific amount of lumber to be cut and delivered or stacked in any one month, but the contract provided that the entire mill cut of certain descriptions should be delivered, if cut within a specified time, or stacked in case of bad roads, and that the price of any calendar month's delivery of lumber should be due on the 20th of the following calendar month during the period of the contract commencing November 26, 1906, and ending January 1, 1908.

"The evidence, while somewhat conflicting, seems to establish the contention of defendant that a considerable percentage of the lumber deliveries was not up to the merchantable standard, or in accordance with the contract; but it is equally true that defendant had exercised the right to cull and reject all such unmerchantable lumber.

"This seems to have caused friction, and even some intemperate remarks and some inconvenience to defendant and exasperation to plaintiff, and possibly some slight loss might have re-

sulted to plaintiff, which, however, was not imputable to defendant, whose general manager was not bound to accept any other than that part of each load which conformed to the contract. The plaintiff contends, and seems to have proved by a preponderance of evidence, that no unnecessary time was lost in sawing and delivering lumber under the contract. Want of water for steam necessitated a suspension of sawing until sufficient well and tank facilities could be provided; and bad roads resulting from protracted rains added other impediments to plaintiff's prompt delivering of lumber. These unpropitious conditions militated more against the Barnette Sawmill Company than the Ft. Harrison Lumber Company. The former suffered for the time of suspension the loss caused by having nothing to deliver, or by inability to deliver under the contract; whereas, after the latter had started its own mill, it could proceed without the mill cut of plaintiff, and did so proceed.

"Under the evidence adduced and referred to in a general way, it is apparent that the defendant terminated the contract by active violation under circumstances not justified by the facts, and under the laws the defendant incurred liability for whatever damage the plaintiff sustained as a consequence of such violation of said contract which could be reached only by consent of the parties or for causes acknowledged by law. There was no mutual consent of the parties and no apparent cause recognized by law. Whatever grievance defendant may have claimed, no legal redress was sought by an action for a specific performance or by an action for damages, not even in this suit are any damages claimed by reconventional demand. Claiming noncompliance with the contract on the part of plaintiff, the defendant chose rather to be a 'law unto himself' than to invoke the legal tribunals necessary under the law if defendant had cause sufficient which has not been shown even in this suit."

The defendant having (in the opinion of the court) incurred legal liability for unwarranted breach of the contract with plaintiff, the court said it became its duty to determine the amount of damages sustained by plaintiff and due by defendant.

It then proceeded to discuss the question of the amount of damages, and declared that:

"It was difficult for the court to arrive at any other than a reasonable estimate in the case—that the evidence did not warrant the court in allowing the full claim made for actual damages. Considering the fact that plaintiff did not use all the timber and that it is yet a valuable asset, and that, estimated on the uncertain weather conditions that prevailed the first half of the year, the anticipated mill cut of lumber for the unexpired period of the contract was too problematical to base a judgment on for more than half the sum of actual damages claimed, the judgment will therefore be for plaintiff and against the defendant for three thousand one hundred and twenty dollars (\$3,120.00) and legal interest thereon from date of the judgment hereinafter rendered."

Defendant's counsel complain of the judgment appealed from, urging that it was justified by neither law nor proof. They insist that the claim is for anticipated profits, uncertain, conjectural, and speculative in character; that it leaves out of sight entirely the fact that because of fire, the blowing up of a boiler or many other possible and probable accidents to sawmills "the whole thing might

have been put out of business; that it was absolutely impossible to say whether this mill would have operated for one day or for the whole unexpired term of the contract; that it was a physical and a legal impossibility to prove what damages the plaintiff sustained by the violation of this contract; that there was no proof as to the number of days upon which the mill could have been operated in view of possible weather conditions; that plaintiff had made no profits under the contract under its partial execution from November to July and could, and would, have made none had it been continued to January, 1908; that it was financially unable to have continued to operate after July 23, 1907, and did not attempt to do any sawing after that date for want of means not being able to saw even the logs which it had cut and hauled to the mill, and which were lying near it. It relies greatly upon *Bergen v. City of Orleans*, 35 La. Ann. 523, and *Crow v. Sheriff*, 45 La. Ann. 1227, 14 South. 122. It maintains that, the plaintiff company having actively violated its contract, it had itself the right to refuse to execute its part." The plaintiff says that in the *Crow* Case the court declared that "the possible profits must be proven with some degree of certainty," but in that case there was nothing certain, neither the price of the lumber nor the expenses of manufacture; whereas in the case at bar the price was fixed by the contract at \$12 per thousand feet, the entire expenses of manufacture has, including the value of the timber, been shown to be \$8 per thousand feet, the contract was fixed to continue until a definite date, January 1, 1908; that the capacity of the mill was shown, and it was shown that the plaintiff company owned sufficient quantity of lumber to have executed the contract even if its termination had been fixed for a term six months longer than it was. Plaintiff claims: The defendant was not justified in terminating as abruptly as it did, and under the circumstances that this was done, the contract of November 26, 1906. That it bases itself upon alleged continued violations by plaintiffs of the contract, which, if true, were not considered of any importance by the defendant who received and paid for the lumber delivered and used it for their own purposes. That, while it was true that some little of the lumber which it had sawed was not exactly up to contract, defendant claimed and exercised the right of inspecting the whole and culling out, rejecting, and not paying for what was not satisfactory to it, and cutting off from lumber offered any part which was not believed suitable, receiving, and paying for only what remained. That, if the defendant had serious reasons for objecting to the lumber tendered it, it should have so stated and held plaintiff responsible when this happened.

That everything which had been done prior

to July 23, 1906, had been acquiesced in and settled between the parties, and nothing occurred at that time to warrant its sudden and abrupt termination of the contract. That the real reason for its action was that the price of lumber had gone down far below \$12, and it was therefore unwilling to continue the contract. That at that time defendant had completed its own mill, and had no further need of assistance from the plaintiff. That it did not pretend to have suffered any damage from anything done or left undone by the plaintiff and sets up no reconventional demand in this suit. That its expressed willingness to "play quits" with the plaintiff and to release it from all responsibility under the contract indicates plainly its desire to escape from responsibility under it. The two coincident facts referred to by the plaintiff of the large fall in the price of lumber and of the finishing of defendant's own mill, and being securely on its feet, to conduct its own operations of sawing and selling its own lumber from that time on, are certainly significant facts tending to establish reasons other than delinquency on the part of the plaintiff to which can be referred defendant's sudden determination to hold (plaintiff) strictly to its contract. The prior alleged falling short of the plaintiff in its obligations entered very little in our opinion as a factor in determining the defendant to receive no more lumber from the plaintiff under the contract.

The defendant had unquestionably the right to insist upon the plaintiff properly performing its work in the future; but it was not warranted in making past failures to do so (which had been acquiesced in and settled), and the assumption therefrom that plaintiff would continue to do so, the occasion, without a prior putting in default, for at once terminating the contract. A placing in default was an essential prerequisite to doing this. *Crusel v. Hermitage Planting Co.*, 114 La. 921, 38 South. 648.

Defendant had the right (subject to the nonimpairment of the legal rights of the plaintiff) to put an end to further sawing and delivering by plaintiff of the lumber which was the subject of the contract between the parties. The clauses in the contract in that regard were for its benefit, and it could waive the same if it thought proper under reservation of plaintiff's rights in the premises. The plaintiff was not called upon in order to obtain the remuneration to result to it from the contract to continue sawing and delivering the lumber to the 1st of January, 1908. It had no right to do so when defendant ordered otherwise.

When defendant refused to allow the plaintiff to further saw and deliver the lumber, it thereby relieved the latter from its obligation to do so, but the plaintiff none the less was entitled to the benefit to it which would have resulted had the sawing of the lumber

and the delivery of the same been continued to the end of the contract. By directing the ceasing of the sawing and delivery of the lumber, the defendant elected in law to place matters in the status of a completed contract. It could not thereafter deal with the plaintiff's rights upon the theory that events might possibly happen in the future which would have put an end to the contract. It could not convert possible fortuitous circumstances into actualities, and deal with them as such, and utilize them to the prejudice of the plaintiff. Plaintiff's mill has not been destroyed by fire, no boiler has exploded, and the lumber which was the subject of the contract remained intact until the termination of the contract responsive to all legal claims which the plaintiff might have in regard to it.

We do not appreciate the force of defendant's argument that plaintiff had up to July 23, 1906, made no profits under the contract, that after that date it was so financially embarrassed that it would have been unable to have completed the contract. Plaintiff had up to July 23d carried out the contract, and was continuing to do so, when ordered to stop sawing and making delivery. The plaintiff had the right to assume that defendant would by payments to it furnish the means necessary to carry on its operations, and it doubtless would have continued them on, unless defendant, by failing to make payments, should deprive it of its means to do so, but it is not necessary to discuss what it might or might not have done, for defendant had, under the circumstances, no concern in that matter.

Plaintiff had no motive after July 23, 1906, to continue sawing the lumber or to sell it to third parties. The evidence shows that after July 23, 1906, the weather would have been favorable for plaintiff's operations; also, that its mill could have sawed without difficulty 12,000 feet of lumber a day its capacity being 25,000 feet a day, and that the lumber on hand was sufficient to keep it employed until after January 1, 1908. The evidence further shows that plaintiff would have made \$4 net by the sawing and delivery of every thousand feet. Plaintiff had secured a fixed price for the timber which belonged to it.

We are of the opinion that, had the defendant not forced the plaintiff to desist from sawing and delivering the lumber, plaintiffs would have carried out the contract. We do not think that defendant has legal ground to complain of the judgment, and are satisfied that, under the evidence, the trial judge's estimate of the amount of damages is a conservative one.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(126 La.)

No. 17,597.

COX v. FIRST NAT. BANK OF LAKE CHARLES (ROBIDEAUX, Intervener).

(Supreme Court of Louisiana. Jan. 17, 1910.
Rehearing Denied April 25, 1910.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR (§ 797*)—TIME FOR MOTION TO DISMISS.

A motion to dismiss an appeal comes too late when filed after answer to the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149-3154; Dec. Dig. § 797.*]

2. APPEAL AND ERROR (§§ 122, 863*)—APPEAL FROM PART OF JUDGMENT—SEPARATE DEMANDS.

Where in one suit two separate demands are made on which separate actions might have been maintained, an appeal may be taken from the finding on one demand only, and if the other party does not appeal from the other demand no question as to the correctness of the finding as to that demand can be raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 60, 866-874; Dec. Dig. §§ 122, 863.*]

3. FRAUDULENT CONVEYANCES (§ 87*)—REVOCATORY ACTIONS—PAST-DUE DEBTS.

Where a railroad contractor assigns his future earnings under a contract to a bank to cover money due and future advances, and the assignment is a valid transfer or sale of credit, money paid by the railroad to the bank by virtue of the assignment when the contractor was insolvent is not subject to a revocatory action, since by the express provision of Civ. Code, arts. 1986, 2658, a past-due debt paid by an insolvent in money is valid.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 221-229; Dec. Dig. § 87.*]

4. BANKRUPTCY (§ 302*)—EVIDENCE ADMISSIBLE UNDER PLEADING—BANKRUPTCY.

Where, in an action by a trustee in bankruptcy to recover money paid to a bank because a preferential transfer, the answer pleaded an assignment by the bankrupt to the bank of all moneys which would become due from a railroad under a railroad construction contract, and the assignment contained a stipulation that the moneys due the bankrupt would be paid directly to the bank, a clause in the railroad construction contract providing that the railroad should pay money due the contractor directly to the bank cannot be relied on, since not pleaded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

5. ASSIGNMENTS (§ 10*)—SALE OF CREDIT—COVERING FUTURE ADVANCES—VALIDITY.

An agreement is valid by which a debtor transfers to his creditor a credit which is to mature at some future time in satisfaction of a debt not yet mature, or even not yet in existence, but which will mature or be in existence and payable by the time the transferred credit itself matures and is payable, as in such case the agreement goes into immediate operation for that part of the debt already existing, and it goes into operation for that part of the debt to be thereafter created as the latter debt springs into existence.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 17, 18; Dec. Dig. § 10.*]

6. FRAUDULENT CONVEYANCES (§ 87*)—SALE OF CREDIT—DISCHARGE OF INDEBTEDNESS.

A railroad contractor for the purpose of securing money to perform his contracts assigned to a bank all moneys which would become due from a railroad under a railroad construction contract, which money was to be paid directly to the bank to secure money then due the bank and money thereafter to be advanced by the bank in reference to the contract, until the indebtedness to the bank was satisfied. The assignment was made eight months before bankruptcy of the contractor, and at the time of the assignment \$6,000 was owing the bank, and thereafter over \$15,000 was paid the bank by the railroad; the last payment of \$4,747.36 being made four days before bankruptcy. *Held* that, to the extent the consideration of the transfer was a debt existing at the time of assignment, the transfer when notified to the railroad company was a giving in payment immediately.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 221-229; Dec. Dig. § 87.*]

7. BANKRUPTCY (§ 164*) — PREFERENTIAL TRANSFERS — PAYMENTS WITHIN FOUR MONTHS—"PREFERENTIAL PAYMENTS."

Held, also, that, so far as the consideration was advances to be thereafter made, it was in the nature of a conditional sale—conditional because the bank was not compelled to advance the money if the credit failed—and the transfer became operative as soon as the advances were made, and hence such payments, including the payment of \$4,747.36, were not "preferential," within Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), though made within the four months, since the transfer was a sale of credit in due course of business and not a preferential payment of a debt.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 164.*]

8. BANKRUPTCY (§ 164*) — "PREFERENTIAL PAYMENTS"—EFFECT OF SALE OF CREDIT—PAYMENTS NOT MADE UNDER CONTRACT.

Held, also, that since the transfer or sale of the credit was not to cover all advances which might be made by the bank to the debtor, but only those in reference to the particular railroad construction contract, so far as the entire amount paid over by the railroad company to the bank exceeded the \$6,000 originally due and advances made by the bank for the particular railroad contract, the payment of \$4,747.36 was a preference under Bankr. Act, § 600.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 164.*]

9. BANKRUPTCY (§ 165*)—PREFERENCE.

Under Bankruptcy Act, § 60a, forbidding preferential payments within four months of bankruptcy, where the bankrupt is indebted to a bank if the bankrupt deposit with the bank a sum of money subject to his check in such a way as to make the bank his debtor, set-off immediately takes place pro tanto between that debt and the debtor's debt, and there would not be a preferential transfer; but if the money is received by the bank not as a deposit, but as a payment, then there is a preferential transfer of property within the act.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 165.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by C. Paul Cox, trustee, against the

First National Bank of Lake Charles; Mrs. O. Robideaux intervening as plaintiff. From a part of the judgment rendered, plaintiffs appeal. Judgment set aside, and cause remanded for further trial.

Thomas C. Plauché, Charles A. McCoy, and Robert L. Knox, for appellant Cox. Charles A. McCoy and Robert L. Knox, for appellant Robideaux. Pujo, Moss & Sugar, for appellee.

PROVOSTY, J. The plaintiff, trustee of the bankruptcy of I. A. Hebert, finding that the defendant bank claimed to be owner and in possession of a steam shovel which Hebert, the bankrupt, who was a railroad earth-work contractor, had been using in his work up to the time of his bankruptcy, and had continued thereafter to use, and finding that, four days before the bankruptcy, the defendant bank had received from the Louisiana Western Railroad Company \$4,747.36 earned by Hebert under a contract with that company, instituted this suit to recover said property for the bankrupt estate. The allegations are that the transfer of the shovel and the payment of the money by Hebert to the defendant bank are null under section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), because made after Hebert had become insolvent and within four months before the bankruptcy; and because simulated, and in fraud of creditors, and giving an unfair preference to the defendant bank over the other creditors. Plaintiff also claims rent for the shovel, at \$150 per month, for all the time the defendant bank shall have had the shovel.

The defendant bank answered that Hebert never owned the shovel, but merely held it under one of those conditional leases by which the lessee is to become owner of the thing leased on final payment of the rent; and that he did not transfer it, but merely returned it when he found that he would have to go into bankruptcy and could not pay the balance of \$1,500 and interest still due upon it. In the alternative, in the event the said lease is held to have been a sale, the defendant bank claims a vendor's privilege for said balance of \$1,500 and interest; and, in the same alternative, claims a further privilege for \$638.74, for necessary expenses in repairing and preserving the shovel.

With regard to the \$4,747.36, the defendant bank has averred that it received this money from the Louisiana Western Railroad Company for account of Hebert, on May 16, 1907, by virtue of an assignment made on August 31, 1906, more than eight months before the bankruptcy, which was on May 20, 1907. By way of further defense, the defendant bank pleaded the prescription of one year in

bar of the revocatory action, and the prescription of four months established by section 87e of the bankruptcy act, as amended February 5, 1903. In the alternative, it pleaded compensation or set-off; Hebert having been indebted to it in an amount far exceeding the said \$4,747.36 at the time said sum was received.

The trial court maintained plaintiff's demand for the shovel, holding that the alleged lease was a sale. It allowed the claim of defendant for necessary repairs and other expenses, but compensated it by an equal allowance to plaintiff for the rental value of the shovel. It rejected defendant's claim of a privilege for \$1,500 and interest as having been extinguished by compensation, or set-off, with a like amount of the \$4,747.36. It rejected plaintiff's demand for the \$4,747.36, sustaining defendant's plea of compensation or set-off as to that part of said sum not compensated by the balance due on the purchase price of the shovel.

From this judgment plaintiff alone appealed, and only from that part of it rejecting the demand for the \$4,747.36. Defendant answered the appeal, renewing the prayer of the answer filed in the lower court. The answer to the appeal was filed on May 14, 1909. On November 18, 1909, defendant moved to dismiss the appeal on the ground that, plaintiff having appealed only from that part of the judgment which was adverse to him, instead of from the judgment as a whole, there has really been no appeal, since it is not possible to appeal from merely a part of a judgment; and that, as a consequence, plaintiff must be held to have acquiesced in the judgment.

This motion to dismiss came too late, it having been filed after answer to the appeal. *Shall v. Banks*, 8 Rob. 168; *Jacobs v. Yale & Bowlings*, 39 La. Ann. 359, 1 South. 822; and numerous other cases unnecessary to be cited.

Plaintiff, in his turn, has moved to strike out defendant's answer to the appeal, in so far as this answer seeks to renew the litigation over the ownership of the shovel, or over the existence vel non of a vendor's privilege on the shovel; or over the claim for necessary expenses in repairs, etc. Plaintiff bases this motion to strike out on two grounds: First, that, no appeal having been taken by either party from that part of the judgment passing upon those issues, the said issues have not been brought up, and are not involved in the suit as it stands on appeal before this court. Second, that, as to said issues, the defendant has acquiesced in the judgment by proving in the bankruptcy court, as unsecured claims, the said alleged debts for which it is claiming a privilege.

Only the first of these grounds need be considered. The two demands of the suit—that in connection with the steam shovel, and that in connection with the \$4,747.36—were distinctly divisible; in fact, were separate

demands. They might, beyond all question, have been made the subjects of different suits. The demands being thus separate, the judgment passing upon them, and upon the demands incidental to them, was, in like manner, distinctly divisible; or, more properly, was two separate judgments in one. Plaintiff restricted his appeal, distinctly, to only one of the demands; or, in other words, to one of the judgments. The effect of this was to put the other demands, or other judgment, out of the suit, for all the purposes of the present appeal. Hence the motion to strike out must be allowed, and the appeal restricted to the \$4,747.36. That judgments thus divisible, or dual, may be divided for the purpose of appeal, must be considered settled in our jurisprudence. *Succession of Calloway*, 49 La. Ann. 968, 22 South. 225, and cases there cited.

Coming to the \$4,747.36 payment, we do not find that it was a simulation. It was made in real extinguishment of a debt, and we find that the revocatory action does not lie against it, since the debt paid was past due, and the payment was in money. Civ. Code, arts. 1986, 2658. The facts relevant to whether it was a preferential transfer under section 60a of the bankruptcy act, as having been made within the four months next preceding the bankruptcy, are as follows:

Hebert and the defendant bank began doing business together in January, 1906. Their manner of dealing was this: Hebert would draw his check upon the bank for the money he needed for carrying out his contracts. The credit side of the bank account would be kept up by crediting the proceeds of promissory notes which Hebert would execute in favor of the bank and the bank would discount, and also by crediting the sums which Hebert would earn under his contracts, and which, by virtue of a special clause inserted in the contracts, would be paid direct to the bank. On August 15, 1906, Hebert secured a contract with the Louisiana Western Railroad Company. In this contract the usual clause for payment direct to the bank was inserted. Fifteen days thereafter, on August 31, 1906, Hebert executed the instrument which is pleaded in the answer as having transferred as of that date the moneys to accrue under said railroad contract. This instrument reads as follows:

"State of Louisiana, Parish of Calcasieu. Be it known, that:

"Whereas, I, Ignace A. Hebert, a resident of the parish and state aforesaid, am indebted unto the First National Bank of Lake Charles for moneys advanced to enable me to carry out a certain contract with the Louisiana Western Railroad Company, for the filling in of the Sabine Trestle, and for the balance due said Bank on the purchase price of a Lidgerwood Rapid Unloader and Steam Shovel, which said Unloader and Steam Shovel is now being used by me in the work for the Louisiana Western Railroad Company, in the sum of ten thousand dollars.

"Now, therefore, in order to secure said bank for the moneys due and advanced by it, and to be advanced from time to time as may be re-

quired in the performance of said work, I do hereby authorize and request the said Louisiana Western Railroad Company to pay to the said First National Bank of Lake Charles, from time to time, all moneys due and coming to me under said contract and such others as I may enter into with said company in the future, until notice from said bank and me, and until the discharge and satisfaction of my indebtedness to said bank."

As a matter of fact, the only debt Hebert owed the bank at that date was the balance of \$6,000 due on the notes given for the credit portion of the purchase price of the steam shovel and of the unloader mentioned in the said instrument, which notes the bank had acquired.

This instrument was duly notified to the railroad company, and, in accordance with it, the railway company paid the moneys in question to the defendant bank from time to time as they became payable; the said \$4,747.36 being the final payment, and the whole aggregating \$15,888.36.

Although the clause inserted in the railroad contract for the payment of the moneys direct to the defendant bank was not pleaded, or relied upon, in the answer, defendant seeks to invoke its aid in the argument. This cannot be done, because said clause was not pleaded, and objection was duly made to the reception in evidence of the contract containing it. Defendant, under the pleadings, must be confined to the instrument of August 31st hereinabove transcribed.

We do not understand defendant as contending that this instrument created a pledge; but that it operated a transfer; and we think it did.

"A contractor may, even before he has commenced the work called for by his contract, transfer the credit which will accrue to him from the performance of the work, for, as soon as the contract has been entered into, he has a conditional credit upon the person for whom he is to do the work." Baudry-Lacantinerie et Saignat, *De la Vente*, No. 760, p. 690. See, also, Aubry et Rau, *Vente*, No. 359, p. 420; Guillouard, *Vente*, vol. 2, No. 748.

By said instrument Hebert transferred a proportion of this credit equal to his then existing debt and to the debt which he might contract thereafter for advances made to him to enable him to carry out his said contract with the railroad company.

The said instrument requires the railroad company to make payment direct to the bank until further notice from the bank. Had the debt to the bank been due at the date of this instrument, and had the future moneys in question been then payable to Hebert, there could be no question but that the credit of Hebert against the railroad company would have been fully and completely transferred to the amount specified:

"It will not be disputed that a written order by a creditor, addressed to his debtor, directing him to pay to a third person a debt due to the former, accompanied by due notice to the debtor, would comply with all the requirements imposed by our Civil Code (articles 2642 to 2654)

for the valid giving of title, delivery, and complete assignment of the credit or incorporeal right referred to in the order." Gordon & Gommilla v. Muehler, 34 La. Ann. 604-608.

The fact that the debt to the bank which formed the consideration of the transfer was in no part mature, and was in part not yet in existence, can make no difference. There is nothing to stand in the way of the validity of an agreement by which a debtor transfers to his creditor a credit which is to mature at some future time, in satisfaction of a debt not yet mature, or even not yet in existence, but which will be mature, or be in existence and payable, by the time the transferred credit itself matures and is payable. In such a case the agreement goes into immediate operation for that part of the debt already existing, and it goes into operation for that part of the debt to be thereafter created as the latter debt springs into existence. A. agrees to advance to B. certain moneys, and B. agrees that, as the moneys are advanced, a like amount of a credit which he (B.) has against C. is to be considered as transferred to A., and C. is duly notified of this arrangement, and accedes to it. We can discover no legal obstacle to the perfect validity of such an arrangement; and such was the tenor and effect of the agreement evidenced by the said instrument.

To the extent that the consideration of the transfer was the debt of \$6,000 already existing at the date of said instrument, the transfer was a giving in payment. To the extent that its consideration was the advances thereafter to be made, it was in the nature of a sale. This was so because the transfer was made in anticipation of the advance; so that no time could intervene between the advance and the transfer in satisfaction, or consideration of it. The sale was conditional. This was so because the credit was conditional, and because the bank did not accept it such as it was, good or bad, in final satisfaction, but accepted it subject to the condition of its proving to be good. This condition is not expressed, but necessarily results from the situation as a whole.

To the extent that the transfer was a giving in payment—that is to say, to the extent that the already existing debt of \$6,000 was its consideration—it went into effect as soon as delivery had been accomplished by notification to the railroad company. To the extent that it was a conditional sale—that is to say, to the extent that the future advances were its consideration—it went into effect at the date the advances were made, since notice of the transfer had been given by anticipation to the railroad company. Whether these advances were made within or without the four months next preceding the bankruptcy is immaterial, since the transfers of which they formed the consideration were not payments, but were in the nature of sales, and, as such, were not amenable to the prohibi-

tion of section 60a of the bankruptcy act. They did not give any preference to one creditor over another, but were mere transactions, in due course of business, by which Hebert transferred to the defendant bank a part of his credit against the railroad company in consideration of a corresponding amount paid him cash by the defendant bank; and the bank in its turn accepted the transfer, subject to the condition of the credit proving good.

However, the said instrument does not provide that any and all future advances which the defendant bank may make to Hebert are to be covered by a transfer of a corresponding amount of the said credit, but only those particular advances made with special reference to the particular contract of August 15, 1906, and to enable Hebert to carry out said contract. What these advances were the record does not enable us to ascertain. By whatever amount the \$15,888.36 received by the defendant bank may exceed the \$6,000 already due on August 31, 1906, and the advances made with special reference to the railroad contract of August 15, 1906, the defendant bank is not entitled to preference over the other creditors of Hebert; and by the amount of any such excess the delivery of said \$4,747.36 to the defendant bank was preferential and voidable.

The burden of proof was on the defendant bank to establish the amount of said advances; but we think that, in the interest of justice, the case should be remanded to afford an opportunity to make such proof.

The thing which constituted the object of the said transfer was not the future moneys themselves which were to accrue under the railroad contract. Had the transfer been of the future moneys themselves, there could have been no actual delivery until, by having been earned, these future moneys had come into existence (for, a nonexistent thing cannot be actually delivered); and, as a consequence, the effect of the transfer would until then have been confined strictly to the parties, and the rights of third persons would not have been in the slightest degree affected. The Code so expressly provides. Civ. Code, art. 1922. But the thing which constituted the object of the transfer was the credit which sprang into existence the moment the contract with the railroad was entered into and became binding on the railroad. This credit was a presently existing thing which could be sold and delivered. It was a distinct and separate thing from the future moneys, in the same way that the hope of a future crop is a distinct and separate thing from the future crop itself, and either may form the object of a sale. See *Losecco v. Gregory*, 108 La. 648, 32 South. 985.

Passing to the plea of compensation, or set-off: If this \$4,747.36 can be considered as having been deposited in the bank by Hebert

to be held for him by the bank subject to his check, in such way that the bank became his debtor for the amount, and was thus his debtor at the time of the bankruptcy—compensation, or set-off, took place pro tanto between that debt and the debt of Hebert to the bank—and there was not a preferential transfer of money. *Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 330. But if the money was received by the bank, not as a deposit, but as a payment, there was a preferential transfer of property. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. In the first of these two cases the court refers to the second, and distinguishes it as we have here done.

For contending that the transfer of the money was by way of deposit and not by way of payment, defendant founds itself upon the fact that the money was credited to Hebert's bank account, and that this was done in accordance with the mode in which the parties had been carrying on their business theretofore.

True, the \$4,747.36 was thus credited at the time it was received; but the account was simultaneously debited with a \$4,800 note past due and unpaid, so that, the entering of the credit as a deposit was manifestly a mere matter of form, and the amount was at no time on deposit subject to the check of Hebert. As was remarked by the Supreme Court of the United States in *Rector v. City Deposit Bank*, 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527, a somewhat similar case:

"The form of the transaction does not affect its nature."

The reality and substance of the matter is that this money was not deposited at all by Hebert, but was paid by the railroad company under instructions from Hebert in "discharge and satisfaction of my indebtedness to said bank." That the money was thus received as a payment, or as money theretofore transferred to the defendant bank, and not as a mere deposit subject to check, is a patent fact; indeed, is testified to by the cashier of the defendant bank; nay, is averred in the answer, and argued in defendant's brief.

The inconsistency between this plea of compensation, or set-off, and the other contention that the agreement of August 31, 1906, was a transfer, has not escaped our attention, but is unimportant from the view we have taken of the case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside in so far as it rejected plaintiff's demand for the \$4,747.36 in question in this suit, and that this case be remanded for further trial in accordance with the views expressed in this opinion. Defendant to pay the costs of this appeal; the costs of the further trial to abide the result of the further trial.

(126 La.)

No. 17,792.

STEEG v. LEOPOLD WEIL BLDG. & IMP. CO.

(Supreme Court of Louisiana. April 11, 1910.)

*(Syllabus by the Court.)***1. ACTION (§ 1*)—GROUNDS OF ACTION.**

Whatever may be the purpose of an individual in the adoption of a particular course, if neither the acts done nor the results accomplished are obnoxious to the law, they cannot be successfully attacked in the courts.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 1-9; Dec. Dig. § 1.*]

2. PERPETUITIES (§ 4*) — RIGHTS OF FORCED HEIRS—EXCHANGE OF PROPERTY BY ANCESTOR.

A citizen may legally exchange part, or the whole, of the property of his estate for shares of stock in a corporation of which he is one of the organizers; and, if the charter imposes no limitation upon the power of the corporation to alienate such property, and imposes upon it no obligation to hold, or administer, the same for another, or to deliver it to another, save the obligation which it owes to its shareholders, such disposition does not create a prohibited substitution or fidei commissum, of which a forced heir, who receives his legitimate in the stock of the corporation, can complain, even though there be certain provisions in the charter which render it more difficult than would ordinarily be the case for him to dispose of such stock.

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 4.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. Clara Well Steeg against the Leopold Well Building & Improvement Company, prosecuted by the executor and heirs of plaintiff upon her death. Judgment for plaintiff, and certain defendants appeal. Reversed and dismissed.

Benjamin Rice Forman, for appellants. W. S. Parkinson, for appellee Steeg. John Francis Tobin (John Chilton Devereux, of counsel), for appellee Well. W. F. Brewer, for Caroline Heineman.

Statement of the Case.

MONROE, J. Leopold Weil lived in New Orleans with Biena M. Weil, his wife and partner in community, by whom he was blessed with seven sons—Samuel, Solomon, Isaac, Jacob, William, Emanuel, and David—and two daughters—Clara (now wife of Aaron Steeg, and the plaintiff in this case) and Caroline (now wife of David Heineman). He also accumulated considerable money, the most of which he invested in real estate in this city, and on May 19, 1904, being then about 67 years of age, he and his seven sons declared, by notarial act, that they constituted themselves a corporation for the purposes and subject to the conditions set forth in the act, as follows:

"Article 1. The name * * * of this corporation shall be the Leopold Well Building & Improvement Company. Its domicile shall be

in the city of New Orleans, * * * and it shall have * * * existence for 99 years. * * * It may have, hold, purchase, sell, convey, lease, rent, pledge, or mortgage property, personal, movable, and immovable, sue and be sued, and may have a corporate seal.

"Art. 2. The objects and purposes for which this corporation is organized and the nature of the business to be carried on by it are declared to be: To purchase, own, and improve real estate; to build, erect, sell, or lease houses and lands for dwellings and other purposes; to purchase, drain, reclaim, and improve lands and to build thereon and to render the same suitable for agricultural and residential purposes; and, generally, to engage in such business as may be necessary or incidental to the purposes herein set forth, and to do all and everything pertaining to, or in any way connected with, the purposes herein declared, including the power to borrow money and secure the same by mortgage or pledge on any of the property hereunder acquired, and to issue bonds or notes therefor."

Article 3 declares that the capital stock shall be \$500,000, divided into shares of \$100 each, to be fully paid for, when subscribed, in cash, services, or property. It further declares that the corporation may commence business when \$100,000 of the stock shall have been subscribed; and further, as follows:

"Whenever any shareholder shall wish to sell his shares of stock, * * * the other shareholders shall have the privilege of buying, in proportion to the shares owned by them, at the price bona fide offered therefor, in writing, by an outsider and submitted to the board of directors; and, if no price is offered by an outsider, then the remaining shareholders shall have the privilege of buying the shares at the book value thereof with such allowance, if the corporation is earning a dividend, added thereto, and for the good will of the business, as the average net earning capacity of the stock, for the years preceding the sale, shall fairly entitle it to."

Article 4 vests the powers of the corporation in a board of five directors, who are required to be stockholders, and names Leopold, Samuel, Jacob, Emanuel, and Solomon Weil as the members to constitute the first board and to hold office until the last Monday in May, 1905, upon which date and annually thereafter directors are to be elected. The article also provides for the election by the directors of a president, vice president, and secretary-treasurer, and the appointment and employment of other officers and agents; and it names Leopold Weil as the first president, Jacob, vice president, and Emanuel, secretary-treasurer. It also provides that the board shall appoint one of its members general manager, with power to act upon conditions to be imposed by the board.

Article 6 provides a method of liquidating the corporation at the expiration of the charter, or upon its dissolution prior to that time.

"Art. 7. No action of stockholders at any meeting shall be valid or binding unless stockholders representing a majority of all the stock shall be present or represented by proxy, and it shall require a vote of at least three-fourths of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the stock so present or represented to elect directors, or to amend the charter, or to dissolve the corporation, or to do any other act at a stockholders' meeting."

The charter was signed by Leopold Weil as a subscriber for 1,333 shares of stock and by his seven sons as subscribers, each for one share, for which they paid in cash or otherwise. Two months later (on July 29, 1904) Leopold Weil sold and transferred to the corporation his real estate in New Orleans for the agreed price of \$142,800, represented by 1,423 shares of its (the corporation's) stock, and thereafter, on February 20, 1905, he died, leaving a will whereby he divided his estate equally among his children, subject to the usufruct of their mother. The will was admitted to probate on the petition of the executors (Samuel and Jacob Weil), and an inventory was made, showing assets to the amount of \$239,424.10, of which there were 1,516 shares of stock in the defendant company, appraised at \$152,500. Thereafter the executors filed an account, showing the net value of the estate, after deducting \$16,492.02 of liabilities, to be \$222,932.08, of which one half (\$111,466.04) went to the widow and the other half to the heirs, subject to the usufruct of the widow. The executors then filed a petition praying that the widow and heirs be put in possession, and they discharged, and there was judgment accordingly on February 27, 1907. On March 19th following Mrs. (widow) Weil, by notarial act, donated to her nine children each 50 shares of the stock of the defendant company, and expressly exempted the same from collation. Mrs. Steeg (plaintiff herein) on May 20th appointed her husband her agent to represent her in all matters relating to the stock so received by her, and during the same month, and in May, 1908, he attended meetings of the stockholders of the defendant company and voted said stock.

Mrs. Weil died on October 19, 1908, and her succession was opened some 10 days later. An inventory taken on November 30th showed assets to the value of \$23,370.48, of which \$13,720 was represented by stock in the defendant company. The inventory was not filed in court until January 4, 1909, when it was ordered to be approved and homologated. In the meanwhile, on December 24, 1908, Mrs. Steeg, authorized by her husband, instituted this suit, the prayer of the petition (and amended petition) in which, after asking that the defendant company and plaintiff's coheirs individually be cited, further asks that there be judgment—

"decreeing the said Leopold Weil Building & Improvement Company to be an illegal organization, a trust, a prohibited substitution, and a fidel commissum, absolutely null, void, and of no effect, and decreeing your petitioner and her coheirs, hereinabove named, to be the owners, in indivision, of all the property hereinabove described; and petitioner prays that experts be appointed to determine whether or not the property can be divided in kind; that an inventory be taken by William Renaudin, assisted by appraisers, and that the said * * * property

be sold at public auction by William Kernaghan, auctioneer, after due and legal advertisements, in accordance with law; that the said auctioneer be authorized to sign and execute the necessary acts of sale; * * * and that all the parties hereinabove named be referred to William Renaudin, notary public, for the purpose of effecting a partition of the proceeds of the same."

An order appointing experts to determine whether the property (being the real estate standing in the name of the defendant company) is divisible in kind, and for an inventory and appraisal appears to have been made on the filing of the petition and ex parte, and thereafter David Weil and Caroline Weil (wife of A. D. Heineman) answered practically concurring in the averments and prayer of the petition.

The corporation and the other heirs excepted: (1) That the corporation alone is the proper party to stand in judgment in an action to annul its charter, and that, until the charter is annulled, no action lies to partition the corporate property among its stockholders; (2) that plaintiffs have no capacity to stand in judgment in a suit to annul the charter of the company, the Attorney General alone being authorized to that effect; (3) that the petition discloses no cause of action, neither the charter of the corporation nor the sale by Leopold Weil disclosing any substitution or fidel commissum; (4) that plaintiff is estopped by having signed the inventory in the succession of Leopold Weil, in which the corporation here attacked is recognized, and by having received 50 shares of the stock of said corporation from her mother, and voted the same through her husband.

The exceptions thus filed were referred to the merits, save that in which it is said that the Attorney General alone can bring a suit such as this, which was overruled. And the defendants last mentioned then answered, admitting the establishment of the corporation, affirming its validity, and reiterating the matters of defense set up in the exceptions.

On the trial, in addition to the facts which have been stated, it was shown that at the time of the establishment of the corporation Leopold Weil owned other property (such as stocks, bonds, notes, cash, etc.) besides the real estate in question; that, after his death, his son, Jacob, became president of the corporation, Samuel, vice president, Emanuel, secretary-treasurer, and Solomon, general manager; that the total amount paid them as salaries has been \$4,000 a year; that the total net income of the company for the years 1905, 1906, 1907, and 1908 was \$52,038.70; that no dividends were declared, but that the profits or income had been reinvested in real estate. Samuel, Jacob, Solomon, and Emanuel Weil were examined by plaintiff (as upon cross-examination, under the act of 1908) upon the question whether it was not the purpose of their father to tie up the real estate turned over by him to the company and the rev-

venues therefrom during the life of the company, and one or two of them testified that his idea was not to declare dividends "that the surplus should always go towards buying realty, and, of course, the stockholdings would increase the value of the stock." The testimony is, however, not (to our minds) conclusive to the effect that he expected his heirs to hold the property for 99 years without using or enjoying it, and then to turn it over to their successors; such expectation being inconsistent with the power conferred by the charter of the company. The judge of the district court, however, reached the conclusion that plaintiff was entitled to the judgment prayed for, and he accordingly decreed the dissolution or nonexistence of the corporation, recognized the Well heirs (who are the only stockholders) as the owners of the property standing in its name, and ordered that said property be sold to effect a partition, and that the parties be referred to a notary to consummate the same. The corporation and the other defendants, save David Well, Mrs. Heineman, and the executor and heirs of Mrs. Steeg (who were made parties plaintiff in consequence of her death) have appealed.

Opinion.

The propositions upon which plaintiff relies, as stated in the petition, are substantially as follows:

That Leopold Well turned over all the property which had been acquired in community to the Leopold Well Building & Improvement Company (hereafter called the company) in exchange for certain shares of the capital stock of the company which had been organized solely for the purposes of taking over and holding the same and of acquiring other property with the revenues thereof, and that, after his death, the company, solely with said revenues, acquired other real estate, though no property of that description was found in the estates of the decedent or his widow.

That said company "never had any legal existence, in so far as it attempts to hold the property of said estates."

"That the same is inconsistent with the Constitution and laws of the state of Louisiana, in that it was incorporated with the intention of avoiding the inheritance laws and with the manifest purpose of holding said property in perpetuity, in trust, to prevent a partition thereof among the heirs, and to keep the same out of commerce. That, for the reasons above set forth, the said corporation is a trust, a prohibited substitution, and a fidei commissum, utterly null, void, and of no effect. That, by reason of the fact that the said * * * company is a prohibited substitution, * * * and that it never had any legal existence, all of the titles of the real estate held by it, as hereinbefore set forth, are in truth and reality the property of the estates of the said Leopold Well and the said Biena M. Well, and is now owned, in indivision, subject to the laws of this state, by petitioner and her coheirs. * * * That said real estate, though listed by said company at less than \$250,000, is * * * worth in excess of \$400,000. Petitioner alleges that, by reason of

the said illegal corporation holding the said property of the estates of her said father and mother, she has no voice in the control and management thereof, can derive no benefit therefrom, and is compelled, in defiance of the law of the state, and against her will, to hold the same in indivision with her coheirs. That she is unwilling so to hold it, and desires a partition thereof, and of any and all other property, real or personal, which may belong to said estates. Wherefore, the premises considered, petitioner prays," etc.

As the inventory of Leopold Well's succession showed assets to the value of \$239,424.10, of which but \$152,500 consisted of stock in the company, and as the inventory in Mrs. Well's succession showed assets to the value of \$23,370.48, of which but \$13,720 consisted of such stock, it is evident that all the property of the community was not put into the company.

Considering carefully the other allegations of plaintiff's petition, we find that the existence of the company is not attacked because of the nonobservance of any statutory requirement for its establishment, or because its declared purpose is to buy, own, improve, and sell real estate as contradistinguished from other property.

Stripped of matters of amplification, the grounds of attack are that the company was formed for the purpose of avoiding the inheritance laws by the establishment of a trust which will hold the property acquired from Leopold Well in perpetuity, keep it out of commerce, and prevent its partition among his heirs, and that the creation of a company for such a purpose and the conveyance to it of the property in question amounts to a prohibited substitution and fidei commissum, and hence that the whole scheme is illegal and void.

It is, however, an essential requisite to a prohibited substitution that the property conveyed to the first recipient shall be held by him without the capacity to alienate it, and thus be tied up in his hands during his life, and that the ultimate beneficiary, to whom it is to be delivered by the first recipient, is to come into the enjoyment of it only upon the death of such first recipient. The fidei commissum differs from the prohibited substitution, in that in such case the charge imposed upon the first recipient is to be executed during his life, and he holds and administers the property as trustee for the beneficiary, in whom alone the title vests. *Beaulieu v. Ternoir*, 5 La. Ann. 480; *Succession of Michou*, 30 La. Ann. 218; *In re Billis' Will*, 122 La. Ann. 543, 544, 47 South. 884.

In the instant case a corporation was created, the object and purposes of which, as declared in its charter, are "to purchase, own, improve, and sell real estate; to build, erect, sell, or rent, or lease, houses and lands; * * * to purchase, drain, reclaim, and improve lands, and to build thereon, and to render the same suitable for agricultural or residential purposes; and, generally, to

engage in such business as may be necessary or incidental to the purposes herein set forth." Being purely a creature of the law, and having no existence beyond the law of its creation, the company cannot in the nature of things have any purpose other than those declared in that law; and, whilst its policy, as controlled by the natural persons who have administered its affairs, seems, thus far, to have been rather to buy real estate than to sell it, and to reinvest its profits, rather than distribute them among the shareholders, that fact, we imagine, is apart from the question under consideration, since the company cannot be held on that account to have been created for the purpose of tying up Leopold Weil's estate any more than could a bank, in the stock of which he may have invested other funds, should the directors conclude to accumulate a surplus rather than declare dividends. Moreover, though Leopold Weil (and the other incorporators as well) may have been inspired by the motive which plaintiff ascribes to them, no limitation or obligations were, or could have been, imposed upon the corporation, save those which are contained in the charter, and, as the charter contains none which would prevent it from alienating the property acquired from Leopold Weil or which require it to administer that property for the benefit of, or to turn it over to, any one, save those who, as stockholders administering the corporation, are already in possession of it, it cannot be said that any substitution or fidei commissum has been created within the meaning of the law prohibiting trusts of that character, unless we should be willing to go further, and say that all property owned by corporations is held in trust within the meaning of that law, in which case we should be obliged to read out of the books all the law authorizing the establishment of corporations. It is said, upon the other hand, that the maintenance of the corporation and of the disposition of property here attacked will be tantamount to the repeal of the law regulating the devolution of property by inheritance, but we do not so regard it. It has always been the law here, as it has been elsewhere, that a citizen may acquire stock in a corporation, and may pay for it in cash or in property, in either case exchanging one species of property for another species, which he prefers, and which, like that with which he parts, will in the event of his death pass to his heirs. Formerly a citizen engaged in mercantile business necessarily placed his whole fortune at risk, unless he became a partner in commendam, in which event he was denied the privilege of handling his own investment. More than that, by the express terms of the law (which remains unrepealed), he was authorized to stipulate in a contract of partnership that the relation should continue between his heirs and his surviving partner or partners, so that, not only was, and is, it pos-

sible for the inheritance of an heir to be subjected to the control of others, but it was, and is, possible for him to incur liability beyond the value of his inheritance through the acts of those exercising such control. Civ. Code, art. 2382. Of course, in the case of a major heir, the difficulty may be readily solved by his renouncing the succession. In the case of a minor heir, no solution seems to suggest itself. In these latter days (since the passage of Act No. 36, of 1888), if one has the whole or part of his fortune invested in merchandise, he may convert his mercantile house into a corporation, and, exchanging his merchandise for shares of the corporate stock, acquire the exemption from further liability which was formerly accorded only to the partner in commendam, without, at the same time, sacrificing the right to conduct the business in which his means are thus invested; and his heirs may inherit his stock, as they would have inherited his merchandise, without incurring the liability resulting from an inherited partnership, and without the necessity of a liquidation of the business. It is, however, argued by the learned counsel for plaintiff (in effect) that the charter of the defendant company, regarded as a contract between the incorporators, is obnoxious to the objections stated in the petition by reason of the peculiar provisions regulating the alienation of its stock, whereby (as it is said) the minority are deprived of the right to either enjoy or to part with their property. We do not, however, concur in the conclusion reached by the learned counsel as to the extent of the deprivation of which the plaintiff complains. If the business of the corporation is profitable, and the withholding of the profits from the shareholders is unreasonable, we imagine (though the courts are rather disinclined to interfere in such matters) that a remedy might be found. On the other hand, if plaintiffs desire to sell their stock, and are unable to obtain a bona fide offer in writing from an outsider, as a basis for their call of the option which the charter gives to their fellow stockholders, they have the right to demand that the latter take the stock at the book value, and, in default of their so doing, plaintiffs may sell it to whom they please, and at what price they please; and by "book value" we understand, not any arbitrary or fictitious value that may be entered on the books of the company, but the value as predicated upon the market value of the assets of the company, after deducting its liabilities. It may be conceded that it would perhaps be more difficult to find a market for the stock of the minority shareholders in the defendant company than for some other stocks, but the same thing may be said of the stock of many other corporations, controlled by a few individuals, and the same difficulty might exist if the minority were free to sell to whom they pleased, without first offering their stock to the majority. Beyond that, as we understand

the situation, there are practically three plaintiffs in this case who constitute the complaining minority, to wit, the heirs of Mrs. Steeg (who are the titular plaintiffs), Mrs. Heineman, and David Weil, and they each own one-ninth of the stock, or a total, among the three, of one-third, from which it follows that they have a very potent voice in the administration of the company's affairs, since under article 7 of the charter it requires at least three-fourths of the stock to elect the directors, or to do any other act at a stockholders' meeting. In conclusion it must be remembered that the charter provisions, of which plaintiffs complain, were agreed upon by the incorporators of the company, who were *sui juris*, were dealing with their own property, and who, subject to those provisions, converted that property into the stock of the company. The provisions so agreed upon impose the same obligations upon all the stockholders, and, though somewhat out of the ordinary, are by no means unheard of, and, so far as we can see, are not intrinsically illegal; the illegality, if any there be, consisting of the (alleged) fact that they are part of a general scheme for the accomplishment of the illegal purpose to tie up the legitimate of the forced heirs of Leopold Weil and his wife. If, however, Leopold Weil and those of his heirs who participated with him in the framing of those provisions were actuated by such purpose, the means adopted by them were, and are, wholly inadequate for its accomplishment, since he died within a few months thereafter, leaving his entire estate under the control of his widow and heirs, so that, whilst he may have advised, and during his life may have enforced, the policy of buying property and holding it, they were left free, at his death, to do as they pleased in that respect. On the other hand, the only evidence that his scheme was devised particularly to the prejudice of the complaining minority is to be found in the fact that none of them are officers of the defendant company, and in a few words which escaped one of the witnesses, from which it might be inferred that the sons-in-law are not altogether acceptable to the Weil family. So far as the administration of the company is concerned, there is no complaint, the salaries paid the officers are reasonable, and the real estate, which was put into the company at a valuation of \$142,300, is alleged in the petition to be now worth in excess of \$400,000, and some \$40,000 has been expended in the purchase of other property. The idea, however, that, because the life of the company is fixed at 99 years, the majority of the share-

holders would continue (even if they were not interfered with) during their lives to pursue the policy of buying and holding, and reinvesting the revenues only to continue to buy and hold, appears to us to attribute to them a capacity for sacrificing themselves for the benefit of posterity which our information does not warrant us in assuming that they possess.

We have abstained from the consideration of several questions which are discussed in the briefs of the counsel for plaintiffs, for the reason that we do not find them presented in the pleadings, and the briefs themselves confirm us in the view that they were not intended to be so presented. Thus, in the original brief, after having recapitulated the points to which we have referred, the counsel says:

"It seems to the writer that the true test, the sole test, in this case, is involved in the question: *Could Leopold Weil by will have tied up his property in the way in which it is tied up here; could he by will have prevented a partition of the real estate among his heirs?*" (Italics by the counsel.)

And the conclusion of his supplemental brief reads as follows:

"It is demonstrated, therefore, that the intention was to organize a corporation which would take and hold intact this estate, and pass it on, from generation to generation, to be controlled and ordered for all time exactly as old man Weil wished. He could not accomplish such a purpose by will. Can such an attempt to evade the law be successful? Can he establish in Louisiana a tenure and disposition of property unknown to its law, indeed, hostile to, and prohibited by, the spirit and letter of her enactments on the subject?"

From the petition itself, and from the argument in support of the case therein presented, our conclusion has been that we were called on to decide the questions which we have considered, and none other; and, for the reasons which have been given, our conclusion upon those questions is that, whatever may have been the purpose of Leopold Weil in exchanging his real estate for shares of stock in the defendant company, neither the course pursued by him nor the results accomplished are obnoxious to the law prohibiting substitutions and *fidel commissas*; and hence that plaintiffs have failed to make out their case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the defendants, rejecting the demands of the plaintiffs, and dismissing this suit at their cost in both courts.

(126 La.)

No. 17,779.

GLADSTONE REALTY CO. v. CURRIE.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied April 25, 1910.)*(Syllabus by Editorial Staff.)*

1. VENDOR AND PURCHASER (§ 176*)—DEFICIENCY IN TRACT SOLD—REMEDY OF PURCHASER.

The right of action by a purchaser for a lump sum of a certain and limited body of land actually containing 3.85 acres, but said to contain 10 acres, more or less, is for a diminution of price, under Civ. Code, art. 2494, and not for a supplement of area.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 176.*]

2. VENDOR AND PURCHASER (§ 176*)—DEFICIENCY IN TRACT SOLD—REMEDY OF PURCHASER—DIMINUTION IN PRICE.

Defendant sold from a certain tract for a lump sum land described by metes and bounds, said to contain 10 acres, more or less, but as a matter of fact containing only 3.85 acres. Thereafter he sold the remainder of his tract to plaintiff for a lump price. The sale was made by boundaries that included the lot previously sold; but the act recited that it was made, "less 10 acres, more or less, sold to" the first grantee. The tract, less the 10 acres, was said to contain 240 acres; but as a matter of fact it and the lot previously sold had an area of 235 acres. Plaintiff sued for a diminution of price, under Civ. Code, art. 2494, providing for an action for diminution of price where the real measure comes short of that expressed in the contract by one-twentieth part. *Held* that, as the grantee on the first deed could only demand 3.85 acres, the shortage in the land actually conveyed, 235.8 acres less the 3.85 acres originally sold, is only 8.5 acres, which is less than one-twentieth of the land supposed to have been sold, so that plaintiff had no right of action for diminution of price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 176.*]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the Gladstone Realty Company against A. Currie. From a judgment for defendant, plaintiff appeals. Affirmed.

Hall & Jack, for appellant. Alexander & Wilkinson, for appellee.

PROVOSTY, J. The defendant, Currie, sold to P. & H. Youree a lot from off his large tract of land. The lot was sold by metes and bounds for a lump price. It was said to contain 10 acres, more or less, but as a matter of fact contained only 3.85 acres. Eleven months later the defendant, Currie, sold the remainder of his tract of land to the plaintiff company for a lump price. The sale was made by boundaries that included the lot sold to P. & H. Youree; but the act recited that it was made "less ten acres, more or less, sold to P. & H. Youree." The tract, less the 10 acres, was said to contain 240 acres. As a matter of fact, it and the P. & H. Youree lot together have an area of only 235.8 acres. Plaintiff brings this suit

for a diminution of price, under article 2494, Civ. Code, which reads:

"Art. 2494. In all cases, whether the sale be of a certain and limited body, or of distinct and separate objects, whether it first set forth the measure, or the destination of the object, followed by its measure, the expression of the measure gives no room to any supplement of price, in favor of the seller, for the overplus of the measure; neither can the purchaser claim a diminution of the price on a deficiency of the measure, unless the real measure comes short of that expressed in the contract, by one-twentieth part, regard being had to the totality of the objects sold; provided there be no stipulation to the contrary."

One-twentieth of 240 is 12. Take 10 acres for the Yourees from the 235.8, and the land is short 14.2 acres of the 240 called for by the deed—a greater shortage by 2 acres than one-twentieth. On the other hand, take 3.85 for the Yourees, and the shortage is only of 8.05 acres, or 4.95 acres less than one-twentieth.

We do not think the Yourees could demand of plaintiff more than 3.85. The sale to them, like that to plaintiff, was "of a certain and limited body" for a lump price, and their right of action would be under article 2494, *supra*, for a diminution of price, like that of plaintiff, and not for a supplement of area. That article does not give a right of action for a supplement of area, but only for a diminution of price.

The learned counsel for plaintiff say, however, that the truth of the matter is that the agreement between the defendant, Currie, and the Yourees, was to cut out 10 acres from the larger tract, and that the surveyor, in establishing the metes and bounds according to which the sale was made, intended to include within them that number of acres, and by error included only 3.85, and that the action of the Yourees would be for a correction of this error, and would be as fully maintainable against the plaintiff as against the vendor, Currie, himself, because in the act of sale to plaintiff there is the recital that what was sold to the Yourees was 10 acres.

The answer is, in the first place, that the said mistake in fixing the metes and bounds is neither alleged nor proved; and, in the second place, that the Yourees could not be allowed to prove, as against the vendee of their vendor any verbal agreement of their vendor, or even any written agreement not of record. Therefore any suit brought by them against the plaintiff company would have to be determined by the application of legal principles to the recorded documents, and the result of so doing would be that the only action accruing to them would be against their vendor in diminution of price, under article 2494, *supra*.

The statement in the deed to plaintiff that the Youree deed calls for 10 acres is of no

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

more significance than the same statement as contained in the Youree deed itself. The Youree deed was not thereby changed. There was no intention to change it. It continued to be just what it was before; that is to say, "a sale of a certain and limited body" for a lump price. There can be no doubt that all parties were under the impression that 10 acres were contained within the metes and bounds mentioned in it. They were mistaken in that regard. That is all. That mistake cannot be construed into a consent that the deed should be amended so as to include land outside of the metes and bounds, or that the Yourees should have any more than their deed called for on the face of the record. And on the face of the record, by operation of the legal principles applicable thereto, the deed called for only 3.95 acres. Judgment affirmed.

(126 La.)

No. 18,151.

STATE v. WHITE et al.

(Supreme Court of Louisiana. April 25, 1910.)

(*Syllabus by the Court.*)

FORGERY (§ 7*)—SUBJECTS OF FORGERY—TRADE CHECK—"NOTE."

Since the enactment of Act No. 228, p. 345, of 1908, trade checks redeemable in merchandise are payable on demand in current money of the United States. Hence a trade check in the form of a promissory note payable to bearer in merchandise, if not an order for money, is a "note," within the purview of the statute against the forgery of notes, orders, etc.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 8-15; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 5, pp. 4836-4839.]

Appeal from Twelfth Judicial District Court, Parish of Vernon; Don E. So Relle, Judge.

Hugh White and another were convicted of forgery, and appeal. Affirmed.

W. M. Lyles, for appellants. Walter Gulon, Atty. Gen., and James G. Palmer, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

LAND, J. The three defendants were indicted for forgery and uttering as true a certain obligation, called a "trade check," for the payment of money, being for \$1, drawn on Gulf Lumber Company in favor of bearer, and purporting to be signed on its face by W. L. Vernon, and to be indorsed on its reverse side by the letters "A. D. M."

The defendants pleaded not guilty, and two of them, having been convicted, have appealed from the sentence.

There was no motion to quash the indictment, but on the trial the accused requested the court to charge that the instrument referred to in the indictment was not a check or order, within the intent of section 833 of

the Revised Statutes of 1870. The "trade check" reads as follows:

"We promise to pay bearer one dollar, two years after demand, in merchandise.

"[Signed] Gulf Lumber Company,
"By W. L. Vernon."

On the reverse appear the letters "A. D. M."

The evidence shows that said letters are the initials of A. D. McClellon, and that he and W. L. Vernon were officers of the Gulf Lumber Company.

From the indictment, and the statement of the trial judge, it may be inferred that the instrument in question is in effect an order issued by the company on itself. The judge ruled that the instrument was an order payable under the law in cash, and came within the intent of section 833 of the Revised Statutes of 1870.

Act No. 228, p. 345, of 1908, provides that the makers of checks, tickets, tokens, or other devices redeemable in whole or in part in merchandise shall be liable on demand in current money of the United States. Hence the instrument, read in the light of the statute, is a perfect promissory note payable to bearer, and, whether considered as a note or an order, is within the purview of section 833 of the Revised Statutes of 1870.

Judgment affirmed.

(126 La.)

No. 17,619.

MATTHEWS v. SLATTERY.

(Supreme Court of Louisiana. April 25, 1910.)

(*Syllabus by the Court.*)

LIBEL AND SLANDER (§ 140*)—JACITATION—SLANDER OF TITLE.

The object of the action of jactitation is to protect possession and give it the same advantage when disturbed by slander as by actual intrusion, to force the defamer to bring suit, and throw the burden on him of proving what he asserts. Hence the action cannot be maintained by an intruder who unlawfully enters upon property of which another is in actual possession, under claim of title, unless such intruder be allowed to remain in undisturbed possession for a year. And the rule so stated applies to a person claiming title from the United States under an inchoate homestead entry and intruding upon land in the actual possession of another under title, or color of title, emanating from a sovereign state.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 397-401; Dec. Dig. § 140.*]

Appeal from the First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by W. H. Matthews against J. B. Slattery. Judgment for defendant, and plaintiff appeals. Affirmed.

Alexander & Wilkinson, for appellant. Pugh, Thigpen & Herold, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Statement of the Case.

MONROE, J. Plaintiff alleges that he is in actual possession of the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 7, township 17 N., range 13 W., under a homestead entry in the United States Land Office, of date September 13, 1908. He complains that defendant is slandering his title and has damaged him thereby, and he prays that he be ordered to desist from so doing and condemned to pay \$200 and costs.

Defendant filed a petition to remove the case to the United States Circuit Court, and then filed a plea of *lis pendens*, and then, apparently abandoning those pleadings, answered, denying that plaintiff has ever been legally in possession of the land in question, and averring that he, defendant, is now, and for 20 years has been, in possession thereof as owner, and (since the death of his wife) as owner and usufructuary.

The facts are as stated in the answer; defendant having been in actual possession of the land as owner (under a title apparently emanating originally from the state of Louisiana) since 1887. It appears that on September 16, 1908, plaintiff paid to the United States receiver of the public moneys at Natchitoches the sum of \$14.05, which was received "in connection with H'd original serial no. 0151," for said land, at \$2.50 per acre; that on September 19th he wrote to defendant that he had made a homestead entry of the land, and that, understanding that defendant had been for some years claiming to be the owner, he would give him time to investigate the matter; that on November 3d, defendant being in actual possession of the land, he (plaintiff) entered thereon and put up a tent, in which he lived, though he found the land inclosed by a fence, which he "supposed" was defendant's, and which he cut in order to get in, and that he knew that defendant appeared to be the owner, according to the parish records, which had been examined by him. Eleven days later (on November 14th) plaintiff instituted this suit, and somewhat later still (on February 23, 1909), having been prosecuted for trespass and convicted, he withdrew from the land "under threats of additional criminal prosecution," and did not pretend to be occupying it when this case was tried in the district court. At some time during his stay on the land he built thereon a small house and barn at a cost of perhaps \$500, those structures having been erected within the same inclosure where defendant has cabins which are rented to, and occupied by, his tenants. Upon the case as thus presented, there was judgment in the district court in favor of defendant, and plaintiff has appealed.

Opinion.

The object of the action of *jactitation* (or *slander of title*) is to protect possession, and

"give it the same advantage when disturbed by slander as by actual intrusion, to force the defamer to bring suit, and throw the burden on him of proving what he asserts."

Hence the action cannot be maintained by an intruder, who unlawfully enters upon property of which another is in actual possession under claim of title, unless such intruder is allowed to remain in undisturbed possession for a year. *Livingston v. Heerman*, 9 Mart. (O. S.) 714; *Dalton v. Wickliffe*, 35 La. Ann. 357; *Patterson v. Landru*, 112 La. 1074, 36 South. 857; *South Louisiana Land Co., Ltd., v. Riggs Cyprus Co.*, 119 La. 193, 43 South. 1003. In contemplation of law, plaintiff was not in possession of the property in question when he brought this suit, for (as has been said in another case) "he no more acquired such possession by breaking or opening the appellee's fence and entering therein than he "would have done if he had first slain the appellee, and had, thereafter, maintained himself on the property, in defiance of the officers of the law and by force of arms." *Darby's Heirs. v. Emmer*, 120 La. 692, 45 South. 551; *State ex rel. Honey Island Land & Timber Co. v. King*, 110 La. 962, 35 South. 181.

As to the laws of the United States relating to the pre-emption of government land, the Supreme Court of the United States has said:

"The right to make a settlement has to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize another man's dwelling. It had reference 'to vacant land,' and it would have shocked the moral sense of the men who passed those laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude. * * * It follows that they [the entrymen] were mere naked trespassers, making an unwarranted intrusion upon the inclosure of another." *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 782.

The act of Congress of February 25, 1885 (Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524]), makes it unlawful for a person having "no claim or color of title, made or acquired in good faith," to inclose the public lands of the United States, and provides a summary remedy for the ejection of such person, but the act, by its terms, applies only to those who have "no claim or color of title, made or acquired in good faith," and can have no application to one who has been in possession for years under a title emanating from a sovereign state. *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

The judgment appealed from is therefore affirmed.

(126 La.)

No. 18,132.

WILLIAMSON v. GRUAZ.(Supreme Court of Louisiana. April 11, 1910.
Rehearing Denied May 9, 1910.)*(Syllabus by Editorial Staff.)***DIVORCE (§ 215*)—ALIMONY PENDENTE LITE—AMOUNT.**

At the institution of an action against a husband for separation from bed and board, he was a prosperous florist and gardener, having a large nursery and being in charge of 50 or 60 gardens. The community of acquêts and gains existed between him and his wife. Its property consisted of \$4,950 cash in bank, and of the plants and flowers of the nursery; the land itself being the separate property of the husband. The husband's income appeared to be about \$400 per month, and the value of the plants and flowers about \$3,500 and of the real estate about \$27,000. *Held*, that the wife, who was an invalid, was entitled to \$50 a month alimony pending the action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 632-634; Dec. Dig. § 215.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Mrs. Elizabeth Williamson against Francois Gruaz. From an interlocutory judgment requiring defendant to pay plaintiff alimony pending the action, defendant appeals; plaintiff answering the appeal and praying for additional relief. Affirmed.

P. L. Fourchy, for appellant. Edgar M. Cahn, for appellee.

PROVOSTY, J. The defendant husband has appealed from an interlocutory judgment condemning him to pay the plaintiff, his wife, \$50 per month alimony pending her present suit against him for separation from bed and board. The wife has answered the appeal, and prayed that the judgment be increased to \$200, the amount asked for in the lower court.

At the time of the institution of this suit, the husband was a prosperous florist and gardener. His nursery occupied one entire square and part of another, and he had charge of some 50 to 60 gardens. The community of acquêts and gains existed between him and his wife. Its property consisted, as we understand, of \$4,950 cash in bank, and of the plants and flowers in the nursery; the land itself being the separate property of the husband. The inventory usual in suits of this kind has not been made. The testimony touching the income of the husband, and the value of the property is little better than pure guesswork. Such as it is, it estimates the income of the husband at about \$400 per month, and the value of the plants and flowers at about \$3,500, and that of the real estate at about \$27,000. The learned counsel for defendant says that the fact is, though not shown by the record, that the injunction issued in the present suit, by which the husband has been prohibited from selling

or disposing of any of the property, not excepting the plants and flowers of the nursery, has broken up the husband's business, and that he has now no revenue, and that the value set upon the property is ridiculously exaggerated.

One thing is certain—the wife is an invalid and must have a maintenance from the husband pending this suit. The attempt of the husband to show that she has a business and property of her own failed utterly. We should like to be able to increase the judgment; but the ground we would have to tread on for doing so is too uncertain.

Judgment affirmed.

(126 La.)

No. 17,831.

DELSA v. RAYMOND.(Supreme Court of Louisiana. April 11, 1910.
Rehearing Denied May 9, 1910.)*(Syllabus by the Court.)***DIVORCE (§ 124*)—SEPARATION FROM BED AND BOARD—EVIDENCE—SUFFICIENCY.**

The plaintiff in this case was granted a separation from bed and board from her husband by the district court. On appeal that judgment is affirmed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 392-398; Dec. Dig. § 124.*]

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Celia Delso against William L. Raymond. Judgment for plaintiff, and defendant appeals. Affirmed.

William C. McLeod, for appellant. John P. Sullivan and Arthur Landry, for appellee.

Statement of the Case.

NICHOLLS, J. The petition of the plaintiff alleges: That she had been married since February, 1906. That at the time of the filing of suit one child, issue of said marriage, namely, Francis Presley Raymond, was born, and since the filing of the suit plaintiff has given birth to a second child, namely, Celia Delso Raymond. That for the first month of her marriage she and her husband went housekeeping on Milan street, in this city, and that thereafter her said husband took her to the home of his mother, Mrs. T. L. Raymond, at No. 7037 Elm street in this city, and that whilst there her baby was born.

"That she and her said husband resided with his mother and father and family for a year or more, and that during that time her life was made miserable by the cruel and inhuman treatment of her said husband and of the members of his family, with his knowledge and consent, and that her life was made a torment and a burden by reason of the outrages perpetrated upon her.

"That after the birth of her said child, and against her wish, and contrary to the advice of the attending physician, the said child was taken from her, although she was fully capable

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of caring for and attending to it, and consigned to the care and custody of her husband's mother, who raised it upon the bottle and cared for its every want, and kept it in her own room, notwithstanding your petitioner's entreaties and supplications. That your petitioner was not allowed to care for her said child, nor to see same, except upon certain occasions, nor to nurse and fondle it, nor to have it with her and by her side nor even in the same room with her at night.

"That during all this time your petitioner's mother and sisters and brother and family were not allowed to call and see her and her child, and were telephoned to stay away by members of her husband's family, with his knowledge and consent, and notwithstanding your petitioner's entreaties to him. That finally your petitioner's family, seeing her misery and unhappiness, and with a view of adjusting, if possible, the breach between her and her husband, sought legal advice, and after consultations between the attorney employed by her family and her husband and his attorneys an understanding was arrived at as follows:

"That your petitioner and her husband would take a trip, and leave the child with the mother of petitioner's husband. That upon their return to New Orleans in the month of October, 1907, her said husband would secure quarters away from the home of his mother, and that the child would be brought to the new home established by them, there to be placed in the care and custody of your petitioner.

"Your petitioner further alleges: That she and her said husband took the trip agreed upon as above stated, but that the balance of the agreement was never lived up to by him. That they were gone for two weeks, which was spent by them on the Gulf coast. That at the end of that time your petitioner's mother-in-law came to get her husband, and that she returned with them to New Orleans. That your petitioner and her husband resided at the Grunewald Hotel upon their return for two days and two nights. That at the end of that time her husband told your petitioner that all their money would go if they kept on living in this manner, and that it would be advisable for them to return and live with his mother. Your petitioner agreed to this, thinking that perhaps this conciliatory measure would win over his people, and that she would receive from them better treatment. Your petitioner alleges that conditions did not change upon her return to her mother-in-law's house, and that she was not given the care and custody of her child, for which her mother's heart was aching, and as her husband had agreed; that, on the contrary, the child was kept away from her, and that her husband's mother had full charge and control of it; that she complained to her husband, but without redress; that after one more week of humiliation, misery, and unhappiness, and of constant taunts and quarrels and insults on the part of her husband's family to her, she and her husband left her mother-in-law's house, and went housekeeping on Milan street; that she stayed there with him for three or four months; but that during all that time she was deprived of the care and custody of her child and of the solace and happiness which its possession would have brought her; that the child was allowed to stay with petitioner's mother-in-law, and, notwithstanding her entreaties to her husband, he took no steps to live up to the agreement made by him, and obtain for her possession of her child. Your petitioner alleges that finally about Christmas, 1907, her husband took up to live again with his mother; that she stayed there one day and one night; that on the said night she refused positively to remain in the home of her mother-in-law, and demanded possession of her child, but that her husband paid no attention to her

entreaties and requests, but after a quarrel with her struck her a blow in the face.

"Your petitioner alleges that on the following morning she left and sought refuge at her mother's home, Mrs. Widow George Delso, residing at 1014 North Dorgenois street. Your petitioner further alleges that she remained at her mother's home about one month, and that she and her family sought to have the differences between herself and her husband adjusted by the intermediary of the attorneys whose services had formerly been retained for that purpose; that her husband finally consented to live up to the agreement he had originally made, and that she went to live with him again on Milan street; that her husband's mother and sister came to live with them and brought her child to her; that her mother-in-law and sister-in-law were only to stay two weeks upon the pretext that it would take her that long to learn to care for the child; that this occurred in the early part of January, 1908; that conditions did not change; that she was practically a stranger in her own house, and denied the care and custody of her child; that, under pretext that it interfered with her husband's rest at night to have a child in the room with him, her child was given over in the control of her husband's mother, who cared for it and kept it in her room night and day; that she was virtually denied the use of part of the house, and only went in the rooms occupied by her mother-in-law and sister-in-law when she went to caress the child; that she was not spoken to by her husband's mother and sister, only when the former quarreled with her; that her husband wrote to her mother that he did not wish her and her family to call and see petitioner; that, notwithstanding petitioner's remonstrances, her husband would do nothing to better her position and her surroundings, and said that whatever his mother did was right. Your petitioner alleges that on Saturday, February 8, 1908, her husband left the house and did not return until the next day, Sunday, February 9, 1908, at 3 o'clock p. m., and that on Monday, February 10, 1908, he again left at about 8:30 o'clock p. m., and was gone for the whole week, and that his brother, Reginald Raymond, came to live at the house with her mother-in-law and her sister-in-law about this time, viz., Saturday February 8, 1908. Your petitioner's husband's father told her that he—her husband—was not coming back any more, and that he had told him to so inform your petitioner, and had instructed him to attend to the house.

"Your petitioner further alleges that on Sunday, February 16, 1908, at about 3 o'clock p. m., her husband came to the house, and informed her that he had made up his mind not to stay there any more; that the house was too small for the baby; that, if she (petitioner) did not want to go, she could stay there, but that he would take the baby to his mother's house, there to live with him and his family.

"Your petitioner entreated him not to do so, but he told her his mind was made up, and your petitioner told him she positively refused to consent to go to live with his mother, or to permit him to take her child there to live apart from her. Your petitioner further alleges that her said husband left about 8:30 o'clock p. m., and that she does not know whether he returned that night or not, as during his absence of one week from the house his family had removed his bed to the front room of the said house.

"Your petitioner alleges that on Monday morning, February 17, 1908, her husband came to the house and asked petitioner if she was ready to go, which petitioner refused to do; that besides her husband her mother-in-law, father-in-law, sister-in-law, and brother-in-law, Reginald Raymond, were there, and that they were ready to leave the house, and that a car-

riage was before the door; that her husband took the child, which had slept in her mother-in-law's room as usual, and started for the carriage with it; that your petitioner grasped her child, and endeavored to take it from her husband's arms; that thereupon her brother-in-law, Reginald Raymond, pushed her violently and threw her to the ground; that she was bruised and hurt, and, when she again attempted to rise, he pushed her down again, and in the meanwhile her mother-in-law, father-in-law, sister-in-law, together with the child, drove off in the carriage, and her husband and his brother walked away, and left her bruised and broken-hearted, crying for her child before her desolate and abandoned home.

"Your petitioner further alleges that she remained in the said house, and that later her husband came and wanted to remove therefrom all the furniture, and that, upon refusing to allow him to do so, he about the hours of 8:30 o'clock p. m. on said 17th day of February, 1908, and whilst darkness was settling upon the earth, knocked off and destroyed all the locks of said premises, leaving her in the said house in an insecure condition, a prey to fear, consternation, and despair.

"Your petitioner alleges that during the two years of her married life above recited her said husband on several occasions struck her, and often quarreled with and abused her; that he sanctioned all that his mother did, and made no attempt to secure for her the care and custody of her child, but approved of and sanctioned the keeping of the child of petitioner by her mother-in-law; that he knew the treatment received by petitioner at the hands of his mother and her family, of the quarrels she was subjected to, of the taunts and insults she received, of the humiliation she was encompassed with, and of the treatment her family received, and that, notwithstanding petitioner's entreaties, he made no attempt to better conditions or to live up to the obligations assumed by him under the marriage contract. Your petitioner alleges that she, on the contrary, has made every effort and endured every sacrifice to restore peace and harmony between her husband and herself, and make their life happy and contented.

"Your petitioner alleges that the cruel and inhuman ill treatment above recited, received by her, and the outrages endured by her at the hands of her husband, and the misery, humiliation, unhappiness, and agony of the two years of her married life, as a result of her husband's conduct, are of such a nature as to render her further living with her husband insupportable and impossible."

Defendant answered. He first pleaded a general denial. Further answering, he admitted that he was married to plaintiff on the date set forth in the petition; that the matrimonial domicile has always been in the city of New Orleans; that at the time the petition was filed the sole issue of said marriage was a boy, Francis Presley Raymond (on September 4, 1908, another child, a girl, likewise issue of said marriage, was born); that the allegations of the petition concerning residences on Milan street and 7037 Elm street are substantially correct. Respondent further admits that from the time of its birth until it was surrendered to petitioner after the filing of this suit the child was cared for mainly by respondent's mother. Respondent denied:

That petitioner was ever deprived of the care and custody of the child; that "her life

was made miserable by the cruel and inhuman treatment" of respondent or of members of his family; that "her life was made a torment and a burden by reason of the outrages perpetrated upon her"; that petitioner was ever humiliated or taunted or insulted by himself or by the members of his family, or that physical violence was ever suffered by petitioner on any occasion by respondent or by any member of respondent's family.

Respondent avers that at all times since his marriage with petitioner he has endeavored to provide her with a home suited to their means and circumstances, and that he has made every effort to live happily with her in accordance with the obligations imposed upon him by the marital contract.

Respondent further avers that any unhappiness or annoyance of petitioner was caused mainly by her own temper and disposition; that petitioner was many times guilty of the use of abusive and violent language toward respondent and the members of respondent's family; and that in the course of altercations she frequently raised her voice to such a pitch as to attract the attention of neighbors and passers-by, and that on other occasions she gave way to fits of passionate screaming, all without there being any cause therefor, and that this conduct upon the part of petitioner caused remonstrance and rebuke upon the part of respondent and the members of respondent's family.

Respondent further avers that for a number of months after its birth his child was delicate and required constant care as to its clothing and diet, and that petitioner was either unable or unwilling to do the necessary amount of care, and that for this reason, and for this reason solely, it was cared for by respondent's mother. Respondent avers that during the greater part of the time that has elapsed since the marriage the members of his wife's family were made welcome at his home, and were encouraged to visit her, but finally the conduct of some of these relatives became such that they were requested to cease their visits, but that such request was only made after due and sufficient cause had been given.

Respondent denied that his conduct had ever been such as to render their further living together insupportable and impossible, but averred, on the contrary, that by mutual concessions broken ties can be reunited, and a happy home maintained.

In view of the premises, respondent prayed that plaintiff's petition be dismissed, and for such other relief as the court may deem proper in the premises.

The trial resulted in a judgment by the district court ordering, adjudging and decreeing in favor of the plaintiff a separation from bed and board between her and the defendant, her husband, and granting her the permanent care, custody, and control of her two minor children, Francis Presley Ray-

mond, and Cella Delso Raymond, issue of her marriage with defendant, the latter child having been born since the institution of this suit, and further judgment for all costs.

It further decreed that plaintiff's rule for alimony be held in abeyance until such time as defendant may be possessed of means to pay the same, with right to plaintiff thereupon to have the same renewed, fixed, and enforced. Judgment read and rendered in open court June 29, 1909.

Defendant has appealed.

Opinion.

Plaintiff and defendant were married in February, 1906. For the first few months of their married life they kept house in a building leased by the husband situated on Milan street. Thereafter, in view of her approaching confinement, her husband took her to the house of his parents, Mr. and Mrs. P. L. Raymond, No. 7037 Elm street, at which place she gave birth to a son. Plaintiff with her baby and husband remained with the latter's parents for a year or more. During this period disagreements between the spouses arose from the complaint of the wife that her mother-in-law had taken from her the care and control of her baby to a degree which she claimed was unwarranted, and which was intolerable to her. The differences between the husband and wife became such as to threaten a separation, and each employed attorneys to represent them. A conference between these attorneys took place, at which it was agreed that the plaintiff and her husband should take a trip to Ocean Springs, leaving the baby with his grandmother, that on their return to New Orleans they should again keep house, and that the child should be placed in the care and charge of its mother. On their return to New Orleans, the husband again leased a house on Milan street, and he and his wife resumed their housekeeping, but the child was not placed under the control of its mother, but continued with its grandmother as before. This condition of things existed for three or four months, at the end of which time her husband took her again to the house of his parents, where she remained only a single night, and went the next morning to her own mother's house, where she stayed for about a month. Through the exertions of the same attorneys who had acted on behalf of the two spouses before, the couple resumed their relations again on Milan street. But, though the child was taken to the Milan street residence, he was taken there by the husband's mother and her daughter for the purpose it was stated of enabling the mother to learn how to prepare the child's food and how to care for it. They were (it was said) to remain there only temporarily for that purpose. A short time thereafter the husband informed his wife that he had made up his

mind to return and live with his parents, and that she and the child were to accompany him there. This the wife refused to do. On February 17, 1908, about 8 o'clock in the morning, a carriage drove up to the door of young Mrs. Raymond's residence, and her husband informed her that he was about to leave the house and return to his parents' home with the child, and called upon his wife to go with them. This she again declined to do, whereupon he took the child in his arms and started to the carriage, followed by his mother and sister. His wife ran quickly to the rear of and around the house, and reached the front gate ahead of them, and threw herself against it to bar their way out, seizing her husband and trying to take the child from him, and screaming at the same time. She was unable to do so, and he entered the carriage with the elder Mrs. Raymond and her daughter, and drove away leaving her behind.

The present suit for separation followed.

At the time judgment was rendered the trial judge was confronted with a condition which would carry with it as a result (if judgment was rendered refusing the relief plaintiff prayed for) the wife's being forced either to leave the matrimonial domicile as then established and follow her husband and her child to his parents' house under circumstances which were by her considered to be intolerable and insupportable, or she would be forced to remain apart from her husband and child, and surrender the latter permanently to her husband's parents.

Facing the fact of this alternative, the trial district judge reached the conclusion that the husband was not justified in breaking up the home which he had established for himself and his wife and their child, and forcing her, in order not to be separated from it, to consent to live at his parents' home under conditions which were to her unbearable.

We agree with the trial judge that the situation was such as to legally entitle the wife to a judicial separation from her husband.

Defendant in his answer denied that his conduct had ever been such as to render his wife and himself living together insupportable and impossible. He avers that, on the contrary, by mutual concession broken ties can be reunited, and a happy home maintained.

There is no declaration by the defendant of any promise or intention to make any change in the situation of which the wife complains. The judgment in this case is not final. The door is yet left open as respondent asserts for the resumption of marital relations between the parties and opportunity afforded to secure a happy home.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

(126 La.)

No. 18,188.

STATE v. SMITH.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by the Court.)

1. PERJURY (§ 25*) — INFORMATION — SUFFICIENCY.

A bill of information, to charge perjury, must show the materiality of the alleged false testimony, either by direct allegation that it was material, or by the allegation of facts from which its materiality is made to appear.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

2. PERJURY (§ 11*)—GROUNDS OF CHARGE.

Perjury may be assigned upon testimony going to the credit of a material witness, as where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a different statement he denies having done so, a charge of perjury may be founded on such denial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 52; Dec. Dig. § 11.*]

3. PERJURY (§ 25*) — INFORMATION — SUFFICIENCY.

Where, in a prosecution for perjury, it appears that the defendant, as a witness in the case in which the perjury is said to have been committed, was asked whether she had made a certain statement out of court, and she answered in the affirmative, but qualified her answer by saying that she had done so because she had been told, that, unless she did, she would be whipped, the bill of information, alleging the falsity of the qualifying statement and predicating the charge of perjury thereon, without alleging its materiality, is bad, for the reason that the facts alleged do not disclose such materiality, since, unless the witness had given testimony at variance with the statement attributed to, and admitted by, her, it was immaterial and irrelevant for the purpose of the issue presented what statement she had made out of court, or under what circumstances she had made it.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Bettie Smith was convicted of perjury, and, from an order sustaining a motion in arrest of judgment, the State appeals. Affirmed.

Walter Gulon, Atty. Gen., and Joseph Moore, Dist. Atty. (R. G. Pleasant, of counsel), for the State. David R. Rosenthal, for appellee.

Statement of the Case.

MONROE, J. The bill of information under which defendant was prosecuted, after setting forth that one Ed. Smith was in due course of law being tried in the district court under an indictment for murder, and that defendant appeared as a witness in his behalf and was duly sworn, proceeds as follows, to wit:

"Whereupon it became a material inquiry on the trial of said issue whether she, the said Bettie Smith, had not, on the second day after the killing, in the sheriff's office in the court-

house at Lake Charles, La., in the presence of Mr. C. B. Perkins and H. Kyle Ramsey, told the sheriff, D. J. Reid, that the Saturday night of the killing Gus Pugh came to the house of Ed. Smith, alias Bama Smith, and he and the said Ed. Smith asked her, the said Bettie Smith, if Gus Pugh had paid his board bill, and she answered, 'No'; that Gus Pugh had told her that Mr. Denas, his boss, had gone to Welsh, and he had not gotten his money, and that Ed. Smith said: 'That is not so. I saw Mr. Denas in Roanoke to-day.' And Gus Pugh said: 'Yes; he has gone to Welsh.' And Ed. Smith replied: 'You are a damn liar,' and immediately shot him, Gus Pugh. And the said Bettie Smith, being so sworn as aforesaid, wickedly contriving and intending to cause the said Ed. Smith to be acquitted of the said felony, did then and there knowingly, falsely, corruptly, willfully, and wickedly say, depose, and give in evidence to the jurors of the jury, then and there duly taken and sworn between the said state and the said Ed. Smith before the judge aforesaid, that she had made the foregoing statement to the sheriff, D. J. Reid, in the presence of H. Kyle Ramsey and C. B. Perkins, as detailed, but that she had done so because the sheriff, Mr. Reid, had told her then and there that, if she did not state the facts as Jack Vaughan had stated them, he would whip her, whereas, in truth and in fact, the said D. J. Reid, sheriff, had not told the said witness, Bettie Smith, that, if she did not state the facts as stated by Jack Vaughan he would whip her, all of which said statement made by said Bettie Smith the said Bettie Smith well knew to be false, so the said Bettie Smith at the court aforesaid before the said judge and the said jury, the said M. D. Andrews, deputy clerk aforesaid, having sufficient and competent power to administer the said oath to the said Bettie Smith, did commit willful and corrupt perjury, contrary to the form of the statute," etc.

On the trial defendant objected to the introduction of evidence, on the grounds, in substance, that the information charges no offense, since it is not alleged that the testimony said to have been false was material to the issue or matter of inquiry, and no facts are alleged from which such materiality appears. The objections were overruled, and defendant, having been convicted, renewed them in a motion in arrest of judgment, which was sustained. The state has appealed.

Opinion.

It will be observed that the bill of information alleges that it became a material inquiry whether defendant had not made certain statements to the sheriff, and that she testified that she had made the statements—

"but that she had done so because the sheriff * * * had told her * * * that, if she did not state the facts as Jack Vaughan had stated them, he would whip her, whereas, in truth and in fact, the said * * * sheriff had not told the said witness * * * that, if she did not state the facts as stated by Jack Vaughan, he would whip her, all of which statement, made by the said Bettie Smith, the said Bettie Smith well knew to be false, so the said Bettie Smith did commit willful and corrupt perjury," etc.

The specific allegation of materiality is therefore confined to the statement made by the witness to the sheriff; and the truth of her admission that she made those state-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments is not intended to be questioned. On the other hand, her testimony as to what the sheriff said to her, though alleged to be false and to constitute the perjury charged, is not in terms alleged to be material. It is, however, well settled, and is conceded by defendant's counsel, that the indictment or information may show the materiality of the alleged false testimony, either by direct allegation that it was material, or by the allegation of facts from which its materiality will appear. And it seems to be the accepted doctrine that:

"False testimony is deemed material not only when directly pertinent to the main issue, but also when it has a legitimate tendency to prove or disprove any material fact in the chain of evidence. * * * Perjury may be assigned upon testimony going to the credit of a material witness in a cause, although such evidence be legally inadmissible and ought not to be received. So, also, perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue, provided the evidence of conviction is not too remote." 30 Cyc. pp. 1418, 1820, 1421.

The rule as thus stated is applied in a case where a witness has given testimony material to the issue, and in answer to the question as to whether he had not previously made a different statement denies having done so. It being held that his answer affects his credibility, and that a charge of perjury may be founded thereon. 30 Cyc. p. 1420, note, citing *Williams v. State*, 68 Ala. 551; *Robertson v. State*, 54 Ark. 604, 16 S. W. 582; *People v. Barry*, 63 Cal. 62; *State v. Mooney*, 65 Mo. 494; *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419. The question, then, is whether the bill of information on which the defendant now before the court is being prosecuted sets forth facts sufficient to show the materiality of her testimony to the effect that the sheriff said that he would whip her unless she made a statement in accordance with that made by Jack Vaughan. And that question, we think, must be answered in the negative, for the reasons that it nowhere appears that on the trial of Smith she made any statement at variance with that made to the sheriff, or, in fact, that she gave any testimony whatever save that which has been hereinabove recited, to wit, that she made the statement to the sheriff concerning which she was interrogated, "but that she had done so because the sheriff * * * had told her * * * that, if she did not state the facts as Jack Vaughan had stated them, he, the * * * sheriff, would whip her." Unless, however, she had, as a witness in the murder trial, given testimony at variance with her statement to the sheriff, it was wholly immaterial and irrelevant to the issue there presented what that statement was, or why she made it. -

The judgment appealed from is accordingly affirmed.

(126 La.)

No. 18,152.

STATE v. DYKES.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by the Court.)

1. BAIL (§ 94*)—IN CRIMINAL PROSECUTIONS —FORFEITURE—RIGHT OF APPEAL.

In a certain class of cases referred to in the opinion appealed, the appeal will be allowed only when the penalty has been actually inflicted. *State v. Cox*, 114 La. 570, 38 South. 456.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 419; Dec. Dig. § 94.*]

2. BAIL (§ 94*)—IN CRIMINAL PROSECUTIONS —FORFEITURE—JURISDICTION OF APPEAL.

The forfeiture of an appearance bond is a proceeding arising directly from a criminal prosecution and falls directly within the criminal jurisdiction of the court.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 419; Dec. Dig. § 94.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; B. B. Purser, Judge ad hoc.

John Dykes was convicted of violation of the election law, and on failing to appear his bond was forfeited, and he appeals. Dismissed.

Thos. M. Bankston and Mathew J. Allen, for appellant. Walter Gulon, Atty. Gen., Wm. H. McClendon, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

BREAUX, C. J. At the March term of the district court in the year 1908, the grand jury of the parish of Tangipahoa found an indictment against John Dykes, charging him with having willfully and unlawfully, at the primary election, held to nominate Democratic candidates for state, parish, and ward officers, to be voted on at the general election in April of 1908, exhibited and allowed his vote to be seen by the voters and participants within the polling precinct, with the intention of letting it be known how he was about to vote.

At the same term at which he was indicted, the court issued an order to arrest the accused, and added, in case of his arrest, to admit him to bail upon bond in the sum of \$150.

Before the adjournment of the court for the term, the accused furnished bond.

On the 20th day of December, 1909, the name of the accused was called for trial in the manner and form required, and, he having failed to answer to his name, the court, on the motion of the district attorney, ordered that he be called on his bond, as required before forfeiture, and, the accused having failed to appear or make answer, his bondsmen, Vic Spring and J. F. Hayden, were called in accordance with the form laid down in such cases.

Each having failed to bring the accused before the court, upon the further motion of the district attorney, and upon offering to the

court the appearance bond and the indictment, the court rendered judgment against John Dykes, as principal, and Vic Spring and J. F. Hayden, as sureties in solido, in the full sum of \$150.

The accused moved to set aside the forfeiture of the appearance bond on different grounds stated: Such as that he was physically unable to attend the trial on the date it was set and on which the bond was forfeited and judgment rendered against principal and sureties.

On the appeal to this court from judgment refusing to set aside the forfeiture of the appearance bond, the state, through her authorized officers, moved to dismiss the appeal from the docket of this court for the reason that the transcript does not present any appealable question for review under article 85 of the Constitution.

The proceeding to forfeit a bond is in its nature a criminal proceeding is the contention of the state; that jurisdiction is to be determined by the crime in the indictment, and not by the amount of the bond; that it is governed in all important particulars by the rule of practice.

As relates to jurisdiction, that no appeal lies unless there was a right of appeal in the case in which the bond was given.

The fine which may be imposed for the offense of which defendant was found guilty is a fine of not less than \$50 and not more than \$500, and imprisonment for not less than two months and not over one year.

No penalty has been imposed in the case against the accused.

Opinion and Judgment.

The imperative words of the Constitution are that a judgment on a forfeited bond against principal and surety cannot be appealed from, except in a criminal case when the crime committed is punishable by death or hard labor.

Precisely the same question presented itself in *State v. Cox*, 114 La. 570, 38 South. 456.

The defendant in the just-cited case had given an appearance bond in a criminal case in the sum of \$300.

The defendant failed to appear for trial, and his bond was forfeited, and the forfeiture was made final, and the defendant and the surety were condemned in the amount of the bond.

Subsequently the defendant surrendered himself for trial.

The prosecuting witness having departed this life, the court entered a nolle prosequi.

Thereafter, the surety moved to have the judgment on the bond recalled and set aside and to be held satisfied by reason of the surrender of the defendant as before stated.

The court overruled the motion. The mover appealed.

The state—as in the case before us for decision—moved to dismiss the appeal.

The court held that, in the class of cases coming within the last paragraph of the Constitution upon the subject, in order that there may be a right of appeal from a judgment on a bond, the penalty must be actually inflicted.

This is a comparatively recent case. It is in point as direct as a case can be. No good ground has been given for not adhering to it. We must decline to follow another. The appellate jurisdiction is limited and does not embrace the present appeal. *State v. Cox*, 114 La. 567, 38 South. 456, cited above.

The fine must have been imposed. The accused had not been condemned. The condition of the appeal is a fine actually imposed. *Id.*

Learned counsel for defendant made a motion orally to transfer the appeal to the Court of Appeal.

As that court is not invested with jurisdiction in criminal cases, we take it that the purpose of the motion was to have it transferred as a civil case.

This court at one time inclined to view that proceedings may be taken as civil in character, as it is not a proceeding for the recovery of a fine, but a proceeding for an amount due the state.

There is something to be said from that aspect of the question.

The court, many years ago, said that a pursuit of this nature is not necessarily an incident to a criminal prosecution; that it is a consequence of such a prosecution arising from the broken condition of a bond; that it resolves itself into a civil suit; and that on account of the limited power of the criminal court it does not devolve upon it to assume jurisdiction in such cases. *Peirce v. Morgan*, 3 La. 342.

Since that decision was handed down, the question has been considered from different points of view.

Repeatedly it was urged before this court that the proceedings were of a civil nature, and that the court should return to the dictum in the cited case.

But that view has never been sustained.

In a comparatively recent case, although the court expressed an opinion showing an inclination to sustain the civil character of the suit, it added:

"In so saying, we do not lose sight of the fact that it has been treated as criminal proceeding in order to determine questions of jurisdiction in cases of appeal from judgment of forfeiture of bail bonds." *State v. Hendricks*, 40 La. Ann. 723, 5 South. 25.

In another case, defendant failed to appear when he was called, and his bond was forfeited, and a judgment rendered against him and the sureties on his bond.

The forfeiture of the appearance bond, and the judgment and execution thereon, the

court said, are proceedings arising directly from a criminal prosecution, and fall within the criminal jurisdiction of the court. *State v. Cornig*, 42 La. Ann. 419, 7 South. 698.

The court added it is not a civil, but a criminal, procedure. *Id.*

This, it is true, relates to proceedings before the criminal district court.

None the less, it having been decided that the prosecution was a criminal prosecution, including the forfeiture of the bond, the proceedings do not change their character after an appeal has been taken.

They are not to be considered as criminal proceedings in the district court and civil proceedings on appeal.

The court said in an early case:

"The forfeiture of the bond by judgment has always been regarded as a criminal proceeding." *State v. Cassidy*, 7 La. Ann. 276.

The following further characterizes the proceedings as in a criminal case not to be tested by the rules applying to a civil action, citing *State v. Cassidy*, 7 La. Ann. 276; *State v. Williams*, 37 La. Ann. 201.

The court in a case on appeal said that the question was not an open one; proceeding to forfeit is criminal in character, citing *State v. Williams*, 37 La. Ann. 200, and *State v. Cassidy*, 7 La. Ann. 276.

The court said again, in *State v. Balize*, 38 La. Ann. 542, that it was a criminal case, in the sense of Act No. 30 of 1878, citing *State v. Cassidy*, 7 La. Ann. 276; *State v. Williams*, 37 La. Ann. 200.

In the case of *State v. Toups*, 44 La. Ann. 896,¹ the court gave careful consideration to the question and reiterated in substance that the question was not an open one, and again the court cited *State v. Cassidy*, 7 La. Ann. 276; *State v. Williams*, 37 La. Ann. 200; *State v. Harrison*, 38 La. Ann. 299; *State v. Burns*, 38 La. Ann. 363; *State v. Balize*, 38 La. Ann. 548; *State v. Hendricks*, 40 La. Ann. 719, 5 South. 24; *State v. Cornig*, 42 La. Ann. 416, 7 South. 698.

The court referred to the cited case *supra*. *Peirce v. Morgan*.

Even according to that case (*Peirce v. Morgan*) the Supreme Court must be held to have constitutional power to examine into and revise the finding of the district court in such cases; that is, that decision is authority for holding that the court must have jurisdiction to forfeit the bond.

The question is not before us in proceedings to collect the bond; that presents another question. To the extent we are called upon to decide even the *Peirce-Morgan* Case is not an adverse decision—for the question is very similar whether it relates to the forfeiture of the bond or to the rule filed to set aside the forfeiture. This was directly held in the following case: *State v. Cox*, 114 La. 567, 38 South. 456.

It is true that the court used the word

"perhaps" in the last-cited case. The court said that perhaps the criminal court had the authority to pass upon the rule filed to set aside the forfeiture.

We do not take it that it was the intention to express the opinion that all the decisions relating to the forfeiture of the bond and jurisdiction in such cases are erroneous.

We reiterate: There is no question before us of enforcing the judgment. Only a case of forfeiture of the bond.

This court, under the provision of law, has repeatedly decided that the nullity of a judgment must be sued for exclusively in the court which rendered it.

And that execution could not be arrested by injunction issued by the civil district court of New Orleans.

The court (we quote from the syllabus) said:

"The latter must apply in a proper case for relief to the court which condemned him, and by invoking remedy in other proceedings."

The question is not *res novo*. We adhere to former rulings.

For reasons stated, the appeal is dismissed, and the case is not transferred to the Court of Appeal.

(126 La.)

No. 17,965.

SIMS v. JETER.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1106*)—ACQUIESCENCE IN JUDGMENT—REMAND.

The defendant lost the suit in the district court. He paid costs, including stenographer's charges and amount due to witnesses.

He applied for and obtained a suspensive appeal.

He was not obliged to pay costs and charges. On appeal, appellee moved to dismiss the appeal on the ground that appellant had acquiesced in the judgment by paying costs and charges.

The court will not consider *ex parte* testimony, offered to prove facts alleged to the end of obtaining a dismissal.

Case remanded in order that evidence may be introduced in the district court, and that court to pass upon the question submitted. Cause subject to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4392; Dec. Dig. § 1106.*]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Reuben Sims against F. F. Jeter. Judgment for plaintiff, and defendant appeals. Remanded.

Alexander & Wilkinson, for appellant. D. T. Land, for appellee.

BREAUX, C. J. Appellee moves to dismiss this appeal on the ground that defendant, F. F. Jeter, on October 18, 1909, voluntarily paid all the costs in the case, including the stenographer's costs and witness fees.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ 11 South. 524.

That defendant had been condemned by the judgment appealed from to pay all costs of the suit. The judgment was signed on the 13th day of October, 1909.

That defendant has refunded to plaintiff in the suit the amount of the stenographer's bill, paid by plaintiff, and part of the clerk's costs which had been advanced by plaintiff, as well as all other costs, as before stated.

Appellee prays that the motion be sustained and the appeal dismissed.

In support of his motion, he filed the affidavit of his counsel and of the clerk of court, showing that the costs have been paid as alleged.

This court is not inclined to consider testimony offered here for the first time, particularly it being ex parte testimony.

The evidence will have to be offered and admitted contradictorily with parties to the suit.

When this will have been done, the court of the first instance will decide the issues of acquiescence vel non, and then the case may be brought up on appeal.

We are decidedly of the opinion that, if appellant must pay costs as in a devolutive appeal, payment of costs is not acquiescence in the judgment. That question has been decided as stated.

We are very much inclined to the opinion, if one has taken a suspensive appeal, payment of costs is acquiescence in the judgment.

We leave the question open for further consideration and decision after the evidence will have been admitted.

For reasons stated, it is ordered, adjudged, and decreed that the case is remanded to the district court in order that that court may admit evidence and determine whether or not there was acquiescence by payment of costs, as before stated, and that the question of costs remain in abeyance until decision on the merits.

(126 La.)

No. 17,699.

DUMONT et al. v. BARRETT.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by Editorial Staff.)

1. DEDICATION (§ 16*)—GRAVEYARD—ACTS CONSTITUTING DEDICATION.

That four or five negroes were buried in a tract since 1872, and the owner mentioned to one person that he had set the land apart for a graveyard, did not show a dedication of the tract as a graveyard.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 16.*]

2. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—ALLEGATIONS AS TO TITLE.

An allegation of the answer in a petitory action that plaintiff's title is invalid, without stating any ground of invalidity, is too vague to be available.

[Ed. Note.—For other cases, see Real Actions, Dec. Dig. § 8.*]

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Emma Ferrier Dumont and another against John A. Barrett. From a judgment for defendant, plaintiffs appeal. Affirmed.

Patrick F. Hennessey, for appellants. Zengel, Thomas & Suthon, for appellee.

PROVOSTY, J. This is a petitory action. Plaintiffs claim, as surviving wife and heir of Andrew Dumont, squares 272, 282, and 283, Fifth district, of this city, which they allege were acquired by Dumont at a tax sale made in 1876 for taxes assessed against Pierre Nougue, the then owner thereof. Plaintiffs allege that two of the squares, namely, 282 and 283, were set apart by Dumont as a graveyard, and as such were exempt from taxation, and that for that reason any sale that may ever have been made of the same to the state for taxes was null.

In his answer, defendant first pleads the general denial. He then alleges that he is owner and in possession of a certain body of land (which he describes) acquired by him at the succession sale of Pierre Nougue, of which Nougue was owner by both conventional and prescriptive title, and he alleges that, if that is the land claimed by plaintiffs, then that plaintiffs' title is invalid.

The evidence shows that the land claimed by plaintiffs is a part of the land acquired by the defendant of the succession of Pierre Nougue, and that Pierre Nougue continued in the actual possession of the large tract, including the land in dispute, up to the time of his death in 1902 when it was sold to defendant, who took, and has retained, actual possession ever since; that this body of land has never been divided into squares, nor had any streets running through it, except perhaps on paper, but has always been under fence as one body of land; that in 1875 there was sold to Dumont, husband and father of plaintiffs, at tax sale, for the taxes of 1873 assessed to Pierre Nougue, the following:

(1) Square 282, bounded by Magellan, Brangler, Valette, and Hancock streets.

(2) Square 243, bounded by Ptolomy, Socrates, Valette, and Hancock streets.

(3) Squares 253, 254, 272, and 283, forming a triangle bounded by Pacific avenue and Valette and Ptolomy streets.

Now, the northern boundary of defendant's land is Hancock street; the western is the McDonough graveyard; the eastern would be Ptolomy street, if that street were prolonged. The streets perpendicular to Hancock stop at Hancock. If they were prolonged, the following of them would traverse defendant's land: Lawrence, Brangler, Magellan, and Columbus. What would be the southern boundary of the land the record does not show; but probably Valette street

would be, if there were such a street. By platting this description, it will be seen that the only part of defendant's land that possibly can be said to be included in the tax sale to Dumont is the so-called square 282, supposedly bounded by Magellan, Brangler, Vallette, and Hancock.

This so-called square, and other land, was adjudicated at tax sale in 1885 to G. W. Wigand for taxes assessed to Dumont. Wigand brought suit against Nougue for possession, and Nougue countered by an injunction suit; and in the latter suit the tax title of Wigand was adjudged to be null, and Nougue was maintained in possession. Wigand, called as a witness for plaintiffs, testifies that at the time of this injunction suit he was told by Dumont that the latter had received a certain payment from Nougue in redemption of the tax sale in 1876.

Plaintiffs contend that the tax sale to Wigand was null, because this so-called square 282 had been set apart by Dumont for a graveyard, and was in fact a graveyard, and as such was exempt from taxation. All we need say about that is that the record fails to show any such dedication, but only that four or five colored people were buried there since 1872, and that Dumont mentioned to one person that he had set the land apart for a graveyard. The allegation in the answer that plaintiffs' title is invalid, without any specification of the grounds of invalidity, is too vague to serve any purpose; but we will add that, had a proper attack been made on plaintiffs' tax title on the ground of the insufficiency of the description of the property and the selling of the land confusedly with other property, the attack would have had to be sustained.

We will add that the parties lived during this whole time within a few squares of each other and of the land in controversy, and that the suit has all the appearance of an afterthought or stale demand.

Judgment affirmed.

(126 La.)

No. 18,075.

FOURMY et al. v. TOWN OF FRANKLIN
et al.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 407*)—CONSTITUTIONAL LAW (§ 290*)—PUBLIC IMPROVEMENTS—LOCAL ASSESSMENTS—DUE PROCESS OF LAW.

Act No. 147, p. 261, of 1902, empowering cities and towns (the city of New Orleans and city of Shreveport excepted) having a certain population, and parish sites, to levy local assessments on abutting real estate for the purpose of paving or otherwise improving sidewalks and curbing, is a lawful exercise of the taxing power, and is not repugnant to articles 2 and 232 of the state Constitution, or to the

fourteenth amendment of the Constitution of the United States, guaranteeing to the citizen due process of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1003; Dec. Dig. § 407; Constitutional Law, Cent. Dig. § 871; Dec. Dig. § 290.*]

2. MUNICIPAL CORPORATIONS (§ 495*)—LOCAL ASSESSMENTS—REVIEW BY COURTS.

Whether a local assessment for street purposes is necessary or not, or will confer any special benefits on the abutting property, are not judicial questions, when ordered in admissible cases, unless there be such a plain and manifest abuse of power as takes the case out of legislative discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1168; Dec. Dig. § 495.*]

3. MUNICIPAL CORPORATIONS (§ 336*)—CONTRACTS—LETTING TO LOWEST BIDDER.

Under section 2, Act No. 147, p. 261, of 1902, paving contracts must be let to the lowest responsible bidder who can give satisfactory security; and where a town council awards such a contract to one of the bidders, ignoring two lower bids, without even plausible reasons, the award will be set aside as an abuse of the discretion vested in the council.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. § 336.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Action by James C. Fourmy and others against the Town of Franklin and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Emmet Alpha, City Atty., and Foster, Milling, Brian & Saal, for appellant Town of Franklin. W. C. Baker, for appellant M. L. Wilcox. Allen & Pecot, for appellees.

LAND, J. In July, 1909, an ordinance was adopted by the mayor and council of the town of Franklin, providing for the construction of concrete sidewalks and curbs of brick at the cost of the abutting property, pursuant to Act 147, p. 261, of 1902. Bids were invited by publication, and the contract was awarded to M. L. Wilcox, the third lowest bidder, at the price of \$19,956.25.

Whereupon the plaintiffs, taxpayers of the town of Franklin and owners of real estate abutting on the sidewalks proposed to be paved, instituted the present suit for the purpose of enjoining the execution of said contract, and of annulling said ordinance on a number of grounds, among others the unconstitutionality of Act No. 147 of 1902.

The plaintiffs in their petition assailed said statute as contravening article 232 of the Constitution of 1898, limiting the rate of municipal taxation to 10 mills, except in case of special taxes voted by the taxpayers; also as violative of articles 2 and 232 of the same Constitution, and the fourteenth amendment of the Constitution of the United States, prohibiting the deprivation of property without due process of law.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiffs also assailed the ordinance and contract as violative of the provisions of Act 147 of 1902 in the following respects:

That 10 days' notice of the ordinance calling for bids for the proposed paving was not given in the two newspapers published in said town, or either of them.

That the contract was not let to the lowest responsible bidder, but the council arbitrarily let said contract to M. L. Wilcox, the third lowest bidder, to the damage and injury of the taxpayers in the sum of \$1,900.

The defendants maintained in their answers the constitutionality of the enabling statute and the validity and legality of the ordinance and contract. M. L. Wilcox, the contractor, reconvened for \$3,000 damages, alleged to have been occasioned by the injunction.

The cause was tried, and there was judgment maintaining the constitutionality of Act No. 147 of 1902, and annulling the ordinance and contract, and perpetuating the injunction sued out by the plaintiffs. All parties have appealed.

1. Act No. 147 of 1902 does not violate article 232 of the Constitution of 1898, as the limitation of taxation therein contained has no application to local assessments or forced contributions. See *Barber Asphalt Co. v. Gogreve*, 41 La. Ann. 251, 5 South. 848, construing article 209 of Constitution of 1879, containing similar limitations on the taxing power.

The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the Legislature, and this will not constitute a taking of property without due process of law. *Margaret French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335.

2. The town of Franklin was incorporated by Act No. 89 of 1876. The general municipal corporation law (Act No. 136 of 1898) has no application to any then existing municipality, unless adopted by a majority vote of the electors therein at an election called for that purpose. As the town of Franklin has never adopted Act No. 136 of 1898, and as the original charter does not confer any power on the council to levy local assessments for the pavement or repair of streets and sidewalks, it follows that Act 147 of 1902 is the only statute that can be invoked in the premises.

The complaint that the proposed work of paving is unnecessary and will not confer any special benefits on the plaintiffs is disposed of by the reasoning and decree of the court in *Kelly v. Chadwick*, 104 La. 719, 732, 29 South. 295, 300. In that case the court quoted ap-

provingly from *Cooley on Taxation*, p. 429, as follows:

"With the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

3. Section 2 of Act 147 of 1902 provides that the municipal council "shall let the contract to the lowest responsible bidder, who can give satisfactory security." The three lowest bids submitted were as follows:

M. L. Wilcox.....	\$19,596 25
Smith & Brady.....	18,947 50
Reynolds & Ligon.....	18,300 00

When the bids were opened and inspected, a motion was made by F. to award the contract to Reynolds & Ligon, and another motion was made by M. to award the contract to M. L. Wilcox. Neither motion was seconded. Mr. Smith, of Smith & Brady, stated that the contract should be awarded to Reynolds & Ligon as the lowest bidder. There is some dispute as to the exact remarks of Mr. Smith on that occasion; but even if he said, "I withdrew in their favor," it is admitted that he did not withdraw in favor of Mr. Wilcox or any other higher bidder. The council went into secret session, and M. and F. withdrew their respective motions. Thereupon a motion was made to award the contract to M. L. Wilcox, and it was unanimously adopted. There is no explanation of this action of the council, save that F. during the secret session went on the street and was told by citizen A. that citizen B. had said that Reynolds, of Reynolds & Ligon, was a crook. Without going into further details, we agree with the district judge that the council failed to exercise the discretion vested in them by law, but acted arbitrarily in the premises.

It may be stated that the mayor vetoed the resolution awarding the contract to Wilcox, but it was passed over his objections.

The petitioners allege that M. L. Wilcox was not the lowest responsible bidder, and that the award of the contract to him was unlawful, and to the damage and injury of the petitioners and taxpayers in a considerable sum of money. These allegations disclose grounds for annulling the award and enjoining the execution of the contract. If such annulment be not embraced in the specific prayer for the annulment of the statute and the ordinance, it is covered by the prayer for general relief. In his reasons for judgment the judge a quo says:

"If this decision is sustained, it will be necessary for the town council to readvertise for bids, in order to carry out their undertaking, and then they may track the strict letter of the laws."

Judgment affirmed.

(126 La.)

No. 17,907.

BRITT et al. v. CALDWELL-NORTON
LUMBER CO., Limited, et al.(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied May 9, 1910.)*(Syllabus by the Court.)***1. INFANTS (§ 30*)—UNAUTHORIZED SALE OF
LAND—RATIFICATION.**

Mrs. Britt's husband acquired the property which is the basis of this suit, and which passed to her and her children. She transferred the property, by a deed under private signature, to R. H. Wade, at a time when her four children were minors, and the deed was not recorded for many years. In the meantime the property had been sold, and Mrs. Britt and her children now sue to recover it. *Held*, that the children were minors at the time, and as their mother was absolutely without right to sell, and there is nothing to show that they were aware of the transfer, that they cannot be held to have ratified the transfer by their mere silence for a period of 10 years, in view of the fact that they were minors at the time of the sale and did not sign the deed. There was no intention on their part to ratify the deed, and they are not bound by mere silence under the circumstances, as the act was the illegal act of another, who acted without the shadow of authority.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 30.*]

2. PLEADING (§ 381*) — VARIANCE — TITLE — PROOF.

After Mrs. Britt had brought suit, she acquired an outstanding title which she introduced in evidence. She had based the suit on the possession of one title, and should not have been permitted to introduce another as the basis of her right, under the guise of attacking the title of the defendant. A plaintiff must stand on his own pleadings, and cannot make up their deficiency by offering matter as evidence which should have formed part of the pleadings, and the last-acquired title should not have been introduced in evidence.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1260; Dec. Dig. § 381.*]

**3. LIMITATION OF ACTIONS (§ 197*)—EVIDENCE
—TIME OF ACCRUAL.**

The facts show that the trees were cut within one year of the filing of the suit, and, as relates to the children of Mrs. Britt, the question is before the court, and the plea will be overruled.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 197.*]

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; Samuel J. Henry, Judge.

Action by Martha Britt and others against the Caldwell-Norton Lumber Company, Limited, and others. Judgment for plaintiffs, and defendant and warrantors appeal. Reversed in part, and dismissed.

Norwood T. Smith, C. M. Cunningham, M. L. Dismukes, and C. W. Elam, for appellants, Scarborough & Carver, for appellees.

BREAUX, C. J. Originally the plaintiff's husband acquired the property from the general government.

He remained owner for a number of years. At his death the property passed to his widow and children.

In the 70's, just prior to leaving to establish her home in Texas, plaintiff conceived the idea of transferring this land to R. H. Wade.

She signed a deed under private signature to him without witnesses.

Her four children were minors at the time. The oldest was born in 1857, the second in 1860, the third in 1862, and the fourth in 1864.

Their names appeared as parties to the deed, although not signed by them.

The deed was not recorded, and remained in private hands, until 1892, when a witness appeared before a notary and made affidavit that the deed had been signed by the parties whose names appeared to it.

In the year 1882 the land was sold at tax sale and adjudicated to the state. It was afterward secured by paying the taxes.

Subsequently a creditor of R. H. Wade seized the property in payment of a judgment and had it sold at public sale. It was adjudicated to Mr. J. C. Scarborough.

The land remained in his name a number of years.

This suit was brought in 1908.

In the year 1909 Scarborough, the purchaser, transferred it to the plaintiff.

The defendant and warrantor pleaded ratification, prescription of 30 years and of 10 years, and they pleaded the prescription of 1 year as a defense against the claim for the trees which they removed from the land.

We take up in the first place the question of ratification.

The plea of ratification is directed by the defendants against the minors' claim. The defendants urged that, as these minors remained silent and acquiescent for over 10 years, they are bound, and cannot now question the validity of the act.

There would be some force in the position if these parties had not been minors at the time, and if it had been shown that they signed the deed.

Both points are fatal to this defense—the minority and the fact that it does not appear that these minors had knowledge of the transfer.

This deed was signed by the mother, Mrs. Britt, and some one else—it is not shown positively by whom the names of the minors were signed—under circumstances which cannot possibly bind by mere silence. There never was the least intention to ratify it, and there was no ratification, and the one who signed the names of the minors was entirely without authority.

The minor who remains silent for 10 years after his majority may be considered as having possibly ratified certain illegal acts of his own.

This does not apply to illegal acts of others in his name without the shadow of authority.

We will not dwell at any length upon the rights of the minors, for it is conclusively shown that they are the owners of one-half of the property.

We will next consider the rights of the mother to this property.

We have noted that she signed the deed. She was the survivor in community, and owned, as such, one-half of the property.

The plaintiff has not succeeded in maintaining her claim. It appears to have passed out of her possession and ownership. There was an outstanding title, subsequently acquired by Mr. Scarborough. He afterward transferred the title back to her.

She offered to prove that defendant (under a title which she alleged was a nullity) was reinvested with its ownership.

Defendants objected to the admission of any testimony offered to prove the title acquired as before stated; that is, title not alleged, and of a date subsequent to the filing of the suit.

The ground of objection was that she had not alleged that title; that she must stand by the title which she had alleged and could not prove the purchase subsequent, before referred to.

The court overruled the objection, and admitted the testimony, not for the purpose, as expressed by the court of enabling plaintiff to make out her title, but to enable her to prove that defendants had not title.

It is quite true, as contended by defendants, that in a petitory action plaintiff has a legal right to attack whatever title may be set up by defendant in his answer, and is not obliged to file any additional pleadings to enable him to do so. That is settled by a number of decisions. That applies when a plaintiff has alleged the title under which he holds and under which he seeks to recover. He must set out his chain of title. If he fails in this entirely, he cannot build up a title of his own, which is necessary for him to recover under the guise of attacking the defendant's title.

Plaintiff must stand on his own pleadings. He cannot make up their deficiency by offering evidence which he should have introduced in the first place. To successfully attack, he must begin by showing that he has some grounds to stand on.

The case as relates to Mrs. Britt must be dismissed as in case of nonsuit.

The different prescriptions to which we have referred above have no merit as against the owners who were minors in 1876 when the property was transferred by Mrs. Britt, as before mentioned. The defendants held no title against them, and were not in possession a sufficient length of time to acquire by prescription. A sale of minors' property without any regard whatever to legal formalities is null. *Lemoine v. Ducote*, 45 La. Ann. 857, 12 South. 939; *Francoise v. Delaronde*, 8 Mart. (O. S.) 619; *Succession of Weber*, 16 La. Ann. 420.

We will later refer to the prescription of one year, also pleaded against the action of trespass.

The matter of the damage caused by the defendant and warrantor in having taken the trees on the land, to the extent that the children of Mrs. Britt are concerned, is before us.

Returning for a moment to the plea of prescription: Plaintiffs are without ground upon which to stand. The dates are against plaintiffs. The date the trees were taken is within one year of the date that the suit was brought.

The plea of prescription of one year is overruled.

The plaintiffs and appellees joined in the appeal, and asked for an increase of the amount of the judgment.

There is good ground, with the facts before us, to increase the damages allowed in the district court.

Plaintiffs are entitled to a larger amount. The measurement made according to Scribner, containing Doyle's rule, has the sanction of statute. On that score there can be no good objection. After having considered the maximum amount of value of the trees placed thereon by some of the witnesses, and the minimum by others the amount is fixed as hereafter shown. The scaler of plaintiff and the scaler of defendant differ materially. The difference arises from the fact that the latter measures more closely than the Doyle rule requires. The former followed that rule, except in minor respects.

Damages for taking the trees of the four plaintiffs—John, Emma, Laura, and Patrick Britt, children of Martha Britt, widow of Patrick M. Britt—owners of one-half of the land, and in consequence of one-half of the trees, are fixed at \$800.

The testimony of the witnesses for plaintiff lead to a high, and that of defendants to a low, estimate of value.

Taking into account the number of trees cut and taken away and the number of feet sustained by the preponderance of the testimony, the amount is fixed.

The number of pine trees is given in the testimony, and the number of oaks. Taking the feet sustained by the preponderance of the evidence, we arrived at our conclusion.

Plaintiffs' scaler took the diameter at the stump and diameter of the end, and made the required addition and a division of the product by two, as required by the statute; while defendant's scaler directed his attention to the small end of the log.

The first is the usual method followed.

Taking as a whole and considering all the evidence, the amount is sustained by sufficient proof to the sum of \$1,600 on the whole tract.

For the reasons stated, the law and the evidence being in favor of plaintiffs, the children of Mrs. Britt, for one-half of the land described in their petition, and for one-half of the value of the trees taken from the land—

that is, \$800—it is ordered adjudged, and decreed that the judgment appealed from as to them be and the same is affirmed, after increase for trees as just stated.

For the reasons stated, and the law and the evidence, it is ordered, adjudged, and decreed that the judgment in so far as relates to Mrs. Britt, who claims one-half of said land and half the trees thereon, be avoided, annulled, and reversed; that the case be dismissed as in case of nonsuit as to her, at her costs in the district court to the extent of one-half.

It is ordered, adjudged, and decreed that she pay one half of the costs of appeal, and the defendants and appellants the other half.

(126 La.)

No. 17,750.

MOORE v. O'BANNON & JULIEN et al.
(Supreme Court of Louisiana. April 11, 1910.
Rehearing Denied May 9, 1910.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 3*)—CONTRACT—ANNULMENT.

In a contract whereby standing timber is sold for a certain amount in cash, and the balance to be paid as the timber is cut (the vendees being allowed a specified time within which to do the cutting), and in which it is agreed that the vendees shall within a delay fixed build a sawmill, within a certain distance of the timber, and make payments for the timber, when cut, on pay days, to be fixed, at said mill, the stipulations with regard to the erection of the mill and the making of the payments there on pay days to be fixed are "accidental," being neither of the essence of the contract of sale, nor necessarily implied therein, and, though noncompliance with accidental stipulations may, where it is so agreed, and in some cases where there is no agreement to the contrary, furnish good cause to annul a contract, yet, where the parties in terms declare that in no event shall the contract become void save for noncompliance with a particular stipulation, which is of its essence, the courts cannot annul it for any other cause than that so specified.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—CONTRACTS—ANNULMENT—GROUNDS.

Where an act of sale conveys standing timber to the vendees "and unto their heirs and assigns," and stipulates that, in no event, shall the sale become void unless the vendees fail to make the payments contemplated by such act, and, the vendees having resold the timber to another party, the original vendor receives a payment, on account, from such party, he cannot afterwards be heard to attack the title of such party on the ground that the original vendee had failed to comply with accidental stipulations, noncompliance with which by the terms of the contract was excluded as a ground for such attack.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Sixth Judicial District Court, Parish of Morehouse; J. P. Madison, Judge.

Action by Joseph W. Moore against O'Bannon & Julien and others. Judgment for

plaintiff, and defendants appeal. Reversed, and judgment for defendants.

H. Flood Madison, for appellant Gullede Bros. Lumber Co. David Todd, for appellee

Statement of the Case.

MONROE, J. Plaintiff entered into a contract with O'Bannon & Julien (an ordinary partnership), witnessed by an instrument in writing, as follows:

"That for * * * \$2.50 to us cash in hand paid, and a further consideration of the sum of \$7.50 to be paid on or before 30 days from date, * * * by O'Bannon & Julien, we hereby grant, bargain, sell, and convey unto the said O'Bannon & Julien, and unto their heirs and assigns, all the pine timber situated on the following lands, to wit: S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, S. 15, T. 23, N. R. 6 E. The said O'Bannon & Julien shall have seven years from the date of this deed in which to cut and remove said timber and the right of ingress and egress over and through said lands. In case O'Bannon & Julien shall not have paid the sum of \$7.50 within 30 days from date, this contract shall be null and void. The condition and consideration of this sale is that the grantors are to receive, and the said O'Bannon & Julien are to pay, * * * \$1.00 per 1,000 ft., log scale, out of the first timber cut, and that the balance, after enough timber is cut to pay the above sums, is to be paid by O'Bannon & Julien as the timber is cut and removed, and the payments are to be made at the sawmill of the said O'Bannon & Julien on the regular pay day at said mill each month after said timber is cut and removed. We hereby agree to warrant the title of said timber against all claims, and that said timber is free from incumbrances. O'Bannon & Julien agree to locate a sawmill within three miles of said timber within six months from date. This deed is, and shall be, binding on the grantors from its date, and in no event shall it become void unless O'Bannon & Julien fail to meet the above payments. Given under our hands and seals, this 12th day of July, 1905."

This instrument was duly signed and recorded, and the wife of the plaintiff added to it a waiver of homestead. The two amounts (\$2.50 and \$7.50) referred to therein were duly paid, and in October, 1905, the partnership of O'Bannon & Julien having been converted into the O'Bannon & Julien Lumber Company, the timber in question was sold to that company, by which on December 29, 1906, it was sold to Gullede Bros. Lumber Company; neither of the parties mentioned having cut any of the timber (so far as appears) up to the present time.

Plaintiff brings this suit to annul the contracts thus mentioned, to cancel the registration thereof, and to have himself quieted in the possession of the timber in question; the gist of his complaint being that O'Bannon & Julien failed to erect the sawmill and appoint the times and place of payment, as stipulated; that their sale of the timber was unauthorized, and renders his position more insecure; and that Gullede Bros. Lumber Company knew when the deeds to them were executed that the original contract had not been complied with. O'Bannon & Julien

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lumber Company, cited through a curator ad hoc, made no appearance. Gullledge Bros. Lumber Company, similarly cited, and appearing through the curator ad hoc appointed by the court, filed exceptions of no cause of action and prematurity, which were overruled, and of prescription, which was referred to the merits, after which it answered, affirming the validity of its title to the timber, and, when the case was called for trial, it further excepted that plaintiff had made no tender of the amounts received by him (which exception was overruled, as coming too late), and that he is estopped to attack the transfer by O'Bannon & Julien to O'Bannon & Julien Lumber Company by having received from the company mentioned on February 13, 1906, a sum of \$100, for which he gave a receipt, reading:

"Received of O'Bannon & Julien Lumber Co. \$100, in addition to the sum of \$10 paid by them. Said sum of money is given now as part payment of the purchase price of timber situated upon the following lands, on which O'Bannon & Julien Lumber Co., have a deed, to wit:" (and then follows a description of the lands).

This plea of estoppel was objected to as coming too late, and, the objection having been overruled, plaintiff filed a supplemental petition, alleging that he received the money and gave the receipt on the representation that the mill would shortly be put up, and that O'Bannon & Julien would personally make payments there for the timber cut.

It was shown on the trial that work was begun on the mill referred to in the contract in March, and that the mill was completed in December, 1906; that O'Bannon & Julien Lumber Company operated it for a few days, and sold it (together with the timber in question) to Gullledge Bros. Lumber Company, by which it was operated for about three months (though without cutting any of the timber acquired from plaintiff), at the end of which period the boilers and some parts of the machinery and appliances were removed; and that the mill has not since been operated. Some testimony was taken, the purpose of which appears to have been to show that the Gullledge Company knew, when it bought the property, that O'Bannon & Julien had not complied with those conditions of the contract relating to the erection of the mill within six months, and the establishment thereof of pay days, but the result of which was to show that said company had the title to the property examined by an attorney at law and bought on the faith of his report that it was good. It was also shown that the Gullledge Company is stronger financially than either O'Bannon & Julien or O'Bannon & Julien Lumber Company. And in the course of the trial that company repeated an offer, which is, substantially, made in the answer filed by it, to the effect that, when it cuts plaintiff's timber, it will pay

him therefor, if the mill in question is not then in operation and pay days shall not have been established there, "at his residence, or at any bank or other place that he may designate, and at any time during the month following that in which the timber has been cut that the plaintiff may designate." To which offer plaintiff, in effect, replied that, having under the law the right to demand the dissolution of the contract, and having availed himself of that right, his answer to the proposition was to be found in his petition.

Opinion.

The contract for the dissolution of which plaintiff sues was not specifically annexed to, and made part of, his petition, and hence the exception of no cause of action was properly overruled; but it was offered in evidence by plaintiff at the opening of the case, and thereafter, as it seems to us, all the other evidence offered in behalf of plaintiff (and which was admitted over the objection of the curator ad hoc representing Gullledge Bros. Lumber Company) was for the most part useless, if not irrelevant, since, conceding the truth of the allegations upon which plaintiff relies, he would not be entitled to the judgment prayed for. True, the contract provides that payments for the timber to be cut by O'Bannon & Julien "are to be made at the sawmill of the said O'Bannon & Julien on the regular pay days at said mill each month after said timber is cut and removed," but it is not pretended that any of the plaintiff's timber has yet been cut, and the vendees and their assigns are allowed seven years from July 12, 1905, within which to do the cutting, so there has been no default as to either the time or place of payment. It is also true that O'Bannon & Julien agreed "to locate a sawmill within three miles of said timber within six months from date," and that they failed to do so; but (1) after the six months had expired plaintiff received \$100 from O'Bannon & Julien Lumber Company, the transferee of O'Bannon & Julien, as in part payment, in advance, of the price of his timber, and reserved no rights with respect to the then existing default, and the erection of the mill was begun in the following month and completed before the end of the year without any attempt on his part at putting in default; and (2) the provision of the contract relating to the erection of the mill is immediately followed by the stipulation:

"This deed is, and shall be, binding on the grantors from its date, and in no event shall it become void unless O'Bannon & Julien fail to meet the above payments."

If, therefore, plaintiff has sustained any injury by reason of failure of O'Bannon & Julien to erect the mill within six months, and has not condoned their default, or has been injured by the shutting down of the mill after it was erected (and no such injury is al-

leged), his remedy, whatever it may be, is not to be found in an action to avoid the contract.

The stipulations relating to the erection of the mill and the making of the payments there on pay days to be fixed are quoad the sale of the timber "accidental," being neither of the essence of the contract nor necessarily implied from its nature, but depending solely upon the will of the parties, regulated by the general rules applicable to all contracts. Civ. Code, art. 1764, par. 3. Where the parties so agree, or, in some cases, where there is no agreement to the contrary, noncompliance with accidental stipulations may furnish good cause to annul a contract. But in this case there is a specific agreement that "in no event, shall it [the contract] become void, unless O'Bannon & Julien fail to meet the * * * payments"; and not only has there been no default with respect to the payments, but the plaintiff has been paid \$100 more than the contract calls for, the amount having been apparently paid to, and received by, him in advance, and beyond the terms of said contract, in order to satisfy and compensate him with respect to the delay in the erection of the mill. If, under such circumstances, we should annul the sale because of the failure of O'Bannon & Julien or their assigns to comply with the accidental stipulation in question, we should be making and enforcing a contract between the parties which they declared in explicit language they did not intend to make or to have enforced.

Concerning the sale of the timber by O'Bannon & Julien to O'Bannon & Julien Lumber Company, and by that company to Gullledge Bros. Lumber Company, as the original contract declares that the vendor sells to "O'Bannon & Julien and unto their heirs and assigns," and stipulates that in no event shall the sale become void unless the vendees fail to make the payments contemplated by the contract, and as plaintiff, after the sale to O'Bannon & Julien Lumber Company, received a payment of \$100 from that company, and, in so doing, acknowledged that it had a deed to the timber, we are of opinion that he (plaintiff) cannot now be heard to attack the title thus acknowledged on the ground that his original vendees failed to comply with the accidental stipulations, which, by the terms of the sale, were excluded as grounds for such attack.

There is no issue presented by the pleadings as to the original validity of the sale in question, the complaint being that O'Bannon & Julien failed to comply with their obligations thereunder; nor does plaintiff seek to recover any damages as having been sustained by him in consequence of such noncompliance. His demand is that said sale and the sale to O'Bannon & Julien Lumber Company, and by that company to Gullledge Bros. Lumber Company, be annulled and the regis-

try thereof canceled, and he fails to show that he is entitled to the judgment demanded, and which, on the verdict of a jury, he obtained in the district court.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the defendants, rejecting plaintiff's demand and dismissing this suit, at his cost in both courts.

(126 La.)

No. 18,233.

SMITH v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by Editorial Staff.)

COURTS (§ 79*)—RULES OF COURT—STATUTES—CONSTRUCTION.

Under Const. art. 104, providing that the rules of practice in the Supreme Court shall apply to the Courts of Appeal until otherwise provided, a rule of practice regulating appeals in the Supreme Court will regulate appeals in the Courts of Appeal, where there is no law on the subject; but where there is a law on the subject, the Legislature must repeal the law and enact another in its place, if a change is desired, and Act No. 223 of 1908, fixing the delay for a rehearing in the Supreme Court at 15 days, does not repeal a rule of the Courts of Appeal limiting the time to 6 days, adopted as authorized by Act No. 100 of 1896.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 275; Dec. Dig. § 79.*]

Case Certified from Court of Appeals, Parish of Orleans.

Action by Mrs. E. W. Smith against the Cumberland Telephone & Telegraph Company. Heard on certificate from the Court of Appeal, Parish of Orleans, by the judges thereof applying for instructions. Questions answered.

P. H. Mentz, for plaintiff. Denegre & Blair and Victor Leavy, for defendant.

BREAUX, C. J. Under article 104 of the Constitution, the honorable judges of the Court of Appeal certify a proposition of law to this court. They desire instruction in regard to whether 6 judicial days after the rendition of a decree by that court is the delay within which to apply for a rehearing, or whether it is 15 days.

The motion for a rehearing was filed in that court after the 6 judicial days had elapsed; the contention of the mover being that he had 15 days.

Article 104 of the Constitution ordains that the rules of practice that regulate appeals in this court shall apply to appeals and proceedings in the Court of Appeal.

In 1908 the General Assembly fixed the delay for a rehearing in this court at 15 days. Act No. 223 of 1908.

To sustain the opinion that the last-cited act is controlling in the Court of Appeal would be in effect to decide that it is a repealing act in so far as relates to the Court of Appeal.

We are not of the opinion that it has that effect.

True the article of the Constitution before referred to provides that the rule of procedure in both courts shall be similar so far as it may be applicable. But the Constitution also ordains that law and rule shall remain until otherwise provided.

It has not been otherwise provided. Besides, there is some restriction in the article of the Constitution cited in the phrase "so far as may be applicable."

It is for the Legislature to determine as to the "applicability of the rule."

Whenever there is no law upon the subject, then the rule of practice to regulate appeals in this court regulates appeals in the Court of Appeal. But if there is a law upon the subject, it behooves the Legislature to repeal the law and enact another in its stead, if a change is deemed proper.

The Court of Appeal has a rule of its own which limits the time to 6 days, adopted as authorized by Act No. 100 of 1896.

That fact also has to be considered in deciding the point at issue, as it was considered as having weight in the case of *Gremillion v. Jones*, 122 La. 126, 47 South. 432.

As in the just cited case, in our opinion, the law's intention is that 6 days shall be the limit.

The just cited case is very similar to the one before us for decision. In that case the court decided Act No. 100 of 1896, allowing 3 judicial days for a petition for a rehearing in the Courts of Appeal, is an unrepealed act.

If it be not repealed in so far as relates to the 3 judicial days, it is not repealed as relates to the 6 judicial days.

To the first proposition we answer that 6 judicial days is the time, and to the alternative question we answer that 15 days' delay is exclusively confined to the Supreme Court, under the act before cited. It follows that we answer the first proposition in the affirmative, and the alternative question in the negative.

BREWER v. MULLINS. (No. 14,421.)

(Supreme Court of Mississippi. May 16, 1910.)

1. WITNESSES (§ 318*)—ATTACKING CREDIBILITY OF UNIMPEACHED WITNESS.

Testimony as to the reputation of a witness for truth and veracity is inadmissible, where no effort has been made to impeach such witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1086; Dec. Dig. § 318.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

For error in admitting testimony of the good reputation for truth and veracity of an unimpeached witness the judgment will be reversed, where the evidence is evenly balanced and the improper evidence may have influenced the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

Appeal from Circuit Court, Noxubee County; John L. Buckley, Judge.

Action by R. Brewer, Sr., against Cunningham Bros., in which W. S. Mullins intervened. From a judgment for intervener, plaintiff appeals. Reversed and remanded.

This is a replevin suit for a mule, brought by the appellant, R. Brewer, Sr., against Cunningham Bros., who disclaimed any title. The appellee, W. S. Mullins, who it seems got possession of the mule after the writ of replevin had been sued out, was admitted to defend. The suit proceeded as if it had been originally brought against Mullins. There was a verdict and judgment for Mullins, from which Brewer prosecutes this appeal.

A great deal of testimony was taken on both sides. Both of the parties to the suit, Brewer and Mullins, testified; each claiming that he had lost a mule and positively identifying the one in question as the one lost. Each was supported in his contention by witnesses to the same effect. It appears from the record that the question of fact as to the ownership of the mule involved was a close one. J. P. Smith was introduced as a witness by Brewer. On cross-examination by the attorney for Mullins he was asked, over the objection of Brewer's attorney, whether Mullins was a truthful man, to which he answered that he was; that he was as truthful a man as there was in the country. The only assignment of error is that the court should not have permitted this testimony, because of the fact no testimony had been offered by Brewer impeaching the character of Mullins for truth and veracity.

J. E. Rives, for appellant. H. H. Brooks, Jr., for appellee.

ANDERSON, J. (after stating the facts as above). The court erred in permitting testimony to uphold the character of the witness Mullins for truth and veracity, when it had not been directly assailed. It was not an issue before the jury, and could not be made

one, except by his adversary attacking it in the manner laid down by law. The issue of the fact before the jury seems to have been about evenly balanced. Under these circumstances, such testimony probably had influential weight with the jury.

Reversed and remanded.

FURST v. PEASE. (No. 14,508.)

(Supreme Court of Mississippi. May 16, 1910.)

ESTOPPEL (§ 32*)—TO DENY POSSESSION—RECAPITAL IN FORTHCOMING BOND.

Where, when a writ of replevin was levied, defendant executed a forthcoming bond, describing property sued for and obligating himself to have it forthcoming at the trial, he could not, on trial, deny that he had possession of it at the institution of the suit and service of the writ, and claim that he only had one piece of it.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 81; Dec. Dig. § 32.*]

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Action by J. B. Pease, Sr., against H. A. Furst. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee sued the appellant in replevin before a justice of the peace of Bolivar county for a soda fountain and apparatus. Pease recovered judgment, and Furst appealed to the circuit court, where there was a trial had and judgment rendered in favor of the appellee, Pease, for the soda fountain; the court giving a peremptory charge to the jury to find a verdict for the plaintiff, Pease. From that judgment, Furst prosecutes an appeal to this court.

The defense sought to be made by Furst was that he only had in his possession one piece of the soda fountain, the carbonator, which he stated in his testimony he offered to deliver to Pease. The affidavit for replevin described each item of the property sued for and the value of the same. The writ of replevin and the officer's return on same describes it in the same manner. When the writ of replevin was levied, the defendant Furst, executed a forthcoming bond for the property, in which it is described exactly as in the affidavit, writ, and return of the officer; and in the appeal bond to the circuit court, given by Furst, the same description of the property is set out. The forthcoming bond has the usual condition, by which Furst and his sureties obligate themselves to have the property forthcoming at the trial of the case.

Fontaine Jones, for appellant. Marcus L. Kaufman and Potter & Thomson, for appellee.

ANDERSON, J. (after stating the facts as above). The court below committed no error in charging the jury peremptorily to find a verdict for the appellee, Pease. In view of

the recital in the forthcoming bond executed by Furst, admitting possession of the property sued for, he will not be heard to deny that he had possession of it at the time of the institution of the replevin suit and the service of the writ. The recital in the forthcoming bond operates as an estoppel upon him to deny the possession of the property. It is an admission, in most solemn form, of the possession of the property by him. It was held in *Healy v. Newton et al.*, 96 Mich. 228, 55 N. W. 666, that "a recital in a supersedeas bond given by a log owner on the rendition of judgment against the principal debtor, which is made a lien on the logs, that a personal judgment has been rendered against the log owner, concludes him and his sureties in a suit on the bond as an admission of that fact." The general rule is: A recital in a bond concludes the parties as an admission of the facts recited.

Affirmed.

MARTIN v. STATE. (No. 14,667.)

(Supreme Court of Mississippi. May 16, 1910.)

BAIL (§ 43*)—CAPITAL OFFENSES—RIGHT TO BAIL.

When a person is indicted for a capital offense, and the proof is evident or the presumption great, he is not entitled to bail, except under special and extraordinary circumstances; but, if the proof is not evident or the presumption great, he is entitled to bail as a matter of right.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 153-164; Dec. Dig. § 43.*]

Appeal from Order of J. S. Hicks, Chancellor, sitting in Sharkey County.

Habeas corpus by Jessie Martin to obtain bail. From an order denying an application for bail, petitioner appeals. **Affirmed.**

McLaurin & Thames, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

McLAIN, C. This is an appeal from an order of Chancellor J. S. Hicks, refusing bail to Jessie Martin at the hearing of a writ of habeas corpus, on the 22d day of April, 1910, in the courthouse of Sharkey county. Jessie Martin was indicted in Sharkey county at the March term, 1910, for the murder of one Noah Borodofsky.

Counsel for relator quotes, with approval, from the case of *Moore v. State*, 36 Miss. 137, as follows: "We wish it understood that, on application for bail, we may grant the bail even where the jury might, and perhaps ought, on the same evidence, to render a verdict of guilty for murder." This rule is criticised by this court in the case of *Ex parte Bridewell*, 57 Miss. 42, in this language: "If by this it was meant that this court, or the presiding judge, on the hearing of a writ of habeas corpus, might, in its discretion and under the exceptional circum-

stances alluded to above, grant bail, even though the relator had not made out a case by which he was constitutionally entitled to demand it, we approve the remark; but if it is meant that the applicant, in the absence of such exceptional circumstances, can ever be said to have established a legal right to demand enlargement by testimony which would make it the duty of a jury to convict him of a capital crime, we dissent from it."

A prisoner, if indicted for a capital offense, when proof is evident or presumption great, should not be admitted to bail, except under special and extraordinary circumstances, or other causes making it reasonable that he should be bailed; but, if the proof is not evident or the presumption great, he is entitled to bail as a matter of right. In *Wray's Case*, 30 Miss. 673, it was held that, if a well-founded doubt (of guilt) can even be entertained, then the proof cannot be said to be evident nor the presumption great, and in such case bail must be granted.

We have carefully inspected the record in this case. We refrain from making any comment on the testimony. The chancellor was the trier of the facts, and he acted upon the conviction that the testimony made upon his mind. He saw the witnesses and heard them testify, and was in a position to determine their credibility and give such weight to the testimony of each as in his judgment it was entitled to. After a careful study of the testimony in the record of this case, it seems to us that it cannot be said that the chancellor abused his discretion in declining to allow the relator bail.

We affirm the decision of the chancellor.

PER CURIAM. For reasons stated in the above opinion of the Commissioner, this case is affirmed.

MIDDLETON v. STATE. (No. 14,340.)

(Supreme Court of Mississippi. May 16, 1910.)

1. CRIMINAL LAW (§ 1122*)—APPEAL—RECORD.

An assignment of error to the act of the court in modifying an instruction will not be considered on appeal, where there is nothing in the record to show that any modifications were made in the instruction, except a statement contained in appellant's brief.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

2. CRIMINAL LAW (§ 1038*)—APPEAL—OBJECTIONS IN LOWER COURT.

An objection to the sufficiency of the instructions cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Appeal from Circuit Court, De Soto County; W. A. Roane, Judge.

J. M. Middleton was convicted of assault and battery, and appeals. **Affirmed.**

L. J. Farley and Farley & Lauderdale, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

McLAIN, C. At the November term, 1909, of the circuit court of De Soto county, the appellant, J. M. Middleton, was tried, convicted, and sentenced to be imprisoned in the county jail for a term of six months and fined \$300 for an assault and battery upon one Matthew Gardner, from which judgment and sentence he prosecutes this appeal.

The assignments of error are as follows, to wit: "First, the court below erred in modifying instructions Nos. 1 and 7, and not granting same as asked by defendant; second, the verdict of the jury was contrary to the law and the evidence and instructions of the court; third, the court erred in overruling defendant's motion for a new trial."

We have examined the record carefully, and it fails to show that instructions 1 and 7 were modified. This court does not know that any modification was made in these instructions by the trial court, except from the statement made in appellant's brief. The record fails to disclose that the instruction complained of by appellant was ever asked in any other form than as the record shows it was given. That point cannot be raised here for the first time. The law of the case as presented by the record before us is correctly given.

Appellant further complains that the verdict is contrary to the law and the evidence. We think not. It shows that an unwarranted and brutal assault was made upon a helpless and weak-minded man, without any cause or justification whatever.

We affirm the case.

PER CURIAM. The disposition of this case recommended by the Commissioner is approved, for reasons stated in opinion.

WHITEHEAD v. STATE. (No. 14,602.)

(Supreme Court of Mississippi. May 16, 1910.)

1. JURY (§§ 72, 116*)—CRIMINAL LAW (§ 589*)—CHALLENGE TO ARRAY—GROUNDS.

That the members of the regular venire in attendance when a criminal case was called had been either disqualified, or qualified, but peremptorily challenged, in the trial of another person indicted for the same offense, and had heard a good deal of the case, would not disqualify them, as a whole, to act as jurors in the subsequent case, so as to require a continuance for want of a jury; but their qualifications to sit in such case should be determined by the court upon their voir dire examination when called as jurors, and even if the whole number then disqualified themselves, for cause or otherwise, the court could proceed to form the jury with talesmen, summoned from the bystanders.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. §§ 72, 116;* Criminal Law, Cent. Dig. § 1315; Dec. Dig. § 589.*]

2. JURY (§ 103*)—QUALIFICATIONS—OPINIONS—"COMPETENT JUROR."

Under Code 1906, § 2685, providing that any person, otherwise competent, who will make oath that he is impartial in the case, shall be a "competent juror" in a criminal case, notwithstanding that he has an impression or opinion as to the guilt or innocence of accused, if it appear to the satisfaction of the court that he has no bias or prejudice, and no desire to reach any result, except that to which the evidence may conduct, a juror is not disqualified by any impression or opinion which he might have upon entering the jury box, requiring evidence to remove it; but light impressions, which may fairly be supposed to yield to the testimony and leave the mind open to a fair consideration thereof, do not disqualify him.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461-479, 497; Dec. Dig. § 103.*]

For other definitions, see Words and Phrases, vol. 4, p. 3418.*]

Appeal from Circuit Court, Carroll County; G. A. McLean, Jr., Judge.

Ben Whitehead was convicted of burglary and larceny, and he appeals. Affirmed.

Turner & Hemmingway, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. At the April term, 1909, of the circuit court of the First district of Carroll county, the appellant, Ben Whitehead, was tried, convicted, and sentenced for a term of five years in the penitentiary for the burglary and larceny of the storehouse of W. B. Posey, from which judgment and sentence he prosecutes this appeal.

There are many assignments of error by appellant in this cause, but the one he presses with much force and zeal is that he was not given a trial by an impartial jury, such as is guaranteed to him by section 26 of the Constitution of 1890. To have a clear conception of this assignment of error, it is necessary to give a brief statement of some of the facts. At the April term, 1909, of the circuit court of the First district of Carroll county, I. N. Brownlow, Gentry Jackson, and appellant were separately indicted for the burglary and larceny of the storehouse of W. B. Posey. All three cases were continued to the October term, 1909, of said court, and during the first week of said term Brownlow was put on trial, which resulted in a mistrial. During the second week Gentry Jackson's case was tried, resulting in a conviction. While the jury in the case of Gentry Jackson was deliberating on its verdict, the case of appellant was called. He presented to the court a motion for a continuance, stating, among other things, that appellant does not believe that he can safely go to trial before the panels of the present week, or of any member thereof, for the reason that Brownlow and Jackson were tried for the same identical offense, the only difference being that they were indicted separately, and not jointly; that the jury trying the said case of Gentry Jackson was composed of 8 members

of the two regular panels for the second week of the term; that 11 members of the said two panels were declared incompetent by the court upon their voir dire examination; that 2 members of the said two panels were excused peremptorily by the state; that 3 members of the said two panels were excused peremptorily by the defendant Jackson; that there are no members of the two panels for the present week who are not disqualified, either for cause or who have been peremptorily challenged in the trial of the very issue to be tried in this cause. The motion of appellant was overruled by the trial judge, and to this ruling the appellant excepted; and he further stated to the court "that he challenges the array which the court intends to offer him, and will challenge it during the impaneling of the jury."

Upon an inspection of the record, it appears that when the case of appellant was called there were 16 members of the regular venire in attendance, 11 of which were disqualified and 5 qualified (but peremptorily challenged) in the Jackson Case. The appellant seems to contend that these 16 had been examined in the Jackson Case touching their qualification, and had necessarily heard a good deal of the case, that they were thereby disqualified in this case as a whole, and therefore there was no nucleus of a jury from which to begin the impaneling of a jury in the case of appellant, and for that reason the trial of his case could not proceed for the want of a jury. In other words, of the jury thus constituted the defendant challenged the array, on the ground that the court had no legal power to impanel the jury under existing circumstances and facts.

We do not concur in this view of the case. These 16 jurors were members of the regular panels for the week, and the question of their qualification or disqualification to sit in appellant's case should be determined by the court upon their voir dire examination when called as jurors; and even if the whole 16 on their voir dire examination disqualified themselves for cause or otherwise, the court had the right to proceed to form the jury with talesman summoned from the bystanders. It has been held by this court "that, if there be no member of the regular panel present, the court cannot, of its own motion, organize a jury, save in special states of case provided for by the statute; but so long as there is a single member of the regular venire in attendance, he may be utilized as the basis for the formation of a new jury, and that the power to do this will not be defeated by challenge or excusing such juror; but that the court, by his presence having acquired jurisdiction to organize a jury, may proceed to exercise a power, though such juror form no part of it." *Barnes v. State*, 60 Miss. 359.

Appellant further complains that the court erred in not excusing certain jurors for cause when being examined on their voir dire.

The brief of counsel for appellant, and the record, is largely filled with a detailed statement of the answers of jurors to questions propounded them on their voir dire examination, in an attempt to show that some of them were incompetent. The court announced to appellant that he would allow him the greatest of latitude in examining jurors as to their competency. The court seems to have exercised great caution in impaneling this jury. When the Jackson Case was before the jury, the court caused all the jurors in the jury box to retire from the courtroom. We have closely examined the questions put to these jurors on their voir dire examination, and their answers thereto, and we are of the opinion that none of them were disqualified by the character of the opinion they had formed of the guilt or innocence of the appellant, and the appellant has no just cause for complaint, because he was forced to exercise his right of peremptory challenge to exclude certain jurors from the panel.

Code 1906, § 2685, provides that "any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct; but any juror shall be excluded, if the court be of the opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error." Appellant seems to contend that, if any kind of impression or opinion which a juror might have had upon entering the jury box required evidence to remove it, then such juror would be disqualified. "Were it possible to obtain a jury without any prepossessions whatever excepting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is that light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitutes not sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist the force, do constitute a sufficient objection to him." *Green v. State*, 72 Miss. 525, 17 South. 382.

Each juror on his voir dire examination was closely and thoroughly examined by appellant touching his qualification, and upon an inspection of the record each stated they had no bias or feeling or prejudice against defendant, and had no desire to reach any result in it, except that to which the evidence

may conduct. After carefully reading the record in this case, we are of the opinion that the court committed no error in refusing to sustain a challenge for cause to the jurors complained of in appellant's assignment of errors.

Appellant further complains that the verdict is contrary to the law and the evidence. We have gone over the evidence, and, while there is conflict in the same, we think the jury was warranted in returning a verdict of guilty. The instructions upon the whole fully and fairly covered the law of the case. Taking the record upon the whole, we are convinced that the appellant has received a fair and impartial trial as guaranteed to him by the Constitution and laws of our state.

The case is affirmed.

PER CURIAM. For reasons indicated in above opinion by the Commissioner, this case is affirmed.

ALABAMA & V. RY. CO. et al. v. TURNER. (No. 14,494.)

(Supreme Court of Mississippi. May 16, 1910.)

1. MUNICIPAL CORPORATIONS (§ 392*)—STREETS—VACATION—COMPENSATION—“ABUTTING OWNER.”

Under Code 1906, § 335d, conferring on municipalities power to vacate streets and alleys, and providing that no vacation shall be made, except on due compensation being first made to abutting owners for all damages sustained thereby, one owning property on a continuous street, which, though the north and south ends bore different names, formed a continuous way in front of such property, and across a railroad right of way, and into a town, was an “abutting owner,” and the city could not vacate the street, and permit the erection of a railroad depot therein, without first making compensation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 936; Dec. Dig. § 392.*]

2. MUNICIPAL CORPORATIONS (§ 58*)—POWERS—EXERCISE—CONFORMITY TO LAW.

Municipalities act under limited powers, and must find authority clearly given in the law, and, when so found, they must follow the law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. § 58.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Action by Mattie Turner against the Alabama & Vicksburg Railway Company and others. From an order overruling a demurrer to the bill, defendants appeal. Affirmed and remanded, with leave to answer.

McWille & Thompson, for appellants. Greaves, Easterling & Manship and Harris & Stricker, for appellee.

MAYES, C. J. This suit was begun in the chancery court of Hinds county by Mattie Turner, in which she seeks to have declared void an ordinance of the town of Clinton closing up the south end of Neal avenue and the north end of Jefferson street, and also

to compel the removal from across the streets in question of the depot of the Alabama & Vicksburg Railway Company as an obstruction to same. She also seeks to recover damage claimed by her to have been sustained by reason of the closing of the street and its obstruction by the depot, and also prays for an order compelling the opening of the street and enjoining the town of Clinton and the railway company from further obstruction or interference with the street. The bill filed is a lengthy one, and need not be here recopied.

It appears from the bill that prior to the year 1907 Jefferson street was one of the main streets in the town of Clinton, running north and across the right of way and tracks of the Alabama & Vicksburg Railway Company, and after crossing the tracks, though a continuous street, its extension or continuation was called Neal avenue. This street had been maintained and used as a public thoroughfare for more than 15 years. Mattie Turner owned land fronting and abutting on the east and west side of Neal avenue, or Jefferson street extended; in fact, her land was divided by this continuous street, and she alleges that she bought the property and built houses thereon, adjusting same with reference to this street. The complainant has erected two houses near the point where Neal avenue, or Jefferson street extended, touches the southern boundary of the railroad right of way. These houses were built at considerable expense to her, and fronting on both sides of Neal avenue. One house is a storehouse, and the other a boarding house and store combined. Some time in 1907 the mayor and board of aldermen of the town of Clinton undertook to close the south end of Neal avenue near complainant's houses, and at the point where the avenue ran into Jefferson street extended, and on the boundary of the railroad right of way. At the same time and in the same order that the mayor and board of aldermen directed the closing of Neal avenue on the south, they also directed the closing of Jefferson street on the north and at the point where same touched the southern boundary of the Alabama & Vicksburg right of way. In short, the board discontinued this crossing entirely, and authorized the railroad company to occupy the whole street across the tracks with a new depot, thus barring passage across there as effectually as if a fence had been built from side to side, and in doing this it closed all access south from Neal avenue to Jefferson street, and from Jefferson street north to Neal avenue. Before the erection of this new depot, the old depot stood some little distance east of the crossing, leaving same free to travel. The town authorities undertook to provide a new street, and to call this new street Neal avenue; but, in order for complainant to get to or from her property, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was necessary to go some distance and by a circuitous route to a point considerably west, where Monroe street crossed the railroad tracks; in short, the new arrangement left complainant in a lane closed up at a point near her houses, making it necessary to travel a circuitous route many times greater in distance than she had formerly been compelled to travel, and closing up what had been for 15 years an open and continuous street. When the street was closed, no compensation was paid to complainant or offered to be paid. The bill alleges that complainant is an abutting owner on the street, and that the action of the city was without authority and void, and that the railroad company, by placing its depot across the street by authority of the city, unlawfully obstructed the use of the street, and that the depot was unlawfully there. The bill was demurred to, and the demurrer overruled, from which order an appeal is here prosecuted to settle the principles of the case.

The first question presented is whether or not Mattie Turner is an abutting property owner, within the meaning of section 3336 of the Code; and we have no hesitancy in saying that she is, and that she has all the rights of an abutting property owner under the law. The street on which she lived, before same was closed, was one continuous street; the south end being Jefferson street and the north end being Neal avenue, but forming a continuous and unobstructed way to and from and in front of her property into the town of Clinton and across the railroad right of way. The point at which this street is ordered to be closed on the south side is adjacent to the property of Mattie Turner, and by the closing of the street she has now nothing left but a lane and a very circuitous route from it to reach her property. Section 3336 of the Code confers upon municipalities the power "to close and vacate any street, or alley, or any portion thereof"; but this very same section provides that "*no street or alley or any portion thereof shall be closed or vacated except upon due compensation being first made to the abutting landowners upon such street or alley for all damage sustained thereby.*" The last clause of this section was put into the Code of 1906 for the first time, and it could have had but one purpose, and that was to more completely protect the citizen in his property rights from incidental damage done him by closing streets, or any portion thereof, by the varying whims of those put in charge of the municipal affairs. The law recognizes that abutting property owners' rights in streets is a property right, and, like all other property rights, it guards and protects it. From the unreasonable hardships imposed upon citizens in this way grew the law for their protection, crystallizing in section 17 of the Constitution, and emphasized and broadened by section 3336 of the Code of 1906.

This case is controlled by the case of Laurel

v. Rowe, 84 Miss. 435, 36 South. 543. The learned judge delivering the opinion in that case, the late Justice Calhoun, noted for his love of mankind and hatred of any kind of oppressive action by those in authority, said: "The tendency of these boards throughout the country is to usurp powers not given them. Countless oppressions of private citizens, too poor, too ignorant, or too humble to excite attention or enlist the advocacy of the influential, never see the sunlight of the courts of law. * * * They must be held in with a tight rein at the bar of the people, sitting in the person of their judges in their solemn tribunals of justice. All citizens of a town have the right to have their public thoroughfares, streets, or alleys, whether acquired by dedication or user, kept open for their own use and the use of visiting strangers who come for commerce or social intercourse. They should never be closed, except when plainly for the public good, and cannot then be closed except upon compensation first paid for any damage, to abutting proprietors." The case of Poythress v. M. & O. Ry. Co., 92 Miss. 638, 46 South. 139, has no application on the facts of this case. The point on which that case turned placed Poythress without any cause of complaint. It was there held that Poythress was not an abutting property owner, and, since the law only applies to that character of persons, it was necessarily held that the suit could not be maintained. The case of Cram v. City of Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282, was cited for the single purpose of showing that under the facts of the Poythress Case it had been held in the Cram Case that such person was not an abutting property owner. The facts of the two cases last cited were similar on the question as to whether or not Poythress could be held to be an abutting property owner.

The jurisdiction given to the municipalities to close and vacate streets, or any portion thereof, is coupled with the condition that they shall *first* make due compensation to abutting property owners. When they act without doing this, they act without authority, and their action is no more forceful than if done by a wholly unauthorized person or body of persons. Municipalities act under limited powers, and must find their authority clearly given in the law, and when so found they must follow the law. The town of Clinton, through its city authorities, could not close this street, except in the manner and upon conditions prescribed by law; and, being so restricted themselves, they could give no authority to the railroad to place its depot in this street. This being the case, the street is unlawfully closed, and the depot is in the street wrongfully.

The decree of the court overruling the demurrer was correct, and the cause is affirmed and remanded, with leave to answer within 60 days after filing of mandate in court below.

DAVIS v. STATE (No. 14,536.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Circuit Court, Wayne County; T. H. Barrett, Judge.

Rozier Davis was convicted of murder, and appeals. Affirmed.

Heidelberg & Heidelberg, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

PETTY v. EAVES et al. (No. 14,314.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Chancery Court, Lee County; J. Q. Robbins, Chancellor.

Action between Julia A. Petty and J. H. and Ollie D. Eaves. From the judgment, Petty appeals. Affirmed.

O. K. Gary, for appellant. Mitchell & Clayton, for appellees.

PER CURIAM. Affirmed.

MANGUM v. DANIELS. (No. 14,478.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Circuit Court, Scott County; R. L. Bullard, Judge.

Action by Wallace Mangum, by next friend, against B. F. Daniels. Judgment for defendant, and plaintiff appeals. Affirmed.

Mize & Tullos and O. R. Singleton, for appellant. W. C. Eastland, for appellee.

PER CURIAM. Affirmed.

DAVIS v. STATE (No. 14,538.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Circuit Court, Union County; W. A. Roane, Judge.

Elbert Davis was convicted of burglary, and appeals. Affirmed.

Jones & Knox, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

TRUE v. TOWN OF BOONEVILLE.

(No. 14,560.)

(Supreme Court of Mississippi. May 16, 1910.)

Appeal from Circuit Court, Prentiss County; John H. Mitchell, Judge.

Action by Johnnie True, by his next friend, against the Town of Booneville. Judgment for defendant, and plaintiff appeals. Affirmed.

Strange & Cunningham, for appellant. Sharp & McIntyre, for appellee.

PER CURIAM. Affirmed.

GULF & S. I. R. CO. v. WILLIAMS et al.

(No. 14,289.)

(Supreme Court of Mississippi. May 16, 1910.)

Appeal from Chancery Court, Simpson County; Sam Whitman, Jr., Chancellor.

Action by Mack Williams and others against the Gulf & Ship Island Railroad Company. From the judgment, the Railroad Company appeals. Affirmed.

Jas. H. Neville and R. L. Dent, for appellant. S. L. McLaurin, for appellees.

PER CURIAM. Affirmed.

J. H. & M. T. TODD v. SIMMONS.

(No. 14,296.)

(Supreme Court of Mississippi. May 16, 1910.)

Appeal from Circuit Court, Pontotoc County; G. L. Jones, Special Judge.

Action between J. H. & M. T. Todd and John D. Simmons. From the judgment, J. H. & M. T. Todd appeal. Affirmed.

C. Lee Crum, for appellants. A. M. Mitchell, for appellee.

PER CURIAM. Affirmed.

MOBILE, J. & K. C. R. CO. v. MISSISSIPPI RAILROAD COMMISSION. (No. 14,259.)

(Supreme Court of Mississippi. May 16, 1910.)

Appeal from Railroad Commission.

The Mobile, Jackson & Kansas City Railroad Company appeals from a decision of the Mississippi Railroad Commission. Affirmed.

Flowers, Fletcher & Whitfield, for appellant. S. S. Hudson, Atty. Gen., for appellee.

PER CURIAM. Affirmed.

NEW ORLEANS & N. E. R. CO. v. McFARLAND et al. (No. 14,346.)

(Supreme Court of Mississippi. May 16, 1910.)

Appeal from Chancery Court, Jasper County; Sam Whitman, Jr., Chancellor.

Action by G. S. McFarland and others against the New Orleans & North Eastern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bozeman & Fewell, for appellant. Hardy & Arnold, for appellees.

PER CURIAM. Affirmed.

EASTMAN, GARDINER & CO. et al. v. RICHARDSON et al. (No. 14,357.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Chancery Court, Smith County; Sam Whitman, Chancellor.

Action between Eastman, Gardiner & Co. and others and J. O. Richardson and others. From the judgment, Eastman, Gardiner & Co. and others appeal. Affirmed.

Green & Green, for appellants. May & Sanders and J. J. Stubbs, for appellees.

PER CURIAM. Affirmed.

POTTER et al. v. MARTIN et al.

(No. 14,130.)

(Supreme Court of Mississippi. May 23, 1910.)

Appeal from Chancery Court, Lauderdale County; Sam Whitman, Chancellor.

Action between Sarah E. Potter and others and R. Martin and others. From the judgment, Potter and others appeal. Affirmed.

Ethridge & Ethridge, for appellants. Witherspoon & Witherspoon and Amis & Dunn, for appellees.

PER CURIAM. Affirmed.

(126 La.)

No. 17,818.

DARRAGH v. VICKNAIR.

(Supreme Court of Louisiana. April 25, 1910.)

*(Syllabus by the Court.)***1. CONTRACTS (§§ 277, 279*)—BREACH—DEMAND FOR COMPLIANCE.**

Where the alleged breach of a commutative contract is passive, damages become due only from the time the party committing the breach is put in default; and, in order to put him in default, the demand for compliance must be accompanied by a tender of compliance on the part of the one by whom the demand is made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1217-1248; Dec. Dig. §§ 277, 279.*]

2. VENDOR AND PURCHASER (§ 18*)—OPTION TO PURCHASE—ABANDONMENT—RIGHT TO DAMAGES.

Where one enters upon and cultivates plantation property, with the option of buying, or paying rent, at the end of the year, and, at the end of the year, voluntarily abandons the option and the property, he cannot recover damages alleged to have been sustained by reason of the failure of the owner of the property to make him a title thereto.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 28; Dec. Dig. § 18.*]

Appeal from the Twenty-Third Judicial District Court, Parish of St. Mary; J. R. Parkerson, Judge ad hoc.

Action by J. L. Darragh against A. E. Vicknair. Judgment for plaintiff, and defendant appeals. Affirmed.

Borah & Himel and Marks, Wortham & Le Blanc, for appellant. Paul Kramer, for appellee.

Statement of the Case.

MONROE, J. During the year 1906 plaintiff, acting through her agent, M. J. Tiernan, had her ("Justine") plantation, in the parish of St. Mary, laid off and advertised for sale in parcels, and defendant went there on two occasions with the view of making a purchase, the result being that on January 23, 1907, he made a verbal contract with Tiernan (acting for plaintiff), under which he entered upon one of the parcels and lived there, cultivating it, until 3 o'clock on the morning of Sunday, January 26, 1908, when he departed for his former residence in the parish of Assumption, carrying with him 10 mules and a cart, which had been sold to him by plaintiff, and no part of the price of which had been paid, and also carrying with him a statement of his account with plaintiff in which he was charged, for mules, \$1,300; for cash advanced, \$1,320, for feed and peas, \$366.68, for cart, \$100, and for certain items of interest (the claim for which is abandoned), and credited with \$1,451.36 for cane sold, and hauling done, leaving a balance to his debit (exclusive of the interest) of say \$1,635.36, to which was to be added \$1,200 agreed to be paid as interest (on the purchase price of the property) or rent (in the

event of his not completing the purchase), making a total debt which he left behind him of \$2,835.36, for which amount (and some further amount, not now insisted on), plaintiff at once instituted suit, obtaining a writ of sequestration under which the mules and cart were seized in the parish of Assumption. Defendant by way of answer and reconventional demand says: (1) That plaintiff agreed to sell him 250 arpents of land and to furnish enough cane to plant two-thirds of the whole tract; (2) that she furnished only enough cane to plant 52 arpents, and that he was obliged to plant the balance of the land in corn and peas; (3) that she failed to supply him with necessary farming implements, save one cart; (4) that she failed, in spite of repeated demands, to make him a title to the land; (5) that the place was in bad condition when he took charge, and that he added \$25 an arpent to its value by clearing and improving; (6) that he expended \$750 in repairing the ditches and clearing 20 arpents of new land; (7) that he put a new roof on the dwelling at a cost of \$14.40; (8) that the cane furnished by plaintiff was bad and produced only 380 tons, whereas it should have produced 1,040 tons, thereby entailing a loss on him of \$2,376; (9) that, on account of the insufficiency in quantity of the cane so furnished, he was unable to plant 114 arpents of the land, on which he could have made 2,280 tons of cane, and a profit in money of \$2,508; (10) that he put down for seed 300 tons of cane, which he could have sold for \$1,080; (11) that he prepared 80 arpents of land for the season of 1908 at a cost of \$400; (12) that he left on the land 52 arpents of first year's stubble, worth \$260; (13) that he left 35 loads of hay, worth \$175; (14) that the land in question is worth \$100 an arpent, and that he is entitled to the difference between that valuation and the amount that he agreed to pay, or \$6,250; (15) that it cost him to go from his home to the parish of St. Mary and back \$100; (16) that he assisted plaintiff in harvesting her crop, and rendered service to the value of \$73.83; (17) that he reached home too late to make a crop in 1908 and lost what he could have made, or say \$1,000. And he prays that plaintiff's demand be rejected, and (reserving his right to claim further damages for the alleged wrongful sequestration) that he have judgment against her, in reconvention, for \$22,684, with interest.

Opinion.

On the trial counsel for plaintiff objected to the testimony offered in support of the claim for damages on the ground that no damages are recoverable for plaintiff's alleged inexecution of the contract without proof of a putting in default; that the allegations of the reconventional demand are too

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vague to admit of proof; that the damages are remote and speculative, upon which objection the trial judge reserved his ruling. Eventually, however, he gave judgment for plaintiff for \$2,835.36, with interest, maintaining the sequestration, and recognizing plaintiff's lien and privilege on the mules and cart, from which we infer that he concluded either that the testimony which had been objected to was not properly before him for consideration, or that it was ineffective for the purpose for which it was offered. As there are allegations in the reconventional demand under which defendant was perhaps entitled to offer evidence to show that he had put plaintiff in default, and as defendant could not well have been controlled in the matter of the order in which he chose to introduce his evidence, we do not find that, so far as the first ground of objection is concerned, there was any error in the ruling of the judge. On the other hand, if, when the evidence was all in, the judge found that no putting in default had been proved, it was entirely proper for him to disregard all the evidence so introduced which tended to support defendant's claim for damages, the case being one of a commutative contract, in which, the alleged breach being passive, damages could have become due only from the time the debtor was put in default, and in which it was necessary to the accomplishment of that result that defendant should have tendered performance on his part. Civ. Code, arts. 1913, 1933. From the view that we take of the whole case, we find it unnecessary to make any specific ruling on the other grounds of objection, though, no doubt, some of the allegations of the petition are obnoxious to the objection of vagueness, and some of the damages claimed are too speculative and uncertain to be susceptible of proof. We interpret the contract, the terms of which were loosely expressed or not expressed at all, and find the facts disclosed by the record to be as follows: Defendant agreed to take, and plaintiff agreed to let him have, 200 acres of land at \$75 an acre, should he, by the end of the year, determine to buy it, the total price to be paid in 12 annual installments, with interest, paid annually, on the whole amount, and one-fourth of the crop to be pledged or set aside to secure such payments, and plaintiff agreed in the meanwhile (at least, for the year 1907) to supply defendant with enough plant cane and stubble to plant two-thirds of that portion of the 200 acres which was open to cultivation, and to make him such advances in money and supplies as might be required for the making of a crop.

Plaintiff sold to defendant 10 mules for \$1,300, and one wagon for \$100, and it was agreed and understood that they were to be paid for at the end of the year, at which time, if defendant elected to buy the land,

he was to pay the first installment of the price and the sum of \$1,200 as the first year's interest on such price (the rate of interest agreed on being 8 per cent.). On the other hand, if he elected not to buy the property, he was nevertheless to pay for the mules and cart and was to pay the \$1,200 as rental of said property for the year. Defendant had inspected the property before entering into the contract, and presumably knew its condition, and the condition of the ditches and improvements, and plaintiff did not undertake to do anything with respect thereto, nor did she undertake to furnish defendant with any farming implements other than the wagon which she sold and delivered to him. Defendant had also inspected the plant cane before entering into the contract, and, though he now makes some complaint of its quality, the evidence fails to satisfy us that it was below the average of the year in that neighborhood, or that it was not such cane as plaintiff had the right to tender. Beyond that, it does not appear that defendant during the time that he was on the place made any complaint of the quality of the cane. He also now complains that there was not enough of the cane—that is to say, that there was not enough (plant cane and stubble) to plant two-thirds of 250 acres (or arpents)—but, as we have stated, his contract concerned 200 acres, and of the 200 acres in question there were not more than say 130 acres that were cultivable. The testimony of defendant and his son-in-law notwithstanding to the contrary, we do not interpret the contract to mean that plaintiff was to furnish plant cane and stubble enough for the planting of the woodland and swamp, as well as the cultivable land, and we find that there is a preponderance of evidence to the effect that the amount furnished was sufficient for the planting of all the land that was cultivable or that was expected to be made so. We do not find that defendant at any time made any serious demand upon plaintiff (or her agent) for the execution of a deed to the land.

The agreement with regard to the payment of the \$1,200 indicates that it was not within the contemplation of the parties that the question whether defendant would avail himself of his option to buy would be determined before the end of the year, and though he makes some general assertions to the effect that during the year he spoke to Tiernan on the subject on several occasions, and that Tiernan put him off and promised to attend to it later, the main attempt to prove a demand for the title and a refusal to execute it relates to something that is said to have occurred at about the expiration of the year from the date upon which defendant went into possession. Defendant fixes the date as January 23, 1908, which was just a year from the date on which he took possession. His son, who testified upon the subject, seemed to think it was Janu-

ary 16th or 19th. There is, however, a witness by the name of Robichaux, who appears to be entirely credible and disinterested, and who testifies that about that time (perhaps a week or two before) he was requested by defendant to go to Tiernan and say to him that defendant would like to have a "settlement," which he did, and he further says that Tiernan sent word back to defendant that he would make a settlement with him whenever he wanted it, to which (according to Robichaux) defendant made no reply. Defendant admits in his testimony that he left Justine plantation at 3 o'clock on the morning of Sunday, January 26, 1908, and started back to the parish of Assumption, and he says that he did not notify any one of his intended departure because he "didn't have nobody to notify." He took with him the 10 mules and the cart that he had bought from plaintiff, and which were wholly unpaid for, and they were seized in the parish of Assumption by the sheriff of that parish under the writ of sequestration herein issued. There is no suggestion in the record that defendant had the \$1,400 with which to pay for the mules and the cart, or the \$1,200 which was due, either as rent or interest, or the \$1,635.36 which he owed plaintiff for advances and supplies; nor is there any suggestion that in the alleged interview between him and Tiernan on January 23, 1908 (when, he says, he demanded a title), he made any offer or tender with respect to the obligations thus referred to. Tiernan testifies that the first that he heard of defendant after he had sent word by Robichaux that he was ready to settle with him was that he had left the plantation in the night, with the mules and the cart, and the next time he saw him was when he appeared on the trial of the case. Conceding, however, that there was some such interview at some time, our conclusion, from the testimony which the defendant and his witnesses (son and son-in-law) give in regard to it, and from the circumstances existing before, at the time, and afterwards, is that there was no serious demand for a title, but possibly an attempt on the part of defendant to lay the foundation for the defense which he has undertaken to make in this case. and that he never at any time really demanded or wanted a title, and never conveyed to Tiernan's mind the idea that he wanted or was demanding it. In view of the conclusions thus stated, it follows that defendant's abandonment of plaintiff's land, and of his right to buy it, was purely voluntary; that his claim for damages falls; and that his liability to plaintiff for the balance due (after deducting certain credits) for the price of the mules and cart, for the advances of money and supplies, and for the rent for the use of plaintiff's land during the year 1907 should be enforced.

The learned judge ad hoc so found, and we think he was correct.

The judgment appealed from is accordingly:

Affirmed.

(126 La.)

No. 17,774.

Succession of DAVIS.

(Supreme Court of Louisiana. April 11, 1910.
Rehearing Denied May 9, 1910.)

(Syllabus by the Court.)

1. BASTARDS (§ 102*)—RIGHT TO INHERIT.

The child of a woman slave by a white man is a bastard, and cannot inherit the succession of the mother opened in the state of Louisiana since the adoption of Act No. 54 of 1894, p. 63, prohibiting marriage between white persons and persons of color.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 254, 255; Dec. Dig. § 102.*]

For other definitions, see Words and Phrases, vol. 1, pp. 717, 718; vol. 8, p. 7588.]

2. BASTARDS (§ 13*)—LEGITIMATION.

Under Civ. Code 1870, art. 204, no illegitimate child can inherit from his parents unless they were capable of contracting marriage at the time of its conception. Act No. 68 of 1870, permitting the legitimation of natural children by declaratory acts before notaries public and two witnesses, where there existed no other legal impediments to the intermarriage except those resulting from color or the institution of slavery, has no application to a case where the parents have not availed themselves of the benefit of the statute.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

3. DESCENT AND DISTRIBUTION (§ 6*)—WHAT LAW GOVERNS.

The capacity of heirs to inherit must be determined by the laws in force at the date of the opening of the succession.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28-32; Dec. Dig. § 6.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the matter of the succession of Virginia R. Davis. Petition of George Gamble to be admitted to inherit granted, and Frank Walker, executor, appeals. Reversed, and suit dismissed.

Charles Louque and Hall, Monroe & Lemann, for appellant Walker. John T. Allen, Arthur B. Watkins, Foster, Milling, Brian & Saal, and Jas. B. Rosser, Jr., for appellee Gamble.

LAND, J. Virginia R. Davis, born a slave in Nashville, Tenn., died at her domicile in the city of New Orleans on July 30, 1908, leaving a last will in olographic form, in which she instituted Frank Walker as universal legatee and appointed him as her executor. The will was probated, and the court ordered the universal legatee to be sent into possession of the property of the estate, consisting of 20 lots of ground, household furni-

ture, and several hundred dollars in money. Among the papers of the decedent was found the note of Frank Walker in favor of the decedent for \$3,500, secured by shares of stock of the Walker Improvement Company. On the trial of his application to be recognized as universal legatee, Frank Walker testified that said note was without consideration, and was intended as a donation to Mrs. Davis in consideration of aid and services rendered to him when he lost an arm, and was sick and penniless for a long time.

One Mrs. Barrett filed a petition, claiming that she was the universal legatee of the decedent under another will, and, in the alternative, that she was a creditor of the estate in the sum of \$50,000, as shown by a certain deed of trust. Mrs. Barrett failed to produce the documents referred to in her petition, and her suit was dismissed.

The present suit was filed in January, 1909, by George Gamble, colored, of the city of Nashville, Tenn.

From the allegations of the petition it appears that George Gamble, colored, is the natural son of the deceased, and was born in or about the year 1863, in the said city of Nashville; that Virginia Riddleberger Davis, colored, formerly known as Virginia, alias Dink Coleman, died at her domicile in the city of New Orleans on July 30, 1908; that said decedent never had any legitimate children, and no other natural or illegitimate child than the petitioner, except a girl child who died in infancy; that, after the birth of the petitioner, the said decedent changed her domicile to the city of New Orleans, and left petitioner to reside in or near the city of Nashville, the said decedent having there secured for petitioner a home during his infancy.

The petitioner alleged the absolute nullity of the will on the ground that it was not wholly written, dated, and signed by Virginia R. Davis, and, in the alternative, that the disposition of said will is illegal, null, and void because the testatrix and the universal legatee at the time of the death of the decedent and of the execution of the will, and for 20 or more years prior thereto, were living and had lived together in open concubinage.

Frank Walker answered, pleading a general and special denial of the alleged heirship of the petitioner, the alleged concubinage, and the alleged invalidity of the will. More than a month later the defendant filed an exception of no cause of action, which was by the court referred to the merits.

The case was tried and judgment was rendered in favor of George Gamble, recognizing him as the natural or acknowledged illegitimate son of the decedent, and as such entitled to inherit her estate, annulling the dispositions of the will of the decedent in so far as the same constituted Frank Walker universal legatee and restricting the bequest

in his favor to one-tenth of the estate, payable out of the movables.

Defendant filed a motion for a new trial, supported by affidavits of the nonexistence of the alleged concubinage. The motion was overruled, and the defendant has appealed. Plaintiff has joined in the appeal, and prayed that the judgment be amended by decreeing the nullity of the will for want of form.

The questions for review are:

(1) Whether George Gamble is the illegitimate son of Virginia R. Davis.

(2) If so, whether George Gamble is the duly acknowledged natural son of Virginia R. Davis.

(3) Whether the will is valid in form.

(4) Whether Virginia R. Davis and Frank Walker lived together in open concubinage as alleged in the petition.

The record consists of an immense mass of conflicting testimony, much of which was taken in Tennessee under commission.

The following facts were found by the trial judge:

That the decedent was born in Nashville, Tenn., of a slave mother and a white father about the year 1842. That on April 22, 1864, she was sold as a slave to one K. for \$600. That before and after the sale she was the prostitute of K. That in the latter part of 1864 or early in 1865 she became the mistress of one Gamble, and while his concubine gave birth to a boy child in the latter part of 1865 or early in 1866. That Gamble sent the deceased money to pay the midwife. That deceased named the boy George Gamble, and acknowledged him to her friends and acquaintances as her child. That the boy lived with his mother until he was three years old. That in 1868 or 1869 the deceased left the boy with an old colored woman named Lucy Cotton, and went to Memphis, Tenn., where in 1874 she became acquainted with Frank Walker. That the deceased was living with W., a bachelor, as housekeeper, and Walker lived in the same house until 1879. That in 1879 Walker left Memphis, and was an engineer on a steamboat until 1881, when he came to New Orleans. That Walker had some correspondence with the deceased, which led to her settling in New Orleans in the year 1882. That after her arrival the deceased rented houses at various times, and kept roomers and boarders. That Walker was her first roomer, and continued to room in the several houses occupied by the deceased until her death. That to one neighbor the deceased stated that Walker was her husband, to others that he was her man. That in 1883 Walker made a will in favor of the deceased, but destroyed the same, when she said, "How long will it take the lawyers to beat me out of the money?" That in 1904 Walker gave the deceased a note for \$3,500 without any consideration. That the will of the deceased was found in Walker's room. That Walker was frequent-

ly absent on business, but always retained his room and his telephone in the house of the deceased. That, when away, Walker corresponded with the deceased. That, when she died, he attended her funeral from a negro church, and was her chief mourner, and the only white man present.

From all the facts and circumstances of the case the judge concluded that Walker and the deceased had lived in open concubinage.

The preponderance of the evidence sustains the findings that the petitioner was the son of Virginia B. Davis, a slave, by one Gamble, a white man, and that prior to her departure from Nashville in 1868 or 1869 the deceased treated the petitioner as her son. But it appears from petitioner's own testimony that his mother abandoned him in 1868, and that ever afterwards there was no communication whatever between them.

The next question is as to the legal sufficiency of the alleged acknowledgment.

In the very interesting case of *Lange et al. v. Richoux et al.*, 6 La. 560, the genesis of our laws on the subject of inheritance by natural children is clearly set forth. The court said:

"The eleventh law of Toro required that, to be regarded as natural children, there should have existed at the birth or conception, no legal impediment to the marriage of the parents, and that they should be acknowledged by the father, dispensing, however, with any formal acknowledgment when the mother lived in the same house with the reputed father and was his sole concubine. Under this law, it was considered by the ablest commentators that proof of birth was equivalent to acknowledgment on the part of the mother and proof of cohabitation with the mother as sole concubine tantamount to an acknowledgment of paternity."

In that case the court held that the capacity of heirs to inherit depends on the law in force at the time the succession is opened, and that, under the Civil Code of 1825, proof of maternity may be made by any kind of legal evidence tending to show status, and that this forced acknowledgment has the same effect as the voluntary one in an authentic act or in the registry of birth or baptism. As article 914 of the Civil Code of 1825 provided that bastard, adulterous, or incestuous children shall not enjoy the right of inheriting the estate of their natural father or mother, the law allowing them nothing more than alimony, it follows that the rule announced in *Lange v. Richoux* must be restricted to natural children capable of inheriting when acknowledged or held to be acknowledged by their parents. The doctrine that natural children may prove their maternal descent by any legal evidence was again affirmed in *Jobert v. Pitot*, 4 La. Ann. 305.

Article 221 of the Civil Code of 1825 provided that no other proof of acknowledgment than that by notarial act or registry of birth or baptism should be admitted in favor of children of color; and by St. March 24, 1831, p. 86, a white person was prohibited

from legitimating a colored child. The same statute defined "natural children" as the issue of parents who "might at the time of conception have contracted marriage." Article 95 of the Civil Code of 1825 prohibited marriage between free persons and slaves, and between free white persons and free people of color.

The Civil Code of 1870 abolished all distinctions between persons on account of race, color, or previous condition of servitude.

Article 221 of the Civil Code of 1825 was revised so as to read:

"Art. 203. The acknowledgment of an illegitimate child shall be made by declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child."

Article 222 of the Code of 1825, prohibiting the acknowledgment of children produced from an adulterous or incestuous connection, was broadened so as to read:

"Art. 204. Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of the conception."

Hence, under the plain letter of the Civil Code of 1870, there is only one class of illegitimate children that can be acknowledged, namely, the issue of persons capable of contracting marriage at the time of conception. Such children are properly called "natural," a species of the class, "illegitimate," and the only kind that can be legitimated. Civ. Code, arts. 198-200. Such children are styled in France "naturels simples." 1 Mourlon, p. 480. The same commentator makes it very clear that natural filiation may be proved in the same manner as legitimate filiation. *Id.* p. 483 et seq.

But Virginia Coleman was a slave, and her son was born a slave. The mother had no capacity to contract marriage with a white man or a free person of color under either the laws of Tennessee or of Louisiana. The intermarriage of slaves, even with the consent of the master, produced no civil effects. Civ. Code 1825, art. 182. Hence the petitioner was conceived and born a bastard, and had no status as a natural child. Has this incapacity been cured by the emancipation of the mother and child, and by their investiture with all the civil rights enjoyed by white people?

By Act No. 210, p. 278, of 1868, the Legislature provided a mode of legalizing private or religious marriages, and marriages of all persons of whatever race or color, and of legitimating the children of such marriages, by declarations of the parties before a notary public. The life of this statute was, however, limited to two years.

By Act No. 68 of 1870, it was enacted:

"That natural fathers and mothers shall have power to legitimate their natural children, by acts declaratory of their intentions, made before a notary public and two witnesses: Provided,

that there existed at the time of the conception of such children no other legal impediments to the intermarriage of their natural father and mother except those resulting from color or the institution of slavery."

In Succession of Hébert, 33 La. Ann. 1107, Emilia Hébert sued to be recognized as the acknowledged natural daughter and sole issue of Melasie Hébert, who died in 1879. The collateral heirs opposed on the ground that Emilia was a colored person, the illegitimate and unlawful fruit of the connection of the deceased, a white woman, with a man of African blood; that the said Emilia had never been acknowledged according to law, and, even if she had been, the acknowledgment was absolutely void because in violation of a prohibitory law. The court held, in substance, that the capacity of Emilia to inherit would have to be determined by the laws in force at the date of the death of the mother in 1879; that, under such laws, there would have been no legal impediment to the marriage of Melasie with Emilia's father, even if he was a colored man; and that the dormant acknowledgment was vivified and validated by the constitutional and legislative provisions which had removed the legal impediments to the marriage of the father and mother. But in the case at bar, when the decedent departed this life in the year 1904, marriages between white persons and persons of color were and had been prohibited for 10 years. Act No. 54, p. 63, of 1894. This amendment of article 94 of the Civil Code of 1870 reads as follows:

"Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void."

If, as held in the Lange and Hébert Cases, *supra*, the capacity of the petitioner to inherit is to be determined by the laws in force at the time of the death of his mother (Civ. Code, art. 950), then he has no capacity to inherit his mother's estate.

Act No. 68, p. 96, of 1870, providing for the legitimation of natural children by notarial act, was intended to remove the bar of incapacity of color or servitude at the time of conception, provided that the parent make the required declarations before a notary public and two witnesses. Civ. Code, art. 200. Act 210, p. 278, of 1868, is a similar statute as to invalid marriages and the legitimation of the children thereof. Both acts are conditioned on the parents making the requisite declarations in the manner and form prescribed by the statute.

The mother of the petitioner did not avail herself of the benefit of either validating statute. Hence the law prohibiting the acknowledgment of children whose parents were incapable of contracting marriage at the time of conception is applicable to this case. Civ. Code, art. 204.

This conclusion renders it unnecessary to consider the other issues presented by the pleadings.

It is therefore ordered that the judgment appealed from be reversed, and that the suit of George Gamble be dismissed, with costs in both courts.

Their Honors, the CHIEF JUSTICE and Mr. Justice NICHOLLS, concur in the decree.

(126 La.)

No. 17,823.

GODCHAUX v. HYDE.

(Supreme Court of Louisiana. April 11, 1910.
On Application for Rehearing, May 9, 1910.)

(Syllabus by the Court.)

1. DAMAGES (§ 150*)—PLEADING—LIQUIDATED DAMAGES.

Where the putting of the debtor in default is a prerequisite to the recovery of damages in ordinary cases, it is also a prerequisite to the recovery of liquidated damages or the penalty stipulated for delay in the performance of the contract. A pleading containing a demand for liquidated damages shows no cause of action in the absence of averment that the debtor is in default by the act of the creditor, by the terms of the contract, or by operation of law.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 150.*]

2. PLEADING (§ 225*)—DEMURRER—AMENDMENT AFTER DEMURRER SUSTAINED.

After a demurrer to a pleading is sustained by the court, an offer to amend comes too late, but in such a case the ruling does not prejudice the right of the party to renew his demand on proper allegations.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 575; Dec. Dig. § 225.*]

3. DAMAGES (§ 71*)—BREACH OF CONTRACT—ATTORNEY FEES.

Where the terms of a contract are doubtful as to the inclusion of attorney fees as damages, such a demand will be rejected.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 146; Dec. Dig. § 71.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Albert Godchaux against Annie V. Hyde. Judgment for plaintiff, and defendant appeals. Affirmed.

Lazarus, Michel & Lazarus and David Sessler, for appellant. Foster, Mihing, Brian & Saal, for appellee.

LAND, J. This is a suit by the plaintiff as the assignee of Fred. N. Johnston to recover certain installments of the price and certain extras alleged to be due under a building contract executed May 15th between said Johnston and Mrs. Annie V. Hyde, defendant herein.

Defendant prayed over of the alleged assignment, and the plaintiff replied that the original assignment had been served on the defendant. Thereupon the order to produce was vacated. Upon learning later that the

document so served was in the nature of a notice of the assignment, plaintiff amended his petition by alleging that the original contract of assignment was verbal, and that the document served on defendant was notice thereof.

Exceptions of vagueness and of no cause of action were filed by the defendant. The latter exception was overruled, but the former was sustained.

Thereupon plaintiff filed an amended petition, alleging that the plaintiff was the contractor's surety on said building contract; that plaintiff had agreed with the contractor to advance to and pay for account of said contractor such money as was necessary to enable him to carry out said building contract; that, in consideration thereof, the said contractor agreed that all moneys becoming due to him under said contract should be paid to and collected by the plaintiff, and then and there did assign to the plaintiff all his rights under the contract; that it was further agreed that the funds to be so collected were to be applied by the plaintiff to the repayment of the advances to be made by him; that, pursuant to said agreement, plaintiff did advance to said contractor all funds required by him for the performance of said building contract; and that of the amounts so advanced there still remains due and unpaid after deducting all sums received from the defendant a balance of over \$4,000.

Defendant for answer admitted the execution of the building contract, and that two payments of \$1,514 each were still due the contractor, Fred. N. Johnston, but claimed an offset of \$2,127.40 for demurrage, attorney fees, and defective work, and pleaded a tender of the balance of \$900.10.

There was judgment for the plaintiff in the sum of \$2,637.60, with interest thereon from judicial demand and costs, and rejecting the demands of the defendant, who has appealed.

Defendant's contention that the proper plaintiff is not before the court is without merit. There was a verbal assignment as alleged, and a written order on the defendant to pay to plaintiff all amounts due Johnston as per contract. As Johnston testified that the plaintiff was entitled to the money sued for, the defendant will be amply protected in paying to the plaintiff, and the exact legal relations between him and Johnston do not concern the defendant.

Demurrage.

The contractor agreed to complete and deliver the building on or before the 1st day of October, 1906, and it was further stipulated as follows:

"It is agreed that, should said contractor fail to finish said work on or before the time specified, he shall pay to or allow the said owner to keep out of any sum due him on this contract, by way of liquidated damages, the sum of seven $\frac{50}{100}$ dollars per diem for each and every day thereafter the said work shall remain incomplete."

On the trial of the case the plaintiff successfully objected to the introduction of any evidence to establish the damages for delay claimed by the defendant, on the ground that the answer did not aver that the contractor had been put in default for noncompletion of the building. After the objection was sustained, the defendant moved for leave to amend her answer, but the motion was overruled.

Was a putting in default necessary in order to recover the stipulated damages?

Plaintiff's contention is that the breach of the contract being passive, a putting in default was necessary as a prerequisite to the recovery of damages. Civ. Code, art. 1912. A contract may be violated passively by not doing what was covenanted to be done or not doing it at the time, or in the manner stipulated or implied from the nature of the contract. Civ. Code, art. 1931. Where the breach has been passive only, damages are due from the time the debtor has been put in default. Civ. Code, art. 1933. Where there is a passive breach, the debtor may be put in default at or after the time stipulated for the performance by the act of the creditor, when he formally demands that the contract be carried into effect. Civ. Code, art. 1911. Whether the principal obligation contain or do not contain a term in which it is to be fulfilled, the penalty is forfeited only when he who has obligated himself either to deliver, to take, or to do, is in default. Civ. Code, art. 2126; article 2122, Civ. Code.

In *Allen v. Wills*, 4 La. Ann. 98, the court said:

"The penalty stipulated in case of the failure to finish the house in September was \$50 a week, but this penalty did not begin to run until Wills was put in default; for there was no stipulation in the contract that he should be deemed in default by the mere fact of his failure to complete the building at the specified time. See Civ. Code (1825) arts. 1905, 1927, 2122; Rogran, 1230; Merlin, verbo, Peine Contractual, § 3."

The same court in a similar case said:

"As long as the obligee does not demand the execution of the contract, the law supposes that it is because the nonperformance does him no injury. Hence, without a putting in default, damages are not due; nor by consequence the stipulated penalty, which is intended as a compensation for damages. * * * Hence the expiration of the term does not render the penal clause executory, unless it has been stipulated that the obligor should be in default by the mere expiration of the term." *Davis v. Glenn*, 3 La. Ann. 444.

In the recent case of *People's Homestead Association v. John C. Staub*, Third Court of Appeals, p. 97, it was held that a putting in default was a prerequisite to the recovery of damages in a case of this kind. In that case the Supreme Court declined to grant a writ of review.

The office of the penal clause is to assure the execution of the principal obligation and to fix in advance the amount of damages for the breach of the contract. The penal clause

is a secondary or accessory contract, and can be enforced only where the debtor is in default for nonperformance of the principal obligation. Where a putting in default is a prerequisite for the recovery of damages, it is also a prerequisite to the enforcement of the penalty. 11 Carpentier, Du Saint, Repertoire, etc., pp. 235-239. Damages fixed by the convention of the parties, or liquidated damages, are governed substantially by the same rules as the penal clause. Civ. Code, arts. 1934, 2125, 2126, 2127; 18 Carpentier, Du Saint, Repertoire, etc., p. 209, No. 233.

Where the damages are stipulated for delay, the mere fixing of the quantum does not dispense with the putting in default of the debtor, nor can such a stipulation convert a passive into an active violation of the contract.

If the creditor is in such a situation that the law will not permit him to sue the debtor for damages, he cannot be allowed to recover them under the name of penalty or liquidated damages.

The following cases are cited in defendant's brief: Berje v. Railway Co., 37 La. Ann. 470, where a contract of affreightment was in question, and the commercial law was applied. See *Id.* Opinion on application for rehearing.

Sarrazin v. Adams, 110 La. 125, 34 South. 301, where there was "an active disregard by defendants (contractors) of the plans and specifications" in several material respects. That case comes squarely within the definition of Civ. Code, art. 1931, of an active violation of a contract "by doing something inconsistent with the obligation proposed." In the same case the plaintiff claimed demurrage of \$5 per day for 104 days. This demand was rejected the court saying:

"She not only went into possession, but urged no objection at the time."

Levy v. Schwartz & Bro., 34 La. Ann. 209, was a case where a cotton press had been constructed unskillfully and not in accordance with the agreement, and the court held that there had been an active violation of the contract, and a putting in default was not necessary. The contract in that case had a penal clause, and the damages were reduced because the agreement had been partially executed. The court, moreover, affirmed the general doctrine that in actions to enforce penal clauses the debtor must be put in default as required in ordinary cases, and applied the rule that, unless there be an express agreement to the contrary, when the contract is executed in part, the damages may be reduced to the actual loss, or the penalty modified, by the judge. Civ. Code, art. 1934, No. 5, 2127.

Plaintiff's objection to the evidence offered to prove the alleged demurrage was properly sustained.

The objection went to the sufficiency of the averments of the answer, and was in effect a demurrer. After the objection was sustained, it was too late to amend the answer by

setting up a cause of action. *Hart & Co. v. Bowie*, 34 La. Ann. 325; *Abadie v. Berges*, 41 La. Ann. 283, 6 South. 529. In *State v. Hackley, Hume & Joyce*, 124 La. 854, 50 South. 777, this court said:

"Unless a cause of action is alleged, there is no suit and hence nothing to amend."

In the same case the judgment was affirmed without prejudice to the right of the plaintiff to renew the suit on proper allegations.

Holding that the evidence offered by the defendant to prove demurrage was properly ruled out, the same cannot be considered for the purpose of showing that the contractor was in default.

Attorney Fees.

We can see no merit in this demand under the terms of the contract. The stipulation as to attorney fees is found in a paragraph of the contract giving the owner under certain circumstances the right to terminate the contract and to complete the building at the expense of the contractor, including the expense of the prescribed notice and costs and attorney fees incident to the completion or enforcement of the contract. This paragraph never became operative. The surety bond, which forms a part of the contract, refers to the obligations assumed by the contractor, including the payment of subcontractors, furnishers of materials, and wages of laborers or workmen employed on the building, and guarantees the owner against all liability under Acts No. 134 of 1880 and 180 of 1894, "and from all loss and expense of any kind including all costs of court or attorney fees made necessary or arising from failure or neglect to promptly comply with all the obligations assumed by said contractor." In the same sentence it is stipulated that the contractor shall deliver the building to the owner free from all such claims and liens. We can perceive nothing in these provisions that bind the contractor to pay the attorney fees and costs of the defendant in this case.

No good reasons have been assigned for amending the judgment in favor of the plaintiff as to the small amounts of extras and set-offs allowed by the trial judge.

It is therefore ordered that the judgment below be affirmed, without prejudice to the right of the defendant to renew her demand for demurrage on proper allegations, and that defendant pay the costs of appeal.

On Application for Rehearing.

MONROE, J. In the District Court, the evidence offered in support of the demand in reconvention was excluded and the demand rejected. The judgment thus rendered has been amended by this court to the extent that the reconventional demand has been dismissed (practically) as in case of nonsuit, which amendment, necessarily carries with it the costs of the appeal.

It is, therefore, ordered, adjudged and de-

creed that the decree heretofore handed down be amended in so far as to condemn the plaintiff and appellee to pay the costs of the appeal.

Rehearing refused.

(126 La.)

No. 17,680.

ROBERTS et al. v. EDWARDS et al.

(Supreme Court of Louisiana. April 11, 1910.

Rehearing Denied May 9, 1910.)

(Syllabus by the Court.)

1. EXECUTION (§ 272*) — SALE — RIGHTS OF PURCHASER.

A sheriff holding in his hands for execution a writ of fieri facias is legally authorized to thereunder seize, advertise, and sell as belonging to the judgment debtor real estate standing in his name in the conveyance records of the parish where that property is situated, when there was at the time no evidence in those records of any claim of adverse ownership, and, for the same reason that the judgment creditor and sheriff were authorized to so seize and sell the said property, the public was legally authorized and justified in purchasing it.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 272.*]

2. EXECUTION (§ 264*) — SALE — RIGHTS OF PURCHASER.

A person purchasing under such circumstances is subrogated to the rights of the seizing creditor so selling the same, and is not limited as a purchaser to the rights of the seized debtor in the property as modified or affected by admissions or acts which may have been made or done by him in favor of third parties which did not appear in the conveyance records, and which might work an estoppel en pais as between himself and such third person. *Brian v. Bonvillain*, 52 La. Ann. 1806, 28 South. 261; *Id.*, 111 La. 441, 35 South. 632.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 264.*]

3. BONA FIDE PURCHASERS — UNRECORDED DEEDS.

All the claims and pretensions of the plaintiff herein are met and defeated by the principle announced in the case of *McDuffie v. Walker*, 125 La. 152, 51 South. 100.

Appeal from Seventeenth Judicial District Court, Parish of Vermilion; Charles A. O'Neill, Judge ad hoc.

Action by Annette Fontelleu Roberts and husband against Wakeman W. Edwards and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Weeks & Weeks and Kitchell, Bailey & Broussard, for appellants. Gordy & Gordy and W. W. Edwards, for appellees.

Statement of the Case.

NICHOLLS, J. The plaintiff Mrs. Annette F. Roberts alleged in her petition: That she was the owner of certain described property. That she is a child of the marriage of Paulin Fontelleu, who died in 1874, and Octavie Gonsoulin, who died about 1890. That they had only two other children—Fontelleu, who died when a child, and Paulin Fontelleu, Jr., who

died about 1902, and she is the sole surviving heir of the said parents and their said deceased children. That her father's succession was opened in Vermilion parish in 1874. Laodice Fontelleu was appointed administrator, and said undivided portion of lot was duly inventoried as part thereof, and was administered upon and sold therein. That a pretended, but illegal, sale thereof having been made thereof in said succession on November 18, 1876, same was at the suit of creditors of said estate declared null and void by judgment of the district court in and for said parish, rendered on the — day of March, 1878, in the suit entitled *Hermann and Vignes (1419) v. L. Fontelleu, Adm'r, et al.*, and in 1878 Wm. F. Schwing, having been appointed administrator of said estate vice said L. Fontelleu, obtained an order to sell the property of said estate including said undivided half lot, advertised, and, after due proceedings on the 11th day of June, 1878, sold said undivided half lot and other property at public sale to petitioner's mother, who had renounced the community between herself and her deceased husband. That said sale was duly recorded, and her said mother went into possession of said portion thereunder, and that in no way has the title thus acquired by her been parted with.

That her said mother having removed from the said parish, Wakeman W. Edwards, who from 1870 to the present time continuously has been a resident and a practicing attorney in said parish, and who had represented creditors of and taken part in the litigation affecting said succession, and had full knowledge of all the facts above set forth, tortiously and wrongfully took, and has ever since retained, possession of said lot as owner, including the portion above described, though he had always known that he had no right to same, and though petitioner's said mother protested against his said possession. That, even if the said Edwards be held in any way entitled to the remaining one-half of the said property which is denied, he has no title to nor right whatever upon said portion herein claimed by petitioner, and is even in that event merely a co-owner therein with her. That for the entire term of his said possession, which has lasted more than 25 years, said Edwards has been using said lot, including the undivided half herein claimed, sometimes personally and at times renting same to others and collecting and using said rents. That the said land has greatly enhanced in value since her said mother's purchase, and that the interest in same which is claimed herein now largely exceeds in value \$5,000, and that the rental value thereof has likewise increased. That said Edwards owes petitioner for the use by him and rent of said undivided portion herein claimed for each and every month from his taking possession sums as follows, to wit: From the time of his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

taking possession for each month until January 1, 1892, the sum of \$20, amounting in all to \$2,500 or more; from January 1, 1892, to January 1, 1898, \$30 a month, making \$2,160; from January 1, 1898, to this date at the rate of \$40 a month, making \$4,560; being a total due for use and rent as aforesaid of \$9,220, this being the fair rental thereof during said time. That said defendant refuses to deliver possession of said portion to petitioner, nor will he pay said amounts due for the use and rent thereof.

In view of the premises, plaintiff prayed that said Edwards be cited according to law to answer this demand, and that, after due proceedings had, there be judgment in favor of plaintiff and against said defendant, recognizing and decreeing petitioner the owner of said above-described one-half interest in said property, and, as such, entitled to full and peaceable possession thereof, and that writs of possession and all other writs necessary in the premises issue accordingly; further, that the said defendant be condemned and adjudged to pay petitioner the sum of \$9,220, being for the use and rent thereof to this date, and a further sum of \$40 for each and every month during the continuation of this litigation, and until petitioner shall have been placed in undisturbed possession of her said portion as prayed for, and she prays for general relief.

Defendant pleaded the prescription of 10 and 30 years *acquisitio causa* and in bar of the action.

Plaintiff filed an amended and supplemental petition, in which, reiterating her original averments, she alleged: That the courthouse of Vermillion parish in the town of Abbeville was destroyed by fire about the year 1885, and that in said fire there was also destroyed nearly all of the records of said parish, including the original conveyances, mortgages, and the files of suits, minute books, successions, and probate records as well as all papers and documents therein. That of the few original records not wholly destroyed all or nearly all were badly burned or scorched or were injured by water. That among the documents destroyed as above were the following, to wit: The file of the succession of plaintiff's deceased father, Paulin Fontelleu, including the petition for an inventory of the property of said succession with a view to the appointment of an administrator, the order thereon for the inventory, and the inventory itself, which was made thereunder and filed about the year 1874, the petition for appointment of Laodice Fontelleu as administrator of said estate, together with the order appointing him as such, his oath and bond qualifying him as such, and the letters of administration issued to him therein; also, the petition filed by Laodice Fontelleu as administrator praying for the sale of the property of said estate, together with the order granting same, the commission issued thereon for said sale, and *procès verbal* of

said sale itself, made under said order and commission about the 18th of November, 1875; also, the provisional account and tableau of distribution filed in said succession by said administrator, the opposition thereto filed by various creditors, or concerns claiming to be creditors including the opposition of Hermann and Vignes; also, the amended account and tableaux filed therein by said administrator, the renunciation of the community by the surviving widow of the deceased, Mrs. Octavie Gonsoulin, wherein she claimed the \$1,000 allowed by law, with privilege to widows and children in necessitous circumstances, also all the proceedings, minute entries and evidence taken on the trial of said opposition, the judgment of the district court rendered thereon, the order and bond of appeal from the Supreme Court of this state on said opposition, and a certified copy of the judgment of the Supreme Court rendered on the said appeal.

That there was also destroyed in the said fire the file of the suit entitled Hermann and Vignes v. Laodice Fontelleu, Administrator, et al., which suit was instituted in the said parish of Vermillion about the year 1896, including in said destruction the petition, answer, and all pleadings in said suit, the evidence taken on trial thereof as well as the minute entries concerning same, and the judgment rendered therein, the commission and order of appeal from such judgment, the appeal bond furnished in said matter, and the certified copy of the judgment of the Supreme Court rendered in said matter reversing the judgment of the lower court, and remanding case for further proceedings, said judgment being rendered about June, 1877; also the petition of the plaintiffs making the administrator of said estate a party to said suit; also the original of an agreement and confession of judgment of the defendants in said suit, they being the said administrator, as well as Mrs. Ernestine Fontelleu, wife of Theodore Fontelleu, and her said husband, which said suit being brought against them to have decreed null or to annul the sale of the property of said estate made by said administrator on November 18, 1875, to said Fontelleu, including the one-half interest of the succession of Paulin Fontelleu in the said lot, and being the half interest not sued for and the said confession of judgment and agreement consenting that judgment be rendered in accordance with the said prayer, and that the said sale be decreed null and void; also the judgment rendered in said suit which was signed on the ——— day of March, 1878, in favor of said Hermann and Vignes, decreeing illegal, null, and void the said sale of said property made on November 18, 1895, to Ernestine Fontelleu; also the surrender of the administratorship of said estate of Paulin Fontelleu by Laodice Fontelleu about said date, the petition for an appointment for William F. Schwing as administrator after due proceedings, his oath and bond qualify-

ing as such; also the petition of the said William F. Schwing for an order to sell the property of said estate to pay debts, as well as an order granting same, the commission issued thereon, the sheriff's return, and the procès verbal of the sale made under said order, which sale was made on or about the 11th day of June, 1878, being the said sale at which petitioner's mother became the said purchaser of the interest of said estate in the property now sued for.

Petitioner further shows that both of said appeals to the Supreme Court, that in succession of Fontelleu and that in Hermann and Vignes v. Fontelleu, above mentioned, were returned in Opelousas, La.; and that the courthouse of St. Landry parish in which were kept the records of said Supreme Court, including the transcripts and judgments recorded in said appeal, was destroyed by fire about 188—, and said transcripts and judgments were burned and fatally destroyed. Petitioner shows that, because of the destruction of the said documents as above set forth, it will be necessary to prove their contents by secondary evidence on trial of this suit.

In view of the premises, plaintiff prays that this amended and supplemental petition be allowed, and she further prays as in her original petition and for general relief and all costs.

Defendant answered. After pleading a general denial, defendant admitted that the courthouse of Vermillion parish was destroyed by fire on the night of April 5, 1885, and that the greater part of the records of the parish and titles to property were destroyed in said fire, but he does not admit the existence of the documents mentioned in plaintiff's previous petitions, or their destruction unless their existence is proved. And, further answering, defendant averred that he specially denied that the said plaintiffs had any legal right, title, or interest in or to any portion or part of the said lot herein claimed by said Annette Fontelleu Roberts, the same being lot 42, Megret's portion of Abbeville, and specially denied that the succession of said Paulin Fontelleu was ever owner of any portion of said lot sued for, or ever had any right or title herein, and he averred that, if any such inventory or sale of said lot or any portion thereof as belonging to the succession of Paulin Fontelleu was ever made as plaintiff had averred, this defendant denied all knowledge thereof, and averred that such inventory and sale were absolutely null and void, being the sale of the property of another person not the owner, and plaintiffs could derive no title therefrom.

But defendant averred the truth to be: That in the month of June, 1878, the date of said pretended sale of said lot 42 by the administrator of the succession of Paulin Fontelleu, deceased, and long prior thereto, said lot in its entirety was the sole property of one Voorhies Trahan, and so continued to be

until the month of August, 1880, being incumbered with a legal mortgage in favor of the state of Louisiana and parish of Vermillion, resulting from the recordation of the tax collector's bond of said Voorhies Trahan, which bond was duly recorded in said parish; that said Trahan acquired said lot entire during the year 1873 from the succession of Daniel O'Bryan, deceased, by a good and valid title duly recorded, the adjudication of said lot to said Trahan being item No. 51, as defendant believes, of the procès verbal of said succession sale, which was duly recorded, and was based on an order of sale of said succession property duly made and recorded, and that said Daniel O'Bryan acquired said lot by good and valid titles duly recorded at a sheriff's sale of the property of one Prindall in the year 1859.

That he (defendant) acquired the entire of lot aforesaid on the 7th day of August, 1880, at a sheriff's sale of the property of said Voorhies Trahan, the then owner of said lot, by a good and valid title thereto, duly recorded, and entered into immediate possession thereof as owner, and has since so remained. That said sheriff's sale was made in execution of a judgment against said Trahan as tax collector, and with recognition of mortgage on all his property.

That the above-mentioned sales of the property of Prindall to Daniel O'Bryan and the sale of the succession property of said O'Bryan to Voorhies Trahan and the said sheriff's sale of said lot to defendant in the year 1880 with all the judgments and orders were regularly and duly made on the proper orders, judgments, proceedings, writs, and advertisements, all of record in said parish, and were valid and legal in all respects, but that all the said records and proceedings have been lost and destroyed by fire, so that defendant is unable to produce the same, and craves leave to introduce secondary evidence of their contents on the trial of this cause.

That he had expended \$6,000 in improving said lot, and reserved his right to claim the same if need be in a further proceeding.

In view of the premises, defendant therefore prayed that plaintiff's demand be rejected, with costs, and that the defendant be quieted in his title aforesaid.

The heirs of the wife of the defendant appeared, and, after alleging her death, they declared that they accepted unconditionally her succession. Alleging that the property involved in the suit was community property they made themselves codefendants in the action. They adopted the allegations and defenses of their father. The plaintiffs (under objection of defendant) filed a supplemental and amended petition, in which they alleged: That, if at any time Voorhies Trahan purchased in his own name said lot No. 42 of Megret's portion (?) of the town of Abbeville (which was denied), he did so for the joint account of himself and Paulin Fontelleu, father of petitioner, with whom he was in part-

nership in said parish of Vermilion. That, if any such purchase was made, it was with their joint funds; it belonged to them jointly. That both before and after her father's death the said Trahan repeatedly admitted verbally and in writing, and by act and deed, that an undivided half of all the real estate in his name in the town of Abbeville, including the lot now in controversy, as so held, belonged to said Paulin Fontelleu, and in no way claimed ownership of the whole thereof. That the said lot as well as all the property in his name in said town was with the full consent of Trahan assessed to himself and said estate jointly, and that he acquiesced therein accordingly. That he was well aware of the opening of said succession immediately after Paulin Fontelleu's death, was an appraiser in, and knew and acquiesced in, an undivided half of said lot being inventoried as belonging to said Fontelleu and forming of said succession, and in its being administered and sold therein accordingly, and that he was appointed and served as agent for the collection of its moneys and rents, including those of the lot in contest. That, when petitioner's said mother acquired the undivided half of said lot in 1878 as heretofore alleged, he was not only present and acquiesced in the sale of said property as belonging to succession of Paulin Fontelleu, but was a bidder at said sale and a purchaser of property thereat, and always acknowledged said half of said lot as belonging to Paulin Fontelleu and his estate, and by his said admissions, acts, and acquiescences he induced petitioner's said mother to believe that he recognized the ownership of said portion of lot by said succession, and that she purchased on the faith thereof. That by said acts, deed, recitals, acquiescences, recognitions, and conduct set forth herein, and in her original petition herein estopped, said Trahan of the parish of Vermilion, this defendant, and any person claiming through said Trahan were estopped from claiming said undivided half of said lot now sued for, and from asserting any title thereto which estoppel she now specially pleads.

That said W. W. Edwards, the defendant herein, was the attorney who conducted all the illegal and wrongful proceedings under which it is pretended that said lot 42 was sold to defendant in 1880, and was well aware of all the facts in the matter and of the nullities in said proceedings. She denied that any legal judgment was obtained against the said Trahan, who was an absentee, and to whom no curator ad hoc was ever appointed to defend said suit, nor, if judgment was legally obtained against said Trahan, which is denied, was any legal notice of judgment ever served upon said Trahan, nor upon any one representing him, and if any writ of *fi. fa.* was issued in said matter, which is denied, he shows that said Trahan was then an absentee, and that no curator ad hoc was appointed to represent him, and that no seizure was legally made of said property, and no

notice of seizure ever legally given or served.

That said sale as well as the pretended seizure *fi. fa.* and all proceedings connected therewith are absolutely null and void, all as the said Edwards well knew, and conveyed no title whatever, nor were any steps ever taken to legally divest her said mother of the title to said property acquired by her in 1878 as set forth in the original petition, and which was immediately placed of record in the conveyance books of the recorder's office of the parish of Vermilion.

That her said mother moved to Iberia parish, and was there in 1874 appointed natural tutrix of her said minor children. That whatever written agreement and acknowledgments relative to said property may have existed between her said parents and the said Trahan have been long ago lost or destroyed if they existed which petitioner verily believes, including all the books, accounts, and papers relative to said partnership, and all business conducted by it, as well as the lands acquired for it and with its moneys. She shows, further, that the original file of the proceedings appointing her said mother tutrix has been lost or abstracted from the clerk's office of Iberia parish, including specifically her oath as such and letters of tutorship therein; that the duplicate copy issued to her as well as said appointment of Trahan as agent was placed of record in the recorder's office of the parish of Vermilion, and that same was destroyed in the destruction of said courthouse by fire, as heretofore alleged; and that it will be necessary for petitioner to introduce secondary evidence in reference thereto.

In view of the premises, petitioner prayed that this, her amended and supplemental petition, be allowed, and that all proper service hereof be made on the defendant according to law, and that, after due proceedings, there be judgment rendered against the defendant as prayed for in said original and supplemental petition heretofore filed, and petitioner prayed for costs and general relief.

Defendant and his children then filed a supplemental answer, denying that Trahan kept books or had partnership money, averred that said firm was insolvent, and denied that the lot was paid for with its moneys or belonged thereto. They reiterate that the property was Trahan's and was incumbered with the legal mortgage from the bond as tax collector, and that no admission of his could impair their rights to estop them. They alleged that plaintiff's mother never paid for the lot, nor had it assessed to her, nor claimed it during the years that defendant held it. They denied any illegality in the sale under which they acquired title or that Trahan was an absentee; that the proceedings were directed by the attorney of said sureties, and not by Edwards.

On trial judgment was rendered against plaintiff, and she appealed.

Opinion.

We understand it to be a matter conceded by all parties that the lot of ground of which the undivided half is sought to be recovered by the plaintiff herein belonged at one time to Daniel O'Bryen; that at his death it was an asset of his succession, and that at a succession sale made at public auction on the 18th of March, 1873, by the sheriff of the parish of Vermilion under an order of sale issued by the parish court of that parish, bearing date the 8th of February, 1873, the said lot was offered for sale and adjudicated to Voorhies Trahan; that on April 8, 1873, evidence of this sale was placed of record in the Book of Conveyances of the parish of Vermilion.

It is asserted by the plaintiff in this suit that this sale was actually and really made to Voorhies Trahan and to plaintiff's father, Paulin Fontelleu. There is no written evidence whatever to support such a claim. There was nothing placed of record in the conveyance books of the parish of Vermilion going to show the existence of such a condition of things.

While the title to the lot stood on the conveyance records in the name of Voorhies Trahan, a writ of fieri facias issued from the district court for the parish of Vermilion in execution of a judgment rendered by that court in the matter of Houard Hoffpauer, President of the Police Jury, v. Voorhies Trahan, Tax Collector. Under that writ the lot in controversy was seized by the sheriff as Trahan's property, and adjudicated on August 8, 1880, to W. W. Edwards, the defendant. The purchaser took immediate possession of the lot so purchased, and held possession of the same under recorded title continuously as owner from August 8, 1880, up to July 27, 1907, when the present petitory action was instituted, and during that possession has placed expensive and valuable improvements upon it.

At the time of the seizure under the said writ of fieri facias, there was no legal reason why the sheriff should not have seized and sold the lot as belonging to Voorhies Trahan, as there was no evidence in the conveyance records of any claim of adverse ownership. For the same reason that the police jury was authorized to seize and the sheriff to sell the lot as being so owned, there was no legal reason why the public was not legally authorized and justified in purchasing.

Any one purchasing at a judicial sale made under such circumstances became subrogated to the rights of the seizing creditors in so proceeding with the sale, and was not limited as a purchaser to the rights of the seized debtor in the property seized and sold by admissions which may have been made in respect to his ownership in favor of third parties that did not appear in the conveyance records.

In the interval between August 8, 1880, and July 27, 1907, opposition and objection from no quarter was made to the possession

of Edwards under his claim of ownership of the property. Under the circumstances shown, it cannot be pretended that at the date of the institution of this suit the status of the defendant was that of a trespasser. He held at that time a position which entitled him legally to be presumptively considered quoad any attack upon his right of possession as a possessor in good faith under a recorded claim of ownership.

Every person who possesses an estate for a year or enjoys peaceably and without interruption a real right is entitled to be maintained in his possession, and is considered provisionally as owner of the same, even after it is reclaimed by another claiming to be the true owner, until the right of the person making such claim is established. Civ. Code, art. 3454.

Plaintiff's claim to the ownership of the undivided half of the lot in controversy is predicated upon a sale alleged to have been made of the same, on the 11th of June, 1878, to petitioner's mother, Octavie Gonsoulin, widow of Paulin Fontelleu, said sale alleged to have been made under an order obtained in the matter of the succession of Paulin Fontelleu upon the petition of William F. Schwing, administrator thereof.

Mrs. Octavie Gonsoulin (widow Paulin Fontelleu) removed to the parish of Iberia, and died about 1890, leaving as her sole heir the plaintiff in this suit. Neither the plaintiff nor her mother have had possession of the lot or are shown to have paid a dollar of taxes upon it. There is nothing in the conveyance records of Vermilion parish going to show that Paulin Fontelleu had a right of ownership to the lot or any part thereof. It is to the records of the conveyances in the recorder's office of the parish that parties contemplating purchases must look, and by which they are guided, and not to the *assessment rolls*. Admissions of the party holding the title to the property under a deed thereto recorded in the conveyance books of a parish that not he but some other person named is the actual owner of the property have no effect as against third parties when such admissions have not been placed of record in the conveyance books, and are not on their face sufficient to establish ownership. Verbal admissions by the recorded owner of property that some particular person other than himself really owns the property have no force and effect against third persons who act on the strength of the conveyance records.

Third persons dealing directly with the recorded owner in the conveyance records, with reference to the acquisition of real rights to the said property or upon it, or acting as a judgment creditor against said property by virtue of the condition of the ownership of the same as shown by the conveyance records, are protected in so doing against the claims of others asserting ownership under the said recorded owner solely

and exclusively on the strength of such admissions made by him adversely to the facts as shown by the conveyance records.

A person is not warranted or justified in dealing (in respect to the acquisition of real estate) with a person who does not appear as owner in the conveyance records of a parish, but whose claims thereto rest solely and exclusively upon admissions made by the party who appears in the conveyance records as owner that he, and not himself, is the actual owner. It does not make any difference in the case before us whether the undivided half of the lot in controversy in this suit was inventoried in the succession of Paulin Fontelleu and subsequently sold at a succession sale in the matter of said succession as belonging to the succession, or that the origin and sole basis for the claim of ownership were verbal admissions of Voorhies Trahan and that the latter had placed the property on the assessment rolls in the name of Fontelleu and Trahan. Those admissions and that placing of the property on the assessment rolls were totally insufficient under the registry laws to affect (quoad third persons) the title of Voorhies Trahan to the property as it stood recorded in the conveyance records.

Persons examining the records for the purpose of dealing directly with the recorded owner for the acquisition of particular property or for the purpose of proceeding judicially as a creditor of the recorded owner against said property as belonging to him are justified in taking action from what appears in the conveyance records, and are not called on to investigate all the subsequent relations between the recorded owner and some third person which might as between that recorded and such third person operate as an estoppel en pais between that third person and the recorded owner. Nothing appeared in the conveyance records in this case of any rights of ownership of Paulin Fontelleu to the property in controversy.

We are of the opinion that all the claims and pretensions advanced by the plaintiff in support of a right of ownership by Paulin Fontelleu to the one undivided half of the lot in the possession of the defendant are met and defeated by the principles announced in the recent decision of this court of McDuffie v. Walker, 125 La. 125 51 South. 100.

Plaintiff in this case must depend on the strength of her own title, and not on the weakness of that of the defendant.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

BREAUX, C. J. I recuse myself having been of counsel at one time in matter of settling the succession of the late Paulin Fontelleu.

(126 La.)

No. 17,789.

GRAHAM v. MURPHY et al.

(Supreme Court of Louisiana. April 11, 1910.
Rehearing Denied May 9, 1910.)

(Syllabus by the Court.)

TAXATION (§ 679*)—TAX SALE—SUBSEQUENT CONVEYANCE BY STATE—VALIDITY.

Plaintiff brought suit, seeking contradictorily with the defendants to test his title to certain property, the original ownership of which was admitted to have been in the ancestor of the defendant. Plaintiff obtained judgment in the district court, and defendants appealed. The judgment on appeal is reversed, and plaintiff's demand and suit dismissed.

Plaintiff's title is based upon a conventional deed of sale to him of the property in litigation, executed by the State Auditor; his authority for doing so being claimed to be Act No. 80 of 1888 and Act No. 126 of 1896. Defendants alleged that the property had never been offered for sale under the provisions of the said acts; that that fact was a condition precedent to any authority in the State Auditor to sell the property. They established that fact on the trial of the case through evidence adduced over plaintiff's objection that the defendants had no interest in raising that issue, inasmuch as the title of defendants' ancestor had passed and was in the state when the Auditor acted, and therefore it alone could question that officer's authority to act.

Held, for reasons assigned, that the offering for sale under Act No. 80 was a condition precedent to the exercise of the State Auditor's authority to sell, and that the defendants were legally interested in raising that issue.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Action by H. F. Graham against James Murphy and others. Judgment for plaintiff, and defendants appeal. Reversed, and suit dismissed.

Richardson & Soule and A. J. Cahill, for appellants. Geo. J. Unterelner, for appellee. Hall, Monroe & Lemann, amici curiae, on application for rehearing.

Statement of the Case.

NICHOLS, J. The plaintiff, in his petition filed June 4, 1907, alleged that he is the owner and in possession of the following described property: A certain square of ground, together with all the improvements thereon, in the First district of this city, bounded by Miro, Tonti, Erato, and Jefferson Line, designated as square 538, as appears from Auditor's deed annexed hereto and made a part hereof.

That the state of Louisiana purchased said property from Patrick Murphy at a sale made by the tax collector of the First district of this city for taxes under an assessment made in the name of Patrick Murphy per act passed before —, notary public, on the — day of —, 1890, Reg. C. O. —, fol. —.

That the said property was unimproved

(swamp land) property, and came into the possession of the state of Louisiana by a mere registry of the deed conveying said property to the state of Louisiana, which possession has been continued for more than three years previous to the date hereof.

That the said Patrick Murphy died in this city some time ago, leaving as his sole and only heirs his children, viz., Catherine Murphy, widow of Thos. B. Green, James Murphy, Joseph P. Murphy, Margaret Murphy, deceased wife of M. J. McAvoy, and Mary Ann Murphy, also deceased wife of M. J. McAvoy. That Margaret Murphy McAvoy died in this city, leaving as her heirs her children, Chas. D. McAvoy, Phillip McAvoy, and Mary McAvoy, deceased wife of George Chisolm. That Mary Ann Murphy McAvoy died in this city, and left as her sole heirs her children, Julia McAvoy and Catherine McAvoy. That Mary McAvoy Chisolm died in this city, and left as her sole heirs her three minor children, Joseph Chisolm, Irma Chisolm, and Effie Chisolm.

That all the above-named parties save Joseph, Irma, and Effie Chisolm, are of the full age of majors and reside in this city.

That Joseph, Irma, and Effie Chisolm are minors who reside in this city. That they are without a tutor, and that it is necessary that a special tutor or curator ad hoc be appointed to represent them. That George Chisolm, their father, still lives, and is a proper person to be appointed special tutor and curator ad hoc to said minors.

In view of the premises, petitioner prayed that — be appointed and sworn special tutor and curator ad hoc to the minors Joseph, Irma, and Effie Chisolm; that James Murphy, Joseph Murphy, Mrs. Catherine Murphy, widow of Thos. B. Green, Chas. D. McAvoy, Phillip McAvoy, Julia McAvoy, Catherine McAvoy, Irma Chisolm, Joseph Chisolm, and Effie Chisolm be cited to answer hereto; that in due course petitioner have judgment in his favor, and against said parties, confirming his title to the hereinabove described property, and for costs and general and equitable relief.

On June 17, 1907, defendants excepted to plaintiff's demand:

First. That the petition was too vague, general, and indefinite to require them to answer thereto.

Second. That said petition disclosed no right nor cause of action against them.

These exceptions having been overruled on the same day, defendants answered. They first pleaded a general denial. Further answering, they alleged that on April 5, 1867, by act before G. W. Christy, N. P., Reg. C. O. B. 93, folio 139, the late Patrick Murphy acquired the following described property, viz.:

"Five lots of ground, with all the improvements thereon and appurtenances thereof, and all rights, ways, etc., situated in the First district of this city, designated by the numbers 1 to 5 in square No. 538, which is bounded by Miro, Tonti, Thalia, and Erato, a sketch where-

of is deposited for reference in the office of G. W. Christy, N. P., as plan No. 3. Said lot No. 1 measures 61' 9" 3" front on Miro street, 23' 6" 5" in the rear, by 120' in depth on the line of lot No. 2, and 125' 9" 5" on the dividing line between the First and Fourth districts. Said lots No. 2 and 3 measure each 32' front on Miro street by 120 feet in depth between parallel lines. Said lot No. 3 forming the corner of Miro and Erato streets. Said lot No. 4 measures 64' 4" front on Erato street, 67' 1" 5" in width in the rear, by a depth of 87' 6" 5" on the side nearest to Miro street, and a depth of 66' 9" 6" on the side line nearest to Tonti street, and measures 28' 7" front on Tonti street, 66' 9" 6" in width in the rear by a depth and front on Erato street of 120 feet and 125 feet 9 inches and 5 lines in depth on the line dividing the First from the Fourth district."

That the said Patrick Murphy died in this city on the 23d day of March, 1888, and his succession was duly opened under No. 25, 017 of the docket of said court, in which proceedings the said property was inventoried, and administratrix was appointed and qualified, but shortly thereafter the said administratrix departed this life, and your respondents, as the sole and only heirs of the said deceased and of his subsequently deceased wife (widow in community), went into possession of his estate.

Now your respondents aver that the said pretended tax title of the said plaintiff is illegal, null, and void, and of no effect, for the following, among other, reasons, viz.:

First. The said property was never offered for sale under the provisions of Act 80 of 1888 at public auction and failed to sell, and hence no warrant in law existed for the sale of the said property under the provisions of Act 126 of 1896, or Act 80 of 1888, § 3; and your respondents show that the statement made in the said act to the plaintiff that the said property had been so advertised was fraudulently made, and operated and seeks to operate a deliberate fraud upon your respondents.

Second. That the said property was not sold for the price and on the terms stipulated by Act 126 of 1896 and Act 80 of 1888, in that the amount paid at the consideration for the said purported Auditor's deed is not the amount which the law fixes as a condition precedent to be paid the state to effect a sale under the provisions of the said acts.

Third. That the purported sale to the state of Louisiana was never preceded by any notice to the lawful owners of the said property as the Constitution and laws of this state require.

Fourth. That the said purported adjudication to the state of Louisiana was never preceded by any lawful advertisement, in that the last advertisement in English of the said property was advertised on Saturday in an evening paper; the advertisement appearing after the hour fixed for the sale of the said property on that day.

Fifth. That the said property was incorrectly and insufficiently described in the assessment thereof, the said assessment being insufficient to identify same; besides the said property was assessed in the name of one deceased as if alive, and was so advertised and adjudicated.

That, the said property never having been offered under the provisions of Act 80 of 1888, the pretended acquisition thereof by the plaintiff from the state of Louisiana simply operated as a relinquishment of the title of the state of Louisiana, and operated as a redemption of the said property from the state from the effect of the said tax sale purported to have been made the said state, and removed the said cloud from the said title of respondents to the said prop-

erty, but created no new title whatever in the plaintiff.

That the said pretended tax title of the plaintiff as set forth by him should be decreed an absolute nullity, and this they demand in re-convention, and, further, for the recognition of their ownership of the said property, which is well worth the sum of \$2,100.

In view of the premises, respondents prayed that the demand of plaintiff be rejected, and that respondent be recognized as the owners in indivision of the said property as hereinabove correctly described, and further ordering the cancellation of the pretended tax title of the plaintiff from the conveyance records. And they further prayed for all costs and for general relief.

On March 24, 1909, plaintiff pleaded the prescription of three years in bar to the attack made by defendant upon his title. He further pleaded that the defendants were estopped from attacking the adjudication to the state because:

First. They have abandoned the property involved herein to the state.

Second. Because that they have permitted the adjudication and title to the property herein involved to remain on the books of the conveyance office for this parish unattacked and unquestioned for a period of 18 years, and only raised this question after plaintiff had changed his position and parted with his money.

In view of the premises, he prayed that these pleas be maintained, and that defendants' attack upon plaintiff's title be dismissed at defendants' costs, and for general and equitable relief.

On the trial the following agreement between counsel was filed:

In the above numbered and entitled cause, in order to save costs, the following admissions are made by the respective parties to this litigation, through their respective attorneys, viz.:

(1) It is admitted that the property involved in this litigation was acquired by the defendants' ancestor, as set up by them in their answer, under the description as contained in the said answer, and that the title of the said ancestor was duly put of record.

(2) It is admitted that the succession of the father of the said defendant was duly opened as set forth in the said answer, and that the heirs and his widow were put in possession of his estate under judgment therein rendered and duly registered.

(3) It is admitted that the mother of the defendants died as set forth in said answer, and, further, that the defendants appearing in said answer are the sole and only heirs of the deceased mother, who died a widow, and are also the sole heirs of the said Pat Murphy.

(4) It is further admitted that the property as described in plaintiff's petition was adjudicated to the state of Louisiana by the tax collector of the First district of the city of New Orleans, for the unpaid state taxes for the years 1888, 1889, and 1890, assessed in the name of "Pat Murphy," and that the title of the state of Louisiana was put of record in C. O. B. 140, folio 149, on the 21st day of July, 1901; the property being adjudicated on July 11, 1891, under the current revenue act of 1888.

(5) It is further admitted that the said property has never been offered for sale by the State Tax Collector of the First district at public auction under the provisions of Act 80 of 1888.

(6) It is further admitted that the said prop-

erty is vacant and unimproved, and at the time of the said tax adjudication to the state of Louisiana was a swamp, and continued so up to 1904, but it is now drained under the general system of drainage of this city, and that the said property is unbanquetted and uninclosed, nor are there any improvements upon it.

All of the said admissions are made by both parties with the express reservation of their rights under the law, and in no manner admitting that any of such evidence is admissible, and under the issues herein raised or the law applicable thereto.

[Signed] Geo. J. Untereiner,
Attorney for Plaintiff,
Richardson & Soule,
Attorneys for Defendants.

(5) It is further admitted that the books of the state tax collector of the First district of the city of New Orleans do not show that the property herein involved was ever offered at public auction by the tax collector of the First district under the provisions of Act 80 of 1888, and Hon. John Fitzpatrick, present tax collector, and Hon. C. Harrison Parker, his predecessor in office at the time of said sale to the state, would, if present in court, testify that the said property was never offered by said tax collector under said Act 80 of 1888.

[Signed] Geo. J. Untereiner.

On June 1st the district court rendered the following judgment in favor of plaintiff, H. F. Graham, and against defendants, James Murphy, Joseph Murphy, Kate Murphy, wife of Thomas Green, Kate McAvoy, Julia McAvoy, Charles McAvoy, Philip McAvoy, and the minors, Irma Chisolm, Effie Chisolm, and John Chisolm, represented here by George Chisolm, their natural tutor and tutor ad hoc, recognizing the plaintiff to be the owner of, and confirming his title to, the following described property, to wit:

"A certain square of ground together with all the improvements thereon, in the First district of this city, bounded by Miro, Tonti, Erato and Jefferson Line, designated as square 538 as appears from the Auditor's deed annexed to and made a part of the plaintiff's petition.

"It is further ordered that the defendants' reconventional demand be dismissed, and that all costs of suit be paid by defendants."

Defendants moved for a new trial for the following, among other, reasons:

(1) The evidence established that the deed upon which the plaintiff relies was issued without any warrant therefor, because that the State Auditor had no authority to sell such property under the provisions of Act 80 of 1888 and Act 126 of 1896 until the said property had been first offered at public auction by the tax collector where the property was situated and had failed to sell. It being fully established that this had not been done, there was no warrant for the Auditor to sell, and the deed issued by him was null and void ab initio.

(2) The title of the state being inchoate, the attempted purchase of the said property by the plaintiff simply operated as a divestiture of the claim of the state, and restored the said property to the same condition in which it was prior to the adjudication made it; and hence the said property became restored to the defendant by said redemption from the said tax adjudication, the defendants being, however, bound to refund to the plaintiff the amount which he had expended in the said redemption, as also any other taxes which he may have paid thereon.

(3) The evidence showed that the plaintiff was

not in possession, and was without valid title, and the court erred in holding that the validity of the purported tax title could not be attacked after three years by defendants, who are in the civil possession of the said property. The plaintiff had no tax title, because the purported tax title was issued without a warrant therefor; hence article 233 of the Constitution of 1898 has no application to such a case as is here presented.

(4) It was error to hold that the defendants were without right or interest to set up the illegalities of plaintiff's purported title from the State Auditor. After the adjudication to the state, it continued to assess the said property to the defendants, thereby admitting their right to redeem therefrom. While the state had the right to dispose of the said property at public auction under the provisions of Act 80 of 1888, had it so advertised same, defendants would have then redeemed same; but, not having so advertised it, they had the right, the permissive redemption right, of divesting the title of the state at any time up to the moment when such property should be adjudicated under the provisions of Act 80 of 1888, and, this right having been exercised by a negotiorum gestor, his act in redeeming, although termed a purchase, inured to their benefit.

A new trial was refused, and defendants appealed.

Opinion.

It appears from the evidence: That on November 9, 1906, the plaintiff filed a petition, in which, after reciting that he was the owner of square No. 538 in the First district of New Orleans, bounded by Miro, Tonti, Erato, and Jefferson Line, having purchased the same from the state of Louisiana as per deed executed by Paul Capdevielle, State Auditor, on July 16, 1906, which property the state acquired by an adjudication made to it by the State Tax Collector for state taxes by deed executed by said Tax Collector.

That he was desirous of being placed in possession of said property. That in order so to do it was necessary that a writ of possession issue to the sheriff of the parish of Orleans, commanding him to seize and in due course to place petitioner in possession of same, and he prayed accordingly. An order that a writ of possession issue as prayed for was granted, but the proceeding seems to have been abandoned; and the present proceedings were filed on June 4, 1907, in which the plaintiff declares upon a deed from the State Auditor, his authority for executing a deed being based on Act No. 126 of 1896.

In the Auditor's deed it is recited that the property conveyed by him to the plaintiff was adjudicated to the state by the tax collector of the First district of New Orleans on the 21st of July, 1891, as the property of Pat Murphy, for unpaid taxes due the state for the year 1890, and had been advertised and offered for sale by State Tax Collector in accordance with the provisions of Act No. 80 of 1888, and failed to sell.

The truthfulness of this last statement was put at issue by the defendants, and over the plaintiff's objection to any evidence being in-

troduced on the subject it was established on the trial that the Auditor was not warranted under the facts in the case in making this last statement. The objection urged by the plaintiff was that the defendants were without reason or interest to contest; that, their title to the property having passed in 1891, the property then became the property of the state of Louisiana, and it had the right to dispose of it as it saw fit.

That it had directed its officers to do that, and if those officers had violated their duty under the law the state of Louisiana was the only one that could attack the Auditor's action, and the defendants could not. Though the trial judge admitted the evidence, he ultimately sustained the plaintiff in the position which he took on that question. Defendants made the correctness of that ruling one of the special grounds for their motion for a new trial.

The plaintiff sues upon a conventional deed to him, executed by the State Auditor; the Auditor's authority to make said deed being based upon Act No. 80 of 1888, Act No. 126 of 1890, and Act No. 126 of 1896.

An examination of that act discloses that the situation and conditions upon which the Auditor warranted in making the deed did not exist. It was an essential prerequisite to a sale being made by that officer that, after the property was adjudicated to the state and notification of the fact given to that office, the latter should have forwarded to the tax collector who had made the sale a list of the properties which had been so adjudicated to the state, approved by him.

Upon receiving said list, the tax collector should have proceeded at once to advertise and sell the properties. In the advertisement, advertising such sales, there should have been given by the tax collector a full and complete notice to all persons and parties in any way interested in said property (no other notice being required; the same operating as a full notice to all). The property in the advertisement should have been condensely described, and in the deed of sale the property should be more fully and correctly described. The advertisement should have contained the name of the party to whom the property had been adjudicated, and the name of the party who claimed to be the owner thereof, and the year for which such adjudication was made, and the amount of the adjudication.

When the property sold to the state for unpaid taxes had been once advertised for sale in accordance with the provisions of the act, and had failed to sell, then, and then only, the Auditor was authorized to receive bids for such unsold property, and sell the same, and execute a deed thereto.

The titles to the state acquired under such an adjudication were declared to be good and perfect. The evident object of this statute was to afford to the owner of the property

an opportunity of purchasing at the second adjudication, and thereby practically redeeming the property, and on his failure to avail himself of this opportunity to oppose the first adjudication, or to purchase the property, then and thereafter to close the door to further contest.

It appears from the pleadings that the defendants contest the legality of the adjudication to the state in 1891 on serious grounds. They are admittedly the heirs and representatives of the original owner, and have a direct interest in availing themselves of the opportunity afforded them by Act No. 80 of 1888 of contesting that adjudication, or of purchasing at the second adjudication, either directly or through the assistance of others.

The state was interested in this matter no further than obtaining the sums due to it. It was certainly not its purpose, by authorizing the Auditor to sell properties adjudicated to it, to allow the fact of such adjudication to remain unnoticed and unacted on for years, and then suddenly and without notice or warning to the original owners to have the properties sold ex parte to third parties for a mere pittance. That was not the object of the law, and that should not be permitted to be the effect of its enactment.

Independently of what has been said, we think that the defendants in the suit have a direct interest in questioning the rights which plaintiff advanced in this suit. He has judicially admitted that he is out of possession, and that a writ of possession is necessary to perfect such rights as he may have in the premises.

By citing the defendants herein, he has recognized that they are heirs of the original owner, and that they have an interest in the subject-matter of the suit. Whatever be the form of the proceedings, it is practically a rule for defendants to show cause, if any they have, why plaintiff's right to the ownership of the property should not be closed by judicial decree.

They have in answer to the demand shown cause. The plaintiff in any case must establish affirmatively his right of action when contested. Plaintiff in this case cannot call upon the defendants to contest his claim, and, when they do contest, deny that they have any interest in the subject-matter of the litigation.

We are of the opinion that the judgment appealed from is erroneous, and plaintiff's demand as herein presented is not well founded. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is, hereby annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that plaintiff's demand and suit be dismissed, with costs in both courts.

(128 La.)

No. 17,910.

PITTS v. KERLEY et al.

(Supreme Court of Louisiana. April 25, 1910.)

*(Syllabus by the Court.)***HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY—EVIDENCE.**

Plaintiff's husband, owning separately and individually, as heir of his father and mother, certain property, jointly with the coheirs, took from a third person (in the form of a sale) an assignment or conveyance of all the rights, title, and interest in said property which said third person had acquired through a deed to him from the holder of an adverse claim to its ownership.

The assignment or conveyance was made during plaintiff's marriage. The husband having died, the wife claimed an undivided half of that property as widow in community.

Held, that the husband by the conveyance did not acquire a new title to the property, but that he through it simply freed, for the benefit of himself and his coheirs, their separate property from adverse claims.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Addie C. Pitts against S. N. Kerley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank J. Looney and W. H. Scheen, for appellant. Blanchard, Barrett & Smith and Alexander & Wilkinson, for appellees.

Statement of the Case.

NICHOLLS, J. The plaintiff, the widow of Robert L. Pitts, represents in her petition that she is the owner of and entitled to the absolute possession of the undivided one-half interest in and to the east half of the northwest quarter of section 20 in township 20 north of range 15 west, containing 80 acres, more or less, and situated in said parish of Caddo, La.; that Stephen D. Pitts acquired said described land from the United States in the year 1858; that from and through him, by his widow Mrs. Ann Pitts, the said land was acquired by Cain Turner, by deed dated April 13, 1876, which was duly recorded in Conveyance Book W, p. 202, of the records of this parish; that the said Cain Turner went into open, actual, and corporeal possession of the said above-described land under his said title; and that his possession has been transferred to petitioner by mesne conveyance.

She shows that the said Cain Turner sold said land by deed dated May 11, 1895, to J. P. Flournoy, which deed was duly recorded in Conveyance Book 15, p. 299; that the said J. P. Flournoy sold the same to P. J. Trezevant by deed dated June 19, 1895, said deed being recorded in Book 16, p. 117; that said Trezevant resold to J. P. Flournoy by deed dated July 9, 1895, as is recorded in Conveyance Book 16, p. 128; and that the said J. P. Flournoy sold to Robert L. Pitts by war-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ranty deed dated July 9, 1895, as is shown by deed duly recorded in Book of Conveyances 16, p. 129—all of which deeds are annexed hereto by certified copies as a part of this petition.

That she married the said Robert L. Pitts prior to his acquisition of said property in 1895, and that she was his wife at the time he acquired the same, and that the said property belonged to the community of acquets existing between them at the time of his death, which occurred in 1905, and that as partner in community she became the owner of the undivided one-half interest therein, and that she now owns the same in indivision with the legal heirs at law of the said R. L. Pitts or their assigns, as will be shown on the trial hereof. She alleged that Sidney N. Kerley, a resident of said parish and state, and the Jeems Bayou Fishing & Hunting Club, a corporation chartered under the laws of the state of Louisiana, and of which Matt. L. Scovill is the president, and whose domicile is in the city of Shreveport, Caddo parish, La., claimed to own said property by some kind of claim or deed of record and makes adverse claims thereto, and that she is entitled to have her title to said property established, though claimed by said parties who are not in the possession of said property, and have her title and right of possession thereto recognized.

She alleges that said property is well worth the sum of \$4,000.

Therefore she prays for service hereof and citation to the said S. N. Kerley and the said Jeems Bayou Fishing & Hunting Club, and, after due and legal proceedings had, she prays that her title be maintained, and that she be recognized and decreed to be the owner of the undivided one-half interest in and to the said east half of the northwest quarter, section 20, township 20, north of range 15 west, and decreed to be entitled to the full and peaceable possession thereof, and for all other orders and decrees needful, for costs, and general relief.

Defendants answered. After pleading a general denial, they averred that they are the owners and in actual possession of all of the northwest quarter of section 20, township 20 north, range 15 west, Caddo parish, La., containing 158.28 acres of land, which area necessarily embraces the east half of the northwest quarter of said section, township, and range, the land described in plaintiff's petition, which said land respondents acquired from Mrs. Sallie Austin, widow (born Pitts), on the 8th day of May, 1896, as per warranty deed, recorded in Conveyance Book 23, p. 25, of the Records of Caddo Parish, La., and from the United States government through various mesne authors one-half, and which said conveyance to respondents by the said Mrs. Sallie Pitts Austin was ratified and confirmed by Rush D. Pitts by quitclaim deed and ratification of date

March 3, 1905, as will appear by reference to Conveyance Book 38, p. 500, of the Records of Caddo Parish, La., and which said conveyance to respondents from Mrs. Sallie Pitts Austin, widow, was ratified and confirmed by act of confirmation and ratification, duly signed by Mrs. Lucy Pitts Joslyn of date ——— 190—, duly recorded in Conveyance Book ———, page ———, of the Records of Caddo Parish, La., certified copies of which said acts hereinbefore referred to are hereby annexed and made part hereof.

Respondents, further answering, deny that said east half of the northwest quarter of section 20, township 20 north, range 15 west, Caddo parish, La., or any part thereof, ever belonged to the alleged community of acquets between plaintiff, the said Mrs. Addie C. Pitts, and Robert L. Pitts, deceased.

Respondents, further answering, specially aver that at the time of the death of said Stephen D. Pitts he left a widow in community (Mrs. Ann Pitts) and three children, namely, Rush D., Robert L., and Thomas H. Pitts.

Respondents further represent: That the said Stephen D. Pitts, Sr., died in the year 1872, and his then surviving widow (Mrs. Ann Pitts) departed this life in the year 1883, without marrying again, and leaving as her sole heirs R. L. Pitts and R. D. Pitts, her sons, and two grandchildren, Mrs. Sallie Pitts Austin and Mrs. Lucy Pitts Joslyn, sole heirs of T. H. Pitts, deceased. That there was a partition entered into by and between the heirs of Mrs. Ann Pitts and Stephen D. Pitts, Sr. That, by and with the consent of the said Rush D. Pitts and Robert L. Pitts, the said Mrs. Sallie Pitts Austin took, along with other property, as her share of the property of Stephen D. Pitts, Sr., her grandfather, and Mrs. Ann Pitts, her grandmother, the whole of the northwest quarter of section 20, township 20 north, range 15 west, Caddo parish, La., with other property. That neither the said Rush D. Pitts, nor said Robert L. Pitts, from and after the said partition, ever disputed the said Mrs. Sallie Pitts Austin's title to said northwest quarter of said section, township, and range, as aforesaid, or any part thereof, and that, when the said land was forfeited to the state for nonpayment of taxes, the said Mrs. Sallie Pitts Austin took a reconveyance from the state, by and with the consent of and at the direction of the said Rush D. Pitts and Robert L. Pitts, they, the said Rush D. and Robert L. Pitts, well knowing that the said property at that time was set aside and conveyed to the said Mrs. Sallie Pitts Austin, and for that reason the said Rush D. Pitts subsequently ratified and confirmed the title to said land which had been made by the said Mrs. Sallie Pitts Austin, to your respondents, all of which is stated in said act of ratification and confirmation made by said Rush D. Pitts to respondents, S. N. Kerley and the Jeems Bayou Fishing & Hunting

Club heretofore referred to. That the alleged conveyance from Mrs. Ann Pitts, widow of Stephen D. Pitts, Sr., to Cain Turner, referred to in plaintiff's petition, was wholly upon terms of credit. That not one dollar of the purchase price was ever paid. That the said Mrs. Ann Pitts had no right nor authority in law to convey said land to said Cain Turner, and that said Cain Turner, having paid nothing for said land, never claimed any ownership to same, and that in the alleged conveyance from Cain Turner to J. P. Flournoy the said Cain Turner declined to give any warranty deed, but only a quitclaim deed to this land and other lands, stating at the time that he had paid nothing for the said east half of the northwest quarter of section 20, township 20 north, range 15 west, Caddo parish, La., the lands described in plaintiff's petition, and claimed no interest thereon, all of which said facts were well known to Robert L. Pitts when he purchased from said Flournoy, and that the alleged conveyance taken by said Robert L. Pitts, husband of the plaintiff herein, from J. P. Flournoy, was intended simply as a redemption for the interest and benefit of the said Mrs. Sallie Pitts Austin, respondents' vendor. That said Robert L. Pitts was a party to the aforesaid partition between the heirs of Mrs. Ann Pitts and Stephen D. Pitts, Sr., and that his alleged conveyance from J. P. Flournoy was for the use and purpose of carrying out and protecting the terms of said partition, and that the said Robert L. Pitts never asserted any claim to the said lands. That the same had been owned and held by the said Mrs. Sallie Pitts Austin and respondents since 1883 and 1899; the said Robert L. Pitts well knowing and his heirs well knowing that he was estopped by reason of said partition and his consideration therefor from asserting or claiming any interest or title in said property.

They further aver: That Benjamin and Barron took a conveyance to said land in question at a tax sale on the 3d day of June, 1889, same having been previously forfeited to the state and subsequently redeemed by respondents' vendor Mrs. Sallie Pitts Austin, and that the said Benjamin and Barron did on December 21, 1890, convey to Rush D. Pitts said land in question, and that the said Rush D. Pitts conveyed to respondents the said land, all with the view of ratifying and confirming title already made by the said Mrs. Sallie Pitts Austin to respondents.

That they have been in actual possession of said lands, paying taxes upon the same annually, and plead prescription of 3, 5, and 10 years and 20 years in bar of plaintiff's demand.

That the plaintiff has absolutely no interest or title in said property, and that her suit and pretended claim operates as a slander upon the title of respondents' title, and has largely depreciated the value of the said land

and interfered with respondents' opportunity to dispose of same, and has made it necessary for respondents to employ attorneys at large expense, damaging respondents in a sum of not less than \$1,000, as will be shown on the trial hereof, for which said sum respondents claim judgment in reconvention with 5 per cent. per annum interest thereon from liquidation. That plaintiff's suit be hence dismissed at her cost, and for judgment in respondents' favor, for the sum and interest set forth and claimed in reconvention.

Defendants subsequently filed a plea of estoppel, averring that on account of said verbal partition so made by and between the heirs of Ann and S. D. Pitts, and on account of the said R. L. Pitts, plaintiff's husband having taken and enjoyed and sold his interest so acquired by and through said verbal partition to other parties and on account of the direction of said R. L. Pitts to Mrs. Austin to redeem the land here in contest from the state, stating to her that it was her own, and to redeem it from the state and on account of the long recognition by the said R. L. Pitts of the ownership of said land in the said Mrs. Austin, who claimed it and exercised acts of ownership over it for many years with the express and implied assent of the said R. L. Pitts and the plaintiff, she is estopped and debarred from claiming the land here sued for, which estoppel defendant specially pleads in bar of her right to recover. Wherefore defendant prays that this plea of estoppel be sustained and for judgment as prayed for in its answer herein, and for costs and general relief.

Plaintiff pleaded the prescription of ten years against the demands of defendants. The district court rendered judgment ordering and decreeing that the claim of plaintiff set forth in her petition be rejected. It further ordered and decreed that the defendants, S. N. Kerley and the Jeems Bayou Fishing & Hunting Club, be and they are hereby declared to be the owners of the east half of the northwest quarter of section 20, township 20 north, range 15 west, Caddo parish, state of Louisiana, and that their title and possession to same be quieted. It further ordered, adjudged, and decreed that plaintiff pay all costs of this suit.

The plaintiff prays to be recognized and decreed to be the owner of the east half of the northwest quarter of section 20 north, range 15 west. She claimed that Cain Turner acquired said land from and through Stephen D. Pitts by his widow, Mrs. Ann Pitts, on April 15, 1876; that Cain Turner sold said land to J. P. Flournoy on May 11, 1896; that J. P. Flournoy sold the same to P. J. Trezevant on June 19, 1895; that P. J. Trezevant resold said property to J. P. Flournoy on July 9, 1896; that J. P. Flournoy sold same to Robert L. Pitts (her husband) on July 9, 1895; that she married Robert L. Pitts prior to the said acquisition by him of said property on

July 9, 1895. The record shows that on April 15, 1876, Mrs. Ann Pitts, widow of Stephen D. Pitts, by notarial act sold to Cain Turner the east half of the northwest quarter of section 20, township 20 north, range 17 west; also the east half of the northeast fractional quarter of the southwest fractional quarter of section 20, township 20, range 15 west, for the price of \$270, payable in two notes of the purchaser, one payable January 1, 1877, the other January 1, 1878, bearing 8 per cent. interest secured as to payment by special mortgage and vendor's privilege on the property sold. That the act declared:

"That Henry Pitts, Rush D. Pitts, and Robert L. Pitts, sons and sole heirs of Stephen D. Pitts, joined in the conveyance with guarantee of title and subrogation to all rights and actions possessed by them, and relinquishing in favor of the purchaser all right, title, and interest which they might own or be entitled to in the property."

But the persons named were not in fact parties to that act and did not appear therein as recited by the notary. Cain Turner by act under private signature dated May 11, 1895, sold and quitclaimed to J. P. Flournoy, for \$75 cash, one hundred and sixty acres in section 18, being the northeast quarter northeast quarter of section 20, all in township 20 north, range 15 east. J. P. Flournoy on June 19, 1895, by notarial act, sold with warranty, to P. J. Trezevant, for \$600 cash, the northeast quarter of section 18 and east half of northwest quarter of section 20, township 20, range 15 west. On July 9, 1895, P. J. Trezevant resold the same property by notarial act to J. P. Flournoy for \$600 cash by and with full warranty; R. L. Pitts being one of the witnesses to the act. On the same day (July 9, 1895) J. P. Flournoy by notarial act sold under full warranty, for \$25 cash, to Robert L. Pitts, "all his interest or claim in and to the east half of northwest quarter of section 20, township 20 north, range 15 west."

On the 8th of May, 1899, Mrs. Sallie Pitts Austin (born Pitts), heir of T. H. Pitts, sold under full warranty and with subrogation by notarial act to Sidney Kerley, for \$100 cash, the southwest quarter of section 10, township 20, range 16, and the northwest quarter of section 20, township 20, range 15. George W. Kendall was a witness to that act.

On March 3, 1905, through act before Thomas C. Barret, notary public, R. D. Pitts, as one of the three heirs of Stephen D. Pitts and Mrs. Ann Pitts, declared that he did thereby waive, relinquish, and renounce in favor of S. N. Kerley and the Jeems Bayou Fishing & Hunting Club all his rights, title, and interests in and to the following described property: "The southwest quarter of section 10, township 20, range 16," and "the northwest quarter of section 20, township 20, range 15." That the consideration of this transfer and waiver of interests was this: The said Pitts had a like waiver of interest in other lands

from the heirs of Stephen D. Pitts and Mrs. Ann Pitts, and he desired to ratify and confirm the sale of that particular property by his niece, Mrs. Sallie Austin to S. N. Kerley, of date May 8, 1899 (and by the said Kerley sold or agreed to be sold to the said fishing and hunting club); his niece and the other heirs of Stephen D. Pitts and Mrs. Ann Pitts having ratified and confirmed the transfer made by him of another piece of property belonging to the succession of the said Stephen D. Pitts and Mrs. Ann Pitts, his mother. She said Pitts further declared that, while there had been no written partition between the heirs of Stephen D. Pitts and Mrs. Ann Pitts, there was an understanding and agreement between them as to a division of the property, and that the property described in the act had been set aside to Mrs. Sallie Austin, who sold it to S. N. Kerley, and by the said Kerley it was transferred or agreed to be transferred to the Jeems Bayou Fishing & Hunting Club, and that it was his purpose and intention to thereby ratify and confirm and to waive and renounce in favor of the said Kerley and the said fishing and hunting club all rights, title, and interest in the said property.

On ———, 1908, Mrs. Lucy Pitts Joslyn (sister of Mrs. Sallie P. Austin), as one of the heirs of Stephen D. Pitts and Mrs. Ann Pitts, declared that as such she ratified and confirmed the sale made by Mrs. Sallie Pitts Austin to S. N. Kerley of "the southwest quarter of section 10, township 20, range 16," and "the northwest quarter of section 20, township 20, range 15," which sale was made on the 5th day of May, 1899, relinquishing in favor of the said S. N. Kerley and the Jeems Bayou Fishing & Hunting Club all right and interest in the said property sold by the said Mrs. Sallie Pitts Austin to said Kerley, and that it was her purpose and intention to ratify and confirm said sale. That the consideration of said ratification was the sum of \$1,500 cash paid to her.

On the 4th of January, 1895, Rush D. Pitts mortgaged in favor of G. W. Kendall, for \$500, "all his right, title, and interest in and to the fractional southwest quarter of section 1, township 20 north, range 16 west," and in "the northwest quarter of section 20, township 20 north, range 15 west."

On April 17, 1907, in the matter of the bankruptcy of S. D. Pitts (son of Robert L. Pitts), and on rule by the Jeems Bayou Fishing & Hunting Club v. H. H. Hackaby, Trustee, the United States court rendered judgment in favor of the fishing and hunting club and against Hackaby, trustee, defendant in the rule, restraining the said trustee from selling, as the property of said estate of S. D. Pitts in bankruptcy, "the undivided one-twelfth interest in southwest fractional quarter of section 10, township 20, range 16," and "the undivided one-eighth interest" in the west half of northwest quarter of section 20, township 20 north of range 15 west.

On May 1, 1886, the sheriff of Caddo parish, ex officio tax collector, offered at tax sale for taxes for 1885, as property assessed in the name of the succession of Mrs. Ann Pitts, the fractional southwest quarter, section 10, township 20, range 16, and the northwest quarter, section 20, township 20, range 15, 230 acres; but said property was not sold for want of bidders. No purchasers having bid for the same, the property remained unsold.

On November 10, 1886, the tax collector drew up an act reciting the fact, and recorded the same on that day, declaring that he did so by virtue of section 3 of Act No. 107 of 1884. The property continued to be assessed in the name of the succession of Ann Pitts in the years from 1885 to 1891, both inclusive. On the 1st of June, 1889, the sheriff, ex officio tax collector of the parish of Caddo, offered at tax sale for taxes of 1888, "230 acres, being fractional southwest quarter of section 1, township 20 north, range 16 west," and "northwest quarter of section 20, township 20, range 15, Caddo parish," said property being assessed as belonging in the succession of Ann Pitts, and at said sale adjudicated said property to Sam Benjamin and Isaac Barron. A notarial deed was executed to the purchasers on the 3d of June, 1889, which was recorded the same day. On the 21st of May, 1890, Sam Benjamin and Isaac Barron, for \$38.44, sold by notarial act to Rush D. Pitts with only, however, such title as they received, and with complete transfer and subrogation to all rights and actions against former proprietors of the property conveyed, "230 acres of land," being fractional "southwest quarter of section 1, township 20 north, range 16 west," and "northwest quarter of section 20, township 20, range 15 west."

On the trial of the case plaintiff introduced in evidence the following letter to her husband, Robert L. Pitts:

"Shreveport, La. July 12, 1890.

"Dear Mr. Pitts:

"I write to know if you can't buy the place which you are renting from my wife. The matter stands in a condition by which it can be purchased very cheap. At the time I was out of business I held two notes against Cain Turner amounting to \$270.00 two hundred and seventy dollars, endorsed over to me by your mother, she having made the title direct to Cain Turner. I borrowed from John J. Dillon on the notes as collateral eighty dollars which is past due and he is speaking of suing me, in other words of foreclosing the mortgage which will make additional loss and I propose to you (not being able to raise the money myself) to buy the notes from him at \$90, and foreclose yourself or let him foreclose and you attend the sale and buy it for yourself, thereby getting a sheriff's title which is the best of all titles. It is impossible for me to raise the money and I would rather you would have the place at a cheap price than any one else.

"Answer.

"Your friend, Ed. M. Austin."

The plaintiff introduced in evidence the two notes which Cain Turner executed when

he purchased the property by the act of April 11, 1876, indorsed in blank by Mrs. Ann Pitts. She testified that they had been given to Mr. Austin, the husband of Sallie Austin, but for what consideration she did not know. He first mortgaged them to Mr. John J. Dillon, then her own husband, Robert L. Pitts, took up the notes and took the land for the notes. She had had the notes in her possession since 1881. Mrs. Ann Pitts died in 1883, and R. L. Pitts, her husband, in September, 1905.

She testified that Cain Turner was a negro, who lived on their place; that he at one time had possession of the land involved in this suit; that after her husband, Robert L. Pitts, bought the land, Cain remained on this particular land, as a tenant, cultivating other lands of her husband. He left the land in 1881 or 1882. The land in controversy was originally given to Sallie Austin. When Mrs. Ann Pitts sold to Cain Turner, witness thought she received a small payment, the balance by notes to Mr. Austin. Her husband never signed away his rights to the gun club. A Mr. Crown was sent to him to have him do so, but he refused. Plaintiff testifies that the land in controversy was given to Mrs. Sallie Austin by her grandmother, Mrs. Ann Pitts. Some land was given by her to her son Rush D. Pitts, but she did not remember that any was given to her own husband. She may have given some, but he never mentioned it to her. The notes were given to Mr. Austin, and not to his wife. Being asked whether Mrs. Ann Pitts had not divided up during her lifetime, all the land that she owned, she answered:

"Not at that time."

Being asked whether she had not done so later, she answered:

"No, sir; she did not give her husband any that she knew of."

Being asked whether she knew that she had given Mrs. Austin some, she answered:

"Yes, sir; this particular piece."

Being asked whether she knew that she gave Rush D. Pitts some, she answered that she could not say positively, but that she thought that she had. She testified that, after the death of her mother-in-law, she and her husband had not occupied any part of the land; that Rush D. Pitts had occupied it, claiming it as his own. Asked whether it was not a fact that her husband got from his mother the west half of the northeast quarter of northeast quarter of section 20, range 15, and whether she was not occupying that land herself, she answered:

"No, sir; if she gave it to him, she did not know anything about it."

When questioned about the taking up by her husband of Cain Turner's notes and taking the land for the notes, it developed that

she merely presumed that the lands had been given for the notes; that what she believed on the subject was from reading of the letter of Austin to her husband, which she thought had been followed up by her husband having received the property for the notes; that her husband had never been given a deed for it; that her husband thought he had a deed to himself, until Mr. Flournoy took up the homestead. Cain Turner had not lived in Shreveport, or around Shreveport, for 10 or 12 years. She thought he lived on the place two years, one year that he claimed it as his own; then he rented the land from her husband. Questioned about Mrs. Sallie Austin having redeemed the property, witness said her husband had sent her brother, Rush D. Pitts, to redeem the whole tract. She heard her husband frequently say that Mrs. Austin could only sell her interest; that she bought; could not give a deed to the whole. Noel, a witness for the plaintiff, being asked whether he knew that the property of the Pitts had been divided up among them, a sort of partition, or an agreement of partition among themselves, said he did not know; he heard Rush Pitts and Bob Pitts say that they had ended it, and each one claimed different parts of the Stephen Pitts land. Bob Pitts claimed the Cain Turner tract, and worked it through a tenant. Cain Turner's land was 80 acres of land he thought. Bob Pitts and Rush Pitts said there was an understanding among the heirs of Mrs. Ann Pitts, some family arrangement about the partition of the lands. Witness understood the Cain Turner land had been given to Mrs. Austin. Mrs. Sallie Austin testified that the land in question had been given to her by her grandmother after her grandfather's death. She knew that Cain Turner was on the land. Witness had never received anything from him. She did not know when Cain Turner left it; had lost sight of the property until Mr. Kendall came and told her that the property of hers had reverted to the state, and that he would redeem it for her, and she had done so. She thought she had a good title on the record up to the time of her grandmother's death, about 1883. She said the land belonged to witness. She supposed that Rush Pitts and Robert Pitts knew that her grandmother had given it to her. That a witness for defendants testified that, when the Kansas City Southern Road built its road in 1896, Rush Pitts and Robert Pitts told witness that they would not sell that land in section 20, because they said part of it belonged to Mrs. Sallie Austin. Both Robert and Rush Pitts said that the land belonged to the three of them; that they had an interest in it, and they would not sell the timber off of it; that it belonged to all three of them.

The plaintiff, Mrs. Addie Pitts, when recalled to the stand, testified, among other matters, that her husband had claimed other

lands besides these 80 acres involved in the litigation; that he had an interest in his father's and his mother's land; he had an interest in other lands.

Opinion.

The only matter with which we are called upon to deal is the claim of Mrs. Addie Pitts, wife of Robert L. Pitts, to one undivided half ownership of the property in litigation, on the ground that her husband had acquired the ownership of the same during his marriage with her, and her having acquired the one-half thereof as widow in community with him.

We do not think that her claim is well founded. Her husband Robert L. Pitts, his brother, Rush Pitts, and his niece, Mrs. Sallie Austin, and Mrs. Lucy Joslyn, were heirs of Stephen D. Pitts and his wife, Mrs. Ann Pitts, and, as such, acquired ownership in all the properties which had belonged to them and the community between them. The property so owned by her husband was his individual separate property, held and owned jointly with his coheirs. With that fact as a starting point, and reading the various acts which occurred later with reference to the property left by Stephen D. Pitts and his wife in the light of that fact, we have no difficulty in reaching the conclusion that Robert L. Pitts acquired no new title to any part of that property during his marriage with the plaintiff. Mrs. Sallie Austin acted in behalf of herself and her coheirs, when she, as heir of Stephen D. Pitts and Mrs. Ann Pitts, redeemed the property which had been sold for taxes by the state, as the property of Mrs. Ann Pitts. In so doing, she lifted any cloud upon the title of the Pitts' heirs to that property resulting from adverse claim on the part of the state. When Rush D. Pitts purchased from Sam Benjamin and Isaac Barron, as adjudicatees at the tax sale made to them in 1889, all rights which they may have acquired therein, he, for the benefit of himself and his coheirs, lifted the cloud which rested on their title as heirs by the adverse claims of these parties. When Robert L. Pitts purchased from J. P. Flournoy all the right, interest, or claim which he had in and to the property involved in this litigation, he, for the benefit of himself and his coheirs, lifted the cloud which rested upon their title from any adverse claims on account of the paper title which Cain Turner had at one time to part of their property. Flournoy held only a quitclaim from Cain Turner of any rights which he had in the premises. Cain Turner made no cash payment when he purchased the property. The notes which he gave, as representing its price, were never paid by him. When on May 11, 1895, Flournoy took a quitclaim deed from Cain Turner for \$75, he (Turner) had long since (as far back as 1883) abandoned the property and left the neighborhood, and the

state had sold at tax sale on June 1, 1889, 230 acres of land, including these in the northwest quarter of section 20, township 20, range 15 west, assessed as belonging to the succession of Mrs. Ann Pitts, to Sam Benjamin and Isaac Barron. Those purchasers had already transferred the same property to Rush D. Pitts (for \$38) all such rights and titles as they had acquired in and to the said property at said tax sale. The act was substantially a redemption of that property from those parties by a quitclaim deed from them, as has been seen. J. P. Flournoy on May 11, 1895, for \$75, took a quitclaim deed from Cain Turner "for any rights which he had in 160 acres in section 18, being the northeast quarter and east half of northwest quarter of section 20, in township 20 north, range 15 west." And, as has also been seen, Flournoy on the 9th of July, 1895, sold the same property to P. J. Trezevant, for \$600 cash, and on the same day (July 9, 1895) P. J. Trezevant, under the same description which he had acquired it, sold for \$600 cash the same property to J. P. Flournoy, from whom he had just bought it. Flournoy, in repurchasing the property, did not seem to have had much confidence in the title which he had acquired from Cain Turner, for he took the precaution of having Robert L. Pitts serve as a witness to that sale. We do not think that was accidental. This was undoubtedly done for the purpose of estopping R. L. Pitts from subsequently contesting the title which he had himself just conveyed to Trezevant. On the same day that he had purchased the property from Trezevant, Flournoy sold for \$25 to R. L. Pitts the east half of the northwest quarter of section 20, township 20 north, range 15 west.

Kendall's interest in having the property redeemed from the state in favor of the heirs of Stephen D. Pitts and Mrs. Addie Pitts arose from the fact that he had taken a special mortgage from Rush D. Pitts on a part of that property. His signing the act from Mrs. Sallie Austin to Kerley was probably to enable her to convey to Kerley an unincumbered title to that property.

We think that the action of all of the parties who took part in these various transactions was to act in concert in disembarassing the title of the heirs of Stephen D. Pitts and Mrs. Addie Pitts from adverse claims from any quarter to the property which they had inherited. We have no idea that Robert L. Pitts intended to obtain a new title to any part of that property to the prejudice of his coheirs.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

LAND, J., recused on account of affinity with member of defendant club.

GILES et al. v. WILMOTT.

(Supreme Court of Florida. Division B. April 19, 1910. Rehearing Denied May 20, 1910.)

(Syllabus by the Court.)

1. ACTION (§ 61*)—PREMATURE ACTION.

In ordinary actions commenced by summons, the plaintiff, in order to succeed, must show that his right of action was complete at the time the action was commenced.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 708-717; Dec. Dig. § 61.*]

2. BROKERS (§ 66*)—ACTIONS BETWEEN—BURDEN OF PROOF.

In order to entitle a broker to recover from another on an agreement of the latter to divide with him the commission on the sale of certain property, the commission must have been actually received by the broker whom it is sought to charge with liability.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 61; Dec. Dig. § 66.*]

Error to Circuit Court, Orange County; M. S. Jones, Judge.

Action by J. W. Wilmott against James L. Giles and Charles F. McQualg. Judgment for plaintiff, and defendants bring error. Reversed.

Beggs & Palmer and Le Roy B. Giles, for plaintiffs in error. Jones & Jones and A. Johnson, for defendant in error.

TAYLOR, J. The defendant in error on the 25th day of April, 1903, sued the plaintiffs in error in the circuit court of Orange county in an action of assumpsit on special contract. The declaration alleged, in substance, that the defendants were real estate brokers and contracted with him to pay him one-half of all commissions that they might get from sales of land made by them to any person or persons whom the plaintiff might introduce to them, and for his aid and assistance in making any such sale; that, in compliance with this agreement, the plaintiff did introduce to the defendants a party who became a purchaser from them of 67,000 acres of land lying in the counties of Orange and Osceola, and that said sale was consummated through the joint exertions of the plaintiff and the defendants in the month of April, 1903; that the owner or vendor of said land allowed said defendants whose brokers and agents they were the sum of \$3,000 as commission for such sale, and that said owner or vendor paid said sum to one I. W. C. Parker as the agent of the defendants; and that by reason of the said agreement between plaintiff and defendants the plaintiff's interest in the said commission is \$1,500, and that the defendants owe the sum to the plaintiff, but refuse to pay the same. The trial of the case resulted in a verdict and judgment in favor of the plaintiff below, and the defendants below bring such judgment here for review by writ of error.

Among other pleas the defendants plead in abatement of said suit as follows: "And for

fourth plea in this behalf defendants say that the plaintiff ought not to further maintain his suit because they say that the alleged cause of action is for a share in commissions alleged to have been allowed and paid the defendants by the owners of certain lands mentioned in said declaration for the sale of said land, and to have been paid by I. W. C. Parker as agent for this defendant and the defendant J. L. Giles, which share in commissions it is alleged the defendants promised to pay to the plaintiff; that at the time of the commencement of this suit the said supposed payments were not due to the defendants, and the plaintiff's right of action, if any he had, had not matured; that the said suit was commenced on the 25th day of April, 1903; that no money had been paid to the said I. W. C. Parker by the said owner of the real estate mentioned in the said declaration for any purpose whatsoever prior to the 4th day of May, 1903, long after the commencement of this suit; that, if the said I. W. C. Parker received from the owner of the said land any money for this defendant and the defendant J. L. Giles, it was received long after the commencement of this suit; and that the suit was brought long prior to any right of action which the plaintiff might have against these defendants, and this the defendants are ready to verify, wherefore defendants pray that this suit shall abate."

To this plea the plaintiff below demurred, and this demurrer was sustained by the court below, and this ruling is assigned as error. The court below erred in this ruling. The plea sets up explicitly that at the date of the institution of this suit no commissions for the sale of said land were either due to the defendants nor had any commissions been then paid to them, and that consequently the said suit of the plaintiff had been prematurely instituted. The demurrer admits all the facts set up in the plea, and if it be true, as alleged in such plea, that at the date of the institution of the plaintiff's suit no commissions were either due to the defendants or had been paid to them, then, at that date, no share in said commissions could have been due to the plaintiff, and therefore his said action was, as contended in said plea, prematurely brought.

In ordinary actions commenced by summons, the plaintiff, in order to succeed, must show that his right of action was complete at the time the action was commenced. 1 Cyc. 744, 745; *Titus v. Gunn*, 69 N. J. Law, 410, 55 Atl. 735. In order to entitle a broker to recover from another broker on an agreement of the latter to divide with him the commission on the sale of certain property, the commission must have been actually received by the broker whom it is sought to charge with liability. 23 Am. & Eng. Ency. Law, p. 930.

As this disposes of the entire case, it be-

comes unnecessary to consider the 38 other assignments of error made in the case. The judgment of the court below in said cause is hereby reversed at the cost of the defendant in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

MCKINNON v. JOHNSON et al.

(Supreme Court of Florida, Division A. April 19, 1910. Rehearing Denied May 20, 1910.)

(Syllabus by the Court.)

1. ELECTION OF REMEDIES (§§ 9, 12*)—FINALITY OF ELECTION.

Where a party elects to adopt one of several inconsistent remedies, he cannot afterwards pursue the others or either of them, even though he fails in the remedy elected and used. But, where a party has several consistent remedies, the mere adoption and use of one will not of itself preclude the use of the others under appropriate circumstances.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 13, 15; Dec. Dig. §§ 9, 12.*]

2. ELECTION OF REMEDIES (§ 9*)—FINALITY OF ELECTION.

Where the election of a remedy assumes the existence of a particular status or relation of the party to the subject-matter of litigation, the party cannot afterwards pursue another remedy by which he assumes a different and inconsistent status or relation to the subject-matter.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 13; Dec. Dig. § 9.*]

3. ELECTION OF REMEDIES (§ 3*)—INCONSISTENCY OF ALTERNATIVE REMEDIES—RESTITUTION PROCEEDINGS AND EJECTMENT.

Restitution proceedings and ejectment are not inconsistent or coextensive proceedings, but they are consistent and cumulative remedies.

[Ed. Note.—For other cases, see Election of Remedies, Dec. Dig. § 3.*]

4. JUDGMENT (§ 715*)—RES JUDICATA—IDENTITY OF CAUSES OF ACTION—ESTOPPEL.

A test of the identity of causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the actions. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244, 1245; Dec. Dig. § 715.*]

5. JUDGMENT (§ 747*)—RES JUDICATA—IDENTITY OF CAUSES OF ACTION.

The facts necessary to be established in an action of ejectment are essentially different from those necessary in proceedings of restitution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1285; Dec. Dig. § 747.*]

6. ADVERSE POSSESSION (§ 114*)—SUFFICIENCY OF EVIDENCE.

When the proof is not clear and positive of adverse possession and occupation of land for the full statutory period, no title by adverse possession can be adjudged.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. ADVERSE POSSESSION (§ 114*)—SUFFICIENCY OF EVIDENCE.

Where the only acts of possession shown of wild lands and town lots is in "looking after them" and paying taxes on them, it is not error to direct a verdict against the party claiming title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

8. ADVERSE POSSESSION (§ 114*)—SUFFICIENCY OF EVIDENCE.

Evidence tending to show adverse possession of lands considered and, after giving every possible probative force to the evidence, no title by adverse possession is shown.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

Action by Seth Johnson, administrator of P. P. Johnson, and others, against D. L. McKinnon. Judgment for plaintiffs, and defendant brings error. Affirmed.

D. L. McKinnon, for plaintiff in error. Laddon & Carter, for defendants in error.

WHITFIELD, C. J. This writ of error is to a judgment for the plaintiffs in an action of ejectment begun June 21, 1906. Trial was had upon a plea of not guilty, and the defendant undertook to show title by adverse possession under color of title. It was admitted that P. P. Johnson, the ancestor of the plaintiffs below, had title to and possession of the property in controversy at his death in September, 1893. Seth Johnson testified that he took out letters of administration in Alabama on P. P. Johnson's estate; that he had possession of the lands since his father's death, and rented them out; that "I have not been in possession of the land since February, 1898, until I was put in possession by writ of possession in the year 1908. I have never paid any taxes on it since 1897. I did not pay the taxes on it because there was a suit pending in the Supreme Court."

It appears that in February, 1893, P. P. Johnson entered into an agreement with A. D. McKinnon for the purchase of land from the latter. Subsequently P. P. Johnson died, and A. D. McKinnon obtained a decree against Seth Johnson as administrator of the estate of P. P. Johnson, deceased, for a breach of the contract with A. D. McKinnon. A deficiency decree was issued for a balance adjudged to be due A. D. McKinnon for a breach of his contract with P. P. Johnson. Under an execution issued on the decree, the lands in controversy belonging to the heirs of P. P. Johnson were levied upon and sold to D. L. McKinnon, the attorney for A. D. McKinnon. The decree under which the sale was made was reversed. *Johnson v. McKinnon*, 45 Fla. 388, 84 South. 272; *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451. Restitution proceedings were

then begun by the heirs of P. P. Johnson to recover the possession of the lands sold under the revised decree. The petition for restitution was answered only by D. L. McKinnon, and the proceedings were admitted by the plaintiffs to have been abandoned. See *Johnson v. McKinnon*, 54 Fla. 221, 45 South. 23, 13 L. R. A. (N. S.) 874, 127 Am. St. Rep. 135, 14 Am. & Eng. Ann. Cas. 180; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, upon former writs of error in this cause.

The plaintiff having rested, the defendant put in evidence the petition in the restitution proceeding. The separate answer of D. L. McKinnon to the petition was then offered in evidence by the defendant, and it was objected to by the plaintiffs, and the objection sustained. A demurrer to the answer and the ruling thereon were likewise excluded by the court.

The answer, demurrer thereto, and the ruling thereon are not an estoppel as an election of remedies by the plaintiffs. They do not show *res adjudicata* of the subject-matter, and they do not tend to show adverse possession of the land in controversy by the defendant. No error is made to appear in the exclusion of these documents.

Where a party elects to adopt one of several inconsistent remedies, he cannot afterwards pursue the others or either of them, even though he falls in the remedy elected and used. But, where a party has several consistent remedies, the mere adoption and use of one will not of itself preclude the use of the others under appropriate circumstances. Where the election of a remedy assumes the existence of a particular status or relation of the party to the subject-matter of litigation, the party cannot afterwards pursue another remedy by which he assumes a different and inconsistent status or relation to the subject-matter. In restitution proceedings the relation or ownership of the property is assumed, though the question of title is not litigated. In ejectment the relation of ownership is likewise assumed, and the title is a subject of controversy. Restitution proceedings and ejectment are not inconsistent or coextensive proceedings, but they are consistent and cumulative remedies. *American Process Company v. Florida White Pressed Brick Company*, 56 Fla. 116, 47 South. 942.

A test of the identity of causes of action for the purpose of determining the question of *res adjudicata* is the identity of the facts essential to the maintenance of the actions. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment. *Prall v. Prall*, 58 Fla. 496, 50 South. 867.

The facts necessary to be established in an action of ejectment are essentially different from those necessary in proceedings of restitution. Besides, in this case, the title and

prior possession of plaintiff's ancestor are expressly admitted. Conceding that the ruling on the demurrer excluded by the trial court is a final judgment, it is not res adjudicata with reference to the issues in this case. For a copy of the order and the issues possible in this proceeding, see *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910, text 913.

The defendant then put in evidence the deficiency decree in the case of *A. D. McKinnon v. Seth Johnson et al.*, and also as color of title the sheriff's deed dated February 9, 1898, conveying to defendant the land by virtue of an execution issued under the decree. As a witness the defendant testified that the sheriff's deed was executed to him, "and immediately, within two months, I went up there and over the land, and, wherever there were any tenants on them, the tenants got off or accepted lease from me. As to the Linton place, Linton would not give it up and I brought an action of ejectment against him and obtained this judgment." Witness exhibited a judgment dated June 9, 1899, in his favor for the Linton land, and testified: "I went up there during the term of court, as soon as I got through with my cases, as I didn't want the place to remain vacant more than I could help. That was in 1899. I had a renter on it the next year.

* * * He remained there one or two years. * * * I rented the place every year after I took charge of it up to the time that the houses were burned down, and it never was vacant more than a few days at a time, and I collected the rent every year except the year 1898, up to the time the house burned down two or three years ago, since the suit was brought. There were two buildings on the places. The fence around a considerable portion of the land burned, and then I only rented the houses until they were burned. I don't remember the names of all the renters. The Linton place is the W. $\frac{1}{2}$, and that portion of the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ lying south of the Campbellton and Chipley wagon road, section 34, township 5 N., range 13 W., containing 165 acres, more or less. I rented the Murphy place * * * all along until the houses became uninhabitable and no one would occupy them. * * * I had tenants on it all along until two or three years ago, when the houses became uninhabitable, since soon after I purchased it, not exceeding two months from the time I purchased. There is 120 acres in the Murphy place in section 26. It is one 80 and a 40. There is another 80 just across the branch which is wild land. The Murphy place is the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, and S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 23. And I think the E. $\frac{1}{2}$ of section 24, is the other 80. The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 30, is a way down on the railroad, and is wild land. I went from two to four times a year to look after the land and see if any trespass had been committed upon it,

and I had Mr. Richter and Mr. Bass looking after it. A little of the Murphy place that had already been turpentine, I rented for that purpose, but refused to allow any further boxing on it. The turpentine was in section 26, and there may have been a little in section 23, adjoining it. I don't know exactly where the line is. Just rented what was already boxed. * * *

"The wild lands I would go over and look after them, pay the taxes on them, and exercise the same acts of ownership I do over my other property I have. Neither the plaintiff nor any one else interfered with me while I was renting out these lands and going over them. * * *

"There were houses on the Linton place, but I cannot say what part of the place they were on. Somewhere about the center, I would judge, some of it was fenced. There was about 40 or 50 acres under cultivation, and there was a pear orchard on it. The year I got a judgment against Linton it was cultivated by Linton. Linton claimed under Johnson. There wasn't very much crop there. It was in June. He had a little potato patch, cane patch. I don't know what it was. I did not find Linton there. He was not there when I got there. He told me he would give up the place. He gave up the place, didn't have any crop. * * *

"It never was vacant after I took charge of it, only when one tenant moved out and another moved in. They cultivated the place every year up to the time the fences were burned. They did not cease to cultivate it until the fence was burned. The fence was kept up by me all the time until it was burned, and would keep out stock. It was burned in 1905 or first part of 1906. I am not sure about that. * * *

"I cannot tell the names of the renters I collected the rent from 1902, 03, 04, or 05. I don't know the last one I collected rent from. It may have been Wilkerson. * * * All I did to the five acres in the Hagerman addition to the town of Chipley was to ride and walk over it in looking after it. I went right over it, never improved it. No fence was erected on it. Lands in sections 24 and 30 are wild. A part of the time I had a portion of the Murphy place turpentine, where it had been boxed before, but refused to allow any new boxes cut on any of the land, although I had frequent applications to do it. I claimed under the sheriff's deed. The Supreme Court afterwards declared it void. I claimed under the deed before and after it, the judgment of *A. D. McKinnon* against the plaintiffs, under which I purchased. The suit in which my deed was declared void was plaintiffs against myself a year or two ago, and I had been holding the lands for more than seven years consecutively. Up to that time I was holding under my deed as title. * * * After the Supreme Court decided my deeds void, which I think was in the early part of 1908; after that decision I only

claimed it as color of title, I also claimed under a tax deed ejectment judgment, and adverse possession. The execution under which I purchased was my brother's, and I was his counsel in the case. I did pay money for the land other than the cost. I gave him credit for it. It was credited on the execution, and I gave him credit for it too. I said that Johnson never interfered with me in controlling the lands. I was renting them out, paying taxes on them, keeping trespassers off them, and selling a part of them. * * *

J. B. Cailey for the plaintiff testified: "I know the land in section 84, township 5 N., range 13 W., near Chipley called the Linton place; have known it for 18 or 19 years. I have had occasion to notice it during the last 10 years. During the last four or five years it has not been cultivated at all. Prior to that time it was partially cultivated. It has not been continuously occupied all that time. There have been times when it was left vacant, not occupied before June, 1906. From 1898 to 1906, possibly half the time, it was not occupied. It was not cultivated every year, I don't think. A man by the name of Wilkerson cultivated it two years. That was about all of the cultivation it had. I think Linton left there about June or August 1898 or 1899, somewhere along there. The Pursely place in 26-5-13 I have known it for the same space of time. It has not been occupied continuously by any one before June, 1906. There was no cultivation of these at all. It has not been occupied more than a year, if that long. It has been vacant for 10 years, no one in possession. The land in 24-5-13 lies in Alligator Creek mostly, and not occupied by any one for the last ten years. I mean the east half of 24-5-13. The S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 30, is practically all swamp, except 10 or 15 acres, and has never been occupied. It is round timbered. I know lot 2, block 1, in the Hagerman addition to the town of Chipley. It is vacant, not inclosed or cultivated. Years ago it was; no house on it; never was. I have passed the Linton place once or twice a week looking after Dekle's Johnson's and different parties lands. I could not tell you what date the place was vacant. It has been vacant for the last 10 years. * * * I would drive by there, and nobody was there, is how I know it was vacant. There was a part of the time before the fence was burned that it was not cultivated. * * * I was all the time at Chipley, except a few months, and I say the Linton and Murphy places were not occupied half the time; and nobody at all occupied the Murphy place, never heard of anybody occupying it these 10 years. The reason I know it I looked after the property of Mr. Johnson. I have been his agent, and was his agent at that time. I didn't know that D. L. McKinnon claimed to own it. Don't know anything about it. * * *

It was admitted that the ancestor of the plaintiffs below "was seised of said lands,

and that title and possession thereof were in him at the time of his death." As the decree against the heirs of the decedent was reversed, and the sale to the defendant below was declared to be void, the title remains in the heirs of the decedent, and the right to possession followed the title until another acquires title by adverse possession or otherwise. The admission of the administrator that he had not been in possession of the lands for about 10 years does not affect the rights of the other plaintiffs, and does not show continuous adverse possession by the defendant.

The defendant D. L. McKinnon under the plea of not guilty undertook to prove title by adverse possession under color of title for the statutory period of seven years. Where a title by adverse possession under color of title is asserted, the statute requires "a continued occupation and possession of the premises" "under the claim of title exclusive of any other right" "for seven years"; and provides that "land shall be deemed to have been possessed and occupied * * * (1) where it has been usually cultivated or improved; (2) where it has been protected by a substantial inclosure; (3) where (although not enclosed) it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for the ordinary use of the occupant; or (4) where a known lot or single farm has been partly improved, the portion of such farm or lot which may have been left not cleared or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated."

There is no such proof of possession and occupation of any of the lands by the defendant for seven years as to indicate that the jury erred in finding for the plaintiffs. The defendant does not give any data from which it can be inferred that he "possessed and occupied" any of the land in any of the ways contemplated by the statute, or in any way to show an actual, continuous possession or occupancy of any of the lands so as to give a title independent of the several methods of possession and occupancy expressly permitted by the statute.

The action was begun June 21, 1906, and the trial here reviewed was had June 19, 1909. The defendant testified that he "had been holding the lands for more than seven years consecutively"; but the facts testified to do not show the "holding" to have been any of the acts expressly allowed by the statute to be deemed a sufficient "possession of the premises." Assuming that, when the defendant went upon the lands known as the Murphy place and leased it "within two months" after February 9, 1898, he then entered into possession of the premises within the meaning of the statute, the defendant does not show with any degree of certainty that he continued to so possess and occupy

the lands for the full period of seven years in any of the ways indicated by the statute as being a sufficient possession and occupation. It is not shown that the lands were "usually cultivated or improved," or that they were "protected by a substantial inclosure," or that they were used for the supply of fuel or fencing timber, etc., or that it was a single farm partly improved; the remainder of it being "left not cleared or not inclosed according to the usual course and custom of the adjoining country." Independently of statutory methods of possession, it is not shown that the defendant was in actual, adverse, continued possession of the land for the period of seven years.

The same may be said of the lands known as the Linton place, except that the asserted possession began "during the term of court" after June 9, 1899, and this action was instituted June 21, 1906. As the only acts of possession shown of the wild lands and the town lots were that the defendant rode and walked over them in looking after them and paid taxes on them, the court did not err in directing a verdict for the plaintiffs as to them. Such acts of possession may be sufficient under a legal title, but they are inadequate to show the acquisition of title by adverse possession. Giving every possible probative force to the evidence in favor of the defendant does not show for him the acquisition of title by adverse possession under color of title in any of the ways permitted by the statute. This conclusion having been reached, it is not necessary to consider other contentions made here; there being evidence in support of the finding as to mesne profits.

The judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER and PARKHILL, JJ., concur in the opinion.

GERMAN-AMERICAN LUMBER CO. et al.
v. BARBEE.

(Supreme Court of Florida. April 6, 1910.
Rehearing Denied May 18, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 459*)—ASSESSMENT—DISCRETION OF ASSESSOR.

The law contemplates that a wide discretion be accorded to the tax assessor in the valuation of property for the purposes of taxation. In the absence of a clear and positive showing of fraud or of an illegal act or of an abuse of discretion rendering an assessment authorized by law so arbitrary and discriminating as to amount to a fraud upon a taxpayer or to a denial of the equal protection of the laws, the courts will not in general control the discretion of the tax assessor in making valuations for taxing purposes. The burdens of taxation cannot be made exactly equal.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 815; Dec. Dig. § 459.*]

2. TAXATION (§ 348*)—ASSESSMENT—VALIDITY.

The mere fact that where timber lands in a county are generally assessed at \$2 per acre when there are no timber leases thereon, and where there are such timber leases the lands are generally assessed at \$1.50 per acre and the timber leases thereon are separately assessed at \$1 per acre, does not render a particular assessment of the land invalid, where no actual fraud is shown, and it appears that the assessment was made by the tax assessor upon what he considered the value of the lands, and not upon an arbitrary valuation, and there is corroborating testimony as to the value of the land, and that the lands may be enhanced in value by the timber leases.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589; Dec. Dig. § 348.*]

In Banc. Appeal from Circuit Court, Calhoun County; J. E. Wolfe, Judge.

Bill by J. R. Saunders and B. P. Jones against L. M. Barbee. Prosecuted on complainant's death by the German-American Lumber Company and others, their successors in title. Judgment of dismissal, and complainants appeal. Affirmed.

Blount & Blount & Carter, for appellants.
Liddon & Carter, for appellee.

WHITFIELD, C. J. The bill of complaint in this cause alleges, in brief: That under contracts with B. P. Jones and J. R. Saunders, the owners of described lands in Calhoun county, the appellant corporation "has certain rights in and the ownership of the timber upon said lands, and, as a part of the obligation assumed by the said contracts, agreed * * * to pay all the taxes legally due upon said lands during the period mentioned in said contracts." That said lands for the year 1907 "were assessed and valued separately and independently from the timber thereon, and said timber was likewise for said year assessed to the German-American Lumber Company and valued separately and independently from said lands at the uniform valuation of \$1 per acre. That the lands are assessed at \$1.50 per acre, except a small portion which is assessed at \$2 per acre. That the taxes on the timber have been paid, and the taxes on the land have been paid, except \$771.31, which complainant alleges is excessive and illegal, in that, "in making the assessments and valuations for taxes in said county for said year, the assessor adopted an arbitrary plan or rule, whereby timbered lands when assessed to the owner, and where no leases of the timber or rights to timber or turpentine privileges existed in another, should be assessed at a uniform valuation of \$2 per acre without regard to the real value, but when such timber rights or leases or timber privileges existed in another such lands should be assessed uniformly at \$1.50 per acre, and the timber rights or leases or timber privileges should be assessed at a uniform valuation of \$1 per acre without regard to the real value in either

case. That, in pursuance of such an arbitrary plan or rule, practically all assessments of timbered lands and timber and turpentine rights and leases upon timbered lands were assessed for said year and in said county in the manner stated above, in consequence whereof most of the lands of your orators Jones and Saunders were assessed for said year at a uniform valuation of \$1.50 per acre, amounting to 56,296.53 acres, while the remainder amounting to 9,770.92 acres were assessed at a uniform valuation of \$2 per acre, and timber rights or leases on all of the said lands at a uniform valuation of \$1 per acre; the lands being assessed separately from the leases as aforesaid, and in the manner before stated. That in pursuance of such arbitrary plan or method of assessment all other timbered lands in said county upon which no timber rights existed in another, and which lands were assessed to the owners, were assessed at a uniform valuation of \$2 per acre without regard to the real value, except that in a few instances they were assessed at \$1.50 per acre, and in one case a large body of land belonging to the Brown Timber Company was for a most part assessed at \$.75 per acre, and none at a valuation exceeding \$1.50 per acre for said year. That the timbered lands and the timber thereon upon which no timber rights or leases existed in persons other than the owners, and which were assessed to the owners at \$2 per acre, were as valuable and their cash market value was as great as were the timbered lands and timber rights thereon of the said Jones & Saunders and others, which lands without the timber were assessed at \$1.50 and \$2 per acre in addition to the assessment of \$1 per acre, made for and on account of the timber and turpentine rights thereon which are assessed to persons other than the owners and paid upon as timber assessments. By reason of said assessment having been made in pursuance of the arbitrary-rule or plan aforesaid, your orators and the lands before mentioned have been discriminated against in the making of assessment to the extent aforesaid, amounting in aggregate, at the rate of taxation imposed upon the property in said county for said year for state and county purposes, to the sum before mentioned. That the assessments were made in pursuance of the plan aforesaid without regard to the true value of the lands or timber rights or any of them, but exclusively upon the fact whether the timber and the lands were assessed in one assessment to the owners, or separately, the lands to the owners, and the timber rights to other persons than the owners of the lands. The said assessments constitute apparent liens upon said lands, and said assessments and liens and the threatened advertisement and sale of the said lands by the defendant cast a cloud over the title thereto. That your orators are willing and hereby offer to pay all the taxes assessed for said year on said lands which your

honor may find to be legal and equitable." That the defendant, Barbee, is the tax collector of Calhoun county and threatens to and will advertise and sell said lands for said illegal taxes. That complainant tendered the taxes legally due, but they were not accepted. It is prayed that \$771.31 of the taxes levied and assessed as aforesaid be decreed to be illegal, inequitable, and unjust; that complainants are not legally liable for the same; that the tax collector be enjoined from collecting said excessive amount of taxes and from advertising and selling the lands for said excessive taxes; and for general relief. J. R. Saunders and B. P. Jones, who were parties complainant to the original bill, having died, the suit was revived in the names of their respective successors in title. The defendant tax collector by answer denied "that in pursuance of any arbitrary plan or method of assessment all other timbered lands in said county upon which no timber rights existed in another, and which lands were assessed to the owner, were assessed at a uniform valuation of \$1 without regard to the real value"; denies an arbitrary assessment and discrimination against complainants in the assessments made; denies an excessive valuation as alleged; and avers that the lands referred to are more valuable than any other large bodies and were assessed at the true value. A replication was filed and testimony was taken. The court on final hearing dismissed the bill of complaint, and the complainants appealed.

The question to be determined is whether the assessment of the lands referred to is illegal because the valuation is arbitrary and excessive. The statutes contain provisions that the tax assessor shall ascertain by personal inspection, "when not already sufficiently acquainted therewith, the value of the lands and assess them at their full cash value. * * * In case any land shall be timbered, and the timber or the right to turpentine same shall belong to a person other than the owner of the land, the assessor shall assess the value of the land independent and distinct from the value of the timber and the turpentine privileges and shall assess the value of such timber and of such turpentine privileges separate and distinct from the said land and from each other, assessing the value of the land and of the timber and of the turpentine privileges to the owners respectively thereof"; and that "the board of county commissioners shall have full power to equalize the assessment of the real estate * * * and for that purpose may raise or lower the value fixed by the * * * assessor * * * on any particular piece of real estate." Specific and definite provisions are made for hearings by the county commissioners of complaints as to the valuation of property as assessed. Sections 20, 23, and 24, c. 5596, and section 1, c. 5725, Acts 1907; sections 522, 525, 528, Gen. St. 1906.

There is no allegation or proof that com-

plaint was made to the county commissioners of the alleged excessive valuation of the lands, as should have been done by the complainant if the legality of the assessment is to be attacked on the ground that the valuation is discriminatory and excessive. On the contrary, there is evidence that no such complaint was made to the county commissioners. The tax assessor was examined as a witness, and denied that without regard to the real values he adopted an arbitrary rule or plan or a uniform valuation in assessing lands and the timber rights thereon as alleged, and testified that he made the assessment here assailed upon what he "considered the value of the lands." He considered the property mentioned "the best body of timber in the county, the best body of land in the county." A member of the board of county commissioners testified that the assessment for 1907 was approved by the county commissioners; that the assessment of the timber lease was separate and distinct from the land; that land worth \$2 per acre is not necessarily assessed at \$1 per acre when the timber lease on the land is assessed at \$1 per acre, "for the reason that land might be enhanced in value in the operation of that lease. The fact that the lease depleted the timber might make it more valuable for other purposes, * * * for farming purposes." Referring to this land, the witness said he considered "it the best tract in the county." There was testimony that timber lands generally in the county were assessed at \$2 per acre where there were no timber leases on it, and that the timber leases are assessed at \$1 per acre; but it is not shown that the land involved here was not worth the valuation at which it was assessed for taxation. A witness for the complainant testified that the lands "might possibly be worth \$3.50 per acre"; that some of it had "been selling for \$4 and \$5." There is clear and positive testimony in support of the answer of the defendant tax collector, and the evidence is sufficient to sustain the decree in favor of the defendant. The law contemplates that a wide discretion be accorded to the tax assessor in the valuation of property for the purposes of taxation. In the absence of a clear and positive showing of fraud or of an illegal act or of an abuse of discretion rendering an assessment authorized by law so arbitrary and discriminating as to amount to a fraud upon a taxpayer or to a denial of the equal protection of the laws, the courts will not in general control the discretion of the tax assessor in making valuations for taxing purposes. The burdens of taxation cannot be made exactly equal. See 2 Cooley on Taxation, 1440 et seq.; King v. Gwynn, 14 Fla. 32. No actual fraud is alleged in this case, and the acts alleged, even if fully sustained by proofs, are not in effect a fraud upon the complainants; and, in view of the entire ev-

idence, no such abuse of discretion in the tax assessor is shown as to render illegal the assessment complained of.

In the case of Logan v. Washington County, 29 Pa. 373, the court held that the value of the land was not enhanced by the separation of the interests in the land and in the coal in it. Here there is testimony that the separation of the interests in the land and the timber thereon might enhance the value of the land.

The decree is affirmed. All concur.

PENSACOLA BANK & TRUST CO. v. NATIONAL BANK OF ST. PETERSBURG.

(Supreme Court of Florida, Division B. April 2, 1910. Rehearing Denied May 4, 1910.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 109*)—RIGHT OF THIRD PERSON TO DEAL WITH CASHIER.

A bank dealing with the cashier of another bank, who is permitted by the directors to have complete control of its business relations with other banks, has a right to trust in the integrity of the cashier of the latter, and transact business with him accordingly, where there is nothing in the known state of affairs of the latter bank, or of the cashier's relation to it, to excite suspicion that he is using his position to the prejudice of his bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 280; Dec. Dig. § 109.*]

2. BANKS AND BANKING (§ 109*)—RIGHT OF THIRD PERSON TO DEAL WITH CASHIER.

S. was the cashier of a bank in the city of P., and was permitted by the directors to have complete control over the dealings of his bank with other banks and of its mail. In February, 1907, he, in behalf of his bank, entered into business relations with a bank at St. P., by which his bank was to keep a balance of \$5,000 with the bank of St. P., and the latter would receive certain collections for the former bank and credit the same to bank at P. A business of several thousand dollars a month was thus carried on between the two banks, including the discounting of a note by one of the stockholders of the P. bank, which was finally charged up to the P. bank at the request of S. On the 26th of July, 1907, S. wrote the cashier of the St. P. bank inclosing his own note for \$5,000, accompanied by good collateral, and requested that his note be discounted and the proceeds placed to the credit of the P. bank. This was done, and on September 11, 1907, at the request of S., this note was charged up to the P. bank and the collateral returned to it. Regular monthly statements showing these and all other transactions were sent by the St. P. bank to the P. bank, and no objection to the charging of S.'s note to the P. bank was made until the latter part of November, 1907. In a suit by the P. bank against the St. P. bank to recover the amount of the \$5,000 note of S. which was charged up to the P. bank, it is held that under this statement of facts the P. bank is not entitled to recover.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 280; Dec. Dig. § 109.*]

Error to Circuit Court, Hillsborough County; J. B. Wall, Judge.

Action by the Pensacola Bank & Trust Company against the National Bank of St. Petersburg. There was a directed verdict

for defendant, and plaintiff brings error. Affirmed.

See, also, 50 South. 414.

Blount & Blount & Carter and F. M. Simonton, for plaintiff in error. P. O. Knight and C. C. Whitaker, for defendant in error.

HOCKER, J. The Pensacola Bank & Trust Company, a corporation organized under the laws of Florida, sued the National Bank of St. Petersburg, Fla., in the circuit court of Hillsborough county, in an action at law, in February, 1908. The declaration contained counts for \$5,000, money received, for a like sum moneys expended, for a like sum work and labor, for a like sum moneys delivered and wrongfully paid out on the individual note of G. C. Scudamore, for a like sum of money of plaintiff used by the defendant, for a like sum of money found to be due plaintiff on account stated. The damages claimed are \$10,000. A bill of particulars is attached to the declaration. The defendant pleaded it was never indebted, it did not promise as alleged, and payment. The case was tried on these pleas. After the evidence was all submitted and the law of the case was being considered by the circuit judge on sundry instructions which were presented to him by the parties, the judge announced his view of the case to the effect that in his opinion the plaintiff was not entitled to recover. He then instructed the jury to find a verdict for the defendant, which it did, and a judgment in favor of the defendant was then entered. The plaintiff has brought the case here on a number of assignments of error. We have read the evidence with care, and with our view of the law applicable thereto we are unable to see that the circuit judge erred.

The National Bank of St. Petersburg was organized as a national bank in 1905. Mr. T. K. Wilson was its cashier before and during the time when the transactions occurred which brought about the litigation in this case. The Pensacola Bank & Trust Company was organized as a state bank in January, 1907, and G. C. Scudamore was its cashier. Scudamore and Wilson came to this state from Kentucky, were acquainted, and had business relations with each other before coming to this state. In February, 1907, Scudamore, the cashier of the Pensacola Bank, wrote to Wilson, the cashier of the St. Petersburg Bank, offering to enter into business relations on the part of his bank with the latter bank, which he represented would be of advantage to both banks. He offered on the part of his bank to keep an average balance of \$5,000 with the St. Petersburg Bank on the condition that the latter bank should receive certain collections for the former and credit the same to the Pensacola Bank—in other words, in the phraseology which they use—to clear its collecting items at par. These terms were accepted, and an account was opened in February, 1907, by the Pensacola Bank with the St. Petersburg Bank.

It seems that the first item of this account was a note of \$5,000 made by a Mr. Gordon, who seems to have been a stockholder in the Pensacola Bank, and the note was intended to raise money to pay for his stock in the latter bank. Scudamore wrote Wilson that he was anxious to interest Gordon in the bank, and that later on, if Gordon wanted to carry the note, the Pensacola Bank would take it from the St. Petersburg Bank and carry it. The note was renewed with the St. Petersburg Bank, and on August 20, 1907, at the request of Scudamore, was charged to the account of the Pensacola Bank. No objection appears to have been made to this action by the Pensacola Bank, though a statement was sent it showing the transaction. The business thus begun between the two banks continued from February, 1907, until some time in November, 1907. The accounts filed show that it amounted to several thousand dollars each month. The St. Petersburg Bank seems to have paid most of its indebtedness to the Pensacola Bank in New York Exchange at the request of the latter. On the 26th of July, 1907, Wilson wrote, inclosing his own individual note for \$5,000, to the St. Petersburg Bank, and requested the latter to discount the note and place the proceeds to the credit of the Pensacola Bank. This note was accompanied by collateral security in the form of a note for \$5,000 executed to Scudamore personally by parties who are represented as perfectly good for the amount. The note was discounted by the St. Petersburg Bank on the 29th of July, 1907, as requested by Scudamore, and the proceeds, \$4,970, was placed to the credit of the Pensacola Bank. On September 11, 1907, at Scudamore's request, this note was charged to the account of the Pensacola Bank and the collateral security returned with the note. A monthly statement showing this transaction was sent to the Pensacola Bank containing this request: "If your account is incorrect notify at once." And no objection was made to it until the 27th of November, 1907, when Mr. Bass, the president of the Pensacola Bank, wrote to Mr. Wilson, the cashier of the St. Petersburg Bank, stating that the latter had no right to charge the note of Scudamore for \$5,000 to the Pensacola Bank, and demanding that the amount be sent to the latter by return mail. On the 30th of November, 1907, Cashier Wilson answered this letter and stated that the understanding was when the loan was made it would at maturity be charged to the Pensacola Bank; that he simply carried out instructions; and that so far as the St. Petersburg Bank was concerned the matter was closed. Up to this time all of the business correspondence on the part of the Pensacola Bank with the St. Petersburg Bank, and all the financial arrangements between them, were conducted by Scudamore exclusively. After this time a good deal of correspondence took place between the two banks in regard to this Scud-

amore note; the St. Petersburg Bank maintaining that it was fully authorized to do what it had done. About this time the financial panic of 1907 was becoming acute, and the officers of the Pensacola Bank seem to have begun to take some interest in the affairs of the bank. An investigation was made, and it was found that Scudamore had appropriated over \$70,000 of the money of the bank. It was discovered that on the 26th of June, 1907, he had appropriated \$2,500 of the Pensacola Bank's cash and had charged the same to the St. Petersburg Bank, and left the books in such shape that the matter could not be traced any further. On July 27, 1907, Scudamore charged the St. Petersburg Bank on the books of the Pensacola Bank with \$2,500 and credited himself on his individual account with that amount. There is no evidence to show that the St. Petersburg Bank had any knowledge of these transactions, and no evidence that any one of the directors or officers of the Pensacola Bank knew of them until some time in the latter part of November, 1907, or even later, when the books of the latter were examined by an auditing company.

Mr. Wentworth testified that he was a director of the Pensacola Bank from the opening of the bank until about 1st of January, 1908; that his bank did not have a finance committee whose duty it was to reconcile statements of accounts between his and other banks doing business with it; that Scudamore generally attended to this; that he does not know who received the various statements sent to the Pensacola Bank by other banks; that he was not present when the mail came in, did not examine these statements until after this trouble arose about the 24th of November, when "we commenced to examine them," and found that the St. Petersburg Bank had charged the Scudamore note of \$5,000 to the Pensacola Bank.

Miss Waggenheim testified that she occupied the position of stenographer for the Pensacola Bank & Trust Company from the time it was organized; that Scudamore had charge of the opening of the mail in that institution; that she never saw any one else connected with the bank open its mail during the time she had been there; that the mail was brought to him by the porter, and he opened and distributed it.

Mr. F. A. Wood, the president of the St. Petersburg Bank, testified that he attended closely to the affairs of his own bank; that Scudamore was the only officer of the Pensacola Bank with whom they ever did any business; that he had his signature and did not have that of any other officer of the bank; that, if his bank had not discounted the \$5,000 note of Scudamore and placed the proceeds to the credit of the Pensacola Bank, the latter's account with his bank would have been overdrawn for the month of July; that he had no suspicion that Scudamore was dishonest; that, if he had known for a mo-

ment the Pensacola Bank & Trust Company would repudiate Scudamore's instructions about charging his note to the Pensacola Bank, he would have proceeded to collect it on the collateral, which was good; that he did not think for a moment the Pensacola Bank would repudiate those instructions of its cashier, as he had been following out the instructions of its cashier all along, and his bank sent the note with the collateral back to the Pensacola Bank, or to Scudamore, cashier of said bank, by the latter's instructions.

The charging of the Scudamore note of \$5,000 to the Pensacola Bank is the foundation of this suit against the St. Petersburg Bank. Quite a number of objections to testimony introduced by the defendant on the trial showing instructions from Scudamore authorizing this charge were made, and the rulings permitting it are assigned as error. It seems to us, however, that it was proper to admit the correspondence and instructions from Scudamore, and all other evidence tending to throw light upon the course of dealing between the two banks. It is insisted by the plaintiff in error that Scudamore was simply the cashier of the Pensacola Bank, and an agent, and that an agent cannot bind his principal when he is known to be acting for himself, and his interest is adverse to that of his principal. Several cases are cited by the plaintiff in error in which this principle is applied to the cashiers and presidents of banks.

In the case of *Hier, Administrator, v. Miller, Receiver*, 68 Kan. 253, 75 Pac. 77, 63 L. R. A. 952, it is held that a cashier of a bank has no implied authority to pay his individual debts by entering the amount of them as a credit upon the passbook of his creditor who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction; that the personal interest of the cashier was sufficient to put the creditor on notice; and that he was liable to the bank for the amount he thus received.

In the case of *Chrystie v. Foster*, 61 Fed. 551, 9 C. C. A. 606, the principle is applied as follows: "C., in order to obtain a credit on his personal account with a bank of which he was the president, procured the defendants, a banking firm, to discount his individual note, credit the amount to the bank, and notify the bank that he had deposited the amount with them to the credit of the bank. The bank had previously given C. credit for the amount, and, after being notified by the defendants that the deposit had been actually made with them, allowed C. to overdraw his account. Thereafter, and while his account with the bank was overdrawn, C., in his official character as president, authorized the defendants to charge the note to the account of the bank, and the

defendants did so. Held, in a suit by the receiver of the bank to recover the deposit, that, unless expressly authorized to do so, the president of the bank could not use the funds of the bank to pay his personal obligation, and, there being no proof of such express authority, the authorization given by him to the defendants was not a defense to the claim."

An examination of the facts of that case as they appear in the opinion shows them to be different from those of the instant case. In that case Collins was president of the Cheyenne National Bank. In order to credit himself with \$10,000 in his own bank for his own use, he procured the defendants, a banking firm of New York, to take his note for \$10,000, and to notify his bank he had deposited with them that amount to the credit of his bank. The banking firm did so, and wrote Collins' Bank: "Your account is credited this day \$10,000 for use—J. W. Collins with you." It is stated that the defendants knew Collins was representing himself and not his bank, and that the object of the transaction was to give Collins a personal credit with the bank for \$10,000. In the instant case the evidence does not show that the St. Petersburg Bank knew, or had reason to believe, that Scudamore was acting for himself in having his personal note discounted and placed to the credit of his bank. The most rational conclusion to be placed on this act was that he was acting for his bank and lending it his personal credit to keep up the balance of \$5,000 to the credit of his bank with the St. Petersburg Bank as he had promised to do. There was nothing to indicate to the latter bank, so far as we can discover, that Scudamore was making this transaction a basis for taking money out of the Pensacola Bank, or of getting personal credit with it. It is clear from the evidence that no officer of the Pensacola Bank ever gave the St. Petersburg Bank any such information either by letter, statement, or otherwise, until some time after the Scudamore note had been charged to the Pensacola Bank, and this note with its collateral security had been returned to the Pensacola Bank or its cashier, and the money derived from its discount had been paid out on the order of the Pensacola Bank, and a statement rendered showing these facts, and no timely objection was made to the transaction.

In the case of *Burton, Receiver, v. Burley, Receiver* (C. C.) 13 Fed. 811, it is held that "where the president of a National Bank instructed its correspondent bank to charge up against the bank of which he was president the amount of a note given by him in payment of such a note, and an account was rendered showing the transactions, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside the

transaction." The facts in this case are nearly analogous to those of the instant case. In the course of the opinion the court says: "What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each other. One bank would never know what to do on instructions given, or a charge made. Here is an individual account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made, and the account is rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank, or else banks must cease doing business with each other. And it ought to be so. Where a bank established under an act of Congress, or any other way, elects its own officers, the men who are interested in the bank—the stockholders, the depositors—ought to be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general usage of banks."

In the case of *Merchants' Bank v. State Bank*, 10 Wall. 804, 19 L. Ed. 1008, the Supreme Court of the United States held that: "Evidence of powers habitually exercised by a cashier of a bank, with its knowledge and acquiescence, defines and establishes as to the public those powers provided that they be such as the directors of the bank may, without violation of its charter, confer on such cashier."

In the case of *Chemical Nat. Bank of New York v. Armstrong* (C. C.) 78 Fed. 339, it is laid down as law that "a bank dealing with the chief executive officer of another bank has a right to trust in his integrity, and transact business with him accordingly; there being nothing in the known state of the affairs of his bank or his relations to it to excite suspicion." In this case the powers of executive officers of banks are discussed, and it is clearly shown that they cannot from the nature of the business in which banks are engaged be always limited by the rules which govern ordinary agencies.

The facts in the case of *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, are stated as follows: "H., as vice president of a Cincinnati bank, made application to a New York bank for a loan of \$300,000. The request was granted,

and that amount was placed to the credit of the Cincinnati bank upon the books of the New York bank. Immediately thereafter H. fraudulently caused himself to be personally credited upon the books of his own bank with a like sum of \$300,000. The action of H. in negotiating the above loan with the New York bank was unauthorized by the board of directors of the Cincinnati bank; but, after the arrangement had been made, that bank drew out by check the money that had been placed to its credit by the New York bank and used the same in discharging its valid obligations." On these facts "it is held that, by so using the money obtained from the New York bank by H. in his capacity as vice president, the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The fraud perpetrated by H. upon his own bank in having himself personally credited upon its books with the amount of the loan was a matter with which the New York bank had no connection, and its rights to recover could not be affected thereby. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H., who assumed to represent it." See the reasoning of Mr. Justice Harlan in the opinion. We see no reason why the rule thus laid down should not be applied in the instant case. The greater part, if not the whole, of the proceeds of the Scudamore note credited to the Pensacola Bank, were used by the latter bank in its business, and we can see no reason why it should again recover it in this action. If, instead of giving his own note to the St. Petersburg Bank, Scudamore had given the note of the Pensacola Bank, and it had been discounted and the proceeds used by the latter bank, we do not think it could be contended that it would not have been liable on the note to the St. Petersburg Bank. But the result is just the same as if this had been done. An examination of the cases shows that it is impossible to formulate a definition of the duties of a cashier that will be applicable to all cases. See Morse on Banks & Banking (4th Ed.) pars. 151-180, incl. He is said to have several inherent powers (paragraph 153, supra), among them the power to borrow money on behalf of the bank, and may bind the bank by a promissory note executed therefor (paragraph 160, supra). Besides his inherent powers, "he may be authorized to act for the bank, by the organic law, by action of the stockholders, by a vote of the board or their verbal order, by usage and tacit approval,

and by necessity or emergency calling for action manifestly to the interest of the bank." Paragraph 165, supra.

It is also said that "if the directors have for many years allowed the cashier to do, without interference, all the business of the bank, they are held thereby to have conferred upon him authority to do anything and everything on the corporate behalf which the charter or law does not absolutely prohibit and forbid a cashier to do, and so render illegal under all circumstances. If the cashier has a power so wide and liberal as this, it is needless to prove a usage to do any particular act which he may have undertaken. If the act does not fall within the limits of unavoidable and inherent illegality, it is valid and binds the bank, though a precisely similar act may never before have been undertaken by the cashier since the creation of the institution." Paragraph 165, supra. It is evident from the testimony in the instant case that the directors of the Pensacola Bank gave to Scudamore a very wide latitude in managing the affairs of the bank. He seems to have had complete control of its business relations with other banks, and of its mail. No one else seems to have taken any interest in these matters. The bookkeeping also seems to have been entirely under his control. If he used the latitude thus given him to the prejudice of the bank, it seems to us it would be most unjust to make the St. Petersburg Bank pay for the negligence of the directors of the Pensacola Bank.

Upon a consideration of the whole evidence in the light of the principles of law applicable thereto, a verdict for the plaintiff could not lawfully have been rendered; therefore the court did not err in directing a verdict for the defendant. See *Wade v. Louisville & N. R. Co.*, 54 Fla. 277, 45 South. 472; *Bass v. Ramos*, 58 Fla. 161, 50 South. 945.

The judgment is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, O. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

LA FLORIDIENNE, J. BUTTGENBACH CO., SOCIÉTÉ ANONYME, v. SEABOARD AIR LINE RY.
(Supreme Court of Florida. April 19, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 19*)—VIOLATION OF REGULATIONS OF RAILROAD COMMISSIONERS—RIGHT OF ACTION—LIMITATION.

Under the provisions of section 2910, Gen. St. 1906, authorizing suits against railroad companies for violation of the rules, rates, and regulations of the railroad commissioners, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

providing that all suits under this chapter shall be brought within 12 months after the commission of the alleged wrong or injury, the time thus limited is a condition precedent to the bringing of any such suit. Such limitation of time is not like an ordinary statute of limitation, affecting the remedy merely, but enters into and becomes a part of the right of action itself, and, if allowed to elapse without the institution of the action, such right of action becomes extinguished and is forever gone.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 19.*]

2. CARRIERS (§ 2*)—VIOLATION OF REGULATIONS OF RAILROAD COMMISSION—LIMITATIONS.

Chapter 5624, Laws 1907, which undertook to amend said section 2910 of the General Statutes of 1906, so as to permit such suits to be brought within 12 months after the termination of suits brought by the railroad commission to enforce their rates, etc., does not and cannot have the effect of reviving a cause of action that accrued under the amended section of the statute and that had become extinguished by the lapse of time prior to the enactment of said amendatory statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 2*]

Hocker, J., dissenting.

In Banc. Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by La Floridienne, J. Buttgenbach Company, Société Anonyme, against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

Bisbee & Bedell, O. T. Green, and R. L. Anderson, for plaintiff in error. Geo. P. Rainey, L. N. Green, W. E. Kay, and R. A. Burford, for defendant in error.

TAYLOR, J. On the 9th day of August, 1907, the plaintiff in error, as plaintiff below, sued the defendant in error, as defendant below, in the circuit court of Marion County; the declaration alleging as follows:

“For that whereas heretofore, to wit, on the 17th day of December, A. D. 1903, the railroad commissioners duly existing and organized under the laws of the state of Florida, at a meeting of the said commissioners held in Tallahassee, Fla., of which the defendant had due notice and appeared before the said commissioners at said meeting, made and passed an order in part as follows, to wit: ‘The rate to be charged by all the railroads and common carriers doing business wholly or in part within the state of Florida for the transportation of phosphate to points within the state shall not exceed one cent per ton per mile.’ And did further order: ‘That where a shipment of phosphate shall pass over two or more railroads in reaching its destination within the state of Florida, the initial line may charge one and one-half cents per ton per mile for the first ten miles which said phosphate shall be hauled.’ And the plaintiff alleges that the defendant company had due notice of and received a copy of the said order soon after the same was

made and passed as aforesaid. And the plaintiff further alleges: That the said defendant company refused to comply with and obey the said order fixing the rate for carrying phosphate as aforesaid, and thereupon, to wit, on the 7th day of March, 1904, an action of mandamus was commenced on the relation of the said railroad commissioners and others in the name of the state of Florida, against the said defendant company, in the Supreme Court of the state of Florida, to compel it to obey and comply with the said order and to carry and transport phosphate at the price and rate fixed in said order. That due service was made on the defendant in the said action, and the defendant appeared and answered in the said action. That such further proceedings were had therein that afterwards, to wit, on the 19th day of October, 1904, said Supreme Court entered its judgment in the said action in the words and figures following, to wit: ‘This cause coming on to be heard upon the amended return of the respondent filed by leave of the court on July 26, 1904, and the joinder of issue upon the amended return of the respondent to the alternative writ of mandamus issued herein, and upon oral and documentary evidence in behalf of the respective parties, submitted on the 12th instant, and having been argued by counsel for the respective parties, and the court having considered the same, and being now advised of its judgment in the premises, finds the issues in favor of the plaintiff: Therefore it is ordered that the peremptory writ of mandamus be and the same is hereby granted; and it is further ordered that the plaintiff do recover of the respondent its costs by it in this behalf expended, which costs are taxed at the sum of —; and it is further ordered that the respondent is required to make return to this court instant of its full compliance with the commands of the said peremptory writ of mandamus.’ That immediately thereafter the said defendant company removed the record of the said action into the Supreme Court of the United States by writ of error, and such further proceedings were thereafter had in the said Supreme Court of the United States that thereafter, to wit, on December 3, 1906, the said judgment of the said Supreme Court of Florida was affirmed by the judgment of the said Supreme Court of the United States. Plaintiff further alleges that the peremptory writ of mandamus which was ordered by the said Supreme Court of Florida on the 19th day of October, 1904, has never been issued. And plaintiff alleges that during the times hereinbefore and hereafter mentioned the defendant was a corporation and was engaged in the state of Florida in the business of a common carrier, and as such owned and operated a railroad between several points and places in Florida and Fernandina, Fla., and at the said times the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Atlantic Coast Line Railroad Company was a corporation and was engaged in doing business as a common carrier in the state of Florida, and as such owned and operated a line of railroad between several interior points and places in Florida and other points and places where its line of road connected with the line of railroad of defendant, making a continuous line of railroad from said interior points and places to Fernandina, Fla. And plaintiff alleges that during the year A. D. 1904 the plaintiff delivered to the said Atlantic Coast Line Railroad Company at Dunnellon, Fla., Holder, Fla., and Anita, Fla., 64,358.70 tons of phosphate rock of 2,000 pounds each, destined to Fernandina, Fla., and the said Atlantic Coast Line received the said phosphate rock and carried the same, to wit, to Ocala, Fla., a station on its line of road; that the defendant received the said phosphate rock at Ocala, Fla., from the said Atlantic Coast Line Railroad Company, hereinafter called the other 'carrier,' and carried the same to Fernandina, Fla. And plaintiff alleges that the defendant and the said other carrier charged the plaintiff for the said services the aggregate sum of \$132,500.00, and demanded payment thereof, which plaintiff paid, paying from time to time each separate charge for each separate shipment of phosphate which was made for each separate service and shipment. And plaintiff avers that the legal charges, according to said commission rate, for the aforesaid services of transporting the said rock from the places of shipment to Fernandina aforesaid, were in the aggregate the sum of \$104,260.79, which was \$28,239.97 less than the amount so as aforesaid charged and collected from the plaintiff. And plaintiff avers that the total distance in miles from the said points of shipment of the said phosphate rock to Fernandina, Fla., was, to wit, 162 miles. And the distance the defendant hauled the said rock was 130 miles, and defendant's proportion of the said excess charges made and paid as aforesaid according to the number of miles it hauled said phosphate rock is the sum of \$22,659.81, to recover which this action is brought, with legal interest thereon from the date of the said several and respective payments. And plaintiff alleges that during the year A. D. 1905 plaintiff delivered to said other carrier at Dunnellon, Holder, and Anita, Fla., 38,457 tons of phosphate rock of 2,000 pounds each destined to Fernandina, Fla., and the said other carrier received the said phosphate rock and carried the same to, to wit, Ocala, Fla., a station on its line; that the defendant received the said phosphate rock at Ocala aforesaid from the said other carrier and hauled and carried the same to Fernandina, Fla. And plaintiff alleges that the defendant and the said other carrier charged the plaintiff for the said services the aggregate sum of \$68,645.20, and demanded payment thereof, which plain-

tiff paid, paying from time to time each separate charge for each separate shipment of said phosphate which was made for each separate service and shipment. The plaintiff avers that the legal charges according to the said commission rate, for the aforesaid services of transporting the said rock from the places of shipment to Fernandina, were in the aggregate the sum of \$62,267, which is \$6,378.20 less than the amount so as aforesaid charged and collected. And the plaintiff avers that the total distance in miles from the said points of shipment of the said phosphate rock to Fernandina, Fla., was, to wit, 162 miles; and the distance the defendant hauled the said rock was 130 miles, and that the defendant's proportion of the said excess charges made and collected as aforesaid, according to the number of miles it hauled the said rock, is the sum of \$5,118.20, to recover which this action is brought, with legal interest thereon from the date of the said several and respective payments. Plaintiff avers: That the said connected line of railroads of defendant and the said other carrier was the only railroad over which plaintiff could have procured the transportation of the said phosphate rock from the interior places aforesaid to Fernandina aforesaid. That prior to the bringing of this suit plaintiff made a demand in writing on the defendant for the said money damages sustained as aforesaid, together with interest thereon, which defendant refused to pay, and afterwards and prior to bringing this suit plaintiff made a written demand upon the said railroad commissioners, requesting and requiring them to enforce the recovery of the said damages so as aforesaid sustained, which said written demand was made more than 90 days prior to the bringing of this suit, and that the said commissioners failed to institute a suit to enforce the recovery of the said damages within 90 days after the said demand on them was made by the plaintiff; wherefore plaintiff brings this suit and claims \$60,000 damages, including its expenses, the expenses of its agents, and their services in this behalf, and reasonable attorney's fees and costs."

To this declaration the defendant filed the following pleas:

"Comes the defendant, Seaboard Air Line Railway, in the above-entitled cause, by L. N. Green, its attorney of record therein, and, not waiving any plea in abatement herewith filed, but insisting and relying upon the same, for pleas severally to each and every cause of action set forth or declared upon in the amended declaration of plaintiff, says:

"(6) And for a sixth plea in this behalf says that said cause or causes of action alleged by plaintiff did not accrue within 12 months prior to the commencement of this action.

"(7) And for a seventh plea this defendant says that this action was not brought within

12 months after the commission of the alleged wrong or wrongs, or the injury or injuries whereof the plaintiff complains.

"(8) And for an eighth plea defendant says that some or all of the alleged causes of action had accrued more than 12 months prior to the 2d day of June, 1907.

"(9) And for a ninth plea defendant says, that some or all of the alleged wrongs or injuries of which the plaintiff complains were committed more than 12 months before the 2d day of June, 1907.

"(10) And for a tenth plea defendant says that various of the alleged wrongs or injuries whereof plaintiff complains were committed more than 12 months before the 2d day of June, 1907."

To these pleas the plaintiff below filed the following demurrer:

"And for a demurrer to the defendant's sixth plea plaintiff says that the same is bad in substance. And for matter of law to be argued in support of this demurrer plaintiff specifies that by chapter 5624 of the Laws of Florida the limitation upon actions of this character, under the circumstances set forth in the declaration, was extended until 12 months after the termination of the legal proceedings between the state of Florida and the railroad company mentioned in the declaration and in said chapter 5624.

"And for a demurrer to defendant's seventh plea plaintiff says that the same is bad in substance. And for matter of law to be argued in support of this demurrer plaintiff specifies that by chapter 5624 of the Laws of Florida the limitation upon actions of this character, under the circumstances set forth in the declaration, was extended until 12 months after the termination of the legal proceedings between the state of Florida and the railroad company mentioned in the declaration and in said chapter 5624.

"And for a demurrer to defendant's eighth plea plaintiff says that the same is bad in substance. And for matter of law to be argued in support of this demurrer plaintiff specifies that by chapter 5624 of the Laws of Florida the limitation upon actions of this character, under the circumstances set forth in the declaration, was extended until 12 months after the termination of the legal proceedings between the state of Florida and the railroad company mentioned in the declaration and in said chapter 5624.

"And for a demurrer to defendant's ninth plea plaintiff says that the same is bad in substance. And for matter of law to be argued in support of this demurrer plaintiff specifies that by chapter 5624 of the Laws of Florida the limitation upon actions of this character, under circumstances set forth in the declaration, was extended until 12 months after the termination of the legal proceedings between the state of Florida and the railroad company mentioned in the declaration and in said chapter 5624.

"And for a demurrer to defendant's tenth

plea plaintiff says that the same is bad in substance. And for matter of law to be argued in support of this demurrer, plaintiff specifies that by chapter 5624 of the Laws of Florida the limitation upon actions of this character, under the circumstances set forth in the declaration, was extended until 12 months after the termination of the legal proceedings between the state of Florida and the railroad company mentioned in the declaration and in said chapter 5624."

This demurrer was overruled by the court below. Thereupon the plaintiff below filed the following replications to the defendant's pleas:

"The complainant, as to the sixth, seventh, eighth, ninth, and tenth pleas herein pleaded, for replication thereunto says: That heretofore, to wit, on the 17th day of December, A. D. 1903, the railroad commissioners duly existing and organized under the laws of the state of Florida, at a meeting of the said commissioners held in Tallahassee, Fla., of which the defendant had due notice, and appeared before the said commissioners at the said meeting, made and passed an order in part as follows, to wit: 'The rate to be charged by all the railroad and common carriers doing business wholly or in part within the state of Florida for the transportation of phosphate to points within the state shall not exceed one cent per ton per mile.' And did further order: 'That where a shipment of phosphate shall pass over two or more railroads in reaching its destination within the state of Florida, the initial line may charge one and one-half cents per ton per mile for the first ten miles which said phosphate shall be hauled.' And the plaintiff alleges that the defendant company had due notice of and received a copy of the order soon after the same was made and passed as aforesaid. And the plaintiff further alleges: That the said defendant company refused to comply with and obey the said order fixing the rate for carrying phosphate as aforesaid, and thereupon it became necessary to prosecute a suit to compel the defendant to obey and comply with the said order, and afterwards, to wit, on the 7th day of March, 1904, an action of mandamus was commenced on the relations of the said railroad commissioners and others in the name of the state of Florida, against the said defendant company, in the Supreme Court of the state of Florida, to compel it to obey and comply with the said order and to carry and transport phosphate at the price and rate fixed in said order. Due service was made on the defendant in the said action, and the defendant appeared and answered in the said action. That such further proceedings were had therein that afterwards, to wit, on the 19th day of October, 1904, said Supreme Court entered its judgment in the said action in the words and figures following, to wit: 'This cause coming on to be heard upon the amended return of the respondent filed by leave of the court on

July 26, 1904, and the joinder of issue upon the amended return of the respondent to the alternative writ of mandamus issued herein and upon oral documentary evidence in behalf of the respective parties, submitted on the 12th instant, and having been argued by counsel for the respective parties, and the court having considered the same, and being now advised of its judgment in the premises, finds the issue in favor of the plaintiff: Therefore it is ordered that the peremptory writ of mandamus be and the same is hereby granted; and it is further ordered that the plaintiff do recover of the respondent its cost by it in behalf expended, which costs are taxed at the sum of ———; and it is further ordered that the respondent is required to make return to this court instant of its full compliance with the commands of the said peremptory writ of mandamus.' That immediately thereafter the said defendant company removed the record of the said action into the Supreme Court of the United States by writ of error, and such further proceedings were thereafter had in the said Supreme Court of the United States that thereafter, to wit, on December 3, 1906, the said judgment of the said Supreme Court of Florida was affirmed by the judgment of the said Supreme Court of the United States, and by such affirmance the said action of mandamus terminated, except that the peremptory writ of mandamus was not issued until long after, to wit, after the 3d day of December, A. D. 1906, and plaintiff avers that this its action was commenced and brought within 12 months after, and from the date of the end and termination of the said action of mandamus as aforesaid brought and prosecuted."

To this replication the defendant below filed the following demurrer:

"The defendant, by L. N. Green, its attorney, says that the replication of the plaintiff to the sixth, seventh, eighth, ninth, and tenth pleas severally, of the defendant, is bad in substance. Points of law to be argued in support of the demurrer to the replication as applicable to each plea:

"(1) The facts stated in the replication do not constitute in law any sufficient reason why the bar of the statute of limitations should not apply to, or defeat, the cause of action and rights of recovery, and each and every such cause of action and right of recovery set up in the declaration.

"(2) The facts stated in the replication do not constitute in law any sufficient reason for reviving or restoring, or have the effect in law to revive or restore the causes of action and rights of recovery alleged in the declaration, or either or any such cause of action or right of recovery, which causes of action and rights of recovery, and each and every of them, had become extinct and of no effect by the lapse of time alleged in the plea.

"(3) Chapter 5624 of the Laws of Florida, approved June 3, 1907, does not apply to

the causes of action or rights of recovery set up in the declaration, or to any cause of action or right of recovery as to which like those mentioned in the declaration, the period of time mentioned in the plea had elapsed before the time when said chapter 5624 of the Laws of Florida became operative, to wit, June 3, 1907.

"(4) Chapter 5624 of the Laws of Florida, which is relied upon to sustain, and as a basis in law for, the plaintiff's replication, is void and of no effect to revive or restore the alleged causes of action and rights of recovery set out in the declaration, or either or any of such causes of action or rights of recovery, which causes of action and rights of recovery, and each and every of them, had become extinct and of no effect prior to the date upon which chapter 5624 of the Laws of Florida became effective as a law of the state of Florida, to wit, June 3, 1907.

"(5) Chapter 5624 of the Laws of Florida, approved June 3, 1907, which is relied upon to sustain, and as a basis in law for, the plaintiff's replication, is void in law and of no effect to revive or restore the causes of action and rights of recovery set out in the declaration, or either or any of such causes of action or rights of recovery, and deprive the defendant of its vested right against the payment of such causes of action and rights of recovery resulting to the defendant from the lapse of time alleged in each plea to which the said replication is pleaded.

"(6) Chapter 5624 of the Laws of Florida, approved June 3, 1907, which is relied upon to sustain, and as a basis in law for, the plaintiff's replication, is void in law and of no effect to revive or restore the alleged causes of action or rights of recovery mentioned in the declaration, or either or any of such causes of action or rights of recovery; such chapter 5624 of the laws of Florida being in violation of the provisions of section 12 of the Declaration of Rights of the Constitution of the state of Florida that no person shall be deprived of property without due process of law.

"(7) Chapter 5624 of the Laws of Florida, approved June 3, 1907, which is relied upon to sustain, and as a basis in law for, plaintiff's replication, is void and of no effect to revive or restore the causes of action or rights of recovery set up in the declaration, or either or any of such causes of action or rights of recovery, which causes of action and rights of recovery had become extinct by the lapse of time mentioned in each of said pleas.

"(8) Chapter 5624 of the Laws of Florida, approved June 3, 1907, which is relied upon to sustain, and as a basis in law for, plaintiff's replication, is void and of no effect to revive or restore the rights of action and causes of action, or rights of recovery set up in the declaration, or either or any of such rights or action or causes of action or

rights of recovery, which rights and causes of action and rights of recovery had become barred by the lapse of time mentioned in each of said pleas.

"(9) There is no law of the state of Florida that makes the facts stated in said replication sufficient to revive the alleged causes of action or rights of recovery sued on, or either or any of such causes of action or rights of recovery, from the legal effect of being destroyed by the lapse of time alleged in each of said pleas.

"(10) That chapter 5624 of the Laws of Florida, in so far as it seeks to restore or revive any right of action or cause of action or right of recovery set out in the plaintiff's declaration, is unconstitutional and void, in that it is restrictive in its purpose and effect.

"(11) That chapter 5624 of the Laws of Florida, in so far as it seeks to restore or revive any claim or claims of plaintiff or right of plaintiff to recover any amount of money to compensate him for expenses including the value of its time and expenses, is unconstitutional and void, because in that it is retroactive in its purpose and effect.

"(12) That chapter 5624 of the Laws of Florida, in so far as it seeks to restore or revive any claims or claim of plaintiff for an amount of money to compensate him for all reasonable attorney's fees, as claimed in the declaration, is unconstitutional and void because it is in violation of the provisions of section 17 of the Declaration of Rights of the Constitution of the state of Florida that no ex post facto law shall ever be passed."

This demurrer was sustained by the court below, and, the plaintiff declining to plead further, final judgment upon the demurrer was rendered in favor of the defendant below, and for a review of this judgment the plaintiff below brings the case here by writ of error, and assigns the following as error:

(1) The court erred in its order of February 24, 1909, overruling plaintiff's demurrer to defendant's sixth plea.

(2) The court erred in said order in overruling plaintiff's demurrer to defendant's seventh plea.

(3) The court erred in said order in overruling plaintiff's demurrer to defendant's eighth plea.

(4) The court erred in said order in overruling plaintiff's demurrer to defendant's ninth plea.

(5) The court erred in said order in overruling plaintiff's demurrer to defendant's tenth plea.

(6) The court erred in its order made April 19, 1909, sustaining the defendant's demurrer to the plaintiff's replication to the sixth, seventh, eighth, ninth, and tenth pleas of the defendant.

(7) The court erred in entering final judgment in favor of defendant April 19, 1909.

Section 2910 of the General Statutes of Florida of 1906 provides as follows:

"2910. Power to sue in behalf of individuals. If any railroad, railroad company or other common carrier doing business in this state, shall, in violation or disregard of any rule, rate or regulation, provided by the commissioners aforesaid, inflict any wrong or injury on any person, it shall be the duty of the railroad commissioners if requested by such injured person to institute proceedings to compel restitution and to enforce the penalty incurred in any court having jurisdiction, and such action by the railroad commission shall preclude settlement by the party or parties injured without the consent of the commission. And if any railroad company or common carrier shall discriminate by way of rebate or otherwise, directly or indirectly, in favor of any consignor or consignee of freights within this state, or allowing him a reduction of the rate fixed by said commissioners as reasonable and just, any other consignor or consignee of freights within this state shall have a right of action against the said railroad company or common carrier, and the amount of his damages shall be fixed by a jury, unless a jury shall be waived, and the measure of damages shall be such sum or sums of money as will fairly compensate the injury done to said last mentioned consignor or consignee. But in all such cases demand in writing on said railroad, railroad company or common carrier shall be made for the money damages sustained before suit is brought for recovery under this section and all suits under this chapter shall be brought within twelve months after the commission of the alleged wrong or injury."

By chapter 5624, Laws approved June 3, 1907, this section of the General Statutes was amended to read as follows: "If any railroad, railroad company or other common carrier doing business in this state, shall, in violation or disregard of any rule, rate or regulation, provided by the commissioners aforesaid, inflict any wrong or injury on any person, it shall be the duty of the railroad commissioners, if requested by such injured person, to institute proceedings to compel restitution, and to enforce the penalty incurred in any court having jurisdiction, and such action by the railroad commission shall preclude settlement by the party or parties injured without the consent of the commission. And if any railroad company or common carrier shall discriminate, by way of rebate or otherwise, directly or indirectly, in favor of any consignor or consignee of freights within this state, or allowing him a reduction of the rate fixed by said commissioners as reasonable and just, any other consignor or consignee of freights within this state shall have a right of action against the said railroad company or common carrier, and the amount of his damages shall be fixed by a jury, unless a jury shall be waived, and the measure of damages shall be such sum or sums of money as will fairly compensate the injury

done to said last mentioned consignor or consignee. But in all such cases demand in writing on said railroad, railroad company or common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and all suits under this chapter shall be brought within twelve months after the commission of the alleged wrong or injury, except in cases where the railroad commissioners have heretofore been, or shall hereafter be, by the refusal of such railroad or common carrier to observe the rates, rules, schedules or regulations by the railroad commissioners compelled to resort to suits to enforce such rates, rules, schedules, or regulations, and in such cases, suits for such loss, damage or penalty may be brought within twelve months after the termination of such suits in favor of the railroad commissioners."

In the case of *Parmelee v. Savannah, F. & W. Ry.*, 78 Ga. 239, 2 S. E. 686, the Supreme Court of Georgia, construing a statute identical with the Florida statute first above quoted, held that such statute makes it a condition precedent to the bringing of a suit for the recovery of amounts paid for freight to a railroad company in excess of the sum allowed by the Railroad Commission that the suit should be brought within 12 months from the time the right of action accrues.

In *Gulledge v. Seaboard Air Line R. Co.*, 148 N. C. 567, 62 S. E. 732, it was held that, where a statute created a new right of action and imposed a limitation which was a condition to the exercise of such right, no explanations as to why suit was not brought within the specified time would avail to excuse the default, in the absence of a saving clause in the statute.

In *Stern v. La Compagnie Générale Transatlantique (D. C.)* 110 Fed. 996, it was held that, where a statute gives a right of action for wrongful death, "provided that every such action shall be commenced within 12 calendar months after the death of such deceased person," such proviso was not merely a designation of the ordinary period of limitation for such actions, operating as a part of the general statute of limitations of the state, on the remedy alone, and hence subject to extension under a provision of such general statute when the defendant was not a resident of the state, and having an action to enforce the right given when brought in another jurisdiction, to be governed by the law of the forum as to limitation, but was an express condition of the right of action itself, which must be given effect in every forum wherein an action based upon the statute is instituted. *Thompson v. Hoxsie*, 25 R. I. 377, 55 Atl. 980; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; 19 Am. & Eng. Ency. Law, p. 151.

Our conclusion is that under the provisions of the first above quoted statute the period of

time (12 months) within which all actions under such statute must be instituted enters into and becomes a part of the right of action itself, and that, if such limited time is allowed to elapse without the institution of an action, the right of action itself is forever extinguished and gone, and that such limitation is not like ordinary statutes of limitations that may be said to affect the remedy merely, but directly affects the very right of action itself.

The replications of the plaintiff to the pleas of the defendant setting up this bar seek to avoid the extinguishment of its right of action, invoking the provisions of chapter 5624, Laws 1907, last above quoted, by which the time for bringing such actions was extended to 12 months after the termination of suit by the railroad commission to enforce its schedules, rules, rates, etc., and alleging that a suit by the railroad commission had been instituted and had terminated within 12 months before the bringing of this suit. The declaration of the plaintiff and the pleas of the defendant show that the cause of action sued on arose more than 12 months prior to the enactment of this last-mentioned statute, and that under the provisions of the first-quoted statute the right of action of the plaintiff had become extinct prior to the passage of the last-mentioned law. Under these circumstances, the Act of June 3, 1907, chapter 5624, could not affect the cause of the plaintiff so as to revive his right of action, for that had become extinguished prior to the act of the Legislature. It is next contended that, even if the plaintiff's claim was barred or extinguished under the statute, that still he has a remedy at the common law for recovery of the alleged excessive freight charges. This contention cannot be sustained. There is in the declaration of the plaintiff no count or allegation upon which the alleged common-law remedy is invoked; but, on the contrary, the declaration plants itself entirely upon the provisions of our statute. The court below ruled correctly in sustaining the defendant's demurrer to the replication of the plaintiff to its pleas, and in the entry of judgment in the defendant's favor, and such judgment is hereby affirmed, at the cost of the plaintiff in error.

WHITFIELD, C. J., and SHACKLEFORD, COCKRELL, and PARKHILL, JJ., concur.

HOCKER, J., dissents.

McRAINEY v. JARRELL et al.
(Supreme Court of Florida, Division A. April 19, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 237*)—DEMURRER IN ANSWER.
When a defendant in a suit in equity avails himself of the right and privilege accorded him

by section 1871 of the General Statutes of 1906 of incorporating a demurrer to the entire bill in his answer thereto, whereby he attacks the equity of the bill, such demurrer is not overruled by the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 492; Dec. Dig. § 237.*]

2. EQUITY (§ 241*)—PLEADING—DEMURRER IN ANSWER—HEARING.

When a defendant in a suit in equity incorporates in his answer to the bill a general demurrer, whereby he attacks the equity of the bill, it is only at the final hearing of the cause that such demurrer can be called up for disposition, though it should be called to the attention of the court at that time before the merits are gone into.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.*]

On motion to reinstate appeal. Granted, and judgment affirmed.

For former opinion, see 59 Fla. —, 52 South. 10.

SHACKLEFORD, J. The appeal entered in this case, by reason of a defective certificate to the transcript, was dismissed. 59 Fla. —, 52 South. 10. A motion for reinstatement of the same on the docket of this court was made, in accordance with the provisions of chapter 5898 of the Laws of Florida (Laws 1909, p. 45), which was granted.

Two points are presented by the assignment of errors for our determination, both of which involve the proper construction of section 1871 of the General Statutes of 1900, which is as follows:

"1871. (1419). May be Incorporated in the Answer.—The defendant may in all cases, instead of filing a formal plea or demurrer, insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter or had demurred to the bill."

The defendants filed an answer to the bill of complaint and incorporated a demurrer therein, in which they attacked the equity of the bill. The complainant filed a motion to overrule the demurrer on the ground that it was a general demurrer going to the whole bill, and, in consequence such demurrer was waived or overruled by the filing of the answer. The motion also sought, in the event the court refused to overrule the demurrer, permission to have the same argued and disposed of prior to the final hearing. The court overruled both grounds of the motion, and upon this ruling all the assignments of error are predicated.

We are of the opinion that the ruling of the trial court was entirely proper. See *Budd v. Gamble*, 13 Fla. 265, and *Hollingsworth v. Handcock*, 7 Fla. 338, and the authorities cited therein, especially *Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274; 1 *Daniell*, Ch. Pl. & Pr. (6th Ed.) *715; *So. L. I. & T. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Alden v. Penney*, 12 Fla. 348, 378. Also see 3 *Ency. of Pl. & Pr.* 415, 416, and authorities

cited in notes. While the demurrer so incorporated in the answer is postponed to the final hearing, it must be called up for disposition at that time before the merits are gone into. Further discussion seems unnecessary.

The interlocutory order appealed from must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

MORGAN v. EATON et ux.

(Supreme Court of Florida, Division B. May 12, 1910. Rehearing Denied May 18, 1910.)

(Syllabus by the Court.)

1. CONTRACTS (§ 145*)—"PLACE OF CONTRACT."

Where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the "place of the contract."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5392, 5393.]

2. VENUE (§ 5*)—PROCEEDINGS TO ENFORCE.

A suit to enforce specific performance of an agreement to convey land need not be brought in the county where the land lies.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 5; * Specific Performance, Cent. Dig. § 324.]

3. SPECIFIC PERFORMANCE (§§ 4, 6, 66*)—NATURE OF REMEDY—EFFECT OF REMEDY AT LAW.

It is the settled rule that the remedy by specific performance is mutual as between vendor and vendee, and, where the remedy is sought by the vendor, it makes no difference that the relief he seeks thereby is only to enforce the payment of a specific sum of money. And a suit by a vendor for specific performance of a contract for the sale of land cannot be defeated on the ground that there is a remedy at law.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9-11, 197; Dec. Dig. §§ 4, 6, 66.*]

4. APPEAL AND ERROR (§ 959*)—PLEADING (§ 236*)—AMENDMENT—DISCRETION OF TRIAL COURT.

It is the settled rule here that our trial courts are vested with a broad discretion in the matter of allowing amendments of the pleadings in a cause, and, unless there is a gross and flagrant abuse of this discretion, the appellate court will not interfere with its exercise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3825; Dec. Dig. § 959; * Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

5. VENDOR AND PURCHASER (§ 128*)—NATURE OF CONVEYANCE REQUIRED.

The rule is that where it appears from the contract, or the circumstances accompanying it, that the parties had in view merely such a conveyance as will pass all the title which the vendor had, whether defective or not, that is all the vendee can insist upon.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 128.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by Bradley L. Eaton and wife against C. C. Morgan. Decree for complainants, and defendant appeals. Affirmed.

See, also, 51 South. 814.

C. C. Morgan, in pro. per. Geo. M. Powell and C. E. Pelot, for appellees.

TAYLOR, J. The appellees filed their bill in equity in the circuit court of Duval county for the specific performance of a contract for the purchase from them by the appellant of divers tracts of land situated in De Soto county, Fla. The bill alleges that the contract of purchase made by the defendant, Morgan, stipulated only for a quitclaim deed to all of the interests of the complainants in and to said land, which deed was to be executed and delivered upon the payment by the defendant of the sum of \$500; that the deed as stipulated for was executed and tendered to the defendant, but he failed and refused to comply with his contract of purchase. The bill also alleges that the said contract was made in the city of Jacksonville in Duval county. The defendant filed a plea in abatement of said suit on the ground that he (the defendant) was not a resident of Duval county where said suit was instituted, but resided in De Soto county, and that said cause of action did not accrue in Duval county, and that the lands in controversy are not in Duval county, but in De Soto county. This plea was overruled on argument, and the defendant then demurred to the bill on the grounds that there was no equity in said bill, that the complainant had an adequate remedy at law, and that it does not appear from said bill that complainant will suffer irreparable injury by reason of the failure of the defendant to perform the contract sued upon. This demurrer was overruled, and the defendant then answered the bill alleging that the complainant had no title to said lands that he could convey; that all of his estate in said lands had been forfeited by tax sales thereof and tax titles. A voluminous amount of testimony was taken and reported to the court, and at the final hearing a decree was rendered in favor of the complainants ordering the defendant to specifically perform his said contract by accepting the quitclaim deed tendered to him by complainants and by paying the contract sum of \$500 therefor. From this decree the defendant below appeals to this court. The order of the court overruling the defendant's plea in abatement is assigned as error. There was no error in this ruling.

Section 1383 of our General Statutes of 1906 provides that: "Suits shall be begun only in the county * * * where the defendant resides, or where the cause of action accrued, or where the property in litigation is."

Was Duval county, under the circumstances of this case, the place where the complain-

ants' cause of action accrued? We think that it was. The facts were that the defendant, residing in De Soto county, by letter addressed to the agent and attorney of complainants, who resided in Jacksonville in said Duval county, proposed to purchase the property at the stipulated sum, and said agent and attorney at said Jacksonville accepted the proposition. It seems to be well-settled law that where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract. 22 Am. & Eng. Ency. Law (2d Ed.) p. 1324, and numerous cases there cited.

A suit to enforce the specific performance of an agreement to convey land need not be brought in the county where the land lies. 20 Ency. of Pl. & Pr. p. 407, and authorities there cited.

The order overruling the defendant's demurrer to the bill is assigned as error. There was no error here. It is the settled rule that the remedy by specific performance is mutual as between vendor and vendee, and, where the remedy is sought by the vendor, it makes no difference that the relief he seeks thereby is only to enforce the payment of a specific sum of money. Fry on Specific Performance of Contracts, p. 32; Yulee v. Canova, 11 Fla. 9.

A suit by a vendor for specific performance of a contract for the sale of land cannot be defeated on the ground that there is a remedy at law. Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Pomeroy's Contracts (2d Ed.) p. 6; Story's Eq. Jur. (11th Ed.) par. 723.

The defendant, after replication to his original answer, made two applications to file a supplemental answer, which proposed answer set up other and divers tax titles that it was claimed divested the complainants of all interest in the lands; but both of these applications were denied by the chancellor, and such rulings are assigned as error. There was no error here. It is the settled rule here that our trial courts are vested with a broad discretion in the matter of allowing amendments of the pleadings in a cause, and, unless there is a gross and flagrant abuse of the discretion, this court will not interfere with its exercise. Smith v. Westcott, 34 Fla. 430, 16 South. 332. The proposed amendments to the defendant's answer urged nothing more than an accumulation of incumbrances on the title of the complainants to said lands, some of which had already been set up in the original answer, but none of which were available to the defendant as a defense to the suit. The contract of the defendant was for a quitclaim deed to such interest and only such interest as the complainant had in said land, and to take such quitclaim cum onere of such outstanding tax titles as existed against them. The rule is that where it appears from the contract, or the circum-

stances accompanying it, that the parties had in view merely such a conveyance as will pass all the title which the vendor had, whether defective or not, that is all the vendee can insist upon. *Thompson v. Hawley*, 14 Or. 190, 12 Pac. 276; *Newark Savings Institution v. Jones' Ex'rs*, 37 N. J. Eq. 449; *Pomeroy's Contracts*, p. 450.

We think the decree of the court below was fully justified by the evidence in the cause, and the said decree is, therefore, hereby affirmed at the cost of the appellant.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

DEASON v. STONE et al.

(Supreme Court of Alabama. Feb. 1, 1910.
Rehearing Denied Feb. 26, 1910.)

DEEDS (§ 127*)—CONSTRUCTION—ESTATES ACQUIRED.

A grantor executed a deed in trust for the use of his son for life, and at his death for the use of his heirs at the time of his death, and their heirs and assigns, forever, and in case the son should leave no heirs at his death the estate should go to the heirs at law of the grantor then living. Held, that the deed, though controlled by the statute of 1812 (Clay's Digest, p. 157, § 37), enacting that every estate in fee tail shall be an estate in fee simple, but providing that any person may make a deed to a succession of donees then living and the heirs of the remainderman, and in default thereof to the heirs of the donor, etc., vested in the son a life estate, with remainder to his children living at his death.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 359; Dec. Dig. § 127.*]

Anderson, J., dissenting.

Appeal from Circuit Court, Tuscaloosa County; S. H. Sprott, Judge.

Ejectment by Fannie A. Deason against Steve Stone and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Daniel Collier and R. H. Scrivener, for appellant. J. Manly Foster and Oliver, Verner & Rice, for appellees.

ANDERSON, J. The deed in question was construed in the opinion of the court in the case of *Findley v. Hill*, 133 Ala. 229, 32 South. 497, and the question involved was again considered in the cases of *Findley v. Deason*, 135 Ala. 661, 33 South. 1013, and *Findley v. Hardy*, 135 Ala. 663, 33 South. 1013, and was decided, in these last two cases, by a mere reference to the first case. As we understand the meaning given the deed in the opinion, it was that Murchison Findley took a life estate, with remainder to his descendants living at the time of his death, and in default of such descendants it was to go to the heirs of the grantor. The descendants of the life tenant were synonymous with bod-

ily heirs, and the holding was that Murchison Findley took a life estate, with a remainder to his bodily heirs living at the time of his death. It may be that this is the proper and only reasonable meaning to be given the words employed in the conveyance; and, whether it created a fee tail or not, the remainder could be upheld since the adoption of the Code of 1852.

It is insisted, however, that this deed was executed in 1826, and was controlled by the statute of 1812, as found in Clay's Dig. p. 157, § 37, and which was not referred to or considered in the former opinion. We confess, that the opinion does not discuss or refer to said statute; but if the ruling, to the effect that a fee tail was not created, is sound, then said statute would have no application. If, on the other hand, the deed did create a fee tail, and the court erred in holding to the contrary, then the statute of 1812, being the law when the deed was made, would apply, and Murchison Findley would take the absolute fee thereunder, unless it came within the proviso therein contained. Section 37, as found in Clay's Digest, is as follows: "Every estate in lands or slaves, which now is or shall hereafter be created an estate in fee tail, shall from henceforth be an estate in fee simple, and the same shall be discharged of the conditions annexed thereto by the common law, restraining alienations before the donee shall have issue, so that the donee, or person in whom the conditional fee is vested, or shall vest, shall have the same power over the said estates, as if they were pure and absolute fees: Provided, that any person may make a conveyance or demise of lands, to a succession of donees then living, and the heir or heirs of the body of the remainderman, and default thereof, to the right heirs of the donor in fee simple."

"First. Did this deed create a fee tail under the common law? Second. If it created a fee tail, did it come within the proviso created in the statute? If the first inquiry can be answered in the affirmative, and the second in the negative, then the grantor, Murchison Findley, took the absolute estate in fee simple, under the force of said statute, regardless of what the law is or has been since the execution of said deed. The first inquiry, as we have observed, was answered in the negative in the former opinion, and if the holding there was sound there is no need to answer the second inquiry. On the other hand, the first question has been answered in the affirmative, and the second in the negative, in the cases of *Simmons v. Augustin*, 3 Port. 90, and *Martin v. McRee*, 30 Ala. 116, wherein it was held that language similar to that given the deed in question created a fee tail, and the first grantee took a fee-simple estate, under the statute of 1812. The words considered in the *Simmons Case*, supra, may

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be identical with those applied by this court in the former opinion to this deed; but the words used in the instrument considered in the Martin Case, *supra*, are identical with the meaning given the words employed in the present deed. There is, therefore, a direct conflict in the holding that this deed did not create a fee tail with the Cases of Simmons and Martin, *supra*, and we must, therefore, determine the soundness of the rulings, respectively, and adopt that view which may seem sound and correct.

It will be observed that the only authorities cited in the case of Findley v. Hill, 133 Ala. 229, 32 South. 497, in support of the holding that the deed in question did not create an estate tail, is *Fearne on Rem.* 177, and the case of *Roberts v. Ogbourne*, 37 Ala. 174. *Fearne on Remainders* does not support the holding. It may be that the *Ogbourne* Case, *supra*, does, in a measure, support the conclusion in the Findley Case, *supra*. This case, however, does not strike us as being sound, or as a well-considered case. Moreover, Stone, J., dissented from same. This case seems to proceed upon the theory that the testator gave directly to the heirs of Sarah Bledsoe, reserving to her simply a use during her lifetime, that the heirs took the entire property, and not the remainder after a life estate, and that the reservation to Mrs. Bledsoe was not of the thing itself, but of the use and benefit for a specified time, and that these facts differentiated the case from those which fell within the rule in *Shelley's Case*. Whether this was a proper construction as to the meaning of the devise to Mrs. Bledsoe, or not, we need not determine; for, if it was, it differentiated it from the present deed, which plainly gives Murchison Findley a life estate, rather than a mere reservation to use the same. On the other hand, we find that the case of *Martin v. McRee*, *supra*, is in line with *Lenoir v. Rainey*, 15 Ala. 667, and *Hamner v. Smith*, 22 Ala. 433. In the case of *Bibb v. Bibb*, 79 Ala. 442, the court reaffirmed the soundness of the Martin Case, *supra*, and declared it the proper construction of the statute of 1812 above quoted, notwithstanding it did not follow same in said case, as the parties had purchased after a former construction of the identical instrument in the case of *Edwards v. Bibb*, 43 Ala. 666, and *Edwards v. Bibb*, 54 Ala. 475. This Martin Case was again cited approvingly in the case of *McQueen v. Logan*, 80 Ala. 307. We do not find that the case of *Roberts v. Ogbourne* has ever been cited, except in the Findley v. Hill Case, *supra*, and in the case of *McQueen v. Logan*, *supra*, and in which said last case it was cited in support of the application of the rule in *Shelley's Case* as to conveyances made prior to the adoption of the Code of 1852. We are therefore constrained to hold that the deed in question created a fee tail, under the well-considered authorities construing the law as it existed when the same was executed, and Murchison Findley acquir-

ed a fee-simple title to the property conveyed. The case of *Findley v. Hill*, 133 Ala. 229, 32 South. 497, is expressly overruled, in so far as it holds that the deed did not create a fee tail, and in holding that the bodily heirs of Murchison Findley acquired a title under same.

As was said by the court, speaking through Stone, C. J., in the case of *McQueen v. Logan*, *supra*: "This rule of interpretation is not now the law of Alabama. It was changed a third of a century ago. Code 1876, § 2183. Only deeds or wills executed before the adoption of our first Code (January 17, 1853) are governed by it. Few cases will hereafter come before us which can feel its influence. Alabama can now share with New York in the touchingly beautiful tribute paid to it by the learned and classical Kent (4 Com. 283)." We must add that this is among the few cases coming to us after over a half century from the adoption of the first Code, and which is governed by statutes previous thereto, but which presents a question long and well settled by the authorities. *Simmons v. Augustin*, 3 Port. 90; *Lenoir v. Rainey*, 15 Ala. 667; *Hamner v. Smith*, 22 Ala. 433; *Martin v. McRee*, 30 Ala. 116; *Bibb v. Bibb*, 79 Ala. 442; *McQueen v. Logan*, 80 Ala. 307.

The Alabama cases cited and relied upon in brief of counsel for appellee can be reconciled with the present holding. The case of *Powell v. Glenn*, 21 Ala. 459, held that, owing to explanatory expressions, "heirs of her body" was synonymous with children. The present deed cannot be construed so as to limit the estate over to restricted descendants of Murchison Findley. It gives the land, upon his death, to his heirs generally; but, owing to the fact that the grantor sought to give it to his own heirs, in case of a failure of heirs on the part of Murchison, and that, if Murchison left no heirs, there could be no heirs of the grantor to take upon Murchison's death, this court held that the deed referred to the descendants of Murchison, and not collateral or general heirs. It was not, and could not have been, correctly held, however, that the "descendants of Murchison" were so limited as to become words of purchase, instead of words of limitation. Moreover, the instrument construed in the *Powell* Case, *supra*, related to personal, and not real, property, and which distinction will be adverted to later on.

The case of *McVay v. Ijams*, 27 Ala. 238, construed a conveyance or devise of personal property, a slave, and, while the opinion questioned a distinction that had been previously made in construing words one way when they related to personal property and another way when referring to real estate, adhered to the distinction, and intimated that there would be a fee tail under the instrument there considered if it related to land.

The case of *Dunn v. Davis*, 12 Ala. 135, was by a divided court, and the instrument construed related to personal property, a

slave, and "heirs or children" were used, and the court held these to be words of purchase, and intimated that they should not be construed in the same sense as where applied to real estate.

In the case of *May v. Ritchie*, 65 Ala. 602, the court held that, because of the use of the words "children" indiscriminately with "heirs of the body" to designate the remaindermen, they took as purchasers; but it was said in this opinion: "Under the operation of the rule in *Shelley's Case*, of force when the deed was executed, a gift to one for life, and then to the heirs of his body, would create an estate tail; the words 'heirs of the body' being, in their nature and ordinary signification, words of limitation, and not of purchase."

The case of *Sullivan v. McLaughlin*, 90 Ala. 60, 11 South. 447, related to a deed made since the Code of 1852. Moreover, other words were used which justified the court in holding that it related to the children of the grantee begotten by the grantor.

In the case of *Campbell v. Noble*, 110 Ala. 382, 19 South. 28, the court held that, under all the circumstances of the case, "heirs of the body" was synonymous with "child or children," and upheld the remainder. On the other hand, the meaning given the deed in question in the case of *Findley v. Hill*, supra, was that the heirs of the first taker did not mean heirs in the broader sense, but meant the children, issue, or descendants of *Murchison* living at his death, and which is broad enough to cover all bodily heirs living at the time of his death. It is not restricted to any class of bodily heirs or descendants, but would include any and all who might be living at the time of his death, and falls entirely within the holding in the case of *Martin v. McRee*, 30 Ala. 116.

The foregoing is the opinion of the writer; but a majority of the court are in favor of following the case of *Findley v. Hill*, 133 Ala. 229, 32 South. 497. They think the construction of the deed in said case was proper, and that the opinion is sound, and not in conflict with the case of *Martin v. McRee*, 30 Ala. 116.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, McCLELLAN, and SAYRE, JJ., concur. ANDERSON, J., dissents.

TILLMAN et al. v. KIFER et al.

(Supreme Court of Alabama. April 14, 1910.)

TRUSTS (§§ 17, 18*)—PAROL TRUST—VALIDITY.

Code 1907, § 3412, provides that no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of

law, can be created, unless by an instrument in writing. A grantor, upon the eve of a failure, deeded property to his sister. The grantor's children sued to have the property conveyed to them, claiming that it was conveyed in trust for them. There was no trust alleged in the deed, and no fact alleged from which a trust would result by operation of law, and no averment of undue influence or fraud. *Held*, that the bill only showed an effort to enforce a trust under an unenforceable parol agreement.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Suit by Rubie E. Tillman and others against Lucy E. Kifer and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Pinkney Scott, for appellants. T. T. Huey, for appellees.

SAYRE, J. In 1891 Robert J. Tillman, being on the eve of a failure in business and a general assignment for the benefit of his creditors, made a deed to his sister, Mrs. Lucy E. Kifer, of certain lots in Tillman's addition to the city of Bessemer on a recited consideration of \$600. Now this bill is filed by the children of Robert J., averring that the lots were conveyed on the trust and confidence that the grantee would hold them for complainants, and would at a later time execute a deed to the alleged beneficial owners. There is no semblance of a trust shown on the face of the deed. No facts are alleged, as that the consideration, or any part of it, moved from the complainants, with an understanding that the beneficial ownership was to be in them, from which a trust would result by operation of law, without express words of creation. Nor is there averment of undue influence arising out of confidential relation, or other circumstances of fraud between the parties, to constitute the grantee a trustee *ex maleficio*, as was the case in *Kyle v. Perdue*, 95 Ala. 579, 10 South. 103, and *Noble v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175, cited by appellants. The bill shows nothing more than an effort to enforce a trust according to the alleged agreement of the parties to the deed; that agreement having been expressed by parol, and not otherwise. The defendants have denied the agreement, have averred that the transaction was of a character entirely different from that set up in the bill, and it may be said that the weight of the evidence is with them.

But, apart from defendants' version, the case made by the bill, and sustained by complainants' theory of the proof, must fall under the condemnation of the statute which provides that no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same. Code, § 3412. All questions in this

case were settled in *Patton v. Beecher*, 62 Ala. 579, to which nothing can be added. *McCarthy v. McCarthy*, 74 Ala. 552, and *Cresswell v. Jones*, 68 Ala. 420, cited by appellants, were cases in which the trusts involved were expressed in writing.

The decree of the court below must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

SAUNDERS et al. v. SAUNDERS.

(Supreme Court of Alabama. April 21, 1910.)
PARENT AND CHILD (§ 2*) — CUSTODY OF CHILD.

Custody of an infant will be transferred from the father to her grandfather, it appearing that her welfare will thereby be best promoted; the right of a father to custody of his child yielding to the consideration of the good of the child.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

Appeal from Chancery Court, Calhoun County; W. W. Whiteside, Chancellor.

Suit by Annie Gordon Saunders against C. W. Saunders and others. Decree for plaintiff. Defendants appeal. Affirmed.

Knox, Acker, Dixon & Blackmon, for appellants. P. F. Wharton and N. P. Sterne, for appellee.

SIMPSON, J. This is a bill filed by the appellee, by her next friend, praying for the appointment of a guardian, and also that the custody of said infant be transferred from her father, C. W. Saunders, and wife, to her grandfather, J. B. Gilmore.

The testimony in this case has been carefully examined, and it is not entirely free from conflict. Said Annie Gordon Saunders is the daughter of said C. W. Saunders by his first wife, who died when the child was about two years old, and she lived with her maternal grandparents until after her father had married again and either had or would shortly have another child, something less than two years before the trial, at which time said infant was ten years old. No evidence was introduced tending to show that said grandparents were not proper persons to have the custody of the child, or that she is not happy with them. On the other hand, the fact that the child has run away four times from her father, to go to her grandparents, is a strong circumstance tending to show her preference.

We agree with the chancellor that no good can be accomplished by discussing the testimony. In fact, some of it had better be forgotten than perpetuated. While we recognize that, as a general proposition, the father has the right to the custody of the child, yet the

good of the child must be the main consideration of the court, and from a careful consideration of the evidence we conclude that the chancellor properly held "that the welfare of the child will be the best promoted, for the present at least, by transferring her custody from her father, C. W. Saunders, to her grandfather, J. B. Gilmore."

The decree of the court is affirmed.
Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

ROWELL v. STATE.

(Supreme Court of Alabama. April 7, 1910.)
CRIMINAL LAW (§ 1069*)—TIME.

The time within which appeal may be taken being limited to the year after rendition of judgment, an appeal taken thereafter is unauthorized, and the Supreme Court is without jurisdiction to entertain it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2691; Dec. Dig. § 1069.*]

Appeal from Circuit Court, Coffee County; J. N. Ham, Judge.

Bell Rowell appeals from a judgment of conviction. Dismissed.

H. L. Martin, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. It appears from the record that the present appeal was not taken until after the expiration of a year from the rendition of the judgment. The time within which an appeal can be taken in such a case is limited by the statute to one year. The appeal is therefore unauthorized, and this court is without jurisdiction to entertain it. *Dennis et al. v. Currie*, 142 Ala. 637, 38 South. 802; *Blackburn v. Huber Mfg. Co.*, 135 Ala. 598, 33 South. 160. It follows that the appeal must be dismissed.

Appeal dismissed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

JORDAN et al. v. EMANUEL.

(Supreme Court of Alabama. April 21, 1910.)

1. PLEADING (§ 80*)—PLEAS IN BAR OF ENTIRE ACTION.

Pleas in the nature of confession and avoidance, interposed, not as mere denials, but in bar of the entire action, are bad; none of them answering the whole complaint, as they profess to do, but at best any one of them being an entire answer to but one count thereof.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 162; Dec. Dig. § 80.*]

2. PLEADING (§ 18*)—PLEAS—INDEFINITENESS AND UNCERTAINTY.

The plea interposed to a complaint containing a count for conversion of two bales of cotton and another for conversion of eight bales

thereof, merely alleging a bill of sale by plaintiff to defendant of two bales of cotton growing on plaintiff's land, is bad for indefiniteness and uncertainty, in not identifying those sold with those carried away.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

3. SALES (§ 1*)—BILL OF SALE.

A bill of sale of "two bales of cotton, 500 pounds each, now growing on my land," is void for uncertainty, in not identifying the bales sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

4. TRIAL (§ 256*)—MISLEADING INSTRUCTION — EXPLANATORY INSTRUCTION — NECESSITY FOR REQUEST.

If an instruction, in an action for trespass and for conversion of cotton, that the bill of sale gave defendant no right to enter on plaintiff's land and pick cotton (not erroneous, because plaintiff's bill of sale to defendant of two bales of cotton growing on plaintiff's land was void for not identifying the bales sold), tended to mislead as to defendant's parol testimony tending to show permission to enter and pick cotton, defendant was required to request an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Burrell Emanuel against G. T. Jordan and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Roach & Chamberlain, for appellants. R. I. Smith and Pillans, Hanaw & Pillans, for appellee.

MAYFIELD, J. The action is in trespass *quare clausum fregit* and in trover for the conversion of cotton and cotton seed. The first two counts are in trespass, and claim damages, not only for breakage and entering plaintiff's land, but also for destroying his crops of cotton, peas, potatoes, grasses, fences, etc. The last two are in trover, one for the conversion of two bales of cotton and the seed thereof, and the other for the conversion of eight bales of cotton and the seed thereof. The defendants pleaded to the complaint as a whole, and not to the counts separately.

The pleas each alleged a bill of sale by the plaintiff to the defendant Jordan of two bales of cotton growing on the land of plaintiff, and that plaintiff authorized Jordan or his agent to go on the land and take possession of the cotton, and that the other defendant was the agent of Jordan in taking the two bales of cotton, and that defendant acted under this authority in taking the two bales of cotton. The pleas were bad, in that they were interposed as pleas in bar of the entire action, when at best no one of them could be an entire answer to but one count of the complaint. They were not interposed as mere denials, but were all in the nature of pleas in confession and avoidance, and as such were insufficient, in that they did not answer the whole complaint, as they professed to do, but only a part thereof. They were also open

to the objection that they were indefinite and uncertain, in that it was not alleged that the two bales of cotton carried away were the two bales sold to the defendant Jordan by the plaintiff. These defects were pointed out, and the court properly sustained the demurrer to the pleas.

The bill of sale of two bales of cotton was void for uncertainty in failing to identify the two bales sold. The parol evidence wholly failed to make it certain in this respect; the only identification being "two bales of cotton, 500 pounds each, now growing on my land." It was not shown that there were only two bales then growing on plaintiff's land, but all the evidence showed that there were more than two; and there was nothing to show that either bale carried away by defendants was one of the bales attempted to be conveyed by the bill of sale. Therefore there was no error in the court's charging the jury, at plaintiff's request, that "the bill of sale gave Jordan no right to enter upon plaintiff's land and pick his cotton." If this charge had a tendency to mislead the jury as to defendants' parol testimony tending to show permission to enter and pick cotton, it could and should have been cured by an explanatory charge requested by defendants.

There being no reversible error shown, the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

JAFTE v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. April 14, 1910.)

STREET RAILROADS (§ 118*)—CROSSING TRACK — INJURIES TO TRAVELER—INSTRUCTION.

In an action for injuries to a traveler while crossing a street railway track, the complaint counted on simple negligence and on a wanton, willful, or intentional injury. The court charged that if a pedestrian is negligent in crossing or attempting to cross a street railway track on a public highway, and such negligence proximately contributes even in the slightest degree to an injury received by him by being struck by a car, he cannot recover because of the motorman's failure to keep a lookout for him, nor on account of a mere failure to sound the gong of the car; that one walking on a street railway track must first look to see if a car is approaching, and if his view is obstructed he must look from a point where, by looking, he can see the track in such direction; and that if plaintiff stopped on the east side of the east track to permit a wagon to pass him along the street, and while there looked toward another avenue, and could not see the car because his view was obstructed by the wagon, and could not hear the car because of the wagon noise, and after the wagon had passed him he then proceeded onto or dangerously near the track without again looking to see if the car was coming from that direction, he was negligent, and that the motorman's mere failure to keep a lookout ahead did not constitute wantonness. *Held*, that such instructions were correct, and not ob-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jectionable as premitting inquiry on the issue of wantonness.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 118.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Ben Jaffe against the Birmingham Railway, Light & Power Company for injuries received to plaintiff while crossing defendant's track. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint contains a good many counts, some in simple negligence, and some for wanton, willful, or intentional injury. These counts may be found, or at least some of them, set out in a former report of this case in 154 Ala. 548, 45 South. 469. The charges complained of as having been improperly given for the defendant, are as follows: (2) "If a pedestrian is negligent in crossing or attempting to cross a street railway track on a public highway, and such negligence proximately contributes even in the slightest degree to an injury received by him by being struck by a car on such track, he cannot recover any damages on account of the mere failure of the motorman to keep a proper lookout for him, nor on account of a mere failure to sound the gong of the car." (4) "One who walks upon a street railway track must first look to see whether a car is approaching on the track, and if his view of the track in one direction is obstructed by a wagon, he must look from a point where, by looking, he can see the track in such direction." (5) "If the jury believe from the evidence in this case that plaintiff stopped on the east side of the east track to allow an ice wagon to pass him along the street, and that while there he looked towards Tenth avenue, and could not see the car because his view of the track in that direction was obstructed by the ice wagon, and could not hear the car because of the noise made by the ice wagon, and after said wagon passed him he then proceeded onto or dangerously near the west track without looking any more to see whether a car was coming from the direction of Tenth avenue, he was guilty of negligence as a matter of law in proceeding onto or dangerously near said track without looking again to see whether the said car was approaching." (6) "The court charges the jury that the mere failure on the part of the motorman to keep a lookout ahead does not constitute wantonness."

Charles B. Powell, for appellant. Tillman, Bradley & Morrow, for appellee.

SAYRE, J. The law of this case was fully and accurately stated to the jury by the learned trial judge. The appellant makes a sweeping complaint of the written instructions given to the jury on the request of the defendant, because, he says, they premit consideration of the counts for willful wrong,

and cites *Birmingham Ry., L. & Power Co. v. Williams*, 158 Ala. 381, 48 South. 93. The charges which were condemned in that case for premitting inquiry as to wantonness, one expressly, and the other in effect, made the result of the case to turn upon questions of simple and contributory negligence; whereas the pleading and evidence raised an issue as to the wantonness of the defendant's servant in the infliction of plaintiff's injury, without consideration of which the case could not have been properly decided. Here, to the contrary, the charges complained of carefully avoided that fault. They dealt with only one phase of the case; but it was defendant's right to have the law so stated to the jury, if that phase was fairly presented and the entire case was not made to depend upon it. There was no error in the action of the trial court, and its judgment will be affirmed.

Affirmed.

DOWDELL, O. J., and ANDERSON and EVANS, JJ., concur.

JOHNSON v. ALABAMA FUEL & IRON CO. (Supreme Court of Alabama. April 7, 1910.)

1. MASTER AND SERVANT (§ 302*)—WRONGFUL ACTS OF SERVANTS—SCOPE OF SERVANT'S EMPLOYMENT—LIABILITY OF MASTER.

The master is not responsible in damages for injuries negligently, wantonly, or intentionally inflicted by his servant, unless the servant be at the time acting within the scope of his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

2. CORPORATIONS (§ 423*)—VICE PRINCIPAL—LIABILITY OF CORPORATION—INDICTABLE CRIMES.

Corporations may create vice principals, who in their general management of the corporate business so partake of the corporate entity that their acts have the same effect upon corporate responsibility as if done or expressly authorized by the governing board, so that corporations may become responsible in cases for the indictable crimes of their agents; but the corporation is liable only when its vice principal acts in the execution of the corporate functions.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

3. CORPORATIONS (§ 492*)—TORTS OF AGENT—MALICE—PERSONAL PURPOSE—LIABILITY OF CORPORATION.

Where the vice principal of a corporation steps wholly aside from his authority, and does an act to gratify personal malignity, or to accomplish another purpose personal to himself and having no relation to the corporate business, the corporation is no longer responsible.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1903; Dec. Dig. § 492.*]

Appeal from Circuit Court, St. Clair County; John W. Inzer, Judge.

Action by Lula Johnson, administratrix, against the Alabama Fuel & Iron Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Matthews & Matthews, for appellant. Percy, Benners & Burr, for appellee.

SAYRE, J. If it should be conceded that the demurrers to counts 1 and 2 were improperly sustained, it does not follow that the judgment must be reversed. Count 1 sought to charge defendant corporation, for that one Adams, a servant in its employment, and while acting within the line and scope of his authority as such servant, did wantonly, willfully, or intentionally kill plaintiff's intestate by shooting him to death. Count 2 charged that Adams recklessly and wantonly shot plaintiff's intestate to death. The case went to the jury upon other counts in every substantial respect the same, except that the act of Adams is averred in them to have been wrongfully done, thus in part, perhaps, putting off a part of the burden of proof assumed in counts 1 and 2. Certainly under the other counts the burden of proof was no greater than it would have been under the first two. It may be assumed that the proof showed to the satisfaction of the jury that Adams wantonly, willfully, or intentionally and wrongfully killed plaintiff's intestate by shooting him. There was certainly evidence which would have authorized that conclusion. Still, as the case was, the plaintiff, without being hampered or restricted in the least by any ruling of the court in that regard, went fully into the question—as fully, we must presume, as she could have done under any state of the pleading—but totally failed to prove one fact, alleged commonly in the several counts, and necessary to her recovery against the defendant in any event, namely, that Adams, at the time of the act complained of, was acting within the line and scope of his authority as the defendant's servant. The master is not responsible in damages for injuries negligently, wrongfully, wantonly, or intentionally inflicted by his servant, unless the servant be at the time acting within the general line or scope of his employment. *L. & N. R. R. Co. v. Whitman*, 79 Ala. 328.

The facts shown, stated with all favor to the appellant, were as follows: Defendant company was operating a coal mine. Adams was its general manager. Appellant and her intestate lived in a tent near by. Adams went to the tent and arrested plaintiff's intestate without a warrant and under circumstances indicative of malice. Why he did this, unless it was to gratify some personal animosity, does not appear. It seems that the defendant kept a house for the confinement of prisoners. Adams placed intestate in that house, and there left him for some hours. Between 9 and 10 o'clock in the evening Adams took intestate from the house, carried him away into the woods, and there shot him to death. We find in these facts no warrant for the inference that the mur-

der of plaintiff's intestate was accomplished by Adams while in the execution of his agency. Nor is the controlling principle, or its application to the facts, affected by the consideration that Adams was a vice principal for the defendant corporation, if it be a fact that he was a vice principal. Corporations may, and often do, create vice principals, who in their general management of the corporate business so partake of the corporate entity that their acts have the same effect upon corporate responsibility as if done or expressly authorized by the governing board or stockholders, and so corporations may become responsible in cases for the indictable crimes of their agents. But this does not impair the doctrine that the corporation is bound only when its vice principal acts, however improperly, negligently, or maliciously, in the execution of the corporate functions. When he steps wholly aside from his authority, and does an act to gratify personal malignity, or to accomplish another purpose personal to himself and having no relation to the business of the corporation, as, for aught appearing to the contrary, was the case here, the corporate master is no longer responsible. This is clearly recognized in the cases cited by appellant. *So. Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930. We think the general charge was properly given for the defendant.

We need not consider the assignment touching the exclusion of evidence. That evidence had no bearing or effect upon the point which has determined this appeal against the appellant.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

DRENNEN v. DUNN.

(Supreme Court of Alabama. April 14, 1910.)

ABATEMENT AND REVIVAL (§ 8*)—PENDING ACTION—IDENTITY OF CAUSE OF ACTION—"SCIRE FACIAS"—"SUIT ON JUDGMENT."

While *scire facias* to revive a judgment is like a suit on a judgment in respect to parties, and in that it requires a defense, the judgment in the suit on the judgment is for the debt and damages, while that on the *scire facias* is that plaintiff have execution, and until the judgment debt is satisfied *scire facias* may be prosecuted at the same time as the action on the debt, and the pendency of the *scire facias* does not abate the suit on the judgment.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. § 55; Dec. Dig. § 8*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6351-6356; vol. 8, p. 7796.]

Appeal from Circuit Court, Jefferson County; A. H. Alston, Judge.

Action by D. M. Drennen against Evans J. Dunn. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The plaintiff, as a surviving partner, sought to recover judgment upon a judgment rendered on the 5th day of May, 1890, which judgment is set out in the complaint. The defendant said that the cause should abate, for that, before the filing of this suit, the plaintiff in this cause, with others, filed a suit in the city court of Birmingham against defendant and others, seeking to recover for the same cause of action sued on in this cause, and that said cause is still pending. The evidence showed that there was filed in the city court of Birmingham on June 25, 1907, by D. M. Drennen, who is the plaintiff in the above cause, and the executor of the will of William Drennen, against Evans J. Dunn, who is defendant in this suit, a motion to revise the judgment sued on in this cause, and that said motion is still pending for trial on the jury docket of said city court of Birmingham, from which the court sustained the plea in abatement.

Stallings & Drennen, for appellant. Bowman, Harsh & Beddow, for appellee.

SAYRE, J. To an action of debt on a judgment the trial court sustained a plea in abatement setting up the pendency of a scire facias to revive the judgment sued on, or, to speak more in accordance with the record, the court sustained a plea of a pending suit upon proof of a pending scire facias. This was error. It has been held that for some purposes a writ of scire facias to revive a judgment may be regarded as a suit upon the judgment. *Hanson v. Jacks*, 22 Ala. 549. Certainly it calls for a defense, and the defendant may plead matters subsequent to the rendition of the judgment. And so in respect to parties it is in the nature of an action upon the judgment. *Baker v. Ingersoll*, 37 Ala. 503. The judgment at the end of the suit on the judgment is for debt and damages; on the scire facias, that the plaintiff have execution. *Id.* It has long been held that the writ of scire facias is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, and until the debt evidenced by the judgment has been satisfied the plaintiff may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of one is no defense against the other. *Carter v. Colman*, 34 N. C. 274; *Lambson v. Moffett*, 61 Md. 426; *Lafayette County v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360; 1 Black, *Judg.* § 482a.

In *Field v. Sims*, 96 Ala. 540, 11 South. 763, there was suit upon a judgment rendered by a justice of the peace. To a plea of the statute of limitations of six years the plaintiff replied that executions had been issued at regular intervals. The court said: "So long as the judgment remains unsatis-

fied, the common-law right to sue thereon is not suspended by the plaintiff seeking the benefit of a concurrent remedy given him by the statute for the enforcement of the judgment by means of an execution." In *Kingsland v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232, a similar question had been decided. It was there said: "The remedy given by the statute (the remedy by execution within 10 years without scire facias) is cumulative merely, and a plaintiff may, if his judgment be not satisfied, sue in debt upon it, although he could, under the statute issue an alias execution." It is clear that the plaintiff in judgment may resort at the same time to execution and his action of debt on the judgment. There seems to be no reason why he may not as well have his remedy by a rule to show cause why execution should not issue and his action of debt concurrently. No reason has been assigned to the contrary, and, upon consideration of the cases cited from other courts and the expressions quoted from our own adjudications, we so hold.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

TERRY v. MONTGOMERY.

(Supreme Court of Alabama. April 14, 1910.)

1. APPEAL AND ERROR (§ 936*)—WITNESSES (§ 32*)—COMPENSATION—CERTIFICATE—PRESUMPTIONS ON APPEAL.

A certificate issued by the clerk of the circuit court to a witness is prima facie evidence of what appears on its face, except where the court retaxes the fees as costs and determines that it was improvidently issued, when the presumption is that the circuit court is free from error, and the burden rests on the party complaining to show the contrary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3287; Dec. Dig. § 936; **Witnesses*, Cent. Dig. § 72; Dec. Dig. § 32.*]

2. COSTS (§ 216*)—RETAXATION—POWER OF COURT.

The court, on retaxing the fees of witnesses, may act without proof on its knowledge whether the witnesses were sworn or not.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 823; Dec. Dig. § 216.*]

3. COSTS (§ 184*)—TAXATION—FEES OF WITNESSES.

The taxation in the bill of costs of the fees of witnesses summoned by the successful party and not examined is prima facie excessive.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 718; Dec. Dig. § 184.*]

4. APPEAL AND ERROR (§ 936*)—PRESUMPTIONS.

The court, on appeal from a judgment of the circuit court, retaxing the fees of witnesses and reducing the fees certified to by the clerk of court, will presume the existence of facts known to the court justifying its action, in the absence of anything in the record affording any information as to the theory of fact on which the certificates were reduced.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3287; Dec. Dig. § 936.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jefferson County; C. C. Nesmith, Judge.

Action between E. A. Terry and B. P. Montgomery. From a judgment retaxing the fees of certain witnesses, the former appeals. Affirmed.

George Huddleston, for appellant. W. T. Ward, for appellee.

SAYRE, J. This appeal is taken from a judgment of the circuit court retaxing the fees of certain witnesses in a case which had been tried in that court. The clerk had issued certificates to the witnesses, and these were the items complained of. Elsewhere these certificates would be prima facie evidence of what appeared on their face. Ward v. Chavers, 115 Ala. 427, 22 South. 116. Nevertheless, the court having determined that they had been improvidently issued, the presumption here is that the judgment of the court in the premises is free from error, and the burden rests upon the appellant to show the contrary. Beadle v. Davidson, 75 Ala. 494.

Complaint is made that the court reduced the fees which had by the clerk been certified to each of ten witnesses. The bill of exceptions contains a history of the main case, and a statement that on the trial of the motion to retax it was shown that four of the witnesses had attended court on request of the defendant, and had remained in attendance during a number of days, which would entitle them to fees in excess of the amount allowed by the court, if they were entitled to fees for each day. It appears that this statement of what was shown on the trial of the motion—amplified as to details, but not covering any other matters—is a statement of all the evidence then and there offered. No doubt this evidence was offered as to them because during the same days there were causes pending and being tried in which they were interested as parties—in fact, by agreement their cases and the main case were tried together as one case, the same issue being involved in all of them.

The compensation certified by the clerk to the four witnesses who had cases of their own, and to three others, was contested on the ground that they had not been summoned or sworn in the cause. Whether they had been sworn does not appear; but that was a matter known to the court, and upon which the court had a right to act without proof. The taxation in the bill of costs of the fees of witnesses summoned by the successful party and not examined is prima facie excessive. Forchelmer v. Kaver, 79 Ala. 285. There was no error in the action of the court in respect to the witnesses with whose cases we have been dealing.

As to the rest, we do not know the amounts of the certificates issued to them, nor does the record afford any information as to the

theory of fact upon which their certificates were reduced by the court, if, indeed, they were reduced. There are a number of reasons, the existence vel non of which was known to the trial court, which may have justified the action of the court in retaxing the fees of all the witnesses, as, for example, that they were not examined, or that more than two were unnecessarily called to prove the same facts, or that they had by order of the court been excused from attendance on some of the days for which they had charged. We will presume any of them, rather than impute error.

On the case as presented, we are unable to say that the judgment of the trial court was affected by error in any particular.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

WEST VIRGINIA LAND CO. et al. v. MAY. (Supreme Court of Alabama. April 21, 1910.)

NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Where, in an action for injuries by the collapse of a platform, plaintiff's evidence of negligence in the construction of the platform consisted in its falling when and as it did, without there being on it the full complement of people it was designed to accommodate, newly discovered evidence, in support of a motion for a new trial, that the platform was not braced and was not properly constructed, in the opinion of the witness, who was experienced in such matters, was not objectionable as cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by E. L. May against the West Virginia Land Company and others. From an order setting aside a verdict for defendants and awarding plaintiff a new trial, defendants appeal. Affirmed.

Steiner, Crum & Well, for appellants. W. F. Thetford, Jr., for appellee.

McCLELLAN, J. This appeal is from an order setting aside a verdict for defendant (appellant) and awarding a new trial to plaintiff (appellee). The plaintiff was injured by the falling of a platform erected in connection with the public unveiling of a monument, which service seems to have found its motive in a desire to promote the sale of lots in a suburb of the city of Montgomery. The plaintiff was in attendance and upon the platform.

Generally speaking, the negligence to which plaintiff ascribes, for proximate cause, his injury, consisted in the failure to provide a reasonably safe structure for the purpose indicated in its erection and intended use. One of the defenses, in theory, was that the struc-

ture was the result of work of an independent contractor, properly chosen. The plea attempting to assert this defense was stricken in response to demurrer. This fact is mentioned because of the argument for appellant, whereby it is in effect insisted that the court erred in sustaining demurrer to the plea invoking the defense indicated. That asserted error of the court could not have been, and was not, a ground of plaintiff's motion for a new trial, which the court granted. The question is not in the case presented here. We therefore express no opinion in that connection.

Among other grounds of the motion for new trial was that of newly discovered material evidence. In our opinion, this ground of the motion justified the court in granting the new trial. It was shown by the affidavit of plaintiff, and so without dispute, that his failure to earlier discover the evidence in question was not due to his want of diligence.

The only other argument on this phase of the case is that the newly discovered evidence was cumulative. According to the bill of exceptions, the plaintiff offered evidence of specific deficiency or deficiencies in the construction of the platform. His evidence of want of proper care in the construction of the platform consisted, in substance, in its falling when and as it did, without there being upon it the full complement of people it was designed to accommodate. The newly discovered evidence would tend to show that the platform was not securely braced, that its supports had no braces at all, and that it was not properly constructed; also it appears, from the affidavit of the party who would testify as stated, that he was experienced to a degree in such matters.

We must, therefore, decline to disturb the order granting the new trial.
Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

A. H. ANDREWS CO. v. STOWERS FURNITURE CO.

(Supreme Court of Alabama. April 14, 1910.)

1. SALES (§ 354*)—ACTION FOR PRICE—DEFENSES.

In an action for the price of chairs sold, a plea that plaintiff sold to a third person the chairs, and agreed to charge them to defendant and ship them to it, in consideration of which contract, and of the performance thereof by plaintiff, defendant guaranteed the account, and that the chairs were never charged to nor shipped to defendant, but were charged to and shipped to the third person, tendered a meritorious issue, and was not defective, as too indefinite, in that it failed to allege sufficient facts, and the consideration therefor, as to how plaintiff agreed to charge and ship the chairs to defendant, nor as failing to allege wherein defendant became a party to the transaction whereby plaintiff agreed to charge and ship it the chairs, nor

as failing to show whether defendant and the third person agreed at the same time with defendant, or plaintiff with defendant and the third person, or how it was done, nor as failing to allege with whom plaintiff agreed to charge and ship the chairs to defendant, and under what circumstances the agreement was made.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 354.*]

2. GUARANTY (§ 25*)—EVIDENCE.

Evidence held to show that plaintiff sold goods to a third person under an agreement with defendant that the goods should be consigned to defendant and the price charged to defendant's account.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 25.*]

3. GUARANTY (§ 50*)—DISCHARGE OF GUARANTOR—BREACH OF CONTRACT.

Plaintiff, having breached its contract by consigning the goods to the third person, could not hold defendant for the price; defendant having the right to stand upon the exact terms of its contract.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 50.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by the A. H. Andrews Company against the Stowers Furniture Company for the price of certain chairs. Judgment for defendant, and plaintiff appeals. Affirmed.

The first four counts were the common counts. The fifth count is upon a contract made by correspondence, wherein the Stowers Furniture Company authorized the Andrews Company to sell T. F. Wood certain chairs, to be by him selected, and to charge the same to the account of the Stowers Furniture Company. Count 6 was upon a guaranty for a sufficient and valuable consideration, based upon the contract above set out. Count 7 is upon the contract requesting and directing plaintiff to sell Wood certain chairs and charge them to the account of the Furniture Company.

Plea B is as follows: "Defendant says that on or about August 31, 1907, the plaintiff sold to one T. F. Wood certain opera chairs, for the recovery of the price of which this suit is brought, to wit, 150 No. 221 opera chairs, for the price of \$5.50 each; that plaintiff agreed to charge said chairs to the defendant and to ship them to the defendant, and in consideration of said contract, and of the performance of the same by plaintiff, this defendant guaranteed said account. And defendant says that said chairs were never charged to nor shipped to this defendant, but, on the contrary, were charged to and shipped to said T. F. Wood; and defendant says that plaintiff should not recover."

The demurrers to plea B were as follows: "Said plea was too indefinite in this: While it states that plaintiff sold to T. F. Wood certain opera chairs, it fails to allege sufficient facts and the consideration therefor, as to how plaintiff agreed with the defendant to charge and ship said chairs to the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant. (2) Said plea is insufficient in this: That it fails to allege or aver or show where in the defendant became a party to said transaction wherein and whereby plaintiff agreed to charge and ship said chairs to defendant. (3) It fails to aver or show whether the defendant and T. F. Wood agreed at the same time with defendant, or plaintiff with defendant and Wood, or how it was done. (4) It fails to allege or aver with whom plaintiff agreed to charge and ship said chairs to the defendant, whether with T. F. Wood or the defendant, and under what circumstances said agreement was made and entered into." There were other demurrers; but it is not deemed necessary to set them out.

Von L. Thompson, for appellant. John H. Miller, for appellee.

SAYRE, J. Action on the common counts and on a special contract for the agreed price of 125 opera chairs, alleged to have been sold by plaintiff to defendant. There are also counts charging defendant as guarantor for one Wood, to whom the chairs are alleged, alternatively, to have been sold. All questions arising out of the pleadings were settled in the court below in favor of the defendant, appellee here. We think the case may be properly disposed of on consideration of the issues presented by the complaint and plea B.

This plea tendered a meritorious issue, and was not, as for any objection taken to it by the demurrer, defective in form or substance. Looking to the most obviously material feature of the defense presented, it appears that defendant undertook to guarantee the price of the chairs to plaintiff, on consideration in part of the plaintiff's promise to consign them to defendant, although they were sold to Wood. It is alleged that plaintiff failed to consign the chairs as agreed. Whether the agreement by which the defendant became bound was in writing, or made orally, was clearly of no consequence, unless the defendant made it so by pleading the statute of frauds. Other pleas set up that defense. The plea under consideration went upon an entirely different line. Further, both plaintiff and defendant were necessarily parties to any agreement by which the latter undertook for a consideration to guarantee to the former payment for the chairs. Such is the import of the plea. It succinctly states the facts necessary to the defense interposed, and there was no occasion to incumber it with the averment of other facts merely circumstantial.

On consideration of the evidence we are of the opinion that the plea referred to was proven without conflict or adverse inference. We will undertake to set out only enough of the evidence to make the situation clear: Wood applied to defendant, a furniture house in the city of Birmingham, to purchase

chairs for a place of amusement which he was about to open. Defendant, being unable to meet his requirements out of its stock, referred him to plaintiff, a manufacturer of furniture in the city of Chicago, giving him a letter of introduction as a personal friend and customer, stating his purpose to buy chairs, and that "any selection that he might make same may be charged to our account." This was on August 21, 1907. On the same day defendant wrote to plaintiff, inclosing a copy of the letter they had given to Wood, and said: "In figuring this bill we want 50 per cent. profit net f. o. b. Birmingham, so in quoting prices kindly be guarded as we have stated." Wood presented his letter to the plaintiff in Chicago on August 29th. In the meantime (August 24th) plaintiff had written in substance that it could not safely add 50 per cent. to its net selling price with any hope of securing Wood's order, if he should be inclined to look about. Replying (August 27th), defendant said it would have to handle the account at its end of the road, stated that Wood would doubtless not look elsewhere, indicated its expectation of sharing in the profit of the sale, and concluded by leaving the matter entirely with the plaintiff, and asking the plaintiff to handle it to the best of its ability. August 29th Wood appeared at plaintiff's place of business in Chicago, and entered into a written agreement for the purchase of the chairs on his own account. Plaintiff agreed in its contract with Wood, among other things, that the chairs, when made, should be consigned to him at Birmingham.

August 31st plaintiff wrote to defendant as follows: "The Stowers Furniture Co., Birmingham, Ala.—Gentlemen: Your letter of August 21st, introducing Mr. T. F. Wood, has been placed in our hands by Mr. Wood, and we to-day have negotiated same with him for 150 of our 221 opera chairs, the price being \$5.50 apiece delivered at Birmingham. Our instructions are to ship these chairs to you and that you would guarantee the payment. The contract is made to Mr. T. F. Wood and signed by him. Now, we are going to undertake the delivery of these goods f. o. b. Chicago to you for the price of \$4.50. This would leave \$1 commission to you, but out of this you would have to stand the freight. Our best information to-day is to the fact that the rate on these chairs to Birmingham will be about 90 cents per hundred, and these chairs will weigh about three chairs to the hundred, and the cost will be about 30 cents a chair. This would leave you a natural commission of 70 cents on each chair, on 150. This is the best we can do for you, and the best trade we can make for you. Now, we would like to have you confirm the understanding of this letter by saying we should send the chairs direct to you, charging you at the rate of \$4.50 f. o. b.

Chicago, payment to be made Oct. 15, 1907. The confirmation of this understanding will be sufficient, if you will write your O. K. and signature on the original copy, which we inclose herewith. We send you this in duplicate, so you can keep one and return the other one to us. We will proceed to the making of the chairs pending a reply to this letter. Thanking you, we are, very truly yours, The A. H. Andrews Co."

The foregoing letter was returned to plaintiff with the following indorsement: "We hereby guarantee this account. Sept. 7, '07. Stowers Furniture Co., Chas. M. Powell, Genl. Mgr." At the same time defendant wrote as follows: "Birmingham, Ala., Sept. 7th, 1907. A. H. Andrews Co., 174 Wabash Ave., Chicago, Ill.—Gentlemen: We beg to inclose you letter O. K'd, as per your suggestion, which guarantees payment of this account; but, in an interview to-day with Mr. T. F. Wood, he advises us that you quoted him a price of \$5.50 f. o. b. Birmingham. I advised him that you had quoted us a price f. o. b. Chicago, not mentioning the price you quoted us, of course. He said that our prices should be f. o. b. here as well. Mr. Wood may write you regarding this matter; but you may tell him same has been arranged between you and I, and that same will be shipped out promptly as per original order. Mr. Wood assured us this morning that he would possibly pay cash for these goods on delivery. That was the only incentive in having you charge him as stiff a price as possible. Yours respectfully, Stowers Furniture Co., Chas. M. Powell, General Manager."

September 9th defendant concluded the negotiation by a letter as follows: "Stowers Furniture Co., Birmingham, Ala.—Gentlemen: We are in receipt of your valued favor of Sept. 7th. We have the confirmation of your order to Mr. Wood. We thank you for this, and will say that we are at work upon the chairs and will undoubtedly make shipment in time. Yours very truly, The A. H. Andrews Co."

This correspondence evidenced the contract between the plaintiff and the defendant, and on it, after some delay, of which complaint was made, but which may now be laid out of consideration, the chairs were consigned to and accepted by Wood at Birmingham. Defendant expected that the consignment would be to it, until it learned that the chairs had been delivered to Wood.

Familiar principles of law will suffice to decide the case here presented. It may be conceded, for the argument, that, if the sale of the chairs had been consummated on the faith of the defendant's two letters of August 21st, defendant's obligation would have been the primary obligation of an original promisor. But such was not the case. Plaintiff was not content with the terms offered by those two letters, nor did it in fact make

a sale to Wood in accordance with them. It negotiated with defendant for different terms, and the negotiation became merged in the proposal contained in its letter of August 31st and defendant's acceptance of September 7th, which thereupon, as for anything appearing in the record, became the final memorial of an agreement of minds then reached for the first time. The stipulation for consignment to defendant put the defendant in a position of advantage, gave it security in respect to the payment of the purchase price, for which it had a right to contract, and must be taken as a part of the consideration of its guaranty. And whether so or not, and whether defendant's obligation was that of surety or guarantor—we think the contract in its final shape made it one or the other—the consignment to Wood was a plain breach of the contract between plaintiff and defendant. Thereupon, on well-established doctrine, defendant had the right to stand upon the exact terms of its contract, and any deviation from it by the plaintiff discharged and absolved the defendant. *Moses v. Home B. & L. Ass'n*, 100 Ala. 465, 14 South. 412. Having reached the conclusion that the plea in question presented a meritorious defense, and that on it the defendant was entitled to the general affirmative charge, consideration of whether other pleas were a sufficient answer to the complaint, or whether they were established by a like measure of uncontradicted proof, becomes immaterial.

We are not at all convinced that there was any error in the various rulings of the trial court on the introduction of evidence. None of it, to which objection was taken, had any tendency to establish a contract different from that shown by the evidence we have set out, nor to show that the contract was not breached by the plaintiff in the particular mentioned, nor that there was on defendant's part any waiver of the breach. These rulings were therefore innocuous, and cannot in any event work a reversal of the judgment under review. The judgment and proceedings in the trial court will therefore be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

LAVERGNE v. EVANS BROS. CONST. CO.
(Supreme Court of Alabama. April 7, 1910.)

1. MECHANICS' LIENS (§ 304*)—PROCEEDINGS TO ENFORCE—SCOPE OF RELIEF.

A mechanic or materialman who furnishes labor and material may obtain in one action his lien and a general judgment against the contracting owner or his personal representative, though he may have only one satisfaction; and on a complaint in an action against an administrator on a special contract for the agreed price of materials furnished and work done under a contract with decedent, and for enforcement of a mechanic's lien, plaintiff may have a judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment of both characters, or, failing to establish his lien, may have a personal judgment only.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 632-635; Dec. Dig. § 304.*]

2. MECHANICS' LIENS (§ 168*)—TIME OF ATTACHING.

Under Code 1907, §§ 4754-4784, relating to mechanics' liens, a lien attaches from commencement of the building or improvements, subject to be defeated if the claim be not verified and filed with the judge of probate within the prescribed time.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 299; Dec. Dig. § 168.*]

3. EXECUTORS AND ADMINISTRATORS (§ 443*)—PLEADING—PROCEEDINGS TO ENFORCE LIEN—STRIKING PLEA FROM FILES.

Where the complaint, in mechanics' lien proceedings against the administrator of the owner of the premises, sought to recover on a contract with the owner in his lifetime for the performance of work and labor upon, and the furnishing of material for, a building, and to enforce a mechanic's lien, a plea, averring a decree of the probate court declaring the estate to be insolvent after suit was brought, though not an answer to the part of the complaint seeking a lien and not a bar to the part seeking a judgment against the personal property of decedent which might come into the hands of the administrator, was something more than a mere suggestion, and should be permitted to remain on the files as a plea to protect the administrator, so that, if judgment should be rendered on other issues against the administrator, execution could not issue, and the judgment would have to be certified for allowance to the probate court under Code 1907, § 2794, providing that an executor may, before judgment, specially plead that the estate has been declared insolvent, upon which the other issues must be tried and judgment rendered thereon, and section 2795, providing that if such judgment is for plaintiff, and it appears that the estate has been declared insolvent, the judgment must be certified to the probate court as a claim against the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 443.*]

4. MECHANICS' LIENS (§ 137*)—STATEMENT OF LIEN—"OWNER."

In proceedings against an administrator to enforce a mechanic's lien on premises, the interest of the owner being a leasehold, the administrator was properly described as the "owner" or proprietor thereof, as the leasehold being a chattel real, descended to the administrator.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 137.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

5. MECHANICS' LIENS (§ 280*)—PROCEEDINGS TO ENFORCE—ADMISSIBILITY OF EVIDENCE.

In proceedings against an administrator to enforce a mechanic's lien for material furnished and work done for decedent, a writing, identified by a certificate of the judge of probate as the original statement of lien which had been filed in his office, was admissible to show a compliance with the statute creating the lien, but was not admissible as evidence of the value or contract price of materials furnished, nor of the value of the building erected, where such statement was not itemized, under Code 1907, § 3970, providing that, in all suits upon accounts, an itemized statement of the account, verified by affidavit, and certified by a competent officer, is competent evidence of the correctness of the account.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 563; Dec. Dig. § 280.*]

6. MECHANICS' LIENS (§ 137*)—PROCEEDINGS TO PERFECT—SUFFICIENCY OF STATEMENT.

It is not necessary to the perfecting of a mechanic's lien that the statement set out the nature and extent of the owner's title, nor that the nature and extent of the alleged owner's interest be proved.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 226; Dec. Dig. § 137.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by the Evans Bros. Construction Company against L. B. Lavergne, administrator of L. N. Archer. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Sterling A. Wood, for appellant. E. C. Crow, for appellee.

SAYRE, J. Suit was brought on February 13, 1909, against the appellant as the administrator of the estate of L. N. Archer, deceased. The complaint, after elimination of the common counts by amendment, went upon a special contract for the agreed price of materials furnished and work done under a contract with the deceased, and for the enforcement of a mechanic's and materialman's lien under the statute. Code, §§ 4754-4784. The complaint, as thus amended, alleged that the contract had been entered into and materials had been furnished and work done for the erection, etc., of a certain building on a lot therein described, on October 27, 1908. In addition to the general issue, a special plea was interposed setting up a decree of the probate court, rendered March 16, 1909, declaring the estate of defendant's intestate to be insolvent, and to this plea the court sustained a demurrer.

The mechanic or materialman who furnishes labor and material is entitled to pursue in one action his lien and a general judgment against the contracting owner or, in a proper case, his personal representative, though he may have only one satisfaction. On a complaint, fashioned as was the complaint in this case, the plaintiff may have a judgment of both characters, or, failing to establish his lien, may have a personal judgment only. *Bedsole v. Peters*, 79 Ala. 133. Under the statute the lien of mechanic and materialman attaches from the commencement of the building or improvement, subject, however, to be defeated and lost if the claim be not verified and filed with the judge of probate within the time prescribed. *Welch v. Porter*, 63 Ala. 225. The complaint alleged a contract with the owner in his lifetime, the performance of work and labor upon, and the furnishing of material for, the building, on October 27, 1908, and the filing of a verified statement on November 28th of the same year. To that aspect of the complaint which sought a lien the plea of insolvency was therefore no answer. Nor could it operate as a plea in bar to so much of the complaint as

sought or would justify a judgment running against the goods and chattels of the decedent which might come into the hands of his personal representative, since it averred a declaration of insolvency after suit brought; nor was it intended to have that effect. The only effect of such a plea in answer to the last-mentioned aspect of the complaint is that, if judgment be rendered on other issues against the personal representative, execution cannot issue, and the judgment must be certified for allowance to the probate court. Code, §§ 2793-2796; *Shiver v. Rousseau*, 68 Ala. 564. While the plea of insolvency pending the suit was not a good plea in bar for the reason indicated, as well as for the reason that it did not answer the entire complaint nor any certain part of it, it was something more than a mere suggestion (*Stern v. Collier*, 101 Ala. 424, 14 South. 477), and it was necessary that it should remain upon the file as a plea for the protection of the personal representative. There was therefore error in the judgment on demurrer which took the plea from the file.

Archer died October 30, 1908. The statement of lien filed in the probate court November 28, 1908, and offered in evidence at the trial, refers to Louis B. Lavergne, as the administrator of the estate of L. N. Archer, deceased, as the owner or proprietor of the lot upon which the building was located. The leasehold interest was a chattel real and descended to the administrator, so that he was properly described as the owner or proprietor thereof.

The statute provides a lien for every mechanic, person, firm, or corporation who shall do or perform any work or labor upon, or furnish any material, fixture, engine, boiler, or machinery for, any building or improvement on land, or for repairing, altering, or beautifying the same, under or by virtue of any contract with the owner or proprietor thereof. There is no requirement that the contract shall be in writing. The evidence adduced afforded a sufficient basis for a finding by the jury that the material for which a lien was claimed had been furnished and the building erected under a contract with the then owner of the leasehold interest. Likewise, it was for the jury to say whether the value of the work done and material furnished had been proven. There was indorsed on the complaint a statement that the account upon which the suit was brought was verified by affidavit. At the trial the plaintiff was permitted to introduce in evidence a paper writing, identified by a certificate of the judge of probate as the original statement of lien which had been filed in his office. This claim of lien and the indorsements thereon by the judge of probate was competent for the purpose of showing a compliance with the statute creating the lien, but was not admissible under section 3970 of the Code

as evidence of the value or contract price of materials furnished nor of the value of the building erected for the reason that it was not itemized. *Sullivan Timber Co. v. Brushagel*, 111 Ala. 114, 20 South. 498. If the defendant apprehended that the statement of lien would be accepted as evidence of the amount due under the contract, that apprehension might have been relieved by special instruction to the jury. As it was, the evidence going to show the value of the materials and improvement was not entirely clear, it may be conceded; but we are unable to say that the jury could not, upon due consideration, arrive at a reasonably satisfactory conclusion as to a minimum due, nor that the amount fixed by the verdict was in excess of that minimum.

We are of opinion that it was not necessary to the perfecting of a lien under the statute that the statement should set out the nature and extent of the owner's title; nor was it necessary to adduce proof of the nature and extent of the alleged owner's interest, for, in any event, only such interest as he had could be subjected to the lien. The statute confers a lien on land and on buildings and improvements to the extent in ownership of all the right, title, and interest therein of the owner or proprietor.

For the error indicated, the judgment must be reversed.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

WALLS et al. v. C. D. SMITH & CO. et al. (Supreme Court of Alabama. April 7, 1910.)

1. HIGHWAYS (§ 155*)—OBSTRUCTION—ACTION BY PRIVATE PERSON.

No private action will lie for the obstruction of a highway, unless plaintiff has suffered injury peculiar to himself and not similar to that suffered by the public; for, if the offense is one against the public, the offender should be punished by indictment as for a common nuisance, or the nuisance should be abated by a bill in equity in the name of the state, to avoid multiplication of suits.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 432; Dec. Dig. § 155.*]

2. HIGHWAYS (§ 160*)—OBSTRUCTIONS—ACTIONS FOR DAMAGES—PLEADING.

In an action for damages for obstructing a highway, plaintiff alleged that defendants, in constructing a railway line across a public road, upon which plaintiff's store was located, constructed an archway over said public road, and made deep and dangerous depressions, and filled in on each side of the archway with dirt, stones, timber, and other material; that by reason of such obstructions plaintiffs were greatly inconvenienced in their travel from their store to their homes, and in the delivery of goods and merchandise to their customers; that they incurred expense for wagons, teams, and employees by reason of such obstruction, in order to deliver their goods by a different and more inconvenient route; and that because of such obstructions

they lost customers and trade, and their business was greatly damaged thereby. *Held*, that the complaint was demurrable as not stating a cause of action, as the inconvenience suffered by plaintiff was no different than that suffered by the public, and the damages claimed for loss of business and the incurring of additional expense was speculative and remote.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 440; Dec. Dig. § 160.*]

3. PLEADING (§§ 193, 362, 428*)—DEMURRER—GROUNDS.

Where a complaint sets forth a valid claim for general or nominal damages, it is not open to demurrer by an addition of a special damage claim, though the special damages are not recoverable; but defendant's remedy is by motion to strike, objections to evidence, or requests for instructions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 439, 1433; Dec. Dig. §§ 193, 362, 428.*]

4. HIGHWAYS (§ 160*)—OBSTRUCTIONS—ACTIONS—PLEADING.

Where the entire claim in an action for damages for the obstruction of a highway is for damages peculiar to plaintiff, and no recoverable damages are averred in the complaint, the existence of nominal or general damages will not be presumed from the mere wrongful act alleged.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 160.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by O. C. Walls and others against C. D. Smith & Co. and others for damages. Judgment for defendants, and plaintiffs appeal. Affirmed.

The counts as finally amended are as follows:

"(1) Plaintiffs claim of defendants the sum of \$5,000 damages, and allege: That on, to wit, May, 1907, the defendants, in the construction of a roadbed or railway line through Reeder's Gap into the city of Bessemer, Jefferson county, Alabama, and across the public road known as the Eastern Valley public road, graded, filled, and excavated said railway across said road, which said Eastern Valley public road was a highway. The construction of said railway continued from, to wit, May, 1907, for the entire period up to and including the date of the institution of this suit, to wit, December, 1907. That during said time plaintiffs occupied and had in operation a merchandise business in a store or building situated at the intersection of said Eastern Valley road and Fairfax avenue of the city of Bessemer. That they had sundry customers living along from said store down said Eastern Valley road south of said store for a radius of some distance. That their homes were situated in Jonesboro, and that they used and traveled to and from said store said Eastern Valley road, which was a public road, and that they used and traveled said road to deliver their merchandise and drinks to customers and to their homes, and that customers used and traveled said road to purchase of plaintiffs their goods at said store up to and until, to wit, May, 1907, at

which time they aver defendants constructed across Eastern Valley public road an archway immediately across or over said road, and made and excavated in said Eastern Valley road deep and dangerous depressions, and filled in on each side of said archway with dirt, stones, timbers, and other materials, until it completely obstructed said Eastern Valley road. That during the construction of said road it became filled in with trees, logs, large stones, and other substances at or near the intersection of said Eastern Valley road with Fairfax avenue, and that they maintained said obstacles as aforesaid, in said Eastern Valley road, and across same, from the period of, to wit, May, 1907, and the remaining part of said year, up to and including the date of filing this suit as aforesaid. Plaintiffs aver that, owing to and as a proximate consequence of obstructing said Eastern Valley road, they were greatly inconvenienced in their travels from their said store to their homes at Jonesboro, that they were deprived of ingress and egress to and from their store, and to deliver their goods and merchandise to their customers; that they incurred expense for wagons, teams, and employes to haul and deliver their goods at a different and very inconvenient route, and owing to said inconvenience from the obstacles in the said Eastern Valley road, placed there by the defendants aforesaid, they were deprived of getting a number of customers and lost trade, and their said business was greatly damaged, to their damage as aforesaid."

The second count states the facts substantially as stated in the first count, with the additional allegation that by the obstruction of said public highway defendants wantonly, willfully, or intentionally damaged the plaintiffs, and their damages are alleged as in the first count.

Pinkney Scott, for appellants. Tillman, Bradley & Morrow and E. H. Dryer, for appellees.

SAYRE, J. The text-books and adjudicated cases are agreed that for an obstruction of a public and common right of way no private action will lie, unless it be alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. The reason for this rule, accepted from the beginning as sufficient, is that the offender should be punished by indictment as for the maintenance of a common nuisance, or the nuisance be abated by bill in equity in the name of the state; for otherwise suits would be multiplied intolerably. *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123, note; *Wood on Nuis.* § 646; *Joyce on Nuis.* § 218 et seq., where many cases are cited. See, also, *Baker v. Selma Street Ry. Co.*, 135 Ala. 552, 33 South. 685, 93 Am. St. Rep. 42, and *First Nat. Bank v. Tyson*, 133

Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46. The reported cases show that the courts have been much vexed in the application of this general principle to particular cases. This much, however, seems clear: That if one's access from his property to the highway be so materially impaired as to affect its value, or if, while attempting to use the highway, one sustains direct injury to his person or property, an action will lie. And here we note the absence from the complaint in this case of any averment of injury of either kind. But where the obstruction is so remote from plaintiff's property as not to affect its permanent or rental value—and in this case there is no allegation that the value of plaintiff's property was impaired—so that the plaintiff is merely driven to a circuitous route or a longer road, the authorities hold that no peculiar injury is shown, but only an interference with the common right of passing and repassing.

Thus in the modern English case of *Winterbottom v. Lord Derby*, L. R. 2 Exch. 316, it was held, upon consideration of many cases, that if the plaintiff proves no special damage to himself beyond being delayed on several occasions in passing along a highway, and being obliged, in common with all others who would use the way, either to go by a less direct road or to remove the obstruction, he cannot maintain an action. It was urged that actual delay was a cause of action. But the court said: "In this case, where the plaintiff, on one or more occasions, merely went up to the obstruction and returned, and on other occasions went and removed the obstruction—that is to say, he suffered an inconvenience common to all who happened to pass that way—I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained." In the Massachusetts case of *Blackwell v. Old Colony Railroad Co.*, 122 Mass. 1, plaintiff complained that the defendant had prevented the use of his wharf in his business of selling, shipping, and storing merchandise, by building a bridge across a navigable stream and arm of the sea, and sought to recover the loss of income and profits from his business. The court said: "The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate, or in which the carrying of an offensive trade creates a

nuisance to the plaintiff." And a demurrer was sustained. To the same general effect are the following, among other cases which might be mentioned: *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Clark v. Chicago*, etc., Ry. Co., 70 Wis. 592, 36 N. W. 326, 5 Am. St. Rep. 187; *Shaubut v. St. Paul*, etc., R. R. Co., 21 Minn. 502; *McCowan v. Whitesides*, 31 Ind. 235; *O'Brien v. Norwich*, etc., R. R. Co., 17 Conn. 372; *Stufflebeam v. Montgomery*, 3 Idaho (Hasb.) 20, 26 Pac. 125.

In another line of cases special and peculiar damages have been found and allowed, as where the defendant obstructed a navigable creek over which plaintiff was then moving his goods in barges, whereby plaintiff was compelled to carry his goods overland at great expense (*Rose v. Miles*, 4 M. & S. 101); as where the plaintiff was actually detained four hours with three loaded asses (*Greasly v. Codling*, 2 Blng. 263); and as where the plaintiff was prevented from performing a contract which he had (*Dudley v. Kennedy*, 63 Me. 465). These were cases in which peculiar and special damages flowed proximately from the act complained of. The Massachusetts case from which we have quoted, and other cases of that character, on the other hand, are to be justified, as we think, upon the ground that the damages claimed were speculative, remote, and not capable of positive proof. And the ruling of the trial court in this case must be sustained, for the reason that, in so far as the complaint shows mere inconvenience in traveling to and fro the plaintiff suffered no injury different in degree and kind from that suffered by the general public. As for those damages which are claimed for the loss of business, and the employment of additional wagons, teams, and employes, and the building of a new road, they are speculative and remote. They amount to nothing more than a claim for the profits of the business which plaintiffs might have done, without these additional aids, but for the obstruction. They cannot be recovered.

If the complaint had set forth a valid claim for general or nominal damages, it would not have been laid open to demurrer by the addition of the special damages claimed, though the special damages were not recoverable. In that case defendants' response to the improper elements of damage claimed should have been by motion to strike, objections to evidence, or by requests for instructions to the jury. *Treadwell v. Tillis*, 108 Ala. 262, 18 South. 886. But the principles considered as determining the nature of plaintiff's right in the premises lead to the conclusion that plaintiff could not maintain his suit as for nominal damages only. The gist of the action in cases of this class is the peculiar private injury, which must be alleged and proved. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Houck v. Wachter*, *supra*. The entire claim being for peculiar damages, which are special also, and necessarily so,

and no such recoverable damages being averred in the complaint, no room is left for presuming the existence of nominal or general damages from the mere wrongful act alleged. *Nichols v. Rasch*, 138 Ala. 372, 35 South. 409. The demurrer was therefore well sustained.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

CALDWELL v. CALDWELL.

(Supreme Court of Alabama. April 12, 1910.)

MORTGAGES (§ 338*)—RESTRAINING FORECLOSURE.

Where the enforcement of a mortgage is against good conscience and would work an irreparable injury, equity will interfere; but a foreclosure will not be enjoined that the mortgagor may have the benefit of a set-off of an unliquidated demand against the mortgagee where there is no allegation of the mortgagee's insolvency, and the refusal of the mortgagee to accept a conveyance of the property in full discharge of the debt affords no reason for restraining the sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1027; Dec. Dig. § 338.*]

Appeal from Chancery Court, Jackson County; W. H. Simpson, Chancellor.

Bill by E. H. Caldwell against S. A. Caldwell to enjoin the execution of a power of sale containing a mortgage until an unliquidated demand due from respondent to complainant could be ascertained and set off. Judgment for respondent, and complainant appeals. Affirmed.

R. W. Clopton, for appellant. Lawrence E. Brown, for appellee.

SAYRE, J. This is a case in which the complainant sought to enjoin the foreclosure of a mortgage under a power of sale in order that he might have the benefit of the set-off of an unliquidated demand against the mortgagee, and is to be settled upon familiar principles of equity jurisdiction. Complainant and defendant are brother and sister, living under the same roof on the mortgaged property, and some ethical reasons are suggested which possibly ought to have consideration by the complainant before a foreclosure is insisted on, but there is no showing of grounds for interference cognizable in a court of chancery. Equity will enjoin an attempt to pervert a power of sale from its legitimate purpose. *Struve v. Childs*, 63 Ala. 473. But it must have substantial reasons for so doing. The interests of society require that such power be not interfered with lightly. It results from contract between the parties, and the party who borrows must consider when he bargains whether he is not giving too large a power to him with whom he is dealing. *Jones v. Matthis*,

11 Jur. 504. The jurisdiction will be exercised only when, because of fraud, or a want or illegality of consideration, or for other sufficient reasons, the enforcement of the collection is against good conscience, and would work great and irreparable injury. So the rule is stated in *Glover v. Hembree*, 82 Ala. 324, 8 South. 251, and in *Vaughan v. Marable*, 64 Ala. 60.

There is no allegation of the defendant's insolvency. In fact, the contrary appears. If it should be assumed that for years the defendant has lived with the complainant under circumstances which would imply a promise to pay for her board—as to the merit of which suggestion we intend no intimation—that demand is unascertained, has no agreed relation with the mortgage debt, and in the absence of allegation of defendant's insolvency, or other special equity, the power of sale will not be enjoined in order to enable the mortgagor to establish a set-off against the mortgage debt. *Glover v. Hembree*, supra. The mere existence of a legal demand against the mortgagee will not justify interference. *Gafford v. Proskauer*, 59 Ala. 264; *Knight v. Drane*, 77 Ala. 371. And it would hardly seem necessary to say that defendant's refusal to accept a conveyance of the property in full discharge of the debt arms complainant with no special equity. Defendant is entitled in equity as at law to have her money.

For the reasons and on the authorities noted, we concur in the chancellor's opinion that there is no equity in the bill, and his decree dismissing the same on general demurrer will be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McLELLAN, JJ., concur.

HOLT v. JOHNSON et al.

HOLT et al. v. McEVOY et al.

(Supreme Court of Alabama. April 21, 1910.)

1. TRUSTS (§ 89*)—RESULTING TRUST—SUFFICIENCY OF EVIDENCE.

In order to establish a resulting trust, the evidence must be strong and unequivocal, and of such character as to disclose the exact rights and relations of the parties.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 137; Dec. Dig. § 89.*]

2. TRUSTS (§ 89*)—RESULTING TRUST—EVIDENCE—CONDITIONS OF TRUST.

While a resulting trust must be proved with great clearness and certainty, such degree of proof is not required as to the existence of conditions of a resulting trust, and for that purpose the satisfaction of the minds of the triors of the facts will suffice.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 137; Dec. Dig. § 89.*]

3. TRUSTS (§ 89*)—RESULTING TRUST—EVIDENCE.

In an action against the heirs of a decedent to establish a resulting trust, based on the

ground that funds belonging to the plaintiff went into the property purchased by decedent in her own name, evidence held insufficient to establish such trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 135; Dec. Dig. § 89.*]

4. TRUSTS (§ 63½*)—RESULTING TRUST—EVIDENCE.

A resulting trust will not be declared against heirs of a decedent merely because a failure to establish such trust will leave decedent open to the imputation of having made an unnatural disposition of his property.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 63½.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Actions by William T. Holt against Rosa A. Johnson and others, and by William A. Holt and others against Elizabeth McEvoy and others. From decrees for defendants in both cases, the plaintiffs appeal. Affirmed.

Frederick G. Bromberg, for appellants. Sullivan & Stallworth, for appellees.

McCLELLAN, J. These bills were filed by appellants, the husband and the next of kin and heirs at law of Mary Jane (Jennie) Holt, née McEvoy, to have declared and enforced primarily resulting trusts in certain real property, on the theory that funds of Mrs. Holt were employed by Mrs. Ann McEvoy, her mother and the mother of the respondents (appellees), in the several purchases of the real property described in the bills, and to which Mrs. McEvoy took the title in her own name. There are also phases of the bills seeking the imposition of a charge on the McEvoy homestead to reimburse the successors in right of Mrs. Holt for funds belonging to her which were devoted to the permanent improvement of the homestead premises, and, also, to secure the possession of a piano alleged to have been paid for out of funds belonging to Mrs. Holt. There is not, as indeed there could not be, any real contention as to the law of the cases. The controverted issue is the same in both. It is of fact purely. The resolution of this issue will determine the equities of both.

The part of the transcript devoted to setting out the testimony, pro and con, covers upwards of 90 closely typewritten pages, and the very helpful discussion by the solicitors in the cause of the evidence bearing on the issue comprises upwards of 60 closely typewritten pages of large dimensions. The whole testimony has been most carefully read and considered, and the discussions of the solicitors have received like attention. From this volume of record matter, dealing with circumstances and events, personal acts and conduct, covering 20 years or more, it is apparent that a full treatment in opinion of the evidence in the cause is impossible. The solicitors and ourselves must in view of the evident necessity be content with the chiefly

general statements and conclusions to follow.

The theory of the bill invokes a familiar phase of equity jurisprudence, viz., the establishment and enforcement of an implied trust. Such implied trusts reckon the legal title in another, and to avoid the conveyance, in cases of the character here presented, and to establish the trust resting, as it does, entirely in parol, it is well understood that the evidence must be "strong and unequivocal, and of such character as to disclose the exact rights and relations of the parties" (Jones on Ev. [2d Ed.] § 422); or, as said in *Lehman v. Lewis*, 62 Ala. 133, the proof "must be clear, full, and satisfactory and convincing"; or, as written in 1 Perry on Trusts, § 137, "the facts in all cases (of the character in hand) must be proved with great clearness and certainty * * * and facts that only base a conjecture that the conditions of a resulting trust existed are insufficient." While the measure of certainty indicated is always requisite, yet that measure does not require the "clearest and most positive proof" of the existence of conditions of a resulting trust. 1 Perry on Trusts, § 137. The satisfaction of the mind of the trier of the facts will suffice.

In 1880 Owen McEvoy died, leaving a widow, Ann McEvoy, and the following children in the order of their ages: Jennie, Rosa, James, John, Lizzie, and Patrick. He possessed a lot in Mobile on which they then resided. The family was poor, at least after the father's death. Jennie about that time entered on an apprenticeship with a dress-maker, Mrs. Loyd. She worked there, either as an apprentice or at her trade, until a few days before her marriage to William T. Holt, in 1886. Soon thereafter—whether from a small beginning theretofore made by Jennie and Rosa during times not demanded in the service of Mrs. Loyd is in our opinion not important—the business concern above referred to seems to have come into well-defined existence. Its place was in the McEvoy home. It grew with the years, and in two or three years after Mrs. Holt's marriage was of considerable size, and had a large clientele among the most prominent and æsthetic people of the city of Mobile. While the evidence shows without any real doubt that Mrs. McEvoy was after the death of her husband the dominant, managing head of the household (not the business), it is just as well demonstrated in the evidence that the chief asset of the business concern named before was the unusual skill and taste of Mrs. Holt as a maker of apparel for women. So, if the controversy here could be determined by the response to the inquiry who afforded the real basis for popular favor, and, in consequence, the profitable (in business) enterprise, there would be no hesitancy

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in casting the conclusion for the appellants. The burden, writing with special reference to this cause, assumed by the appellants, was to trace funds of Mrs. Holt into the hands of Mrs. McEvoy, and to follow those funds into the purchases and expenditures before indicated. The evidence does not do this with the certainty requisite to justify the relief sought in these bills. The evidence leaves no room for doubt that the children of Mrs. McEvoy, some of them, omitting for the present reference to Jennie, even after maturity and up to the time of their marriages, regularly brought their earnings to Mrs. McEvoy. Doubtless this course was the product of the poverty prevailing about, and for a period of time after, the father's death—a course amounting to a pooling of the incomes of the working members of the household. Mrs. McEvoy herself, the weight of the evidence is, cooked, washed for strangers to the household, raised and sold some vegetables, and sold milk from a cow and a few goats. It is also apparent that she was a woman of frugal ideas, and supervised and restrained the children in matters of their clothing. There is a strong tendency in the evidence to the effect that she was generally the paymistress of the business concern, and so, out of the funds coming into her custody through Mrs. Holt and others connected with the business. William T. Holt became early after his marriage a member of the household, and paid \$4 per week for his board. There is no evidence that Mrs. Holt and her two children ever paid any fixed board. It does appear that Mrs. McEvoy, and probably other members of the closely related household, took the natural part in caring for the Holt children. The original family changed by natural events; those marrying moving away. In the case of Rosa she was paid wages, after her marriage, when in the service of the business concern.

While the evidence admits of adverse inferences, if not of positive denial, we think the conclusion is unescapable that Mrs. Holt during the entire life of the business exercised without question the right to take out of, or to retain, or both, funds coming into the business for personal use. What, if anything, Mr. Holt contributed to her and the children's support or afforded her and their children for expenditure, is not clear from the evidence. He was steadily employed in other pursuits. Mrs. Holt traveled, especially after her health began to fail, and from expressions made by her, it appears that one inspiration in her work was that she might travel for pleasure, if not for health. She was unquestionably the managing head of the business concern, buying materials, hiring and discharging the help, and exercising general supervision over the business. Such, we hope our summary has indicated, was the condition of affairs and

course of business from 1886 to Mrs. Holt's death in 1902.

Aside from the wholly uncertain amount of funds of the business going into the custody of Mrs. McEvoy, her money possession had source, at least for many years, in the turned-in wages of some of her children (outside of Jennie). But the conclusion on the issue in hand cannot be controlled or materially affected, even if it be conceded, to appellants' advantage, that the sole money possessions of Mrs. McEvoy were derived from the business concern conducted in the home of Mrs. McEvoy and Mrs. Holt. The probative force of the fact that bills against patrons of the concern were made out in the name as creditor of Mrs. Holt is not left unconsidered. As has been stated, her skill and taste was the inducement and life of the business. She managed it; she made it what it was. But from this, in the face of other evidence in connection with that we have indicated, it cannot be concluded that the business was that of Mrs. Holt alone. It is shown without dispute that Mrs. Holt besought Mrs. McEvoy to make a will (the terms of which she seems not to have suggested); and this to avoid confusion. Not only this, but, after a considerable sum or sums now claimed as upon the right of Mrs. Holt had been expended by Mrs. McEvoy in permanently improving the homestead lot, Mrs. Holt, with her husband, joined the other children for love and affection and \$10 paid in a conveyance thereof to Mrs. McEvoy. This was a solemn act of Mrs. Holt herself, opposed to the theory of the bills before us. Not only this, but in 1891 Mrs. McEvoy expended \$1,200 in the purchase of two pieces of the real estate now involved, in 1893 \$800 was likewise expended, and in 1900 \$1,800 was likewise expended; all the conveyances being taken to Mrs. McEvoy and promptly recorded. At no time was any complaint made by Mrs. Holt, if she actually knew of these dealings. At no time was it shown that she sought any adjustment of matters. No partnership agreement was ever made, and no fixed compensation or share of the business income for Mrs. Holt was ever mentioned so far as this record shows. The suggestion of Mrs. Holt that Mrs. McEvoy should make a will, to avoid confusion—a confusion doubtless meant to be attributed to the relative rights or claims of Mrs. McEvoy's other children—strongly supports the conclusion on the facts we feel impelled to announce, viz., that without arrangement, express or implied, with Mrs. McEvoy or those of the home, Mrs. Holt built up and successfully managed the business described; that she took from its income what she needed or wanted, and so without being called to account; and that the rest went into the common fund out of which all in the house, save William T. Holt, lived, and out of which Mrs. McEvoy at least in part took the mon-

ey, approximately \$5,000, to improve the home place, and to make the purchases set forth in the bill. If the fund in Mrs. McEvoy's hands from the income of the business was treated as the subject of a common property in which Mrs. Holt was a sharer, to what part Mrs. Holt was entitled is, on this record, matter of pure conjecture, if, indeed, it could ever be made certain in any degree.

Under the rule before stated, for the measure of certainty of proof in order to sustain the declaration and enforcement of an implied trust, it is too evident for doubt as the learned chancellor concluded that in this instance the complainants entirely failed to maintain in the evidence their asserted theory of right and equity. That the brothers and sisters of Mrs. Holt, as appellants contend, will, through the will of Mrs. McEvoy, share, to the exclusion, pro tanto, of Mrs. Holt's children, in the result of years, even until her death, of the applied skill and the fine repute in her profession of their mother, Mrs. Holt—a result not in accord with natural duty or natural impulse—is without doubt a strong appeal to a universal human sentiment; but, though true and just the sentiment is, rules established for the ascertainment and vindication of rights cannot be qualified in application thereby. Impulse, however nobly inspired, should not, cannot, influence the judicial determination of issues at law or in equity.

The decrees appealed from must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

CITY OF HUNTSVILLE v. COUNTY OF MADISON.

(Supreme Court of Alabama. April 5, 1910.)

1. MUNICIPAL CORPORATIONS (§ 484*)—TAXATION (§ 183*)—SPECIAL ASSESSMENTS—EXEMPTIONS.

A constitutional or statutory exemption of public property from general taxation does not necessarily exempt it from special local assessment for public improvements, but property owned and held by the state and counties for public purposes is generally exempt from taxation of any description, and is not subject to taxation in any form, unless the legislative intent to render it so clearly appears.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1045-1050; Dec. Dig. § 434;* Taxation, Cent. Dig. § 285; Dec. Dig. § 183.*]

2. TAXATION (§ 572*)—COLLECTION OF TAXES—REMEDY.

While an action at law will generally lie to collect taxes where no other method is prescribed, a prescribed method is exclusive, and must be followed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1135; Dec. Dig. § 572.*]

3. MUNICIPAL CORPORATIONS (§ 525*)—SPECIAL ASSESSMENTS—PROPERTY OF COUNTY.

Code 1907, §§ 1359-1420, provide for the levy and assessment, by municipal corporations, of special taxes for public improvements, and prescribes a remedy for their collection by a proceeding in rem, without personal judgment against the owner. *Held*, that an action at law was not maintainable against a county to declare and enforce a lien on the county courthouse for a special assessment levy for street improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1240, 1241; Dec. Dig. § 525.*]

4. MUNICIPAL CORPORATIONS (§ 586*)—STREET IMPROVEMENTS—ASSESSMENTS—ENFORCEMENT—PERSONAL JUDGMENT AGAINST OWNER—STATUTES.

Code 1907, § 1398, authorizing judgment against a landowner in proceedings to enforce a special assessment for street improvements, and section 1400, providing for execution thereon, applies only to a case where an appeal is taken to the Supreme Court, and where a supersedeas bond is given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1304-1306; Dec. Dig. § 586.*]

5. MUNICIPAL CORPORATIONS (§ 439*)—STREET IMPROVEMENTS—COUNTY PROPERTY—BENEFITS.

Under the Constitution limiting special assessments to the increased value of the property resulting from the benefit to be derived therefrom, no benefit is conferred on courthouse lots or the buildings erected thereon and used by the public of the county by the improvement of streets abutting thereon, for which such property can be assessed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1063; Dec. Dig. § 439.*]

6. EQUITY (§ 219*)—BILL—DEMURRER.

Where a bill is without equity, it is subject to demurrers testing its equity, as authorized by Code 1907, § 3121.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 496; Dec. Dig. § 219.*]

Appeal from Chancery Court, Madison County; W. H. Simpson, Chancellor.

Bill by the City of Huntsville against Madison County to declare and enforce a lien against the county courthouse situated within the city for a special assessment against it for paving and street curbing, etc. From a judgment sustaining demurrers to the bill, plaintiff appeals. Affirmed.

Brickell & Smith, for appellant. Walker & Spragins, for appellee.

ANDERSON, J. That there is a well-defined distinction between general taxation and a local assessment for public improvements, such as pavement, sewerage, etc., there can be no doubt. It is also settled that constitutional or statutory exemption of public property from general taxation does not necessarily exempt it from special local assessment for public improvements; but, while there is a conflict, the weight, and, we think, the sounder authorities, hold that general language in a statute giving cities power to levy assessments for street improvements is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not sufficient to embrace the property of the state or county which is devoted to strictly public uses, nor authorize the enforcement of such special assessment against it under a general judgment against the county. In other words, property owned and held by the state and counties for public purposes is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the Legislature to render it so clearly appears. *Worcester County v. Mayor of Worcester*, 116 Mass. 193; *Page & Jones on Taxation*, § 580; *Gray on Limitation of Taxing Powers*, §§ 1906, 1174, 1175; *Witter v. Mission School District*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; *Edwards Co. v. Jasper Co.*, 117 Iowa, 385, 90 N. W. 1006, 94 Am. St. Rep. 301, and note; *City of Clinton v. Henry Co.*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *Franklin Co. v. Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396. For an able and complete discussion of the subject, see note commencing on page 400. While there are many authorities holding that this special tax is permissible unless prevented by the statute, they are almost uniform in holding that it cannot be enforced by fixing a lien on the public property, and those that permit the levy merely authorize the collection by a personal judgment rather than by an action in rem. It must also be borne in mind that most of the statutes considered in this line of decisions did not confine the right to collect the tax solely by subjecting the property, but authorized a personal judgment. Therefore, in view of the fact that they all hold that the tax could not be enforced by an action in rem, we are of opinion that they would have held that the right to levy against public property did not exist had the statutes prescribed an action in rem as the exclusive remedy to enforce the collection of said tax. Article 26, p. 638, Code 1907, provides for the levy and assessment by municipal corporations of this special tax for public improvements and prescribes the remedy for the enforcement of the collection of same, and which is, of course, subject to the limitations fixed by section 223 of the Constitution of 1901. The authority to levy this tax is general, and the statute makes no express provision for the levy of same against state or county property held for public purposes. Nor can the power to do so be necessarily implied in view of the fact that the statute (section 1386) fixes a proceeding in rem as the sole method of enforcing the collection of said special tax. It is true it authorizes the recovery of the amount of the assessment with interest and cost, but it can only be enforced against the property, and does not

authorize a personal judgment against the owner. True, also, section 1398 authorizes a judgment, and section 1400 authorizes execution, but they apply only in case of an appeal to the Supreme Court and in cases where the appellant gave a supersedeas bond. "The general rule seems to be that, where the Legislature has not authorized any method for collecting a tax, an action at law will lie to collect it. Where the Legislature, however, has authorized a method of collection, the method is exclusive, and generally in such case an action will not lie unless the statute expressly authorizes it." *Gray on Limitations of Taxing Power*, §§ 1174, 1175; *Worcester v. Worcester*, 116 Mass. 193.

There is another question which should be borne in mind in arriving at the legislative intent, and which seems to have been ignored in those cases holding that county property was liable to said special tax. The Constitution expressly limits this tax so as not to exceed the increased value of the property resulting from the benefit to be derived from such improvements. It is a matter of common knowledge that courthouse lots and the buildings thereon were procured and erected for public use, not to sell or rent, and it would be difficult to ascertain how the county could be materially or financially benefited because of the pavement or beautifying of the streets of Huntsville. There can be no material enhancement in the value of the courthouse square that would prove of any substantial benefit to the taxpayers of Madison county generally. They own the square for certain purposes, not to rent or sell at a profit, and as a rule the investment is permanent, and for the uses to which the property is adapted it is just as valuable to the public whether adjacent property is worth \$100 or \$1,000 per front foot. The fact that county property is included in the exemptions from general taxation by the terms of section 2061 of the Code of 1907 is no indication that it was intended to be subject to this special tax. It was exempt regardless of this statute, and was doubtless included in the schedule with other property not necessarily exempt, independent of the statute, and for the purpose of setting forth all exempt property.

The bill, being without equity, was subject to the demurrers testing its equity (section 3121 of the Code of 1907), and which were properly sustained, and the decree of the chancery court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

WALTON v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Alabama. April 14, 1910.)

1. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—REPAIRING DEFECT—EFFECT.

Under employer's liability act (Code 1907, § 3910, subd. 1), giving an employé a right of action against the employer for personal injuries caused by defects in works, machinery, etc., and subdivision 2, giving a right of action for injuries caused by the negligence of an employé who has any superintendence, etc., where an employé was injured while repairing a switch, that there was a defect in the switch could not be attributed to any breach of duty owing from the employer to the employé at the particular time, since the employé's business at the time was to repair the defect.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 107.*]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—LIABILITY OF EMPLOYER—NEGLIGENCE—NECESSITY OF SHOWING.

Under employer's liability act (Code 1907, § 3910), giving an employé a right of action against an employer for personal injuries, that a servant was injured while doing what his contract required him to do did not charge liability upon the employer, since it was necessary that negligence be shown under some subsection of the statute.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—EVIDENCE—QUESTION FOR JURY—"INEVITABLE ACCIDENT."

Under employer's liability act (Code 1907, § 3910, subds. 1, 2), where the jury would have been justified from plaintiff's testimony in referring plaintiff's injury to inevitable accident (that is, accident which prudence on the part of defendant, or those employés standing in places of responsibility in respect to plaintiff, could not have anticipated), or they might have referred it to the negligence of plaintiff's co-employé, who was a fellow servant, there was nothing to take the case to the jury, and a general charge for defendant was proper.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1007; Dec. Dig. § 285.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3571-3573.]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Joe Walton against the Tennessee Coal, Iron & Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint contains five counts, under subdivisions 1 and 2 of the employer's liability act (Code 1907, § 3910). It appears from the testimony of the plaintiff that he was working on the narrow-gauge railroad track at the time he was injured; that the track was used in connection with the furnaces of the defendant, and belonged to the defendant; that at the time of the injury the superintendent, under whom he was at work, was screwing up one of the switches, and instructed plaintiff to pour oil on it while another employé raised it up, and that when it was raised up it came over and hit his foot;

and that he was unable to say what was the matter with the switch.

W. T. Edwards, for appellant. Percy, Ben-ners & Burr, for appellee.

SAYRE, J. The plaintiff alone testified to the manner in which he received his injury. It seems that there was some defect in the switch, but that fact cannot be attributed to any breach of duty owing from the defendant to the plaintiff at the particular time, for the plaintiff's business at that time was to repair the defect. As for other aspects of the case, we have been unable, after repeated readings of the plaintiff's testimony, to find anything upon which a jury might hang a verdict for the plaintiff. The fact that plaintiff was hurt while in the employment of the defendant, and while engaged in doing what his contract of employment required him to do, did not suffice to charge liability therefor upon the employer. It was necessary that negligence be shown under some subsection of the statute. This the plaintiff failed to do. On his own account of what occurred the jury would have been justified in referring plaintiff's injury to inevitable accident only; that is, accident which prudence on the part of defendant, or those employés standing in places of responsibility in respect to plaintiff, could not have anticipated, or they might have referred it to the negligence of plaintiff's co-employé Burdett. But Burdett was a fellow servant without more. He stood in no such relation to plaintiff, nor had charge for defendant of any such instrumentality, as that the employer's liability act imposed liability upon the common master for his negligence. There was nothing to take the case to the jury, and the general charge was well given for the defendant.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

SOUTHERN HARDWARE & SUPPLY CO. v. LESTER.

(Supreme Court of Alabama. April 19, 1910.)

1. BANKS AND BANKING (§ 119*)—DEPOSITS—RELATION OF PARTIES.

The relation between a bank and a general depositor is that of debtor and creditor, respectively.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 289-292; Dec. Dig. § 119.*]

2. BANKS AND BANKING (§ 138*)—DEPOSITS—PAYMENT OF CHECKS—EXTINGUISHMENT OF LIABILITY.

If free from fraud or other vitiating circumstance affecting its rights, a bank, by paying checks on it, extinguishes its liability to the depositor to the extent of the sums so paid.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 344, 398, 405; Dec. Dig. § 138.*]

3. BANKS AND BANKING (§ 188*)—DEPOSITS—PAYMENT OF CHECKS — TITLE TO MONEY PAID.

The currency delivered by a bank in payment of a check is the money of the bank, and not the money of the drawer.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 188.*]

4. BILLS AND NOTES (§ 104*)—CHECKS PROCURED BY DURESS—VALIDITY.

Checks are utterly void as between payee and drawer if their issuance be procured by duress in obtaining their issuance by an officer of the drawer, a corporation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104.*]

5. BANKS AND BANKING (§ 148*)—CHECKS PROCURED BY FRAUD—LIABILITY FOR PAYMENT.

If banks on which checks were drawn had no notice of fraud in procuring their issuance by the drawer, they are not negligent in honoring them, and the checks are not in such case forgeries in such sort as to render the banks liable for paying them when sued by the drawer.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

6. DETINUE (§ 5*)—RIGHT OF ACTION—TITLE OF PLAINTIFF.

Where plaintiff's sole reliance in detinue is title, comparative right as between the parties is not always the test of recovery vel non, since a defendant may prevail because title is outstanding in a third person.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9; Dec. Dig. § 5.*]

7. DETINUE (§ 1*)—RIGHT OF ACTION—PERSON DEPRIVED OF POSSESSION.

One wrongfully deprived of possession of his property may recover it in detinue when it can be identified.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. § 1; Dec. Dig. § 1.*]

8. PROPERTY (§ 7*)—OWNERSHIP—TITLE AS CHARACTERISTIC THEREOF.

There is and must be title to all things real or personal if once subjected to ownership, as in absence of a taker, on decease of the owner, property escheats to the state.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.*]

9. PROPERTY (§ 7*)—OWNERSHIP—KINDS OF TITLE.

Title may be of several kinds; among them, absolute, conditional, equitable, and legal.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.*]

10. DETINUE (§ 5*)—RIGHT OF ACTION—TITLE AND RIGHT OF POSSESSION.

The issuance of checks to the payee having been fraudulently secured, and their payment as far as she was concerned being wrongful, the legal title to the money paid in honoring the same, and the right to its immediate possession, is in the drawer, and the latter may recover it in detinue from payee, there being no question that the currency sued for is the identical money delivered to the payee by the banks.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9; Dec. Dig. § 5.*]

11. SEARCHES AND SEIZURES (§ 5*)—EXECUTION OF SEARCH WARRANT—TITLE TO MONEY SEIZED—DETERMINATION.

Under Code 1907, § 7770, providing that, where property is taken under a search warrant and delivered to the magistrate, he must, if it was stolen or embezzled, cause it to be delivered to the owner on satisfactory proof of ti-

tle, the magistrate has no jurisdiction to determine title to money taken on a search warrant, unless it is established that it was stolen or embezzled.

[Ed. Note.—For other cases, see Searches and Seizures, Dec. Dig. § 5.*]

12. COURTS (§ 475*)—CONCURRENT JURISDICTION—RETENTION WHEN FIRST OBTAINED.

Where a court's jurisdiction and plaintiff's right to prosecute therein once attaches, that right cannot be arrested or taken away by proceedings in any other court, but this rule depends for effective application on the condition, among others, that the court first taking jurisdiction must have adequate jurisdiction to grant the relief to which the parties are entitled, and it does not apply if its power is too limited to afford such relief.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229-1259; Dec. Dig. § 475.*]

13. DETINUE (§ 16*)—SUIT AGAINST SHERIFF—DEFENSE BY ADVERSE CLAIMANT.

In detinue against a sheriff for money obtained in a warrant to search for stolen money belonging to plaintiff, the sheriff properly invoked the law of the law and equity court to bring a claimant thereof, from whose possession the money was taken by him to litigate the question of title and possession, as provided by Code, § 6051, allowing defendant to require an adverse claimant to come in and defend.

[Ed. Note.—For other cases, see Detinue, Dec. Dig. § 16.*]

14. DETINUE (§ 16*)—CLAIM BY THIRD PERSON—NATURE OF CAUSE.

When, in detinue against a sheriff for money obtained on a warrant to search for stolen money belonging to plaintiff, a defendant substituted pursuant to Code 1907, § 6051, came into the case and propounded her claim to the money, the proceeding became a civil cause between her and plaintiff.

[Ed. Note.—For other cases, see Detinue, Dec. Dig. § 16.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Southern Hardware & Supply Company against Frank Cazalas, for whom Lillie B. Lester was substituted as defendant. From a judgment for her, plaintiff appeals. Reversed and remanded.

McIntosh & Rich, for appellant. Webb & McAlpine, for appellee.

MCCLELLAN, J. The Southern Hardware & Supply Company instituted in the law and equity court of Mobile this action of detinue to recover \$5,620 of United States currency against Frank Cazalas as sheriff of Mobile county. The sheriff had come into possession of the currency as the result of obedience to the mandate of a search warrant issued out of the inferior criminal court of Mobile county on an affidavit made by Hardaway Young, wherein it was charged that Lillie B. Lester and her husband, Fleetwood Lester, had stolen the said sum of money belonging to the Southern Hardware & Supply Company, a corporation. After service of the writ in detinue on the sheriff, he appeared and suggested, as provided by Code 1907, § 6051, Lillie B. Lester as claimant of the currency in question, and thereupon, after notice

served upon her, and according to the statute, Lillie B. Lester became the substituted (for the sheriff) defendant, and so appeared by counsel. She subsequently filed a plea and also a "statement of claim." Her plea was the general issue; in short, by consent. Her "statement of claim" denied the plaintiff's legal title to and right of immediate possession of the property in suit, and, in addition, stated the circumstances under which the sheriff came into possession thereof, that the sheriff made return of his execution of the search warrant on the day of its issuance, and that on the following day this suit in detinue was instituted.

On the state of fact in this record these conclusions cannot be escaped: That Hardaway Young, the president of the appellant, as the result of duress of an aggravated character, signed an order whereby, in the usual course of conduct of the appellant's business, another officer of appellant issued checks, aggregating the sum represented by the currency sued for, to Lillie B. Lester, which checks were drawn on banks in the city of Mobile and against the accounts of the appellant therewith, and that Lillie B. Lester secured on these checks or on the cashier's checks issued in response to those checks from these banks the identical money sought to be recovered in this action. These conclusions of fact are not the subject of serious controversy between counsel on this appeal. Indeed, as we understand the contention of counsel for appellee, both here and below, it is that, aside from the matter of exclusive jurisdiction, asserted only in brief, as upon the provisions of section 7770, to be later considered, the plaintiff in instituting detinue has mistaken its remedy, for the reason that the legal title to and right to the immediate possession of the currency resided in the banks honoring the checks made payable to and collected by Lillie B. Lester. The currency came into the possession of Mrs. Lester by the honoring of checks drawn in her favor on banks with which appellant was a general depositor. The relation then existing between appellant and the banks was that of creditor and debtor, respectively. By the checks the creditor directed its debtor to pay the amounts of money stated therein to Mrs. Lillie B. Lester, and this the debtor banks did. If free from fraud, or other vitiating circumstance affecting the banks' rights, it is obvious that the debtor banks extinguished their liability to their creditor to the extent of the sums represented by and paid upon these checks; and from this premise it follows undeniably that the currency delivered to Mrs. Lester was then the money of the debtor bank, and not the money of the drawer, creditor. That this is true is obvious when it is considered that a debtor cannot discharge his obligation to his creditor by payment or satisfaction out of his creditor's assets, funds, or values. To operate as payment or satisfaction, the debtor must, of course, part with

his assets, funds, or values. While these considerations are expressions of self-evident legal truths, the case made by the evidence in this record cannot be resolved, as is insisted, to the conclusion of rights asserted, by the application of the legal truths stated.

The issuance of the checks in question was the immediate result of the order signed by Young. The evidence before us leaves no room to doubt that he copied the order and signed the order because of such duress of physical fear, enforced by a drawn pistol, as made him a mere automaton to register the will of Mr. Lester. 10 Am. & Eng. Ency. Law (2d Ed.) pp. 334, 338, and authorities in note 3 on the latter page; *Royal v. Goss*, 154 Ala. 117, 45 South. 231. That Mrs. Lester was both cognizant of and participated in, at least preliminarily and latterly, the profit of this aggravated act of coercion, cannot be gainsaid on the evidence here. She is shown, among other circumstances, to have borrowed on the morning of the event a pistol from her landlady, to have called Young over the phone and requested him to come to her place of abode, concealing in that conversation the presence thereof of her husband, to have been within reach of call by her husband, who, with Young, was in the parlor where the order was copied and signed; to have taken the order, secured as stated, and to have gotten the money therefrom mentioned, which was, as the order recited, for the purchase of "Mrs. Lester's stock" in the appellant corporation; and to have left the residence, on her errand, after a parting warning to her husband, in effect, to refrain from extreme measures. So that Mrs. Lester was not innocent of the wrong from which the checks to her resulted and by the payment of which the identical currency here sued for came into her possession. Can recovery from her of the currency, the specific thing, by appellant, be defeated on the theory that the legal title to and immediate right of possession of the money, essentials to the maintenance of detinue where the title, alone, as here, is the sole reliance of the plaintiff to recover the chattel; there being no evidence of prior possession of this money by the plaintiff was, at the commencement of this action, in the several banks cashing the checks? A satisfactory reply to this question depends, as respects the relation of the banks to this currency, upon the status created by the issuance and payment of checks to Mrs. Lester. Undoubtedly the checks issued by the officer of the appellant in the usual course of conduct when the president thereof executed orders for the payment of money, whether signed as president or not, and without any notice of the means employed to secure the order, were as between Mrs. Lester and appellant utterly void, because of the duress practiced to procure their issuance. Author, *supra*. But this result did not obtain as respected the banks on which the checks were drawn and by which they were paid to Mrs.

Lester. If the banks had no notice of the fraud underlying the issuance of the checks, and none whatever was shown, the banks were guilty of no negligence in honoring them. The checks were not forgeries in such sort as to render the banks liable for the sum so paid out on them in an action by the appellant against the bank. These checks were in themselves genuine. Their infirmity lay in the fact that as the effect of an illegal cause they were issued. If, to reiterate, the banks paid them without notice of the wrongful conduct innocently superinducing their (checks') issuance, the banks were not negligent, and the sums so paid were discharges pro tanto of the debtors' (banks') liability to their creditor, the drawer of the checks. Such, this record shows, was the practically applied view of both banks and appellant, in consequence of the issuance of the checks and their payment by the banks; it being established that the banks charged the sums severally paid by each on the checks so issued to the accounts of appellant.

So the result to this point is that the banks (debtors) have satisfied pro tanto their indebtedness to the general depositor, their creditor, and hence the sums so paid on the checks were not, after delivery thereof to Mrs. Lester, the property of the banks; for the obvious reason that satisfaction pro tanto thereby of their liabilities to the creditor denuded the debtor banks of any right or interest in the money, they not, of course, being permitted to both discharge their liabilities to the creditor and, at the same time, retain the right to the means of that discharge. It accordingly follows that the banks are on this record without right, title, interest, or claim in or to the money delivered, as indicated, by them to Mrs. Lester.

The necessary consequence of the winnowing process before essayed is that the contest is narrowed to the inquiry, not which of the two, appellant or appellee, has the better right to the money involved, for in detinue, where plaintiff's sole reliance is title, comparative right, as between the parties to the action, to the possession, is not always (if ever? we may interpolate, as a query) the test of recovery vel non, since a defendant may prevail, as is here asserted, because title is outstanding in a third person, but the inquiry is: Did the plaintiff at the commencement of this action have such title as authorized a recovery in detinue, the essential being title to, general or special, and the right to the immediate possession of, the subject-matter claimed? By the application of the rule of exclusion we think it must be affirmed that plaintiff had such title, and, following it, the right to the immediate possession.

There can be no questioning on this record that the currency here sued for was the identical money delivered by the banks to Mrs. Lester. Nor can there be two opinions on the right of one wrongfully deprived of the

possession of his property to recover it, in specie, in an action of detinue, where it can be identified. To all things, real or personal, once subjected to ownership, title there is and must be. In the absence of a taker on decease of the owner, property escheats to the state. That title may be of several kinds; among them, absolute, conditional, equitable, and legal. In this instance we are concerned with the last mentioned, viz., the legal. That is the crux of the issue of law the defendant asserted to success below, and again urges here. The only parties whose rights could be or were for practical purposes involved in the question of title to this currency were the banks paying the checks, the plaintiff, drawer of the checks, and Mrs. Lester, drawee of the checks and receptor of the money thereon.

Upon what appears to us sound reason we have excluded the banks from any right or title (and there is no semblance of circumstance, even, that the banks were or are claiming any right or title to the money, having, respectively, charged the several sums against the accounts of the plaintiff with them, respectively), to the currency in suit. So that in final analysis the point of inquiry is: Which, appellant or appellee, had at the inception of this suit the legal title to the currency? One or the other, and none other, must have then been the repository of the title. Was the appellee? If she was not, then appellant was the repository of the legal title to this currency. The banks, to repeat, are not now factors in the equation. As between them and the plaintiff, there is no contest, if, indeed, there could be, no negligence on their part in honoring the checks being shown. But this conclusion cannot avail appellee whose participation in a wrongful act made her the receptacle of funds to which in law she was not entitled. If she could successfully claim even a measure of title to funds so received by her, on the ground that the creditor's debtor honored a check written and payable to her as the result of a wrongful act of which she knew, and in which she, at least, acquiesced, we would personify in practice a violation of the rule, based on evident morality, that one cannot have advantage of one's own wrong. In order, as readily appears, to find, as against appellant, title to this currency in Mrs. Lester, it must be done by the very operation of sanctioning, yea approving, an act, wrongful in its inception and wrongful throughout the course of acts, finally placing in her custody the funds in question. The appellant's checks were wrongfully secured to be issued, and their payment, as far as Mrs. Lester was concerned, was wrongful.

Out of such wrongful acts no title against the wronged could possibly vest. Having no place with the wrongdoer, the title must have been with the wronged. The medium, the banks, through which the wrongdoer secured the funds, passed out of the contest between

plaintiff and defendant, and that there was an innocent medium cannot as between these parties create a status of title that could not have existed had these funds been innocently paid in cash from the till of the plaintiff on the order extracted as the result of physical fear produced by a drawn weapon. The plaintiff had, when this suit was instituted, the requisite title and right to the immediate possession of the identical currency to maintain detinue. Code, § 7770, provides: "When the property is taken under the warrant and delivered to the magistrate, he must, if it was stolen or embezzled, cause it to be delivered to the owner, on satisfactory proof of his title. * * * " While, on the trial below, the defendant offered no evidence, it will not be assumed that, had the magistrate entered upon the inquiry whether the money had been stolen or embezzled, the defendant would have shown on her behalf that such was the case. Unless it is so established, the magistrate has no jurisdiction under the quoted phase of the statute (section 7770) to determine title.

However, appellee's counsel insist that plaintiff could not recover in this action because the sheriff was bound to hold the currency, could not of his own violation surrender it, until the magistrate determined the questions triable by him in virtue of the quoted provisions of section 7770. The rule, as generally stated, is familiar that "where the jurisdiction of a court and the right of a plaintiff to prosecute in it has once attached that right cannot be arrested or taken away by proceedings in any other court." *Troy Fertilizer Co. v. Prestwood*, 116 Ala. 119, 22 South. 262, among others. But this rule, as generally stated, depends for effective application upon one condition, among others, viz., that such court, first taking cognizance of the matter, must be adequately jurisdictioned to grant the relief to which the parties are entitled, or, conversely, that the rule indicated does not apply where the court first taking cognizance of the case is too limited in power to afford the relief to which the parties are entitled. 8 Am. & Eng. Ency. Law, p. 33; 11 Cyc. pp. 983-986; *Eaton v. Patterson*, 2 Stew. & P. 9, 15; *Dwyer v. Garlough*, 81 Ohio St. 158, 160.

If it should be assumed that the magistrate's jurisdiction under the authority of section 7770 to determine the title to the currency in question was equal and concurrent with that of the law and equity court to do so, this record presents a case where the plaintiff abandoned the first tribunal for the second, and, in proper order, the defendant, without objecting to the latterly assumed jurisdiction, appeared and contested the plain-

tiff's right to the property involved. It may be debatable whether the defendant under such circumstances can question the jurisdiction of the latter court. It is unnecessary to now decide the matter.

As appears from the statute (section 7770), the jurisdiction of the magistrate to determine the title to property taken under a search warrant is conditioned upon whether it was "stolen or embezzled." A more limited power of adjudication could hardly be provided; and its restrictiveness is emphasized when compared to that enjoyed, in cases for the determination of the title to personal property, by the law and equity court. In this latter court, whether the property was "stolen or embezzled" is not a condition to jurisdiction. These parties were entitled to a determination of the title to the currency even if its anterior (to the sheriff's) possession by defendant was not the result of acts within the condition of the statute (section 7770). This the magistrate's restricted power could not afford. It therefore follows that the rule against the ouster of equal, adequate, and concurrent jurisdiction first obtained has no application to this case. Having the right to invoke the more ample jurisdiction of the law and equity court, the plaintiff's demand for the property on the sheriff was (if necessary) a warranted initial step consistent with the contemplated invocation of a more adequate jurisdiction. The sheriff did not justify his detention upon the ground that he held the property subject to the magistrate's order in the premises, but contented himself with the suggestion that Mrs. Lester claimed the property and invoked the power of the law and equity court to bring her in to litigate the question of title and possession as provided by Code, § 6051. In adopting this course we can see no fault.

When the substituted defendant came into the litigation and propounded her claim to the currency, the proceeding became a civil cause between plaintiff and (substituted) defendant. *Sullivan v. Robinson*, 39 Ala. 613. *Pruett v. Gunn*, 158 Ala. 123, 48 South. 492, sustained a possession sought to be justified under civil process. That is not the justification asserted here.

Our conclusion, then, is that the court erred in excluding on defendant's motion all the evidence, and, in consequence, in affirmatively instructing the jury to find for the defendant (claimant).

The judgment is reversed and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

W. F. FITTS & SON v. BRYAN.

(Supreme Court of Alabama. April 21, 1910.)
NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where, with very slight diligence, a party and his attorney could have ascertained whether either of them had a letter disclosing a fact relied on, the absence of the letter on the trial did not justify a new trial for newly discovered evidence, because of the absence of due diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

Appeal from Circuit Court, Choctaw County; John T. Lackland, Judge.

Action by W. F. Fitts & Son against John C. Bryan. From a judgment granting a new trial after verdict and judgment for plaintiffs, they appeal. Reversed and rendered.

W. F. Glover, for appellants. Gray & Lindsey, for appellee.

SIMPSON, J. This is an appeal from the judgment of the court granting a new trial on motion. At the spring term of the circuit court a judgment on the verdict of a jury was rendered in favor of the plaintiffs in the case of W. F. Fitts & Son et al. v. John C. Bryan (the appellee). The judgment entry shows that at said spring term, 1909, came the defendant and moved the court to set aside the judgment and grant a new trial, setting out the grounds on which the motion is made, and signed by the attorneys for the motion. In fact, this entry seems to be a copy of the motion, and it is marked, "Filed March 20/09." The clerk goes on to state, over his signature, that: "The above motion was not spread on the motion docket 'till the Fall term, 1909. Motion continued"—and under the signature of the clerk appears this entry: "3/20/09. [Signed] J. T. Lackland, Judge." The record then shows that on October 7, 1909: "Motion granted, and plaintiffs except to the granting of same. Cause ordered to be reinstated on the docket."

The bill of exceptions also sets out the motion for a new trial, to wit, newly discovered evidence, in that a letter rescinding the contract of insurance had been delivered to the insurance company, and by it to O. L. Gray, and defendant made no demand on the company for the production of said letter, because he was under the impression and believed the letter was still, at the time of the trial, in the possession of O. L. Gray, one of his attorneys in this cause; second, meritorious defense; and, third, the judgment is contrary to the evidence. It states that "no notice of said motion was given to plaintiff, said motion was spread upon the motion docket on the 5th day of October, 1909, a day of the fall term, 1909, of said court; also that plaintiff objected seriatim at the hearing of said motion on the grounds,

first, that it had not been acted on by the court at the spring term, 1909, and duly continued, and the same had been discharged; second, the grounds, as to diligence and discovering new evidence, in said motion, was insufficient; third, there was no proof of any diligence or new testimony, as no testimony under oath was given as to same." Said objections being overruled, the bill of exceptions states: "This being all of the evidence, the court made an order granting said motion for a new trial in said cause, to which ruling of the court the plaintiff duly excepted."

Without considering the technical irregularities insisted upon, the claim of newly discovered evidence was not sufficient, as there was an entire absence of any allegation (as well as evidence) of such diligence as the law requires on that subject. The attorney for the petitioner certainly knew whether he had the letter in question in his possession, and they both could have ascertained, with very slight diligence, whether either of them had the letter. *K. C. M. & B. R. R. Co. v. Phillips*, 98 Ala. 159, 168, 169, 13 South. 65; *McClendon v. McKissack*, 143 Ala. 189, 192, 193, 38 South. 1020; 4 Mayfield's Dig. p. 315, par. 5; *Traub v. Fabian*, 49 South. 240.

The judgment of the court is reversed, and a judgment will be here rendered overruling the motion for a new trial.

Reversed and rendered.

DOWDELL, C. J., and **ANDERSON** and **SAYRE, JJ.**, concur.

RYALL v. PEARSON BROS.

(Supreme Court of Alabama. April 21, 1910.)
TRIAL (§ 139*)—DIRECTION OF VERDICT.

Where a plea was not supported by evidence as to all its material averments, a general affirmative charge for defendants as to such plea was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341, 365; Dec. Dig. § 139.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Action by J. S. Ryall against Pearson Brothers. There was a directed verdict for defendants, and plaintiff appeals. Reversed and remanded.

I. I. Canterbury, for appellant. **J. M. Miller** and **De Graffenried & Evins**, for appellees.

MAYFIELD, J. This was an action of detinue, brought by plaintiff against defendants. To the complaint the defendants pleaded the general issue and several special pleas, among which was plea No. 3, which was in words and figures as follows: "That the property alleged in said complaint to have been con-

verted or taken by the defendants was, prior to the date of said alleged conversion or taking, impounded by one J. S. Trigg, who was, or claimed to be, a pound keeper in Spring Hill precinct, in Marengo county, Alabama; that said Trigg sold said property for alleged pound fees, and at said sale one T. M. Walston became the purchaser, and the same was delivered to him; that after said sale the plaintiff tendered to said Walston the amount paid by him at said sale for said property; that thereafter these defendants, knowing of said tender so made by said plaintiff to said Walston, and relying thereon as an admission by said plaintiff that said sale was valid and regular in all respects, and that said Walston was lawfully in possession of said property, with title thereto, and long after said tender was made, and while said Walston was in possession of said property, claiming the same as his own, to the knowledge of plaintiff, bought said property from said Walston. And defendants aver that said plaintiff is estopped, by reason of said facts above set out, from denying that said Walston was lawfully in possession of said property, with title thereto, and from denying that the title and possession of these defendants, obtained by them from said Walston, as above set out, is unlawful or invalid or unauthorized."

The court, at the request of defendants, gave the general affirmative charge in their favor as to this plea, which resulted in verdict and judgment for defendants. We are unable to find in this record proof sufficient to support all the material averments of this plea, and consequently hold that the trial court erred in the giving of this charge. Nor can we say that it was error without injury. The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

SOUTHERN RY. CO. v. HANBY.

(Supreme Court of Alabama. April 7, 1910.)

1. MASTER AND SERVANT (§ 325*)—TORTS COMMITTED BY SERVANT—FORM OF ACTION.

The liability of a master for an assault and battery committed by a servant while acting within the scope of his employment is in case and not in trespass, where the master did not authorize, aid, abet, or ratify the wrongful act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 325.*]

2. PLEADING (§ 64*)—SEPARATE CAUSES OF ACTION—JOINDER IN ONE COUNT.

Distinct and independent causes of action in tort cannot be joined in the same count of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 134; Dec. Dig. § 64.*]

3. ACTION (§ 50*)—MISJOINDER—PARTIES INVOLVED.

A complaint, in an action against a master and a servant for an assault committed by the

servant, which alleges that the servant, while acting within the scope of his employment, assaulted plaintiff, and which proceeds in the same count on the theory of respondeat superior in imputing liability to the master, but without alleging facts authorizing the inference that the master committed, authorized, aided, abetted, or ratified the wrongful act, states a cause of action in trespass against the servant, and in case against the master, and is bad for misjoinder of actions and parties.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.*]

4. PLEADING (§ 209*)—DEMURRER—OBJECTIONS.

A demurrer to a complaint undertaking to state a cause of action against two defendants jointly, on the ground that it fails to state facts sufficient to constitute a cause of action against defendants jointly, and that it affirmatively shows that it is not a joint cause of action, makes the point of misjoinder of actions and parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 520; Dec. Dig. § 209.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by S. M. Hanby against the Southern Railway Company and another. From a judgment for plaintiff, defendant named appeals. Reversed and remanded.

Weatherly & Stokely, for appellant. Frank S. White & Sons, for appellee.

SAYRE, J. Appellee sued the defendant corporation and its servant jointly to recover damages for an assault and battery suffered by him, while he was a passenger, at the hands of the servant. In each count of the complaint it is alleged that the defendant Malone, while acting within the scope of his employment by the defendant corporation, did assault and beat the plaintiff. It is entirely clear that these counts state an action of trespass *vi et armis* against the defendant Malone. Equally clear is it that each of them proceeds on the principle of respondeat superior in imputing liability to the defendant corporation; nothing being alleged from which it might be inferred that the master committed, authorized, aided, abetted, or subsequently ratified the wrongful act. It is settled that the master's liability, under such circumstances, is consequential upon the servant's unauthorized act, and that the action against the master is in case. *Southern B. T. & T. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 196, 55 Am. St. Rep. 930, opinion by Head, J.; *City Delivery v. Henry*, 139 Ala. 161, 34 South. 389. Prior to the statute trespass and case could not be joined in the same declaration. It being impossible to frame an action against master and servant in the same form for the intentional and unauthorized trespass of the servant, it may be there are insuperable obstacles in the way of joining counts against master and servant for a wrong of that description notwithstanding the statute. However that may be, distinct

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and independent causes of action in tort cannot be joined in the same counts. *L. & N. R. R. Co. v. Cofer*, 110 Ala. 491, 18 South. 110; *H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 413, 10 South. 274; *A. G. S. R. R. Co. v. Shahan*, 116 Ala. 302, 22 South. 509. Our recent case of *Southern Ry. Co. v. Arnold*, 50 South. 293, holds nothing to the contrary. There the action, though in tort against master and servant jointly, was in case against them both, and in consequence involved no misjoinder of actions. It follows that there was a misjoinder of actions and parties in each count of the complaint.

But appellee contends that the demurrer interposed failed to take the point that there was a misjoinder. Answering a complaint each count of which undertook to state a cause of action against two defendants jointly, the language of the demurrer was that each count failed to state facts sufficient to constitute a cause of action against the defendants jointly, and this language was varied so as to say of each count that it "affirmatively shows that it is not a joint cause of action." It seems to us that a ruling to the effect that these assignments of grounds of demurrer fell short of calling the court's attention to the misjoinder here insisted upon would approach hypercriticism. The burden and stress of the demurrer's complaining was that there was a misjoinder of parties. We are of opinion that the demurrer took the point and should have been sustained.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

SMITH, STEWART & CO. v. DEAN.

(Supreme Court of Alabama. April 5, 1910.)

1. EXECUTION (§ 163*)—VACATING—PROCEEDINGS—RELIEF.

A motion by a judgment debtor to recall an execution, on the ground that the judgment had been satisfied before the issuance of the execution, invokes the jurisdiction of the court conferred by Code 1907, § 3256, to secure parties against any abuse of execution, as regulated by section 4141, and the movant is entitled to relief whenever the party obtaining the execution has no right to enforce the judgment.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 473-483; Dec. Dig. § 163.*]

2. EXECUTION (§ 163*)—VACATING—PROCEEDINGS—RELIEF.

Where a judgment creditor and his attorney, resisting a motion to recall an execution on the ground that the judgment had been satisfied by the assignee thereof before the issuance of the execution, relied on the fact that they used the execution for the collection of the fees of the attorney for his services in procuring the judgment, the burden of showing, not only that the attorney had a lien, but the amount due to him as a fee, rested on them, and, where there was a failure of such proof, the court properly found in favor of the movant.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 473-483; Dec. Dig. § 163.*]

3. EXECUTION (§ 163*)—VACATING—PROCEEDINGS—RELIEF.

A judgment for a judgment debtor moving for an order recalling an execution on the judgment, on the ground that the judgment had been satisfied by the owner before the issuance of the execution, does not destroy the original judgment, or determine anything more than the issues litigated on the motion.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 473-483; Dec. Dig. § 163.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Application by N. C. Dean for an order recalling an execution on a judgment obtained by Smith, Stewart & Co. From a judgment granting the relief prayed for, the latter appeals. Affirmed.

John W. Chamblee, for appellant. Joe O. Halls and J. R. Montgomery, for appellee.

SAYRE, J. Plaintiffs in error having obtained a judgment against Dean in the circuit court of Jefferson county, and execution having thereafter issued for its collection, Dean spread a motion upon the motion docket of the circuit court for an order recalling the execution on the ground that the judgment had been satisfied by the owner before the execution had issued. The motion invoked the court's jurisdiction "to secure parties or privies in their rights against any oppression or abuse of execution, or other process, or upon any release, discharge, or payment after judgment" (Code, § 3256), as regulated by the provisions of section 4141 of the Code. It is to be administered on those equitable principles which apply to proceedings under the writ of supersedeas, and entitles the movant to relief wherever the plaintiff has no just right to enforce the process. *Lockhart v. McElroy*, 4 Ala. 573; *Shearer v. Boyd*, 10 Ala. 279.

At the hearing it appeared without contradiction that plaintiffs' attorney of record was seeking to collect the judgment notwithstanding it had been assigned by a formal instrument in writing. By what were intended to be formal pleadings, the plaintiffs answered the motion in three ways: (1) That they had not executed an assignment of their judgment to J. J. Edmondson. But the execution of the assignment was proved without conflict. (2) That the assignment was procured by the fraud and collusion of defendant and Edmondson, so that plaintiffs had not lost their right to control the execution and enforce the collection of the judgment. But as setting up fraud, the pleas, though most liberally construed, were insufficient. There is averment of facts which may have had more or less relevancy to a charge of fraud. The effort of the pleas seems to have been directed to the creation of the impression that the assignment was induced by Edmondson's misrepresentation of facts known to him but unknown to plaintiffs. But, whatever may have been intended, the pleas are totally de-

ficient in averment that Edmondson, who is alleged to have been inspired by Dean, either suppressed any truth or suggested any falsehood in respect to the Jefferson county judgment in his communications with plaintiffs. Indeed, there is no averment that Edmondson made any representations whatever to the plaintiff. The idea is suggested only by the averment that "the defendant inspired said correspondence between plaintiffs and Edmondson"; whereas, there is no averment of correspondence or other communication between plaintiffs and Edmondson. (3) That plaintiffs' attorney had a lien on the judgment for the security of his compensation for services rendered in its procurement, so that no one could acquire the right to satisfy the record thereof to his prejudice. But in view of plaintiffs' undeniable right to dispose of their interest in the judgment, and of the fact that they had assigned it, not questioned for any reason in this connection, though it be assumed for the moment that plaintiffs might impeach their own advised assignment as inefficacious to the extent of the lien, or, as more probably was the purpose, that the attorney might control the execution for the collection of his fee, and though it be further assumed that such an assignment might be limited in its operation without the presence of the assignee, who might have intervened or might have been made a party to the proceeding by process (*Eslava v. Farley*, 72 Ala. 214), the burden rested upon the plaintiffs, or on their attorney if he was using the execution for the collection of his fee only, to reasonably satisfy the jury, not only that he had a lien, but to show the extent of it—the amount due to him as a fee. In this regard there was a total failure of the proof. It results that the general affirmative charge was properly given to the movant. Plaintiffs, or their attorney, having been denied no opportunity to prove the extent of his lien, all other rulings were innocuous.

We remark, in conclusion, that the effect of the judgment on the motion was not to destroy the original judgment, or to determine anything more than the issues litigated on the motion.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

SELF v. COMER.

(Supreme Court of Alabama. April 7, 1910.)

1. JUSTICES OF THE PEACE (§ 75*)—FORCIBLE ENTRY AND DETAINER—REMOVAL TO CIRCUIT COURT.

Code 1907, § 4283, authorizing the removal of any suit for forcible entry and detainer, or unlawful entry and detainer, into the circuit court, where title may be tried, applies only to cases arising under section 4262, giving a remedy for forcible entry and detainer, and, by

amendment added in 1879 (Acts 1878-79, p. 49), extending the remedy to cases in which there was a peaceable entry, and then, by unlawful refusal, or by force and threats, a turning or keeping plaintiff out of possession.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 243-245; Dec. Dig. § 75.*]

2. FORCIBLE ENTRY AND DETAINER (§ 4*)—"PEACEABLE ENTRY."

In the amendment added in 1879 (Acts 1878-79, p. 49), extending the remedy of forcible entry given by Code 1907, § 4262, to cases where there was a peaceable entry, the "peaceable entry" intended is an intrusion, though peaceable, upon plaintiff's prior actual possession.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5-22; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 6, p. 4986.]

3. JUSTICES OF THE PEACE (§ 75*)—REMOVAL OF CAUSE TO CIRCUIT COURT.

The amendment of 1879 (Acts 1878-79, p. 49), extending the remedy of forcible entry and detainer given by Code 1907, § 4262, to cases where there was a peaceable entry, does not extend to unlawful detainer cases the right of removal to the circuit court granted by section 4283, in cases of forcible entry and detainer, especially as the latter section requires the defendant, as a condition precedent to removal, to state in a sworn petition that he entered the land not only peaceably but under claim of title, and not under any claim of an agreement with plaintiff.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 243-245; Dec. Dig. § 75.*]

4. JUSTICES OF THE PEACE (§ 75*)—REMOVAL OF CAUSE TO CIRCUIT COURT.

Under Code 1907, § 4283, providing that on the trial of cases of forcible or unlawful entry and detainer, removed to the circuit court, the plaintiff must recover on the strength of his legal title unless he can prove that the defendant entered the lands under agreement with plaintiff, or by force, the plaintiff, on removal, is entitled to try the case as one of forcible entry and detainer, or unlawful detainer, as those remedies existed under section 4262, before the amendment of 1879 (Acts 1878-79, p. 49), extending the remedies to cases where there was a peaceable entry.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 243-245; Dec. Dig. § 75.*]

Appeal from Circuit Court, Walker County; J. J. Ray, Judge.

Action between J. W. Self and L. O. Comer. From the judgment, Self appeals. Appeal dismissed.

Leith & Gunn, W. L. Acuff, and Z. P. Shepherd, for appellant. Bankhead & Bankhead, for appellee.

SAYRE, J. The statute (section 4283 et seq. of the Code) authorizes the removal of any suit for forcible entry and detainer or unlawful entry and detainer into the circuit court where the title may be tried. The language of the statute aptly describes only causes arising under section 4262 which gives a remedy for forcible entry and detainer.

The last clause of section 4262, added by amendment in the year 1879 (Acts 1878-79, p. 49), extends the remedy of forcible entry and detainer to cases in which there was a peaceable entry, and then, by unlawful refusal, or by force or threats, a turning or keeping the plaintiff out of possession. The peaceable entry here intended is an intrusion, though peaceable, upon the plaintiff's prior actual possession. *Knowles v. Ogle-tree*, 96 Ala. 555, 12 South. 397. There is no indication whatever of a legislative purpose to extend the right of removal to unlawful detainer cases. An unlawful detainer is where one who has lawfully entered into possession of lands as tenant, falls or refuses, after the termination of his possessory interest, to deliver possession to any one lawfully entitled thereto. Code, § 4263. Indeed, section 4283 requires, as a condition precedent to removal, that the defendant shall state in a sworn petition that he entered upon the land, not only peaceably, but under claim of title thereto, and not under any claim of any agreement, contract, or understanding with the plaintiff, or those under whom the plaintiff claims. The effect of section 4285 is that, notwithstanding the removal to the circuit court, the plaintiff may proceed to try the case as one of forcible entry and detainer or unlawful detainer, as those remedies were defined before the adoption of the amendment of the year 1879, for the provision is that on the trial of all cases removed under the statute the plaintiff must recover on the strength of his legal title unless he can prove that the defendant, or those under whom he claims, entered on the lands under contract, or agreement with plaintiff, or those under whom he claims, or by the use of force; thus clearly evincing the legislative purpose to retain the salutary summary remedies in cases where they were afforded prior to the amendment. On the other hand, the amendment added to those cases in which summary possessory proceedings might be had without respect to legal title—a class different in essential character from either forcible entry and detainer or unlawful detainer—a class of cases in which the defendant enters peaceably, but without contract, upon the possession of another. Then, in 1897, it being perceived that one who enters into possession under circumstances involving neither estoppel nor force ought to have—indeed, was constitutionally entitled to have, since, under those circumstances, his right depends entirely upon his title—his right to possession determined on his legal title and by the verdict of a jury, the Legislature enacted the removal statute of 1897 in terms which permitted forcible entry and detainer cases, strictly so called, as well as cases arising under the amendment of 1879 to be removed

to the circuit court for a trial of title. We need not look too curiously into these amendatory and removal statutes. They have no relation to cases of unlawful detainer in which the defendant has acquired possession by contract. The suit in hand being clearly a suit of unlawful detainer, and nothing else, was not cognizable in the circuit court except on appeal. The statute did not authorize its removal, and the circuit court was without jurisdiction to try. There is, therefore, no judgment to support the appeal which must in consequence be dismissed.

Appeal dismissed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

PRESSLEY v. STATE.

(Supreme Court of Alabama. April 14, 1910.)

1. HOMICIDE (§ 157*)—EVIDENCE—PRIOR DIFFICULTY—DETAILS.

In a prosecution for homicide, only the fact, and not the details, of a former difficulty between decedent and accused is admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 288-292; Dec. Dig. § 157.*]

2. CRIMINAL LAW (§ 415*)—DECLARATIONS OF DECEASED—HEARSAY.

Declarations of deceased, after the difficulty in which he received the wound from which he afterward died, were inadmissible as hearsay, no predicate having been laid to admit them as dying declarations.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

3. CRIMINAL LAW (§ 686*)—TRIAL—ORDER OF PROOF.

It is within the discretion of the court to permit the state, over defendant's objection, to recall and examine a witness on matters not inquired into on the first examination after defendant had rested.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1619, 1620, 1625, 1626; Dec. Dig. § 686.*]

4. HOMICIDE (§ 297*)—INSTRUCTIONS.

Where, in a prosecution for homicide there was evidence that deceased lived where he was killed, that about three hours before the shooting defendant and deceased had a difficulty, and that when deceased was killed or received the fatal wound he was unarmed and was not attacking defendant, an instruction that the fact that a man makes threats against another does not put him out of the pale of society and authorize the man that he is threatening to hunt him up and kill him was not objectionable as abstract.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 611; Dec. Dig. § 297.*]

5. HOMICIDE (§ 300*)—ARGUMENTATIVE INSTRUCTIONS.

A requested charge that the fact that decedent was at his house did not justify him in attacking defendant or in killing him without cause, and if he did so and shot at him with a pistol, and defendant did not bring on the difficulty, then defendant had the right of self-defense, and if it reasonably appeared to defendant as a reasonable man that his life was in danger, or that he was in imminent danger of life or limb at the hands of deceased, he would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be entitled to shoot deceased to death, etc., was objectionable as argumentative and as pretermittting defendant's duty to retreat.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 618; Dec. Dig. § 300.*]

Appeal from City Court of Talladega; G. K. Miller, Judge.

Olin Pressley, alias, etc., was convicted of murder, and he appeals. Affirmed.

The errors insisted upon sufficiently appear in the opinion of the court. The following charges were refused to the defendant: (1) General affirmative charge. (2) "The mere fact that Cicero Culberson was at his house did not justify him in attacking the defendant, or in killing him without cause; and if he did so, and if the evidence shows that Cicero attacked defendant, and shot at him with a pistol, and that defendant did not bring on the difficulty, then the defendant had the right of self-defense; and if it reasonably appeared to the defendant as a reasonable man that his life was in danger, or he was in imminent danger of life or limb, at the hands of Cicero Culberson, the defendant would have the right to shoot, even to death, the said Culberson, if the jury believe from the evidence that the defendant was not at fault in bringing on the difficulty."

M. D. Ivey, for appellant. Alexander M. Garber, Atty. Gen., and Marlon H. Sims, Sol., for the State.

EVANS, J. The defendant was indicted on the 8th day of September, 1909, in the city court of Talladega, by the grand jury thereof. On the 13th day of September, 1909, he was duly arraigned according to law, and pleaded "not guilty." All the orders of court appear regular, and according to law, upon the record. On the 4th day of October, 1909, the day regularly set for his trial, he was tried and convicted of murder in the second degree. On the trial, the defendant reserved exceptions to the ruling of the trial court on the admissibility of certain evidence, and to a certain part of the oral charge, and to the refusal of the court to give written charges Nos. 1 and 2, asked by defendant. We will consider the exceptions in the order in which they arose on the trial of the case.

On examination of defendant's witness P. C. McKinney, alias Lewis Brown, by the defendant, said witness testified "that he saw a fuss or difficulty between defendant and deceased; that this fuss occurred about three hours before the shooting; and that in said difficulty he saw deceased hit defendant with a stick." The solicitor objected to going into the details of this difficulty which took place about three hours before the shooting by which deceased was killed. The court sustained the objection, and the defendant excepted. It is a well settled rule of law

in this state that, while the fact that there was a former difficulty may be proved to show motive or malice, yet the details of such difficulty cannot be proved. *Jones v. State*, 116 Ala. 468, 23 South. 135; *Martin v. State*, 77 Ala. 2. The defendant then offered to exhibit a stick, and to prove by the same witness that about three hours before the shooting deceased struck defendant twice with said stick, and ran defendant under the house, and ran after him. The court sustained the objection of the state to the introduction of said evidence. This was, of course, an effort to prove the details of a former difficulty, and was inadmissible upon the authorities above cited.

The defendant offered to prove what deceased said after the difficulty in which he received the wound from which he afterwards died, and after the defendant had left the place where it occurred. No predicate was laid to prove dying declarations, and to prove what was then said was inadmissible hearsay; as there was neither the sanction of an oath, nor its legal equivalent—the consciousness of impending death.

After the defendant rested his case, the court, against the objection of defendant, allowed the state to recall and examine a witness on matters not inquired into on his first examination. To do so was within the discretion of the trial court. *Braham v. State*, 143 Ala. 28, 38 South. 919.

The defendant excepted to the following part of the oral charge delivered by the court: "Yet, the mere fact, gentlemen, that a man makes threats against another, that don't put him out of the pale of society, and authorize the man that he is threatening to hunt him up and kill him," upon the ground "that the same was abstract; there being no evidence to support it, or to show that defendant hunted up deceased." Upon a careful consideration of the evidence we are of opinion that the charge is not, in all the phases of the evidence, abstract. There was evidence tending to show that deceased lived at the place where he was killed; that about three hours before the shooting defendant and deceased had a difficulty; and that at the time deceased was killed, or received the fatal wound, he was unarmed and was not attacking defendant. At least, there was evidence from which the jury might have inferred such to be the facts. In view of such evidence, we cannot say that the charge was subject to the objection interposed.

Written charge No. 1, asked by the defendant, was the general affirmative charge, and was properly refused. There was evidence upon which the jury could properly predicate the verdict rendered.

Charge 2 was argumentative, and therefore properly refused. It also pretermits the duty of retreat, and is otherwise bad.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In criminal cases, allowing or refusing a new trial is within the discretion of the trial court.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

NORTH ITALIAN COLONIAL CO. v. JANOVICH-CALAFIORE CO. et al.

(Supreme Court of Alabama. April 21, 1910.)

1. APPEAL AND ERROR (§ 671*)—HEARING—SUBMISSION—NECESSITY.

Where the records of the Supreme Court did not show the submission of a motion for dismissal of the appeal on the ground that appellant's counsel had no authority to prosecute the appeal, but only a submission on the merits, the questions raised by the motion cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.*]

2. PARTIES (§ 93*)—PLEADING (§§ 254, 356*)—OBJECTIONS TO AMENDMENTS—MOTION TO STRIKE.

An objection that an amended complaint set up a new cause of action and brought in new parties should be made by motion to strike, and not by demurrer to the amended complaint.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.* Pleading, Cent. Dig. §§ 752-760, 1111-1119; Dec. Dig. §§ 254, 356.*]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

Action by the Janovich-Calafiore Company and others against the North Italian Colonial Company. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

The suit was commenced in the name of P. Janovich and F. Calafiore, partners, under the firm name and style of the Janovich-Calafiore Company, and sought recovery under the common count. By an amendment, subsequently offered, plaintiffs were changed as follows: "P. Janovich and S. Calafiore, partners under the firm name and style of Janovich-Calafiore Company, successors to Florio, Janovich & Co."—and sought recovery under the common count, made with Florio, Janovich & Co., which is alleged to be the property of the plaintiff by assignment from Florio, Janovich & Co.

Barnett & Bugg, for appellant. McCorvey & Hare, for appellees.

McCLELLAN, J. While appellee spread upon the motion docket of this court, and had notice of the same served upon the adversary, a motion questioning the authority of counsel, who appear for appellant, to prosecute the appeal and to assign errors for appellant, and praying, therefore, for dismissal of the appeal, the records of this court do not show a submission, in any way, of the cause on the motion stated. The submission was on the merits only. We cannot, therefore, consider the matter raised by the motion.

By leave of the court below, an amended complaint was filed, which, appellant insists, introduced a new cause of action and substituted entirely new parties plaintiff. The objection was sought to be taken by demurrer to the amended complaint. Appellant mistook his remedy. It should have been by motion to strike. *Moore v. First Nat. Bank*, 139 Ala. 595, 607, 38 South. 777. There was, hence, no error in overruling the demurrer.

The propriety of the allowance of an amendment of the character appellant contends was allowed in this instance was considered in *Ala. Const. Co. v. Watson*, 158 Ala. 166, 48 South. 506.

Let the judgment be affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

SANFORD v. WILEY.

(Supreme Court of Alabama. April 21, 1910.)

1. ABATEMENT AND REVIVAL (§ 7*)—OTHER ACTION PENDING.

A summons in justice's court purporting to be by plaintiff against defendant, but not signed by plaintiff or his attorney, and disavowed by plaintiff as soon as he saw it, followed by his refusal to prosecute the suit, does not preclude a subsequent suit by plaintiff against defendant on the same cause of action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 35-37; Dec. Dig. § 7.*]

2. SALES (§ 228*)—TITLE OF BUYER.

Where an owner of cattle sold them to a buyer who paid the price, a subsequent sale by the owner to a third person did not pass title to the third person.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 647; Dec. Dig. § 228.*]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Action of detinue by W. D. Sanford against W. A. Wiley. From a judgment for defendant, plaintiff appeals. **Reversed and remanded.**

The appeal is from a judgment denying plaintiff a motion for new trial, the main basis for which is that the court erred in admitting in evidence a paper purporting to be a summons in another case between the parties to this suit. The evidence of the plaintiff was that the defendant was a tenant living on his place during the years 1904-05, and that about the last of January, 1904, the plaintiff bought the cattle sued for in this case from one Thomas Heath, the calf being the increase since that time; that he let the defendant have the cow to milk while on his place, and told him to leave them there when he left; that the defendant remained upon the place until the end of 1905, when he moved off, taking the cattle with him; and that plaintiff did not know of his having moved the cattle until shortly before

bringing the suit, whereupon he made demand for the cattle. Heath was introduced for the plaintiff, and testified to the fact of the sale and payment by plaintiff, and that defendant had not paid him anything. Defendant's defense was that he bought the cattle from Heath, paying him \$10 in cash and offering him his note for the balance, but that Heath declined to accept it, and told him that he must get the cash, whereupon he went to his landlord, Sanford, and he replied: "That is all right. I will settle with Heath for you." The question as to the summons and complaint is sufficiently set out in the opinion.

C. E. O. Timmerman and Gunter & Gunter, for appellant. Ballard & Thomas, for appellee.

SIMPSON, J. This is an action of detinue, brought by the appellant, against the appellee, for a cow and calf. The court erred in overruling the motion of the plaintiff for a new trial. The court had admitted on the trial a previous summons in the justice of the peace court, purporting to be by the plaintiff against the defendant, which summons was not signed by the plaintiff or his attorney, and the evidence showed, without conflict, that the plaintiff disavowed said summons as soon as he saw it, refused to sign it, did not prosecute that suit, but immediately brought this suit. The plaintiff and a witness, Heath, testified that plaintiff had bought the cattle from Heath and paid for them the last of January or the first of February, 1904, and plaintiff stated that he had loaned the same to the defendant. The defendant did not introduce any evidence to contradict these witnesses, but testified that in May, 1904, he had bought the cattle from Heath. Giving credit to all of the testimony, even if the defendant did purchase the cattle from Heath (or attempt to purchase same) after they had been sold by Heath to the plaintiff, such purchase could not pass any title to the cattle, and the plaintiff would be entitled to the general affirmative charge.

The judgment of the court is reversed and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

LANG v. STATE.

(Supreme Court of Alabama. April 14, 1910.)

1. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

Proof that deceased when he made the declarations sought to be introduced as dying declarations was not only conscious, but knew he was going to die, and told witness that "he was killed and bound to die," and that witness did not encourage him, but told him he thought he would die, was a sufficient predicate for the

admission thereof, though the witness was thereafter contradicted as to deceased's condition and the declarations made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTED CHARGE—INSTRUCTIONS.

It is not error to refuse a requested charge, substantially like an instruction given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. HOMICIDE (§ 307*)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, an instruction that if defendant was drunk, and so or thereby deprived of his self-control, and, while so drunk, fell or staggered against the door or house and without purpose on his part caused the gun to explode, and thereby killed deceased, this would not make him guilty of murder in the second degree or manslaughter in the first degree, was properly refused as involved and confusing.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 307.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Pone Lang was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The court, at the request of the solicitor, gave the following charges:

"(1) You are the sole judges as to the credibility of the witnesses. (2) You are the sole judges as to the weight that should be given the testimony. (3) The defendant is a competent witness in his own behalf, yet in considering his testimony you would be authorized to weigh it in the light of the interest he has in the result of your verdict, together with all the testimony in the case. (4) It is not a mere doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt."

The following charge was refused to the defendant:

"(5) That the defendant was drunk, and so or thereby deprived of his self-control, and while so drunk fell or staggered against the door, or house, and without purpose on his part caused the gun to explode, and thereby killed the deceased, this would not make him guilty of murder in the second degree, or manslaughter in the first degree."

John A. Lusk, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The witness Clark testified that the deceased was not only conscious, but knew he was going to die, and told him that "he was killed and bound to die." The witness did not encourage him, but told him he thought he would die. We think a sufficient predicate was laid for the admission of the dying declaration. *Clark v. State*, 105 Ala. 91, 17 South. 37, and cases cited. It is true, there was evidence, subsequently introduced by the defendant, tending to contradict Clark as to the condition of the deceased, and tending to show that he did not charge the defendant with shooting him, but this did not

affect the admissibility of the evidence, but went to its credibility, and which was a question for the jury.

Charge R, refused to the defendant, was covered by given charge B. Indeed, they are exactly alike, except for the use of the word "case" in one in place of the word "instance" in the other.

Charge S, refused to the defendant, if not otherwise bad, was involved and confusing.

There was no error in giving the state's requested charges.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

CARLISLE v. ALABAMA GREAT SOUTHERN R. CO.

(Supreme Court of Alabama. April 14, 1910.)

1. RAILROADS (§ 396*)—DEATH OF PEDESTRIAN—NEGLIGENCE—WILLFULNESS—BURDEN OF PROOF.

Code 1907, § 5476, provides that when any person is killed or injured by a railroad locomotive or cars the burden of proof in any suit brought therefor is on the railroad company to show a compliance (with three preceding sections, relating to the operation of trains), and that there was no negligence on the part of the railroad company or its agents. *Held* that, where plaintiff's decedent was killed at night by one of defendant's trains, and suit was brought in which both negligence and willful injury were charged, the burden was on the railroad company to meet by specific proof the specific negligence averred, but was on plaintiff to establish a cause of action for willful injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343; Dec. Dig. § 396.*]

2. RAILROADS (§ 390*)—DEATH OF PEDESTRIAN—LAST CLEAR CHANCE.

Where, in an action for the death of a pedestrian on a railroad track, defendant's trainmen denied all knowledge of the presence of deceased on the track, plaintiff could not recover on the theory that the engineer became aware of plaintiff's presence on the track under circumstances reasonably indicating peril, and that by reasonable care thereafter he could have prevented the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

3. RAILROADS (§ 396*)—DEATH OF PEDESTRIAN—EVIDENCE.

Where decedent was killed at night by a railroad train, and there was no proof that any one saw the accident, the fact that he was killed on the track was insufficient to afford an inference that he was ever on the track in advance of the engine, nor was the fact that the track was straight, and that the engineer kept a lookout ahead as far as was consistent with his other duties in the operation of the train, sufficient to afford an inference that either the engineer or fireman saw deceased on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343, 1356; Dec. Dig. § 396.*]

4. RAILROADS (§ 396*)—INJURIES TO PEDESTRIAN—WILLFULNESS—EVIDENCE.

In an action against a railroad company for the death of a pedestrian on the track, evi-

dence held insufficient to justify an inference of willful injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343; Dec. Dig. § 396.*]

5. APPEAL AND ERROR (§ 704*)—REVIEW—RECORD.

Alleged error in overruling plaintiff's motion for judgment because certain interrogatories propounded to defendant were not sufficiently full could not be reviewed where the interrogatories were not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2939-2941; Dec. Dig. § 704.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by Elma Carlisle as administrator, etc., against the Alabama Great Southern Railroad Company for the death of her intestate. Judgment for defendant, and plaintiff appeals. **Affirmed.**

The case made by the pleadings and evidence is sufficiently stated in the opinion of the court. The evidence to which objection was sustained, which is referred to in the opinion, is as follows: Plaintiff asks its witness George Going if there was an arc light between Alabama avenue and Arlington avenue; also its witness Lipscomb whether or not Lowe had been running an engine on that road for three years through Bessemer; also of witness Wood, "What distance could an engine, with 23 cars well equipped with air emergency brakes, be stopped, running at not exceeding eight miles per hour, and not less than six, being operated over this track, going north and upgrade?" also, to the same witness, "An engine with 20 cars behind it, going south over this track as mentioned, between Nineteenth and Fourteenth streets, with all modern appliances, and in good order, with an air emergency brake throughout the train, running at not over eight miles per hour, and not less than six miles per hour, could be stopped in what distance, with such train and appliances?" also to the witness Van Hearn, "If the train he had testified to as being on the Nineteenth street crossing, was an Alabama Great Southern train?"

Pinkney Scott, for appellant. A. G. & E. D. Smith, for appellee.

SAYRE, J. The point on defendant's track where the body of plaintiff's intestate was found after death, and the point where he had been crushed and whence his body had been dragged a short distance by the train, were within the corporate limits of the city of Bessemer, but were not in any road or street nor at any road or street crossing. The track was straight for some distance in either direction. This track and others were upon the defendant's right of way which lay immediately between two avenues; the two avenues and the intervening right of way covering an open space, we judge, from 200 to 250 feet in width. The deceased came to his death between 9 and 11 o'clock, p. m., and

was doubtless killed by one or the other of two trains operated by the defendant between those hours—it being perhaps unnecessary to state minor differences in the evidence in respect to their operation, for, in every substantial particular, the facts in respect thereto are the same. One train, moving to the south, consisted of an engine and 20 freight cars. The other, moving about an hour later to the north over the same track, carried 23 cars. Both trains stopped over or in close proximity to the place where the body of deceased was found and where it had been crushed on the track. Deceased, when last seen, about 9 o'clock, was probably much intoxicated, though some of the evidence tends to show that he was "drinking" only. He then seemed to be waiting to catch a street car which would pass along on a track on Carolina avenue parallel with, and just to the east of, defendant's right of way. The car would carry him home to Jonesboro which lay to the south. No one saw the catastrophe. Interrogatories were propounded to the defendant under the statute for the examination of adverse parties, and answered on the oath of the trainmen who operated the two trains. The depositions of these witnesses were introduced by the plaintiff. The trainmen denied any knowledge whatever of the circumstances under which deceased came to his death. They deposed that the engines and trains were properly equipped in every respect; that headlights were burning; that the bells were rung at short intervals; that they kept a lookout ahead as far as they could consistently with their other duties in the operation of the trains, but saw nothing on the track; and that the trains moved at a rate of speed not in excess of six miles an hour. No attack was made upon their credibility, nor was there evidence of any fact which would tend to discredit their testimony, unless some tendency of that sort is to be found in the surroundings and their own statements. The court below gave the general affirmative charge for the defendant, with hypothesis. The complaint of leading importance here is that this action of the court was error. Section 5476 of the Code is made the basis of the contention. So much of that section as needs to be repeated is as follows: "When any person * * * is killed or injured * * * by the locomotive or cars of a railroad, the burden of proof, in any suit brought therefor, is on the railroad company to show a compliance (with three preceding sections), and that there was no negligence on the part of the company or its agents." It is argued that it should have been left with the jury to say whether the defendant had sustained the burden of proof put upon it by the statute.

It is necessary to note the theory of plaintiff's case as stated in the complaint. Counts 1 and 2 aver a wanton, willful, or intentional killing in general terms. Count 5 imputes to defendant's servant in charge of the engine

or train wanton, willful, or intentional misconduct after discovering that plaintiff's intestate was in a perilous and dangerous condition on the track of defendant's railway. Counts 3 and 7 allege that, after discovering the perilous position of plaintiff's intestate on the track, the engineer so negligently operated the engine as to kill him, thus charging what is commonly spoken of as subsequent negligence. Count 4 charges a negligent failure to blow the whistle or ring the bell at short intervals while moving within the corporate limits of the city of Bessemer; while 6 avers a failure to observe an ordinance of the city of Bessemer which prohibits the movement of trains therein at a greater rate of speed than six miles an hour.

So far as this case is concerned it will be assumed that the enactment of that provision of the statute which imposes upon railroad companies the burden of acquitting themselves of any negligence was a constitutional exercise of legislative power, no question having been made about that. It is not assumed, however, that, apart from the requirement of the observance of the particular precautions commanded by the statute at designated places, any greater degree of care is thereby imposed upon railroads than are imposed by the general rule of due care in the operation of railroads. That the statute makes no change in this respect is recognized in the recent case of *L. & N. R. R. Co. v. Holland*, 51 South. 365. It will not be assumed that the statute was intended to require railroad companies to anticipate every conceivable way in which death or injury may happen to one by the operation of a train and to produce evidence to exclude such universal presumption of negligence. It is not supposed, for instance, that trains must be operated with reference to the possibility that some one may undertake to steal a ride or pass between the cars. We apprehend that the railroad discharges the duty placed upon it when it shows that it has complied with the particular requirements of the statute, and observed that degree of care imposed by a situation of which it had knowledge or which it ought to have reasonably anticipated. Nor can wanton, willful, or intentional wrong be imputed to railroad companies by the mere absence of all evidence. The statute requires only proof that there was no negligence, and in many cases this court has recognized the vital distinction between mere negligence, on one hand, and intentional wrong, or that conscious disregard of the probable consequences of a known situation of danger which is the equivalent of intentional wrong, on the other. So, then, the burden of proving counts 1, 2, and 5 rested upon the plaintiff in this case. Under the other counts the burden was on the defendant of meeting by proof the specific charges of negligence stated in them.

Plaintiff having proved without contradiction, by the testimony offered in her behalf,

compliance by the defendant with the statute of the state and the ordinance of the city of Bessemer, the question is whether the defendant failed to show the exercise of due care in any other respect. Under those counts charging subsequent negligence the jury would have been authorized to find a verdict for the plaintiff upon one hypothesis only, namely, that defendant's engineer became aware of the presence of plaintiff's intestate upon the track under circumstances reasonably indicating peril, and thereafter failed to take such precaution for his safety as due care would have suggested. For such, in effect, is the averment. The trainmen having denied all knowledge of the presence of the deceased on the track, on what theory might the jury have inferred the contrary? Appellant cites the cases of *Southern Ry. Co. v. Bush*, 122 Ala. 470, 26 South. 168, and *Southern Ry. Co. v. Shelton*, 136 Ala. 191, 34 South. 194. In the case first named it was shown beyond question that Bush, the person killed, was upon a trestle in advance of the train, and was there killed. The trial court refused to charge the jury that the fact that the track was straight for a long distance, and the view of the track unobstructed, and the engineer was in his seat looking ahead on the track, and that there was nothing to prevent the engineer from seeing a person on the track, were not sufficient to authorize an inference that the engineer saw Bush. This court held the charge to have been properly refused. At more than one point in the opinion emphasis is laid upon the fact that the engineer was looking ahead along the track. The court said that the facts stated in the charge were certainly relevant and admissible for the purpose of proving that the engineer did see Bush, and were properly submitted to the jury on that issue. The court added: "While no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury, whose province alone it is to decide the weight to be given to facts legally in evidence and their effect on an issue which they are admitted to prove." In *Southern Ry. Co. v. Stewart*, twice considered here (153 Ala. 133, 51 South. 51), the person injured was at a place where no rule of law imposed upon the railroad company the duty of keeping a lookout for him. The absence from the record of any evidence showing that the engineer was looking ahead when or immediately before the engine ran over the deceased was considered a sufficient reason for taking away from the jury those aspects of the case in which it was sought to impute negligence or wantonness to the engineer subsequent to the discovery of the deceased upon the track. The ruling was that the evidence had failed to show *prima facie* that the engineer had seen the deceased, there being at that place no duty to keep a lookout for him. The *Shelton Case* is in many respects similar to the

case to be decided. There, the engineer and fireman testified that they had kept a lookout forward, but had not observed Shelton on the track. There was, however, also positive testimony that deceased was on the defendant's track in advance of the engine, and that the engine had run over him. On the case so presented this court said: "The jury were not bound to believe or disbelieve the testimony of these witnesses in its entirety. They could believe that they were looking ahead at the time, and that they could have seen a man on the track, and disbelieve their statements that they did not see any one on the track. And the conclusion on the evidential tendencies under consideration would be drawn thus: Shelton was in a position of manifest peril on the track in front of the engine. He was in view of the enginemen. They were looking along the track where he was. Therefore, they must have seen him, and this though they testify that they did not." It is to be observed that in the *Bush Case* the language quoted was used in view of the undisputed fact, and in the *Shelton Case* in view of the fact expressly assumed for the argument, that the deceased was upon the track in advance of the engine and was destroyed by the engine. In the case under consideration the fact that the track was straight and the enginemen keeping a lookout ahead, as far as consistent with the discharge of other duties in the operation of the train, affords, of course, no inference that they saw deceased upon the track unless by some other evidence it be shown that he was in fact upon the track in advance of the engine. Certainly the fact that deceased was killed upon the track, and other circumstances, go to show that a train ran over him. But if the testimony of the trainmen that they looked and saw nothing upon the track be taken out of the case—and this testimony makes only for defendant's view—it is left without factors of reasonable decision whether plaintiff's intestate was on the track in advance of the engine and so was run over, or whether he fell under the train in some other way, as may well have been the case. We conclude, therefore, that the plaintiff, in the evidence offered by her, discharged *prima facie* the burden of proof put upon the defendant by the statute, and that a conclusion that her intestate was killed by the negligence of the engineer subsequent to the discovery of his presence upon the track, or otherwise negligently, has nothing but surmise upon which to rest.

As for the general charge of wanton, willful, or intentional injury contained in counts 1 and 2, we think that neither any argument made nor any difficulty inherent in the evidence renders it necessary that the evidential facts should be stated. In our judgment there was no evidence which would have supported a finding of either wantonness or intentional wrong. The evidence was wholly inadequate to show that frequent use of the track

at that hour of the night which would warrant a finding that there existed in fact conditions which rendered it more than ordinarily dangerous to operate trains at that point. And without regard to this deficiency in the evidence, there is nothing to show an operation of the trains on the occasion in question in a reckless or wanton manner. The trains moved at a rate of six miles an hour upon the defendant's property, with headlights burning and bells ringing. It cannot be said, nor could the jury infer, that such an operation of trains would probably result in injury. *Southern Ry. Co. v. Shelton*, supra.

Of appellant's motion for a judgment in default of full answer to the interrogatories propounded by her to the defendant, and the assignment of error based upon the action of the trial court in overruling it, it is needful to say only that the interrogatories nowhere appear in the record, and we cannot, of course, determine that the answers failed to make full disclosure of everything required.

Having reached the conclusion indicated as to the prima facie sufficiency of the evidence to acquit the defendant of negligence, and the inherent defect in the evidence offered to rebut the case so made, it is requisite to inquire, further, only whether plaintiff was improperly denied an opportunity to prove facts which might have added weight to her case. It is entirely clear that none of the facts, which the court refused to let plaintiff prove, could have supplied the defects in plaintiff's case which have been pointed out. If it should be assumed that the rulings complained of were erroneous, the errors were errors without injury.

We are of the opinion that the court below reached a correct conclusion, and that its judgment ought to be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

STATE LIFE INS. CO. OF INDIANAPOLIS v. WESTCOTT et al.

(Supreme Court of Alabama. April 20, 1910.)

1. CONSTITUTIONAL LAW (§ 206*)—INSURANCE —WHAT LAW GOVERNS—STATUTES—CONSTITUTIONALITY.

Code 1907, § 4583, providing that all insurance contracts, the application for which is taken in Alabama, shall be deemed to have been made within the state, and shall be subject to the laws thereof, and section 4572, providing that no written or oral misrepresentation or warranty, made in the negotiation of an insurance policy, or in the application or proof of loss, shall defeat or void the policy, unless the misrepresentation increases the risk of loss, are not invalid or violative of Const. U. S. art. 14, § 1, prohibiting the passage of any law abridging the privileges or immunities of citizens, etc., but are valid, and superseded a provision of a policy in an Indiana company, written on an application executed in Alabama, reciting that

the parties stipulated that the policy should be an Indiana contract, and should be determined in accordance with its laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 634; Dec. Dig. § 206.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURRER.

Any error in sustaining a demurrer to a plea is harmless, where the same matters were alleged in other pleas, which were allowed to stand, so the defendant had the benefit of evidence on all the matters alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by Samuel H. Westcott and others, as executors, etc., of William D. Westcott, deceased, against the State Life Insurance Company of Indianapolis. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. L. Harmon and Charles F. Coffin, for appellant. John V. Smith, for appellees.

SIMPSON, J. This suit is by the appellees against the appellant on a policy of insurance on the life of William D. Westcott, deceased. The defense set up is that the defendant is not liable, because of certain false statements, or misrepresentations, made by the deceased, in answering certain questions in the application for the policy; the main point of contention being as to the constitutionality and effect of certain statutes of Alabama.

The application and medical examination were made through a "soliciting agent" in Montgomery, Ala., and sent to the defendant at its office in Indianapolis, Ind. It is stated in the application that applicant agrees "that any contract based upon this application shall, at all times and places, be held to have been made at Indianapolis, Ind., and shall in all respects be determined in accordance with the laws of said state." In said application are also the following words: "It is hereby agreed that all the foregoing statements, and also those I make to the company's medical examiner, which are hereby made a part of this application, are specifically intended by me to be warranties, and are offered to the company as a consideration for the policy applied for, which policy I agree to accept," etc.

Section 4583 of the Code of 1907 provides that "all contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within this state, and subject to the laws thereof." Section 4572 provides that "no written or oral misrepresentation, or warranty therein made, in the negotiation of a contract or policy of insurance, or in the application therefor, or proof of loss thereunder, shall defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increase the risk of loss."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The insistence of the appellant is that, notwithstanding section 4588, the parties are still at liberty to contract that the policy shall be governed by the laws of another state; and, second, that section 4572 is violative of section 1, art. 14, of the Constitution of the United States, which prohibits the passage of "any law which shall abridge the privileges or immunities of citizens," etc. The authorities cited by appellant are to the point that, as a general proposition, citizens may make contracts, providing that they shall be governed by the laws of another state; but a reading of the entire chapter containing the sections cited shows that the intention of the Legislature was that all contracts made on applications signed in the state should be governed by its provisions, and that the statute should override any provision in the contract contrary thereto.

In a case in which a statute required the insurer, by its agent, to examine the property and fix its value before issuing a fire policy, and made it liable for the entire amount of the policy, while the policy provided for the usual way of fixing the actual cash value of the property at the time of the fire, etc., and for arbitration, the court held that the provisions of the contract contrary to the statute were invalid, and, citing a number of cases, and among them a strong opinion by Judge Brewer, late of the Supreme Court of the United States, held to the doctrine that these statutes are made for the express purpose of preventing the operation of provisions in the contract of insurance, which are often printed in small type, and that to give them such an interpretation as to allow the parties to waive their provisions in the contract of insurance would destroy the very object and purpose of the statute. The statute "molds the obligation of the contract into conformity with its provisions." *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45.

Where the statute of Missouri provided a rule of commutation different from that expressed in the contract, the Supreme Court of the United States said: "The manifest object of this statute, as of many statutes regulating the form of policies of insurance, * * * is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company, with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter." *Equitable Life Society v. Clements*, 140 U. S. 228, 233, 11 Sup. Ct. 822, 825, 35 L. Ed. 497.

Judge Taft, in construing a similar statute of Pennsylvania, said: "This is one of a class of statutes passed in many states to relieve against the hardships arising from the strict

enforcement of the common law of warranties, in insurance policies, concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit, and of the purest technicality. That such statutes are remedial in their nature, and are quite within the police power of the Legislature, is no longer a debatable question." *Penn. Mut. L. Ins. Co. v. Mechanics' S. B. & Tr. Co.*, 72 Fed. 418, 19 C. C. A. 286, 38 L. R. A. 33.

The case of *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453, 21 South. 361, was decided shortly before the general statutes readjusting the insurance laws of the state, in which these sections occur, and they were doubtless adopted to meet that case. We hold that the section in question is not violative of the Constitution of the United States, and that the provisions of the contract are governed by the terms of the statute.

In addition to what has been said, the policy itself provides that "all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid this policy, unless it is contained in the application therefor." This clause is somewhat ambiguous in its meaning, and we have thought it best to dispose of the question on the law, as above announced.

What has been said disposes of the questions raised on the pleadings. The matters alleged in the pleas to which demurrers were sustained were reasserted in pleas subsequently filed, and which were allowed to stand, so that, if there was any error as to either of them, it was error without injury. The defendant had the benefit of evidence on all of the matters alleged, and the court, sitting as a jury, passed upon the facts.

We find no error in the record, and the judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

HARRELL v. STATE.

(Supreme Court of Alabama. April 21, 1910.)

1. HOMICIDE (§ 164*)—MURDER—INTOXICATED CONDITION OF DECEASED—EVIDENCE OF—ADMISSIBILITY.

In a prosecution for murder, where there was as yet no evidence of self-defense, the theory developed being the accidental discharge of a pistol in a scuffle for its possession, a question whether about half an hour before the shooting deceased showed any evidence of imbibing of spirituous liquors, was properly rejected, since in the then state of the evidence whether or not deceased was intoxicated was immaterial.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 164.*]

2. WITNESSES (§ 277*)—CROSS-EXAMINATION.

In a prosecution for murder, where the evidence tended to show accused's flight soon after the tragedy, it was not error to allow questions asked accused on cross-examination, which sought explanation of the course of his flight, and the circumstances attending it down to his arrest in another state.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

3. CRIMINAL LAW (§ 759*)—TRIAL—INSTRUCTIONS.

In a prosecution for murder, a requested charge that if there are two constructions which may be put upon any point in the evidence, one favorable to defendant and the other unfavorable, you must follow the construction favorable to him, was properly refused, as it invaded the province of the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1737, 1738, 1790-1793; Dec. Dig. § 759.*]

4. HOMICIDE (§ 286*)—MURDER—TRIAL—INSTRUCTIONS.

In a prosecution for murder, a requested charge that if the jury believed that defendant entertained feelings of affection for deceased, and these feelings still existed up to and after the crime, they should then have a reasonable doubt as to the existence of malice, etc., was properly refused, since it predicated an acquittal upon feelings of affection entertained, at the time of the shooting, by defendant for deceased, and murder in the extreme degree may be committed notwithstanding such affection, which may, upon occasion, inspire the murderous act as an expression of jealousy.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 588-590; Dec. Dig. § 286.*]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Freeman Harrell was convicted of murder in the first degree, and he appeals. Affirmed.

The facts are sufficiently stated in the opinion of the court. The following charges were refused to the defendant: "(1) The court charges you, gentlemen of the jury, that if there are two constructions which may be placed upon any point in the evidence, one favorable to the defendant and the other unfavorable, you must follow the construction favorable to him. (2) The court charges you, gentlemen of the jury, that if you believe from the evidence in this case that the defendant, Freeman Harrell, entertained feelings of affection for Nancy Toodles, and that these feelings still existed up to and after the crime of the shooting, you should then have a reasonable doubt as to the existence of malice; and if such reasonable doubt exists, you cannot find the defendant guilty of murder."

Samuel F. Hobbs, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MCCLELLAN, J. The defendant is condemned to die for the murder of a woman, Nancy Toodles. The evidence discloses the prosecution's theory to have been that defendant, inspired by jealousy, shot deceased

without semblance of legal excuse or justification. The defense was that in a scuffle or tussle over a revolver the weapon was discharged, resulting in the woman's death. During the examination in chief of Hatcher, a witness offered by the defendant, this question was propounded: "Describe her condition at that time. Did she show any evidence of having imbibed of any spirituous liquors?" The state objecting to the question, the court elicited from witness that the occasion to which the question related was about half an hour before the woman was shot. The court sustained the objection. The status of fact and circumstance before the jury at the time the quoted question was propounded was only that we have indicated as prosecution's theory. There was no evidence of self-defense in the case at that time, if indeed, there was at later stages. The court was not required to anticipate that there would be such evidence or such defense. In the then state of the evidence, intoxication vel non of the deceased was wholly immaterial, and the court properly rejected the question. *Askew v. State*, 94 Ala. 4, 8, 10 South. 657, 33 Am. St. Rep. 83; *Gregory v. State*, 140 Ala. 16, 27, 37 South. 259; *Nichols v. Winfrey*, 90 Mo. 403, 408, 2 S. W. 305. The legitimate office of such testimony is to reflect light upon the "defensive" act of the accused. If his act be not legally defensive, but aggressive, it is obvious that the condition of the assailed, as regards intoxication, is without the issue of guilt vel non; for the killing of one steeped in intoxicants cannot be justified or palliated on account thereof.

The exceptions taken to the allowance of questions propounded to defendant on the cross-examination of him are without merit. The evidence tended to show his flight soon after the tragedy. These questions on the cross sought and elicited explanation of the course of his flight, and the circumstances attending it, even down to the occasion of his arrest in another state. There was no error in allowing the questions propounded. *Thomas v. State*, 100 Ala. 53, 14 South. 621; *Franklin v. State*, 145 Ala. 660, 39 South. 979.

The first instruction refused to defendant was faulty in the particular that it invaded the province of the jury. *Fonville's Case*, 91 Ala. 39, 8 South. 688; *Smith's Case*, 88 Ala. 23, 7 South. 103.

The other instruction was palpably bad. It predicated an acquittal of murder upon feelings of affection entertained, at the time of the shooting, by defendant for deceased. Murder, in the extreme degree, may be committed notwithstanding the existence of such affection, and that it does exist may, upon occasion, inspire the murderous act as an expression of a jealousy grounded in an extreme affection.

We discover no error in the record, and hence the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

The date for the execution of the sentence of death having passed, Thursday, the 9th day of June, 1910, is fixed and set as the day and date on which the sentence of the law shall be executed.

EXCELSIOR STEAM LAUNDRY CO. v. LOMAX.

(Supreme Court of Alabama. April 14, 1910.)

1. MUNICIPAL CORPORATIONS (§ 703*)—LEAVING TEAM IN STREET—VIOLATION OF ORDINANCE.—“WITHOUT ANY PERSON IN CHARGE.”

Where a laundry wagon driver left his team standing at the curb unattended while he went into the second story of a building, 40 to 50 yards away and 30 feet from the sidewalk, to deliver some articles from the laundry, the team was left standing “without any person in charge,” within the meaning of an ordinance punishing such neglect, and the occasion was not within an exception when the vehicle is being loaded and unloaded, which exception is not to be extended so as to include more than such temporary abandonment of the reins as is reasonably incident to loading and unloading by the driver.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 703.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—LEAVING TEAM IN STREET—NEGLIGENCE—QUESTION FOR JURY.

Negligence in leaving a team unattended in the street was a question for the jury, when there was some evidence that the driver took some precaution in the way of securing the horses before he went into a house.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

3. EVIDENCE (§ 32*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

Courts of this state do not take judicial notice of municipal ordinances, though residents within a municipality must take notice of its ordinances, which have the force of laws within the limits of the corporation, and so, where an ordinance is offered in evidence, the court cannot assume to know the date on which it became effective as law, where not shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.*]

4. APPEAL AND ERROR (§ 663*)—BILL OF EXCEPTIONS—STATEMENT AS TO EVIDENCE—CONCLUSIVENESS.

The bill of exceptions stating that it contains all the evidence, the Supreme Court cannot deal with it on any contrary hypothesis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

5. MUNICIPAL CORPORATIONS (§ 706*)—LEAVING TEAM IN STREET—PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY.

The proximate cause of injury claimed to be due to defendant's driver leaving a team unattended in the street was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Carrie Lomax against the Excelsior Steam Laundry Company. From judgment for plaintiff, defendant appeals. Reversed.

Tillman, Bradley & Morrow and L. C. Leadbeater, for appellant. Bowman, Harsh & Beddow, for appellee.

SAYRE, J. An ordinance of the city of Birmingham reads thus: “Section 875. Leaving Horse Unattended.—Any person who leaves any horse, mule or team standing attached to any vehicle in the streets without any person being in charge of said horse, mule or team, except when being loaded and unloaded, must, on conviction, be punished,” etc. The driver in charge of defendant's laundry wagon had left his team standing at the curb, and unattended, while he went into the second story of a building, 40 to 50 yards away and 30 feet from the sidewalk, to deliver some articles from the laundry. There can be no doubt that the team was thus left standing without any person in charge within the meaning of the ordinance. Nor did the occasion fall within the spirit and reasonable interpretation of so much of the ordinance as provides an exception when the vehicle is being loaded and unloaded. The danger of leaving teams standing in streets without any one in charge, and the providence of the ordinance, are obvious, and the exception is not to be extended so as to include more than such temporary abandonment of the reins as is reasonably incident to the loading and unloading vehicles by the driver. Without going beyond the exigency of the case presented by the facts shown in the record, we state our opinion that the driver was not, within the meaning of the ordinance, loading or unloading the defendant's vehicle when he went into the house under the circumstances testified to by him.

There was evidence which tended to show that the driver had taken some precaution in the way of securing the horse before he went into the house. Whether, apart from his alleged violation of the ordinance, he was guilty of negligence as charged in the first count, was, therefore, a question for the jury; and it follows that, in giving the general affirmative charge for the plaintiff, the trial court assumed that the ordinance alleged in the third count of the complaint was a valid ordinance in force at the time of the injury complained of. The courts of this state do not take judicial cognizance of municipal ordinances. Case v. Mobile, 30 Ala. 538; Fuhman v. Huntsville, 54 Ala. 263; North Birmingham Ry. v. Calderwood, 80 Ala. 247, 7 South. 360, 18 Am. St. Rep. 106. This, although the residents within a municipality must take notice of its ordi-

nances, and such ordinances have the force and effect of laws within the limits of the corporation. *Calderwood's Case*, supra. The recital of the bill of exceptions is in this language: "Plaintiff here offered in evidence a copy of section 875 of the Code of the city of Birmingham, which was received in evidence and was as follows: [Here follows an ordinance in the language of the complaint.]" The courts, refusing to take cognizance of municipal ordinances, cannot logically assume to know the date upon which an ordinance became effective as law. The proof offered was unquestionably sufficient to establish the ordinance as subsisting at the time of the trial; but it failed to show that it had been adopted prior to the time at which plaintiff received her injury. The bill of exceptions distinctly states that it contains all the evidence, and we are without authority to deal with it on any hypothesis to the contrary.

Furthermore, it was for the jury to say whether the violation of the ordinance by the defendant's agent, the driver, was the proximate cause of plaintiff's injury. There was no such necessary causal connection in fact between the two as authorized the court to declare, as matter of law, that the alleged violation of the ordinance was the proximate cause of the plaintiff's injury. That was for the jury.

Reversed and remanded.

DOWDELL, O. J., and McCLELLAN and MAYFIELD, JJ., concur.

HARMON v. STATE.

(Supreme Court of Alabama. April 21, 1910.)

1. CRIMINAL LAW (§ 427*)—CONSPIRACY—CIRCUMSTANTIAL EVIDENCE.

A conspiracy may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1017; Dec. Dig. § 427.*]

2. HOMICIDE (§ 281*)—QUESTIONS FOR JURY—ELEMENTS OF OFFENSE.

Whether there was a conspiracy between one charged with assault with intent to murder and another who committed the overt act, held, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 281.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—DISCRETION OF COURT—ORDER OF PROOF—RECEPTION.

Error in admitting evidence of acts of an alleged co-conspirator of accused before a conspiracy had been shown was not ground for reversal, where evidence was subsequently admitted making the question of a conspiracy one for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 363*)—EVIDENCE—RES GESTÆ.

In an action for assault with intent to murder, the overt act claimed to have been com-

mitted by accused's co-conspirator, an answer to a question whether the ball from the pistol used hit any person standing near was admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 363.*]

5. HOMICIDE (§ 156*)—ASSAULT WITH INTENT TO KILL—EVIDENCE.

The testimony was also admissible to show that the pistol was loaded with a ball.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 156.*]

6. WITNESSES (§ 390*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

A witness may always be impeached by showing that he has made contradictory statements as to material matter, and hence in a prosecution for assault with intent to murder, the overt act being charged to have been done by accused's co-conspirator, where the alleged co-conspirator had testified that accused did not give her the pistol used, which was a material fact, evidence that she had, after the act, told the sheriff that accused gave her the pistol was admissible to contradict her, being properly limited to such purpose, though ordinarily statements of a co-conspirator, after accomplishment or failure of the object of the conspiracy, are not admissible against the other.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 390.*]

7. HOMICIDE (§ 100*)—PARTIES TO OFFENSE—PRINCIPALS.

Where one commits an assault with intent to murder, if the pistol used was given her by another for the purpose of committing the offense, they were conspirators in the commission of it, and equally guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 130; Dec. Dig. § 100.*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

George F. Harmon was convicted of assault with intent to murder, and he appeals. Affirmed.

The facts are sufficiently stated in the opinion of the court. The following charges were given at the instance of the state: "(1) I charge you, gentlemen of the jury, that conspiracy may be proved by circumstantial evidence. (2) I charge you, gentlemen of the jury, that if you believe from the evidence beyond all reasonable doubt that the defendant gave Stella Beck the pistol for the purpose of shooting Jack Brown, you cannot convict the defendant."

Logan, Van de Graaf & Logan, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the crime of assault with intent to murder Jack Brown. The evidence on the part of the state showed that in the month of June, 1909, said Jack Brown, who was deputy sheriff, was at Blocton, near the pay office of the Tennessee Coal, Iron & Railroad Company; that one Stella Beck was there, attempting to collect a pay check due by said company to defendant, there being there a considerable crowd of operatives collecting their pay checks; that, said Stella Beck being disor-

derly at the pay window, said Jack Brown pushed her down the steps; that at that time she did not have on, nor on her arm, any coat; that, a few minutes before this time, the defendant was standing at the foot of said steps with a blue coat on his arm; that in above five minutes after she had been pushed down the steps said Stella Beck came back up the steps with a blue coat, similar to the one defendant had, on her arm, and drew a pistol, either from under the coat or from its pocket, and fired it at said Jack Brown; that defendant admitted that it was his coat and his pistol which Stella had, but denied that he had given them to her. It was also shown that Stella Beck and defendant lived in the same house. At the conclusion of the state's evidence, the defendant moved the court to exclude all of the testimony, on the ground that the state had not shown prima facie that there was a conspiracy between said Stella Beck and defendant to shoot said Jack Brown with intent to murder him. A conspiracy may be proved by circumstantial evidence; and, under the evidence of the state, it was for the jury to determine whether or not the conspiracy existed.

Just after the introductory portion of the testimony of Jack Brown, the first witness, he was asked, "Did Stella Beck shoot at you that day?" to which question the defendant objected, among other reasons, because no prima facie conspiracy had been shown between Stella Beck and the defendant; but, on the statement of the solicitor that he would connect this testimony and show it to be relevant, the court overruled the objection, and, after the question was answered, the defendant moved to exclude the answer for the same reasons. It is true that neither the statements nor the acts of one supposed conspirator are admissible in evidence against the other, until the conspiracy has been proved; and Mr. Greenleaf criticises the practice of admitting them even provisionally, as was done in this case, and states that it should not be done except under particular and urgent circumstances, but that it is within the discretion of the judge. 1 Greenl. on Ev. (15th Ed.) § 111. Yet, in view of the subsequent testimony, this was not reversible error.

The next error insisted upon is the overruling of defendant's objection to the question to the same witness, "Did the ball hit any person standing near?" and the refusal to exclude the answer thereto. The court holds that this testimony was properly admitted as part of the res gestæ, and also for the purpose of showing that the pistol was loaded with a ball.

The witness for the state, J. F. Golson, stated that, after Stella had been arrested for the shooting, he took her to the jail in Blocton, about one-half mile away, and that

when they got near the jail he had a talk with her. He was then asked: "Did Stella Beck, when you got near the jail, on the day you arrested her, tell you that the defendant, George Harmon, gave her that pistol?" to which question the defendant objected. "Whereupon the solicitor stated to the court that it was solely for the purpose of contradicting Stella Beck that the testimony was offered." The court overruled the objection, and the defendant excepted. The witness answered, "Yes." The defendant then moved to exclude the answer, which motion was overruled, and the court stated that it was admitted only for the purpose of contradicting Stella Beck.

It is true that the statements of a co-conspirator, after the accomplishment, or failure of the object of the conspiracy, are not admissible against the other (1 Greenl. on Ev. [15th Ed.] § 110; 3 Greenl. on Ev. [15th Ed.] § 94; Logan v. United States, 144 U. S. 264, 309, 12 Sup. Ct. 617, 36 L. Ed. 429), but a witness may always be impeached by showing that he has made contradictory statements as to a material matter. This witness had testified that the defendant did not give the pistol to her, which was a material fact in the case, and it was proper to show that she had contradicted that statement by stating that he did give it to her. The court properly limited the statement.

The first charge given at the request of the state asserts a correct proposition of law. Marler v. State, 67 Ala. 56, 66, 42 Am. Rep. 95; Martin v. State, 136 Ala. 33, 38, 34 South. 205. It was for the jury to say whether or not there were circumstances sufficient to prove a conspiracy.

There was no error in giving the second charge requested by the state. The evidence was without conflict that Stella Beck was guilty of assault with intent to murder, and if the pistol was given to her by the defendant, for the purpose of committing that crime, they were conspirators in the commission of it, and each was equally guilty.

The judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

FRANCIS et al. v. WHITE.

(Supreme Court of Alabama. April 14, 1910.)
EXECUTION (§ 294*)—REDEMPTION—WAIVER OF RIGHT.

Joinder of the execution defendant with the purchaser at execution sale in conveyance to a third person, with covenants of warranty, of a part of the property, is not a waiver of right to redeem the rest of the property, but a waiver of the right of the purchaser at execution sale to deal with the redemption on the basis of a redemption in toto only.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 294.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit by R. B. White, administrator, against W. R. Francis and others. Decree for plaintiff. Defendants appeal. Affirmed.

Callahan & Harris, for appellants. E. W. Godbey, for appellee.

SAYRE, J. This is a bill filed under the statute to redeem from an execution sale. The sufficiency of the amended bill as stating a right to relief in equity has been thrice considered here, and sustained. See 142 Ala. 590, 39 South. 174; 150 Ala. 679, 43 South. 1019; 49 South. 334. The question now presented was raised by a plea filed on the last return of this case to the chancery court. The plea avers that after the execution sale the defendant in execution, redemptioner's intestate, joined with the purchaser at the execution sale in a conveyance of a part of the property to a third party, one Brock, with covenants of warranty. The plea was filed as an answer to the bill as a whole, and for that reason the plea was overruled. Necessarily the conveyance was a waiver and renunciation of the right to redeem the part conveyed. It left the grantor without interest in that parcel. Appellants' contention is that necessarily also it operated as a waiver and renunciation of the right to redeem the rest, and this for the reason that redemption cannot be effected by piecemeal.

When this case was here on the last appeal it was said: "Redemption cannot be effected by piecemeal. It must be of the entire tract sold, no matter how many the subpurchasers of parts thereof"—citing *Roulhac v. Jones*, 78 Ala. 398, and *Harden v. Collins*, 138 Ala. 399, 35 South. 357, 100 Am. St. Rep. 42. In *Lehman v. Moore*, 93 Ala. 189, 9 South. 592, it was said that "the statute itself provides for and requires the redemption of whatever interest passed by the foreclosure sale." There was no decision, nor anything calling for a decision, that, when an execution debtor conveys his right of redemption in a part of the property sold, he either forfeited, waived, or renounced thereby his privilege under the statute as to the remainder of the estate, or that his vendee acquired an exclusive right to redeem. Certainly there was no decision that, if the purchaser at a mortgage or execution sale suffers a redemption of a part of the property, insisting upon the payment of the entire debt and lawful charges, as he has an unquestioned right to do, he thereby becomes entitled to hold the remainder of the estate. The right to do that was denied in *Lehman v. Moore*, where it was said that it would be an anomaly, which the law does not contemplate and will not tolerate, to require the redemptioner to make the purchaser whole in respect of all he has expended in consideration of the land, and at the same time leave half that consideration in his hands. The statutory right of redemption, originally a privilege conferred upon the

mortgagor or execution debtor alone, has by subsequent enactments been made vendible and descendible, and is conferred upon the assignee of the equity or statutory right of redemption, among others. The right of redemption is favored by the law. There is no reason why the requirement that the entire debt and the entire property shall be redeemed should be more rigid in the case of statutory redemption than in the case of an equity of redemption asserted before foreclosure. One reason for the rule that the mortgagee cannot be compelled to divide his debt and security by submitting to redemption of a part only of the mortgaged property on payment of a pro rata share of the debt is that the unity of the debt and security result from the contract, which extends the lien of the debt as a whole equally to each separate parcel of the land. Another is that the mortgagee ought not to be entangled with conflicting claims of assignees of equities in different parts of the property. The complainant in a bill to redeem must have the mortgagor's title, or some interest under it. *Butts v. Broughton*, 72 Ala. 294; *Rapier v. Gulf City Paper Co.*, 64 Ala. 330. But it is not necessary that he be interested in the entire property. If he owns the equity of redemption in any portion of them, he may redeem the entire property. *Howser v. Cruikshank*, 122 Ala. 258, 25 South. 206, 82 Am. St. Rep. 76; *Jones v. Matkin*, 118 Ala. 341, 24 South. 242. The party so redeeming is entitled to hold the entire estate until he shall be reimbursed what he has paid beyond his just proportion. He is considered as assignee of the mortgage, and stands, after redemption, in the place of the mortgagee in relation to the other owners of the equity. *Lehman v. Moore*, supra; *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

We think similar principles are to be applied in this case. The purchaser is concerned only to have his entire debt and lawful charges, and to be relieved of further entanglement with the property, and all that the bill will do for him. Such was his right, also, when he joined in the deed of a part of the property, if that is to be taken as a partial redemption. It was for the purchaser then to insist upon an entire redemption. But there can be no reason whatever why redemption in parcels may not be had, the purchaser being willing. So far from the conveyance to the third party being a waiver of the right to redeem the rest of the estate, it was nothing more than a waiver of defendant Francis' right to deal with the redemptioner upon the basis of a redemption in toto only. We take it, however, that the deed to Brock was intended, not as a partial redemption, but only to eliminate the part conveyed from the pending question of redemption. As to the undisturbed residue of the estate, the rights of the parties thereafter were just what they had theretofore been in respect to the entire estate. We are of opinion that the

chancellor's decree was in accord with equitable principles, and ought to be affirmed. Affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

KRAMER v. COMPTON.

(Supreme Court of Alabama. April 21, 1910.)

1. TRIAL (§ 91*)—OBJECTIONS TO EVIDENCE—TIME TO MAKE.

A party objecting to evidence must object to the question eliciting the evidence and then move to exclude the answer, and a motion to strike out not made till after cross-examination is too late, as a party cannot speculate on what the testimony will be and then move to exclude it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244; Dec. Dig. § 91.*]

2. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—ERRONEOUS EXCLUSION.

The error, if any, in excluding evidence of a fact subsequently proved is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4206; Dec. Dig. § 1057.*]

3. SALES (§ 358*)—ACTIONS FOR PRICE—EVIDENCE—ADMISSIBILITY.

Where plaintiff claimed that defendant was liable to him for goods sold to a third person, and did not seek to intercept any money due by defendant to the third person, evidence as to whom defendant paid the balance due from him to the third person was inadmissible.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

4. TRIAL (§ 105*)—EVIDENCE—OBJECTIONS—DISCRETION OF TRIAL COURT.

Though a party who fails to make an objection to evidence at the proper time cannot afterwards claim the right to have the evidence excluded, the court may in its discretion exclude illegal evidence at any time.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105.*]

5. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in excluding an answer of a witness is without injury where the witness subsequently without objection answered the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

6. PLEADING (§ 433*)—ISSUES—AIDER BY VERDICT.

Where a count in the complaint subject to demurrer for failing to allege a fact was not demurred to, but issue was taken on it, and the fact was proved, plaintiff was entitled to judgment on it.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 433.*]

7. PRINCIPAL AND AGENT (§ 99*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

A principal is liable for the acts of his agent within the scope of his apparent authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261, 458-464; Dec. Dig. § 99.*]

8. TRIAL (§ 246*)—INSTRUCTIONS—EXPLANATORY CHARGE.

Where, under the facts, a charge asserting a correct principle is misleading, an explanatory charge may be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 568; Dec. Dig. § 246.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Assumpsit by J. H. Compton against H. Kramer. From a judgment for plaintiff, defendant appeals. Affirmed.

It appears that the controversy was over an amount advanced to John Wingate, and the evidence for the plaintiff tended to show that Wedemeyer came to plaintiff and asked him if he would advance to Wingate corn, hay, oats, etc., for his team while he was hauling staves for the defendant, and that he advanced Wingate \$304.30. The evidence as to the agency of Wedemeyer is set out in the opinion. The court also permitted evidence, over the objection of the defendant, tending to show that the defendant paid bills in the summer of 1908 to other parties, which were for goods bought by Wedemeyer as agent. The defendant also sought to show by the same witnesses that Kramer informed the witness, before paying the bill, that he was not obliged to pay the same, and that he had given Wedemeyer no authority to make it. The defendant also sought to show that the balance in his hands due Wingate had been paid to James, Marion & Co., and he also sought to show that he did not authorize his agent, Wedemeyer, to contract any bills in buying corn, oats, and hay for the men who were hauling staves.

The following charges were given at the request of the plaintiff: "(A) If the jury believe from the evidence that plaintiff sold and advanced to defendant's agent goods and merchandise during the early part of 1908, and the same were unpaid for, the jury must find for the plaintiff for the amount due on said merchandise and goods. (B) If the jury believe from the evidence in this case that plaintiff sold and advanced goods, merchandise, and cattle, amounting to \$304.35, to the defendant's agent, W. B. Wedemeyer, during the early part of the year 1908, and that said amount is unpaid, the jury must find for the plaintiff. (C) A principal is liable for the acts of his agent, done within the scope of his apparent authority."

William Cuninghame, for appellant. Abrahams & Taylor, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant, by attachment, the first count in the complaint being the Code form on account due by defendant to the plaintiff, and the second being for goods, etc., sold and advanced to the defendant's agent. The defendant appeared by at-

torney, and no pleas appear by the record to have been filed, but the judgment entry states that issue was joined on the pleadings filed, which necessarily means the general issue to the complaint. Although there was no allegation in the second count that the agent was authorized to bind the defendant, or that the goods were advanced to the agent, at the special interest and request of the defendant, yet the only issue raised by the evidence is the question of the liability of the defendant for the acts of the agent. It is not disputed that one Wedemeyer was employed by the defendant to oversee the getting out of staves for the defendant, and having them hauled to the shipping point, but the defendant contends that Wedemeyer was simply employed, at a certain price, to attend to that matter, without any authority to purchase any supplies on the defendant's account, and without being held out as a general agent; while the plaintiff claims that the defendant had authorized him to make the advances to said agent, and charge the same to him, and he relies mainly on a letter which he claims to have received from the defendant, date not given, though from other testimony it appears to be in December, 1907, which letter has been lost, and plaintiff was allowed to state its contents in substance as follows: "Dear Sir: John Knause is no longer my agent, and any debts that he will make in your store, I will no longer be responsible for same. I am notifying you, in order that you may advise him. I am sending W. B. Wedemeyer to take the place of John Knause, and any assistance that you might and can give him will be appreciated by me and paid for by me." The defendant testifies that said letter merely introduced Wedemeyer, and asked plaintiff to assist him, as he was a stranger in the country. One J. J. Marion was allowed to testify, in behalf of the plaintiff, that he had let one Wingate, who was working under Wedemeyer, have certain goods at Wedemeyer's request, and that Wedemeyer told him that defendant would pay for the goods, which he afterwards did. Defendant then cross-examined said Marion, at length, in regard to the transaction, and then moved the court to exclude "all the testimony of this witness as to Kramer paying a bill for goods sold by witness," and the court refused to exclude the evidence. The motion came too late, and the court properly refused to exclude the evidence. The defendant should have objected to the question and then mov-

ed to exclude the answer. A party cannot speculate on what a witness's testimony will be, and then move to exclude it. *Hudson v. State*, 137 Ala. 64, 34 South. 854; *Downey v. State*, 115 Ala. 108, 22 South. 479; 5 Mayfield's Dig. p. 419, § 75.

The second and third assignments insisted on claim that the court erred in refusing to allow the witness Marion to answer certain questions in regard to what the defendant said about not being under any obligation to pay the Marion debt, and as to what Wingate's contract was, before defendant paid said debt. If this was error, it was without injury, as the letter of defendant was afterwards admitted in evidence, showing exactly what the defendant did say.

There was no error in excluding the statement of the defendant, when on the witness stand, as "to whom he paid the balance" due by him to Wingate. This was entirely irrelevant to any issue in this case. It is not sought to intercept any money due by the defendant to Wingate; but the claim is that the defendant is liable himself for the goods sold to Wingate. It is true that the exception to this testimony was not made until after the question was answered, but the rule is that, although a party who fails to make the objection at the proper time cannot afterwards claim the right to have the answer excluded, yet the court may, in its discretion, exclude illegal evidence at any time. *Jarvis v. State*, 138 Ala. 37, 34 South. 1025; *Liner v. State*, 124 Ala. 1, 6, 27 South. 438. If there was any error in excluding the answer of the defendant, as a witness, to the question by defendant's counsel to the effect that he did not authorize Wedemeyer to contract any bills, it was without injury, as the witness subsequently made the same statement without objection.

There was no error in giving charges A and B, at the request of the plaintiff. While the second count of the complaint would have been subject to demurrer, yet issue was taken on it, and, if it was proved, the plaintiff was entitled to judgment on it.

Charge C asserts a correct principle of law, and was properly given. If, under the facts of this case, it was misleading, an explanatory charge could have been given.

The judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

NEWTON OIL & MFG. CO. et al. v. CARR.
(No. 14,283.)

(Supreme Court of Mississippi. May 23, 1910.)

1. FRAUDULENT CONVEYANCES (§ 142*) — TRANSACTIONS INVALID — TRANSFER OF STOCK OF GOODS.

Where a deed of trust does not in express terms provide for the continuance in business of the grantors, selling and replenishing stock in the usual course of dealing, it is not void on its face.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 450; Dec. Dig. § 142.*]

2. FRAUDULENT CONVEYANCES (§ 142*) — TRANSACTIONS INVALID — TRANSFER OF STOCK OF GOODS.

Where a deed of trust on its face permitted mortgagors to add to or replenish their stock, and they were verbally authorized to sell and they continued in possession, buying and selling and conducting the business in the usual and ordinary way, and the mortgagors were to account to the mortgagee for the proceeds of all sales, but it is not shown that this was done, the effect of the arrangement was to hinder, delay, and defraud creditors, and the mortgage was therefore fraudulent and void.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 450; Dec. Dig. § 142.*]

Appeal from Chancery Court, Winston County; J. F. McCool, Chancellor.

Suit by J. C. Carr against the Newton Oil & Manufacturing Company and others. From a decree in favor of complainant, respondents appeal. Reversed and remanded.

Rodgers & Brantley, for appellants. L. H. Hopkins, for appellee.

SMITH, J. On the 4th day of June, 1908, appellant recovered a judgment against James and William Wilson, composing the firm of Wilson Bros. On the 14th day of July following said judgment was enrolled in the office of the circuit clerk, and on the next day execution was issued thereon. Under this execution the sheriff was proceeding to sell the stock of goods belonging to said Wilson Bros., when appellee filed this bill in the court below, alleging that he had a prior lien on said stock of goods under a deed of trust executed to him thereon by said Wilson Bros. on the 5th day of June, 1908, and prayed for and was granted a temporary injunction enjoining said sale. The recital in the deed of trust relative to the stock of goods is as follows: "Also the entire stock of wares and merchandise now in said stores at High Point, Miss., and of wares and merchandise to be placed in said stores during the year 1908." To this bill a demurrer was filed, alleging, among other things, that said deed of trust was void for the reason that it shows on its face that it was made to hinder, delay, and defraud creditors. This demurrer being overruled, appellant filed its answer, charging that said deed of trust was fraudulent and void as to creditors, and alleging, among other things, that since the

execution thereof Wilson Bros. had continued in possession of said stock of goods, selling and replenishing same, and conducting a mercantile business in the usual and ordinary way. On final decree the injunction was made perpetual, from which decree this appeal is taken.

"The deed of trust does not in express terms provide for the continuance in business of the grantors, selling and replenishing stock in the usual course of dealing, and therefore is not void on its face." Baldwin v. Little, 64 Miss. 126, 8 South. 168. The deed of trust, however, on its face permitted the mortgagors to add to or replenish their stock, and it is admitted by appellee that they were verbally authorized to, and did, continue to sell. It is also clear, from other portions of the evidence, that the mortgagors continued in possession, buying and selling and conducting a business in the usual and ordinary way. According to appellee, the mortgagors were to account to him for the proceeds of all the sales; but no attempt was made to show that this was done. The legal effect of this arrangement and course of dealing was to hinder, delay, and defraud creditors, and therefore the court must declare the mortgage fraudulent and void. Britton v. Criswell, 63 Miss. 304; Johnston v. Tuttle, 65 Miss. 492, 4 South. 553.

The decree of the court below is reversed, and the cause remanded.

WILSON et al. v. WILSON et al.
(No. 14,474.)

(Supreme Court of Mississippi. March 28, 1910.
In Response to Suggestion of Error,
May 16, 1910.)

WILLS (§ 561*)—DESCRIPTION OF PROPERTY—INSUFFICIENCY.

A description of land in a will as the N. E. $\frac{1}{4}$ of a section is unknown to governmental subdivisions, as well as the popular understanding, and is absolutely void.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1221; Dec. Dig. § 561.*]

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

Ejectment by L. M. Wilson and others against J. W. Wilson and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This is an action of ejectment for recovery of possession of the N. E. $\frac{1}{4}$ of section 26, township 9, range 1 E., Madison county, Miss. This land, with a large body of other lands, including the S. $\frac{1}{2}$ of section 26, was owned by one J. G. Wilson in his lifetime; but the N. W. $\frac{1}{4}$ of said section was not owned by him. At his death said J. G. Wilson devised his land (describing it in his will) to the appellees. Among other property described in the will is the following: N. E. $\frac{1}{4}$ section 26. It is evident that the N. E. $\frac{1}{4}$ did not pass under the will, unless

under the description N. E. $\frac{1}{2}$. On the trial the court entered a judgment (a jury being waived) for defendants, that they retain possession of said N. E. $\frac{1}{4}$, section 26, and this appeal is prosecuted.

W. H. & Robert H. Powell, for appellants.
H. B. Greaves, for appellees.

WHITFIELD, C. J. The description of N. E. $\frac{1}{2}$ of a section is unknown to surveying and to governmental subdivisions of land, and has been held in *Pry v. Pry*, 109 Ill. 466, to be an absolutely void description. We think this decision is sound. The theory of the appellees is that the N. E. $\frac{1}{2}$ of a section might be laid off by beginning at the southeast corner and running a straight line diagonally through the center of the section to the northwest corner; but it is obvious that a line so drawn would include a part of the N. W. $\frac{1}{4}$ and a part of the S. E. $\frac{1}{4}$, neither of which could by any possibility be brought within the description of the N. E. $\frac{1}{2}$ of a section. The N. E. $\frac{1}{2}$ of a section necessarily imports that there should be nothing embraced in that description south of an east and west line through the center of a section, and nothing west of a north and south line through the center of a section. The very terms, N. E. $\frac{1}{2}$, so import.

We are therefore of the opinion that this description, N. E. $\frac{1}{2}$ of a section, is an absolutely void description, and that for this reason the judgment should be, and it is, hereby reversed, and the cause remanded.

In Response to Suggestion of Error.

ANDERSON, J. The "N. E. $\frac{1}{2}$ " of a section is unknown to the popular understanding as well as the government surveying. It is a void description in either sense. The contention that the "N. E. $\frac{1}{2}$ " of a section is all that part inclosed by a line running from the southeast to the northwest corner, thence east to the northeast corner, and south to the southeast corner of the section, is unsound. If that description would be the "N. E. $\frac{1}{2}$," the question is, Northeast from where? How can a piece of land be said to be northeast, unless it lies north of an east and west line, and east of a north and south intersecting line? In describing land, either in the popular sense, or according to surveying terms, the viewpoint or basis for directions is the center of the section, or lesser subdivision, sought to be divided. From the center, the N. E. $\frac{1}{4}$ of a section is all the land north of an east and west line, and east of a north and south line, through the center of a section. Viewing the N. E. $\frac{1}{4}$ from a standpoint of the center of a section, it is in fact northeast, and the N. W. $\frac{1}{4}$ is northwest, the S. W. $\frac{1}{4}$ southwest, and the S. E. $\frac{1}{4}$ southeast.

From what point of the triangle formed by dividing the section from the southeast

to northwest corners, as contended by counsel, would the half section, which it is claimed would be the "N. E. $\frac{1}{2}$," in fact, be northeast of? We say there is no point; neither is there any line or lines from which it would be north and east, or northeast. Standing in the center of a section thus divided, the half section in question would lie east, north, northeast, northwest, and southeast. Some of the land would be in the northwest part of the section, some in the northeast part, and some in the southeast part. If a person should begin at the southeast corner of a section so laid off, and walk around the half section, there would be no possible point along the lines from which the half section would be northeast, or from which lines could be run inclosing it all to the north and the east.

The suggestion of error is overruled.

STEWART et al. v. FOXWORTH et al. (No. 13,889.)

(Supreme Court of Mississippi. May 16, 1910.)
ADVERSE POSSESSION (§ 106*) — TITLE ACQUIRED.

Where one and those through whom he claimed had been in the open, notorious, and adverse possession of land for more than 40 years, claiming it as their own, his title thereto was perfect.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 604-623; Dec. Dig. § 106*.]

Appeal from Chancery Court, Marion County; R. D. Cooper, Special Chancellor.

Suit by John Foxworth and others against Harriet Stewart and others. From a decree for complainants, and dismissing the cross-bill filed by defendants, they appeal. Reversed and remanded.

This is a suit in chancery, seeking to have certain lands described in the bill of complaint sold and the proceeds divided among complainants and defendants; complainant John Foxworth alleging that he had acquired a one-seventh undivided interest therein. There was a decree granting the relief prayed, and dismissing the cross-bill filed by the appellants here, from which comes this appeal.

L. Henington and Green & Green, for appellants. McWillie & Thompson, Jones & Tyler, and Mounger & Mounger, for appellees.

SMITH, J. Appellants and those through whom they claim have been in open, notorious, and adverse possession of the land in controversy, other than that portion thereof inclosed within the fence erected by A. E. Foxworth, for more than 40 years, claiming it as their own, and the finding of the chancellor to the contrary is clearly and manifestly wrong. Their title thereto is therefore

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perfect, and the decree of the court below, awarding a sale thereof for partition thereof, is erroneous.

Reversed and remanded.

METCALF v. YAZOO & M. V. R. CO.

(No. 14,499.)

(Supreme Court of Mississippi. May 23, 1910.)

1. CARRIERS (§ 247*)—OR PASSENGERS—COMMENCEMENT OF RELATION—STATUTES.

Under Code 1906, §§ 4854, 4867, requiring railroads to maintain reasonably necessary depots and to keep rooms therein open for the reception of passengers at least one hour before the arrival of trains, an intending passenger may lawfully use the rooms therein for any necessary or convenient purpose in furtherance of his intention to become a passenger; and an intending passenger, who avails himself of a waiting room within a reasonable time before the arrival of the train, is a passenger, though his purpose is merely to place his hand baggage in the waiting room as a matter of convenience to himself and in furtherance of his ultimate object, and though he has a purpose to leave again before the arrival of the train on a matter of convenience, pleasure, or business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

2. CARRIERS (§ 247*)—PASSENGERS—WHO ARE.

Where a railroad has opened its waiting room in a depot for the reception of passengers, and a person intending to take passage on a train shortly to arrive resorts to the depot for that purpose, the relation of carrier and passenger arises as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

3. CARRIERS (§ 247*)—PASSENGERS—WHO ARE.

Where a person intending to take passage on a train went to the depot 15 minutes before the arrival of the train to deposit in the waiting room his satchel, his resort to the depot was for a lawful purpose and in furtherance of his intention to become a passenger, and the relation of carrier and passenger was created, though he intended to leave the depot to see a person on business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Action by J. B. Conly, prosecuted after his death by Harley Metcalf, as executor, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Shields & Boddie, for appellant. Mayes & Longstreet, for appellee.

MAYES, C. J. In 1908 J. B. Conly instituted suit against the Yazoo & Mississippi Valley Railroad Company for the purpose of recovering damages for injuries alleged to have been sustained by him, some time in September of that year, by falling into an excavation made by the company around its depot at Duncan, Miss., which, it is claimed, was negligently left open without warning

light or safety guard. Mr. Conly alleges that he fell while at the depot for the purpose of taking passage on a train, due about 10 or 15 minutes after he entered the depot, and about 7:20 p. m. After the institution of the suit Mr. Conly died, and the suit is prosecuted by the executor.

The facts are substantially as follows: Mr. Conly left Round Lake, Miss., in a buggy about 5 o'clock, and drove to the town of Duncan, intending, as it seems, to take passage on the 7:20 p. m. south-bound passenger train on defendant's road. After arriving at the town of Duncan he proceeded to the hotel to get supper. After supper, and 15 or 20 minutes before the train was due, he left the hotel for the depot, with his grip in his hand and a mileage book in his pocket, having in view the purpose of taking passage on the train when it should arrive. It was the double purpose of Conly to deposit his grip in the waiting room of the depot in preparation of his contemplated trip, and then to go over to the store of a Mr. Wynn, which was but a short distance from the waiting room, as he desired to speak to Mr. Wynn on a matter of business. Conly proceeded to the depot, and entered the waiting room safely, and after depositing his grip turned to go out to see Mr. Wynn, and as he stepped out of the door fell into an excavation in front of same, and sustained painful injuries, at least. It appears that the excavation was made by reason of the fact that the company was repairing its depot. The excavation seems to have been immediately in front of the waiting room entrance, and from three to five feet deep, and some two or three feet wide. Across this trench, and for the purpose of getting into the waiting room, some planks were placed leading into the door; but they were unguarded and without warning light. Conly said he could not see the excavation when he entered, because there was no light. As he entered, he says the light in the waiting room was shining in his eyes and blinded him, and when he came out the light was behind him, and the excavation so close to the door that, while it was bright enough to make the gravel walk visible, it did not light up this excavation. It is not our purpose to intimate how serious were the injuries Conly received. That question is left to the jury. The question before this court is simply whether or not the facts make out a case of liability on the part of the company. The court below gave a peremptory instruction to find for defendant, holding that Conly was not a passenger at the time of the injury, and from this action of the trial court an appeal is prosecuted by the executor.

Let us first review the statutes of the state on the subject of the railroad's duty in respect to its depots and waiting rooms. By

section 4854 it is made the duty of every railroad to establish and maintain such depots as shall be reasonably necessary for the public convenience; and by section 4867 it is made the duty of every railroad to keep rooms open for the reception of passengers at least one hour before the arrival, and one half hour after the departure, of all passenger trains. Thus it is that the law requires that the railroads shall have depots, and that they shall make them comfortable and accessible at reasonable times to intending passengers. It would be useless for the statute to require the railroads to keep rooms open for the reception of passengers an hour before the arrival of the train, unless intending passengers could make lawful use of the rooms, within that limit of time, for any necessary or convenient purpose which is in furtherance of the bona fide intention to become a passenger. This is the manifest purpose of the statute, and the very object of having the waiting room open is to receive intending passengers and their hand baggage. When an intending passenger avails himself of the convenience which the law has established for his benefit, and which the railroad must provide, within a reasonable time before the arrival of the train, his object being to facilitate and further his purpose to take passage, even though it be to place his hand baggage in the waiting room as a matter of convenience to himself and in furtherance of his ultimate object, such person, while on the depot grounds or in the waiting room, is a passenger, and entitled to all the protection of a passenger, though he have a purpose to leave again before the arrival of the train on a matter of convenience, pleasure, or business. To hold otherwise would place the rights of persons accepting the conveniences provided by law for their use in a precarious and uncertain condition under the law, and relieve railroads from a duty which they stand under to the traveling public, for which no sensible or just reason can be assigned. It is a matter of common knowledge that intending passengers use the waiting rooms for depositing their hand satchels, and such like, many minutes before a train is due to arrive. Some may loiter around the grounds and the platforms, while others may find it convenient and necessary to cross a street on a matter of business or pleasure; but because of this it is none the less the duty of a railroad to keep its grounds and rooms in a safe condition, both for the intending passenger who imprisons himself within the four walls of the waiting room and the passenger who is on the grounds for the purpose of relieving himself from the burden of his baggage in order that he may go out for some purpose, it being certain that both come to the depot for the ultimate purpose of taking a train.

It is argued by counsel for appellee that, before there can arise the relation of car-

rier and passenger, there must not only be an intent on the part of a person to become a passenger and to avail himself of the facilities offered by the carrier for transportation, but there must be an express or implied acceptance by the carrier of the person so intending as a passenger. Many authorities are cited to sustain this proposition, and we find no fault with the law there announced; but the question is, What constitutes this acceptance? Must the person go to the agent of the carrier and formally announce his arrival and intention to take passage? Must the agent then and there formally accept such person, in order to establish the relation? Clearly no such formality is required, in view of the fact that it is the lawful right of every citizen to establish this relation, with or without the consent of the railroad. The true rule is that, when the railroad has opened its waiting room for the reception of passengers as required by law, and any person intending to take passage on the train next to come has resorted to the depot in lawful furtherance of that purpose and in a proper condition to be received as a passenger, there arises from these acts, as a matter of law, the relation of carrier and passenger.

The contention of counsel for appellee that the relation of carrier and passenger could not arise until after Conly had entered the depot grounds on his return from Wynn's store is unsound and too narrow. Conly had gone to the depot to deposit his satchel in the waiting room only 15 minutes before the arrival of his train. His resort to the depot was for a lawful purpose and in furtherance of his intention. The depot was open for the reception of passengers and for their convenience. If he had hunted up the agent, and told him that he contemplated taking the next train, and desired to place his baggage in the waiting room and go out to see Wynn, the agent would doubtless have told him that the waiting room was there for the full convenience of one situated as he was. He was making the very use of the waiting room that the railroad and the law designed should be made of it. Conly was no loiterer on the depot grounds. He was no idler or trespasser; but he was there on the lawful business of an intending passenger.

We have found no case precisely like the case now on trial, but in the note to the case of Alabama, etc., Ry. Co. v. Godfrey, 130 Am. St. Rep. 76, will be found many authorities discussing this subject and sustaining the principle here announced. In section 997, vol. 2, Hutchinson on Carriers, it is said: "It would be impossible to frame a clear, precise, legal definition of the word 'passenger,' which would embrace all its essential elements." In 6 Cyc. p. 536, it is said that the relation of carrier and passenger exists, as to railroad companies, "not merely when the passenger enters the train with the tick-

et already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course."

The case of *Andrews v. Y. & M. V. R. Co.*, 86 Miss. 129, 38 South. 773, is no authority for any question involved in this case. In the *Andrews* Case it is shown that Andrews went to the depot more than two hours before the train he desired to take was due. He went into the private office of the agent, and requested the privilege of doing some writing on account of his own affairs, thus going to the depot and making use of its private office as an office in which to transact some business of his own. While so engaged in his own business in the private office of the depot, the depot agent and Andrews got into a personal difficulty about a private matter, and the court stated in the opinion that Andrews had gone to the depot in order that he might have a comfortable and convenient place in which to transact his own business, and was not, therefore, a passenger; that Andrews was knowingly violating the rules of the company, and could not claim its protection under the facts of that case. But the very object of Conly's visit to the depot was in furtherance of his purpose to take passage. Everything he did while there was in accordance with the rules of the company, and he was merely availing himself of those facilities which the company had placed there for the use of passengers, and which, under the law and rules of the company, he had a right to use.

In view of what we have heretofore said, we deem it unnecessary to further discuss the questions argued on behalf of appellee.

Reversed and remanded.

MONTGOMERY, City Treasurer, v. STATE ex rel. CROWDER. (No. 14,358.)

(Supreme Court of Mississippi. May 23, 1910.)

1. MUNICIPAL CORPORATIONS (§ 60*)—MAYOR AND BOARD OF ALDERMEN—POWERS.

Under Code 1906, § 3316, providing that the mayor and aldermen shall have the care and control of the city and its property and finances, etc., the mayor and aldermen are vested with complete authority over the property and finances of the city, and may do all things, consistent with the laws of the state, which they deem necessary to the care of the finances or to the best interest of the inhabitants.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 150, 151; Dec. Dig. § 60.*]

2. DEPOSITARIES (§ 6*)—CITY DEPOSITORIES—ORDINANCE CREATING.

Under Code 1906, § 3316, a city had power to pass an ordinance providing for the establishment of city depositories, fixing securities, and prescribing the mode of determining the interest rates.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 20; Dec. Dig. § 6.*]

3. DEPOSITARIES (§ 8*)—CITY DEPOSITORIES—ORDINANCE CREATING—LIABILITY OF TREASURER.

Under an ordinance establishing city depositories, providing that when the treasurer shall obey its provisions he shall be relieved from any further responsibility for the funds, when he has paid the money to the depositories, he has acted in obedience to the lawful authority and made a proper disposition of the funds, and he cannot longer be held responsible.

[Ed. Note.—For other cases, see *Depositaries*, Dec. Dig. § 8.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Mandamus by the State, on the relation of A. C. Crowder, against W. A. Montgomery, to compel respondent, as City Treasurer, to comply with an ordinance. Writ issued, and respondent appeals. Affirmed.

Williamson & Wells, for appellant. Potter & Thomson and Wm. Hemingway, for appellee.

MAYES, C. J. On the 1st day of June, 1909, the mayor and board of aldermen of the city of Jackson adopted an ordinance providing for the establishment of city depositories, fixing securities, and prescribing the mode of determining the interest rates. It is unnecessary to set out the ordinance, since there can be no legal objection to its practical operation, if the city authorities had the power to pass it. After adopting this ordinance creating the depositories in the manner provided by it, and fixing interest rates to be paid, the mayor and board of aldermen directed the city treasurer to turn over the funds to the depositories in accordance with the provisions of the ordinance, which the treasurer declined to do, asserting that the ordinance was void, and the mayor and board of aldermen without power to pass same. Whereupon the city, through its mayor, instituted mandamus proceedings to compel obedience to the ordinance by the treasurer. A demurrer was filed to this petition, which practically makes this issue. The case was heard, and the demurrer was overruled, and the defendant declined to plead further. Whereupon the trial judge issued the writ of mandamus, commanding the treasurer to obey the ordinance and pay over the money in accordance with same. From this judgment an appeal is prosecuted here.

In the case of *State v. Edwards*, 93 Miss. 704, 46 South. 964, the constitutionality of the state depositories was upheld. The above case simply settles the proposition that, wherever there is authority to pass such law, the law violates no constitutional provision. The mayor and board of aldermen constitute the legislative power of the cities, towns, and villages which they represent, and are vested with full power to pass any and all ordinances which are not repugnant to the laws of the state. This power is ex-

pressly given them by section 3816 of the Code of 1906. By this same section the mayor and board of aldermen are given the full care, management, and control of the property and finances of the city, town, and village which they represent. Under the above section the mayor and board of aldermen are vested with as complete authority over the property and finances of the city as the Legislature is of the property and finances of the state, and they may do all things, consistent with the laws of the state, which they deem necessary to the care of the finances of the city, or to the best interest of the inhabitants, who are the real owners of the funds. The state has approved of this method of dealing with its finances, and, instead of having its funds lie idle in the vaults of the treasury, they are loaned out and create a revenue for the people of the state. The city has undertaken to do the same with the city's funds, and in so doing is well within its power. The ordinance provides that when the treasurer shall obey its provisions he shall be relieved from any further responsibility for the funds. When he has paid the money into the depositories, he has acted in obedience to the lawful authority, and made a proper disposition of the funds, and, of course, he cannot be longer held responsible.

We can see no objection to this ordinance, and the judgment of the court below is affirmed.

ALABAMA & V. RY. CO. v. BALDWIN. (No. 14,483.)

(Supreme Court of Mississippi. May 23, 1910.)

1. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO CASE.

There is no error in refusing an instruction which is not applicable to the facts of the case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

2. EVIDENCE (§ 20*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

That it is the duty of a railroad section master to supervise the right of way and keep it in proper condition, so that fires would not extend from it to the property of others, and to extinguish such fires when set out, is a matter of common knowledge, of which the court will take judicial notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

3. MASTER AND SERVANT (§ 302*)—LIABILITY TO THIRD PERSONS—SCOPE OF AUTHORITY.

Where it was the duty of a section master to supervise the right of way and keep it in proper condition, so that fires would not extend from it to the property of others, and to extinguish such fires when set out, the act of such section master and his section hands in setting out a fire was one within the scope of their authority, for which the railroad company was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

4. RAILROADS (§ 484*)—OPERATION—FIRES—PROXIMATE CAUSE OF INJURY.

In an action for damages caused by a fire set out on a railroad right of way by a section master and section hands, evidence held sufficient to go to the jury on the question whether the negligence of the crew in setting out the fire or the sudden springing up of the wind was the proximate cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

5. DAMAGES (§ 138*)—FIRES.

In an action against a railroad company for the destruction of orchard trees by fire starting from the railroad right of way, where the testimony shows that the trees were worth from \$1 to \$4 apiece, an award of about \$1.50 per tree was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 397, 398; Dec. Dig. § 138.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by E. E. Baldwin against the Alabama & Vicksburg Railway Company. The cause was revived in the name of C. F. Baldwin, as executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee's intestate, E. E. Baldwin, sued the appellant, the Alabama & Vicksburg Railway Company, for \$732 damage claimed to have been done him by the appellant in the destruction of his peach orchard of 336 trees by fire set out by the employees of the appellant. The plaintiff died after suit was brought, and the cause was revived in the name of his executor, C. F. Baldwin. There was a trial, and verdict and judgment for \$594 and costs, from which this appeal is prosecuted.

It is insisted that the case ought to be reversed on three grounds, viz.: That the court erred in not granting the peremptory instruction asked on behalf of the defendant; that the verdict is excessive; and in refusing instruction No. 1 for the defendant, as follows: "If the jury believe from the evidence that the defendant's section hands, for the purpose of warming or cooking their food, set out the fire which, by spreading, caused the injury to plaintiff complained of, and that as soon as it was discovered that the fire had spread to plaintiff's property they made all proper effort to extinguish the same, they will find for the defendant."

The testimony for the plaintiff tended to establish the following facts: His home was near the railroad. His peach orchard and tenant houses were located near by on the south side of the railroad. The fire occurred in January, 1908, which destroyed his orchard. On that day a section crew, in the employ of the defendant company, were at work on the road near plaintiff's premises. This section crew set fire to a pile of old cross-ties on the right of way on the south side of the railroad. About noon, when they ate their dinner, these cross-ties were burning. There is some testimony to show that there was still another fire, which the section crew

built to warm their dinners by. After eating dinner they went to work at a point not far distant from where this fire was, which was left burning. The right of way of the railroad at this point was foul with weeds and grass, not having been cleared or burned off for a year or more. Shortly after the section crew returned to their work, a fire was discovered burning from the direction of the railroad, where the burning cross-ties were left, toward the orchard. It had made considerable progress; it seems, when discovered. Parker, the section foreman, took his hands, and with the help of Baldwin succeeded in extinguishing the fire before it reached the tenant houses, but after it had burned through the orchard and destroyed the trees. While they were fighting the fire, Parker stated to Baldwin that the fire got out from the burning cross-ties; that it sprung up so suddenly he could not stop it. One of the section hands stated to a witness, about the same time, that the fire got out from one made at noon by the section crew to warm their dinner. There were 336 peach trees entirely destroyed. The testimony showed they were worth from \$1 to \$4 apiece.

The railroad company undertook to show by its witnesses that the section crew set out no fire; that they neither set fire to cross-ties, nor built a fire to warm their dinners by; that the right of way had been burned off a few months before, and was clear of weeds and grass. Several of the section hands testified to these facts.

McWille & Thompson, for appellant.
Wells & Wells, for appellee.

ANDERSON, J. (after stating the facts as above). There was no error in refusing instruction No. 1 for the defendant, because not applicable to the facts of this case. This instruction was asked on the authority of *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793. In that case the court held that the railroad company was not responsible for the fire which destroyed the property of the plaintiff, set out by the section hands for the purpose of warming their food, because in so doing they were not engaged about the master's business. They were acting without the scope of their authority, and pursuing their own private ends. In that case the court used this language: "Nor is there any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be set out on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track." The instant case is clearly distinguishable from that. Here it was the duty of the section master to supervise the right of way, keep it in proper condition so that fires would not extend from it to the property of others, and extinguish such fires when

set out. The record in this case sufficiently shows such to be among his duties; and, if it did not, it is a matter of common knowledge, of which the court will take judicial notice. In *Railroad Co. v. Stinson*, 74 Miss. 453, 21 South. 14, 522, the court held: "And as to the scope of that agency [referring to the section master] we will employ that common knowledge possessed by mankind generally in ascertaining whether it was his duty to look after and clear off the company's right of way. We take knowledge of the fact that it was his duty to keep the track and right of way in proper condition." So that, in setting out the fire and in failing to extinguish it, even though it was done for their own private purposes, the section foreman and hands were acting within the scope of their authority. They were engaged about the business of their master. They were required not to do the very thing they did do, if dangerous to the property of others.

There was no error in refusing the peremptory instruction. It is contended that no negligence was shown; that the act of the section crew in setting out the fire was shown not to have been the proximate cause of its spreading to plaintiff's orchard; but the sudden springing up of the wind was shown to have been the intervening efficient cause, and, therefore, the court should have directed the jury to find for the defendant. In view of the condition of the right of way at this point, taken in connection with the other facts and circumstances shown, there was sufficient evidence to go to the jury on this question.

It cannot be said that the verdict was excessive. The jury allowed the plaintiff about \$1.50 per tree. The testimony shows that they were worth from \$1 to \$4 apiece.

Affirmed.

McDANIEL v. INZER et al. (No. 14,298.)
(Supreme Court of Mississippi. May 23, 1910.)
REFORMATION OF INSTRUMENTS (§ 45*)—MISTAKE—EVIDENCE.

In a suit to reform a deed, so as to include certain land alleged to have been omitted by mistake, evidence held to require a decree granting plaintiff the relief demanded.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Appeal from Chancery Court, Ponotoc County; J. Q. Robbins, Chancellor.

Bill by T. L. McDaniel against J. W. Inzer and others to reform one deed and cancel another. From a decree for less than the relief demanded, complainant appeals. Reversed.

The appellant, McDaniel, filed his bill in the chancery court of Ponotoc county against the appellee, Inzer, and Mrs. Seal and her four children, Tishia, Floyd, Mattie, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

Willie, to reform a deed to him to 80 acres of land made by the Seals, being the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, except 20 acres in the southwest corner, and 20 acres in the northeast corner of the S. W. $\frac{1}{4}$, section 21, township 9, range 2, on account of a mistake in the description made by the draughtsman of the deed, and to cancel a deed to one-fifth undivided interest in said 80 acres of land made to Inzer by Tishia Seal as a cloud upon his title. There was a decree pro confesso against all of the defendants except Inzer, who answered. On final hearing a decree was rendered reforming McDaniel's deed to 40 acres of land, and canceling, as a cloud upon his title, the deed to Inzer from Tishia Seal to that 40, and denying him any relief as to the other 40 acres, described as the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 21, township 9, range 2. McDaniel appeals from this decree.

Fontaine & Fontaine, for appellant.

ANDERSON, J. (after stating the facts as above). The only question involved in this case is one of fact—whether the chancellor was justified by the testimony in denying the appellant, McDaniel, relief as to the 40 acres of land described above. After a very careful investigation of the record, we are satisfied that McDaniel ought to have been granted the relief prayed for as to the entire 80 acres of land. In his opinion, which is in the record, the chancellor states that the testimony did not show clearly and satisfactorily that Tishia Seal intended to convey her interest in the land in question by the deed of October 7, 1907. It is true that the justice of the peace, Ray, who wrote the deed (and whose testimony, by the way, is rather vague and indefinite), testifies that he did not understand it was intended to include the Bramlett 40 acres. McDaniel testified that it was so intended; Ray, in writing the deed, though describing the land erroneously, did include 80 acres; and afterwards Tishia Seal attempted to convey a one-fifth undivided interest in the whole 80 to Inzer for only \$87.50, when it was worth something near \$200. These facts, taken with all the circumstances and surroundings, show conclusively that the whole 80 acres of land was intended to be included in the deed of October 7, 1907. The testimony, justifying the decree of the chancellor granting relief as to one 40, applied with equal force to the other; and, for the same reason, the relief prayed for should have been granted as to that.

Notwithstanding it is with great reluctance we disturb the finding of the chancellor on a question of fact, we are impelled to do so in this case. The case is reversed, and a decree in favor of the appellant, T. L. McDaniel, reforming his deed of October 7, 1907, so as to describe the 80 acres of land in question as follows: The S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, except

20 acres in the southwest corner, and 20 acres in the northeast corner of the S. W. $\frac{1}{4}$ of section 21, township 9, range 2 E., in Ponotoc county, Miss., and canceling, as a cloud upon the title of said McDaniel, the deed from Tishia Seal to J. W. Inzer, dated 20th of October, 1906, to the said 80 acres of land.

Reversed.

SULLIVAN v. GRAND LODGE, K. P., et al.
(No. 14,256.)

(Supreme Court of Mississippi. May 23, 1910.)

1. MARRIAGE (§ 40*)—EVIDENCE—PRESUMPTIONS.

A marriage solemnized in due form of law is presumed valid; the burden of showing the invalidity of the marriage being upon the person attacking it.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-69; Dec. Dig. § 40.*]

2. MARRIAGE (§ 40*)—PRESUMPTIONS—CONFLICTING PRESUMPTIONS.

The presumption of the validity of a marriage solemnized according to law is superior to the presumption of life.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 67; Dec. Dig. § 40.*]

3. DIVORCE (§ 174*)—EVIDENCE—SUFFICIENCY.

In an action to recover the amount of a mutual benefit certificate, in which both claimants claimed to be the wife of insured, evidence held to show that insured was not divorced from his first wife before marrying the second time, so that the second marriage was invalid.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 174.*]

Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action by Emma Sullivan against the Grand Lodge, Knights of Pythias, of Mississippi, to recover insurance money, in which Mary Davis was interpleaded by defendant. From the judgment awarding the money to Mary Davis, plaintiff appeals. Affirmed.

McKnight & McKnight, for appellant. N. Vick Robbins, for appellees.

SMITH, J. On the 25th day of October, 1906, Jacob Davis, a member of appellee order, died intestate, and the holder of an endowment policy in said order for the sum of \$500, payable at his death to his widow or other heirs. The appellant filed a declaration in the court below, alleging that her intestate, Mentha Davis, who died on the 23d of July, 1907, was the widow and the sole heir at law of Jacob Davis, and prayed for judgment against appellee for the sum of \$500, alleged to be due under said policy. Appellee, having filed its affidavit stating that it was ready to pay the \$500 as the court might direct, and alleging that "a third party, Mary Davis, a resident citizen of Sharkey county, without collusion with the defendant, has a claim to the subject of action in the above-styled cause," an order

was entered directing appellee to pay said sum of \$500 into court, and that summons issue for the said Mary Davis to appear and maintain or relinquish her said claim thereto. Mary Davis thereupon appeared, propounded her claim to the said \$500, claiming that she was the widow and sole heir of the said Jacob Davis. From a judgment awarding said money to the said Mary Davis, this appeal is taken.

It appears, from the marriage records of Warren county and from the testimony of the minister of the gospel who performed the ceremony, that the rites of matrimony were celebrated between the said Jacob Davis and Menthia Davis, appellant's intestate, on or about the 18th day of March, 1899; and it further appears from the evidence that they thereafter lived and cohabited together as man and wife until Jacob's death. On behalf of Mary Davis it was shown, from the records of Washington county and by the minister of the gospel who performed the ceremony, that the rites of matrimony were celebrated between the said Jacob Davis and Mary Davis in September, 1892. It further appears that, after living together five or six years in Washington and Sharkey counties, Jacob left Mary and moved to Warren county. On cross-examination of Mary Davis, it appeared that in 1886 or in 1887 she was married to one Brown Hunter in Sharkey county, that they lived together two or three years, and that Brown, having gotten into some sort of trouble, left Mary, since which time she has not seen him, and had heard that he was dead. By agreement of counsel it also appears "that the records of Sharkey, Warren, and Washington counties do not show any decree of divorce granted dissolving the bonds of matrimony between one Mary Davis, the defendant, and any Jacob Davis, or any one else."

One of appellant's assignments of error is that the court erred in refusing to grant her a peremptory instruction. Her first contention is that the marriage of Mary and Jacob Davis was void, for the reason that Brown Hunter was not shown to be dead at the time same was contracted, and was not shown to have been then absent for a sufficient length of time for his death to be presumed. There is some confusion in the books upon this subject, but it is settled in this state that, where a marriage has been solemnized in due form of law, it will be presumed to be valid, and that this presumption is superior to, and will overcome, the presumption of life. The burden of showing the invalidity of the marriage is upon the party attacking it. *Spears v. Burton*, 31 Miss. 555; *Wilkie v. Collins*, 48 Miss. 511; *Railway Co. v. Beardsley*, 79 Miss. 417, 30 South. 660. In *Wilkie v. Collins* the court said: "If no other fact appeared, but simply the marriage, the presumption is in favor

of validity. But there is also a presumption in favor of the continuance of life, which is only overcome by a protracted absence for the time specified. In such circumstances, founded on considerations of policy, and in favor of innocence, the presumption in favor of the marriage will prevail, as against that of the continuance of life; and it will devolve upon the disputant of the marriage to overcome it by testimony that the first husband was living at the time of the second marriage." Under the evidence, therefore, the marriage of Mary and Jacob must be presumed to have been valid.

But it is said that the law also presumes the validity of the marriage between Jacob and Menthia, and that the burden devolves upon the party attacking same—that is, upon Mary Davis—of showing its invalidity; that is, that the former marriage of Mary and Jacob had not been dissolved by death or divorce. This is, of course, true and it was so held by this court in *Railway Company v. Beardsley*, supra; but this burden was met by Mary. She herself was living, and the proof showed, as clearly as a negative can ever be shown, that no divorce had been obtained by her or by Jacob. The evidence shows that after their separation, which occurred in Sharkey county, Jacob lived continuously in Warren county; that she continued to, and now does reside in Sharkey county. A decree of divorce would have to be shown by the record, and under the agreement of counsel the records of those counties show no such decree. It follows, therefore, that no such decree was ever made. If authority is needed for this proposition, it can be found in *Schmisseur et al. v. Beatrice*, 147 Ill. 210, 35 N. E. 525.

Appellant also contends that the Jacob Davis who was married to Mary was not identified as the same Jacob who was afterwards married to Menthia. There was sufficient evidence, particularly the testimony of John Bowman, from which the jury could find this fact. There was no error in the other matters complained of.

There is an apparent conflict between the case of *Wilkie v. Collins* and *Railway Company v. Beardsley*, supra, relative to the validity of the last marriages therein involved; that is, the ones therein which correspond to the marriage of Jacob and Menthia in the case at bar. An examination of these cases, however, will disclose that in the former case the court seems not to have considered the presumption of validity attaching to this marriage, and which casts the burden of showing its invalidity upon the party attacking same. The case was permitted to turn upon the validity of the first marriage alone.

The rule announced in *Railway Company v. Beardsley* is a correct one, and is supported by the weight of authority.

Affirmed.

SOUTHERN RY. CO. IN MISSISSIPPI v. DONLEY. (No. 14,285.)

(Supreme Court of Mississippi. May 18, 1910.)

Appeal from Circuit Court, Carroll County; G. A. McLean, Jr., Judge.

Action by S. J. Donley against the Southern Railway Company in Mississippi. From a judgment for plaintiff, defendant appeals. Affirmed, if plaintiff accepts a reduced amount; and, if not, reversed and remanded.

This is an appeal from a judgment for \$300 for damages to the land of appellee, caused by gravel from the roadbed of the appellant railroad company being washed onto said land by a creek which overflowed its banks after heavy rains.

Catchings & Catchings, for appellant. M. B. Grace, for appellee.

MAYES, C. J. If the appellee will remit the amount recovered in this suit down to \$175, the case shall stand affirmed; but, upon its failure to do so within 20 days after the rendition of this judgment, the decree shall be reversed, and the cause remanded. The cost of this suit in this court to be taxed against appellee.

HUMPHREYS et al. v. DREW.

(Supreme Court of Florida. Division A. April 19, 1910. Rehearing Denied May 20, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 262*)—LIABILITY OF INCORPORATORS—ACTION BY CREDITORS.

Section 2652 of the General Statutes of 1906 prohibits the transaction of any business by a corporation until certain specified requirements have been complied with, and provides that, if any corporation shall transact any business before complying with such requirements, its incorporators and stockholders shall be personally liable for all of the corporation debts as if they were members of a general partnership, and not stockholders of a corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 262.*]

2. RIGHTS OF CREDITORS.

The fact that creditors deal with and extend credit to a concern as a corporation does not estop them from enforcing the personal liability of the stockholders for failure to comply with the requirements of section 2652 of the General Statutes of 1906.

3. CORPORATIONS (§ 220*)—LIABILITY OF INCORPORATORS—PARTNERSHIP.

The stockholders of a proposed corporation who execute a promissory note in the name of such corporation prior to the issuance of the letters patent are liable as members of a general partnership for the amount of such note, under the provisions of section 2652 of the General Statutes of 1906, and an action thereon may be maintained against them as partners.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 866; Dec. Dig. § 220.*]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER TO PLEAS.

If pleas are so faulty and defective as to be wholly bad and to constitute practically no defense, or clearly tend to confuse the issue, as the case may be, so that the court would be warranted in striking out such pleas of its own motion, no reversible error is committed in sus-

taining a demurrer thereto, even though the proper method of attack might be by motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089, 4090; Dec. Dig. § 1040.*]

5. APPEAL AND ERROR (§ 1017*)—REVIEW—FINDINGS OF REFEREE.

The findings of a referee upon questions of fact, where the witnesses are examined before him, are entitled to the same weight as the verdict of a jury. In neither the one case nor the other would an appellate court be warranted in disturbing such findings or verdict or in reversing the judgment because the evidence adduced is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3996-4005; Dec. Dig. § 1017.*]

Error to Circuit Court, Suwannee County; A. B. Small, Judge.

Action by M. C. Drew against A. L. Humphreys and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Humphreys & Harrell and Carter & McCollum, for plaintiffs in error. Charles E. Davis, for defendant in error.

SHACKLEFORD, J. The defendant in error brought an action of assumpsit against the plaintiffs in error, which was referred by agreement of the parties for trial and disposition to Hon. A. B. Small, by whom a judgment was rendered in favor of the plaintiff in the court below for \$1,687.13 damages, and \$48.16 costs, which judgment the defendants seek to have reviewed here by writ of error. The action is brought against the defendants as partners doing business under the name of the Live Oak Brick & Supply Company, and it is sought to recover a balance alleged to be due upon a certain promissory note, a copy of which is attached to the declaration as the cause of action. The declaration contains three counts. Very briefly stated, the first count alleges the execution of a certain promissory note by the defendants, bearing date the 3d day of October, to the order of McDonald Brick & Cement Company, for the sum of \$2,896.97, payable 60 days after date, with interest from date at the rate of 10 per cent. per annum; that the McDonald Brick & Cement Company assigned the same to the plaintiff. The second count alleges that the defendants filed their application for a charter of incorporation as the Live Oak Brick & Supply Company on the 19th day of September, 1906, which application was granted and letters patent issued on the 20th day of the succeeding October, but that prior to such date, to wit, on the 3d day of October, 1906, the defendants, being indebted to McDonald Brick & Cement Company in the sum of \$2,896.97 by and under the style of the Live Oak Brick & Supply Company, made their promissory note by which they promised to pay to the order of such creditor such sum of money 60 days after date, which

note was then and there assigned to the plaintiff. The third count is but little more than a condensed statement of the first count.

The first error assigned and urged before us is the sustaining of a demurrer to the second plea of defendants. Such plea is as follows:

"And for a second plea these defendants say that the said M. C. Drew and the McDonald Brick & Cement Company before the incorporation of the firm as alleged, and since the said time, have been dealing with the Live Oak Brick & Supply Company as a corporation, and every transaction had between the Live Oak Brick & Supply Company before and since the execution of the said note has been a transaction as a corporation. Defendants further say that the said M. C. Drew by receipts for money paid and by letter and otherwise has repeatedly recognized and dealt with this company as a corporation. Wherefore, these defendants say that the said M. C. Drew is estopped to deny that the plaintiff in this cause was a corporation or is a corporation."

The substantial matters of law intended to be argued in support of the demurrer were stated as follows:

"(1) The facts set up are not sufficient to estop plaintiff.

"(2) It neither traverses nor confesses and avoids the declaration.

"(3) It sets up no misrepresentation on the part of the plaintiff.

"(4) The law fixes the status of the defendants.

"(5) It is not shown that the defendants have acted in their prejudice on representations or actions of the plaintiff."

In support of this assignment, the plaintiffs cite and rely upon the following authorities: *Coogler v. Rogers*, 25 Fla. 853, 7 South. 391; *Jackson Sharp Co. v. Holland*, 14 Fla. 384; *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 South. 247; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; *Morawetz on Private Corporations* (2d Ed.) para. 750, 774, 778. We have carefully examined these authorities, and are of the opinion that they signally fail to sustain the contention of the plaintiffs in error. We would refer to section 2032 of the General Statutes of 1906, which is as follows:

"2652. (2127) Corporation Not to Transact Business Until Certain Requisites Complied With.—No corporation shall transact any business until it has had the letters patent with a certified copy of the charter recorded in the office of the clerk of the circuit court of the county wherein the principal place of business is located, and has also filed with the Secretary of State and with the said clerk (except in the case of building and loan associations) duplicate affidavits by its treasurer that ten per cent. of its capital stock has been subscribed and paid. If any corporation shall transact any business before complying with these requirements, or if any cor-

poration chartered by a special act of the Legislature shall transact any business before filing said duplicate affidavits and paying the charter fees required by law to the Secretary of State for the state treasury, its stockholders, or in the latter case its incorporators and stockholders, shall be personally liable for all of the corporation debts as if they were members of a general partnership and not stockholders of a corporation."

See *Heinberg Bros. v. Thompson*, 47 Fla. 163, 37 South. 71, which seems to us absolutely decisive of the point. The note in question was executed prior to the issuance of the letters patent, at which time the defendants had no corporate existence of any kind, either de jure or de facto. The plea is doubtless defective as a pleading for other reasons, but it is unnecessary for us to consider them. This assignment must fail.

After the sustaining of this demurrer the defendants filed four amended pleas, the second and fourth of which are as follows:

"And, for a second plea, to each and every count of plaintiff's declaration herein these defendants pray judgment of said cause because they say that the said alleged note and promise in the said declaration mentioned, if any such were made, were made jointly with the McDonald Brick & Cement Company, a corporation under the laws of the state of Florida, doing business in the city of Jacksonville, in Duval county, Fla., and who is still doing business in Duval county, Fla., and within the jurisdiction of this court, and not by these defendants alone, and this the said defendants are ready to verify. Wherefore, inasmuch as the said McDonald Brick & Cement Company are not named in the said writ together with the said defendants, they, the said defendants, pray judgment of said writ, and that the same may be quashed."

"And for a fourth plea these defendants say that plaintiff ought not to have and maintain his said action against them, because they say that the said M. C. Drew, plaintiff in this cause, and the said McDonald Brick & Cement Company, a corporation under the laws of the state of Florida, and doing business in the city of Jacksonville, in Duval county, Fla., were copartners with these defendants and members of the said firm of the Live Oak Brick & Supply Company at the time of the execution of the alleged note; that the McDonald Brick & Cement Company was duly authorized by its charter; that the said M. C. Drew and the said McDonald Brick & Cement Company were the owners of a large amount of the capital stock of the firm of the Live Oak Brick & Supply Company, to wit, \$2,000, at the time of the execution of the said note; that at the time of the execution of said note the said partnership business had not been settled, and that the execution of said note was a partnership transaction and for and on behalf of partnership business, all of which these defendants

stand ready and willing to verify. Wherefore these defendants pray judgment, if plaintiff ought to have his aforesaid action against them."

The plaintiff filed a motion to strike all of such pleas, which was granted only as to the second and fourth pleas, and this ruling forms the basis for the second and third assignments. The grounds stated in the motion as to the second plea are as follows:

"(a) It is the second successive plea in abatement to the declaration.

"(b) It sets up matter contained in former plea overruled by the court.

"(c) Corporations are incapable of entering into partnership relations with others."

The grounds stated in the motion as to the fourth plea are as follows:

"(a) It attempts to set up matter in abatement.

"(b) It contains in substance matter set up in first and second pleas.

"(c) It neither traverses nor confesses and avoids.

"(d) It is repugnant.

"(e) Corporations cannot enter into partnership relations with others."

We would call attention to the fact that nowhere in the motion to strike is it alleged or set forth that such pleas were "so framed as to prejudice or embarrass or delay the fair trial of the action," for which reasons the same were liable to be stricken out, as provided by section 1433 of the General Statutes of 1906. We have set forth the grounds of the motion as applied to each of the stricken pleas.

A demurrer was also filed contemporaneously with the motion to strike, which was directed to all of the pleas and which was overruled as to the first and third pleas, but no ruling whatever appears to have been made thereon as to the second and fourth pleas, so that matter is not before us for consideration. A careful examination of the two pleas which were so stricken discloses that they are quite faulty and defective, so much so in fact that we are of the opinion that the trial court would have been justified in striking them out of its own motion. This being true, it necessarily follows that no error was committed in granting the motion, even though it may not have been framed in accordance with the statute. See *Hooker v. Forrester*, 53 Fla. 392, 43 South. 241; *O'Brien v. State*, 55 Fla. 146, 47 South. 11; *Poppell v. Culpepper*, 56 Fla. 515, 47 South. 351; *Hammond v. Vetsburg*, 56 Fla. 369, 48 South. 419; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 South. 922. These two assignments have not been sustained.

This brings us to the fourth and last assignment, which is based upon the overruling of the motion for a new trial. This motion contains seven grounds, but no useful pur-

pose would be served by discussing them in detail. Suffice it to say that the main contention urged before us is as to the sufficiency of the evidence to sustain the findings of the referee. It is settled law in this court that the findings of a referee upon questions of fact where the witnesses are examined before him are entitled to the same weight as the verdict of the jury. In neither the one case nor the other would an appellate court be warranted in disturbing such findings or verdict or in reversing the judgment because the evidence adduced is conflicting. *Brown v. Bowie*, 58 Fla. —, 50 South. 637, and authorities there cited. We are of the opinion that the evidence is amply sufficient to support the findings of the referee. It follows from what has been said that the judgment must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOOKER, and PARKHILL, JJ., concur in the opinion.

UNITED HARDWARE-FURNITURE CO. v BLUE.

(Supreme Court of Florida. March 4, 1910.
Headnotes Filed May 19, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 89*)—SALE OF GOODS—ACCEPTANCE.

No contract for the sale of any personal property, goods, wares, or merchandise shall be good, unless the buyer shall accept the goods (or any part of them) so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain or contract be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.*]

2. FRAUDS, STATUTE OF (§ 89*)—SALE OF GOODS—ACCEPTANCE.

In order to bring a contract for the sale of goods within this exception, it is necessary that the goods should have been received and also accepted by the buyer. Even the delivery of goods to the buyer, or the receipt of them by him, without an acceptance, is not sufficient. Some act or conduct on the part of the buyer or his authorized agent, maintaining an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract, or payment, or part payment.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.*]

3. FRAUDS, STATUTE OF (§ 89*)—SALE OF GOODS—ACCEPTANCE—ACCEPTANCE BY CARRIER AS AGENT.

A common carrier, whether selected by the seller or the buyer, to whom goods are intrusted without instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the act required to constitute an acceptance and receipt on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the buyer and to take the case out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 170; Dec. Dig. § 89.*]

4. ACCOUNT STATED (§ 6*)—ACCOUNT RENDERED—EVIDENCE.

To give an account rendered the force of an account stated because of silence on the part of the party sought to be charged, the evidence must show the rendition of the account to the defendant.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 30-40; Dec. Dig. § 6.*]

5. ACCOUNT STATED (§ 19*)—ACCOUNT RENDERED—EVIDENCE.

The plaintiff's usual custom of sending out statements to different parties, including the defendant, the first of every month, showing the goods bought during the preceding month and the balance remaining over, is not sufficient to establish the fact that certain bills in question were rendered to defendant.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 93; Dec. Dig. § 19.*]

6. FRAUDS, STATUTE OF (§ 115*)—"MEMORANDUM" SIGNED BY PARTY TO BE CHARGED—ENTRY IN ACCOUNT BOOK.

The entry in the seller's account book is not a memorandum signed by the party to be charged within the meaning of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4472; vol. 8, p. 7720.]

7. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—RULING ON EVIDENCE.

The court makes a harmless error in sustaining an improper objection to a question, where the witness had already given an answer to the question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

8. TRIAL (§ 45*)—APPEAL AND ERROR (§ 692*)—NECESSITY FOR BILL OF EXCEPTIONS—REFUSAL TO RECEIVE FURTHER TESTIMONY—DUTY TO STATE NATURE OF TESTIMONY OFFERED.

Before counsel may be heard to complain of the action of the court in proceeding to judgment, notwithstanding his offer to introduce further testimony, he should have disclosed to the court what that testimony was, and, before this court may review it, the bill of exceptions should set it forth.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 110-114; Dec. Dig. § 45.* *Appeal and Error*, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

9. TRIAL (§ 55*)—RECEPTION OF EVIDENCE—EVIDENCE PREVIOUSLY PROPERLY STRICKEN.

Testimony offered by the plaintiff having been heretofore admitted in evidence and afterwards properly stricken, the court did not err in refusing to allow a repetition of it.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 55.*]

In Banc. Error to Circuit Court, Taylor County; B. H. Palmer, Judge.

Action by the United Hardware-Furniture Company against K. A. Blue. Plaintiff took a nonsuit, and, from a final judgment, brings error. Affirmed.

W. B. Davis, for plaintiff in error. L. W. Blanton and O. E. Davis, for defendant in error.

PARKHILL, J. The plaintiff in error sued the defendant in error in the circuit court for Taylor county; the declaration containing the common counts. The plea was never indebted. Pending the taking of testimony, the plaintiff took a nonsuit, and, under the provisions of section 1697 of the General Statutes of 1906, comes here by writ of error for relief from the final judgment therein.

The testimony tends to show that the plaintiff conducted a general hardware and furniture business in Perry, Taylor county, Fla. The defendant lived in North Carolina, but owned and operated a sawmill at Shady Grove, or Luther, in Taylor county, Fla.; one D. A. Blue, Jr., being his agent in charge of the mill. Some time during the summer of 1907 D. A. Blue, Jr., at three different times ordered or bought from the plaintiff a circular saw, a conveyor outfit, and a piece of Gandy belting. The order was not in writing, a verbal arrangement between the plaintiff and defendant's agent. Not having the goods in stock, of which fact the agent of the defendant had knowledge, the plaintiff ordered the same shipped to the defendant by other parties and paid for them. Blue, the agent, directed the plaintiff to have the goods shipped to K. A. Blue. The defendant has never paid for the articles in question here. The plaintiff's book of original entry shows that on August 12, 1907, there was charged thereon to K. A. Blue 1 52" circular saw, \$78.25.

The plaintiff introduced in evidence the following order:

"Order No. 156.

7/18, 1907.

"M. E. C. Atkins & Co.

"Ex. to K. A. Blue,

"At Shady Grove, Fla.

"How Ship: Express. When:—

"Terms: —

"1 inserted tooth circular saw, 52" diam. 44 teeth, right hand, gauge 8 or 9 Hole Std. Lng. pin holes std. 600 to 650 Rev. Express to K. A. Blue, Shady Grove, Fla. Expense United Hdw. Furn. Co., Perry, Fla. Will appreciate prompt attention. Our customer needs the saw to-day."

J. L. Wagner testified that he was the shipping clerk for E. C. Atkins & Co. of Indianapolis, Ind.; that on the 6th day of August, 1907, he made a shipment as agent for said E. C. Atkins & Co. to K. A. Blue, Shady Grove, Fla., by order of the United Hardware-Furniture Company, the plaintiff here, the shipment consisting of one case, circular saw; that he delivered the same to a common carrier, the express company, properly marked and addressed, and such directions given as would indicate who was the consignee and where it was to be delivered to the consignee by such express company.

We will not undertake to follow the other

shipments; the one already mentioned sufficiently raising the question here presented.

The plaintiff in error contends that the court erred in holding that the plaintiff had not shown a valid written contract or memorandum thereof signed by the defendant, nor an acceptance and actual receipt of the goods.

"No contract for the sale of any personal property, goods, wares, or merchandise shall be good, unless the buyer shall accept the goods (or part of them) so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain or contract be made and signed by the parties to be charged by such contract, or their agents thereunder lawfully authorized." Section 2518 of the General Statutes of 1906.

This case does not fall, as contended, within the holding in *Chamberlain v. Lesley*, 39 Fla. 452, 22 South. 736: "An action of assumpsit for money paid is maintainable in all cases where the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an understanding, express or implied, on his part to repay it." Neither is it a case where one as agent buys for a principal; an agreement between them not being within the statute. 20 Cyc. 241; *Wiger v. Carr*, 131 Wis. 584, 111 N. W. 657, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998, note 1000. The facts here disclose a sale of goods proper; that is, a transfer of the title to the personalty in consideration of a price in money. 2 Page on Contracts, 1020. The plaintiff, conducting a mercantile business, sold defendant a saw. Not having it in stock, plaintiff ordered a wholesale dealer to ship it to defendant. This was done; the wholesale dealer charging it to plaintiff and plaintiff charging it to defendant.

No note or memorandum in writing of the bargain or contract for the sale of the goods in question was ever made and signed by or for the defendant. Neither did he give anything in earnest to bind the bargain or in part payment. But it is contended that the defendant buyer accepted the goods so sold and actually received the same, making the contract good under the statute.

Our statute is like the seventeenth section of 29 Car. II; and, in order to bring a contract for the sale of goods within this exception, it is necessary that the goods should have been received and also accepted by the buyer. Even the delivery of goods to the buyer, or the receipt of them by him, without an acceptance, is not sufficient. *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337. Some act or conduct on the part of the buyer or his authorized agent maintaining an intention to accept the goods as a performance of the contract and to appropriate them is required to supply the place of a written contract or payment, or

part payment. *Benjamin on Sales*, para. 160, 181; *Schouler on Personal Property*, pp. 485, 486; 2 *Kent's Com.* 495; *Taylor on Ev.* par. 957; *Black on Sales*, 106; 29 *Am. & Eng. Ency. Law* (2d Ed.) 972, 974, and cases cited; *Charlotte Harbor & N. Ry. Co. v. Burwell*, 56 Fla. 217, 48 South. 213; *Demens v. Le Moyne*, 26 Fla. 323, 8 South. 442.

The plaintiff in error contends that "delivery to the common carrier was a delivery to the consignee." But our statute requires not only that the buyer shall actually receive the goods, but that he shall accept the same also. True, the acceptance and receipt of the goods may be through an authorized agent, but a common carrier (whether selected by the seller or the buyer) to whom the goods are intrusted without instructions to do anything but to carry and deliver them to the buyer as was the case here is no more than an agent to carry and deliver the goods, and has no implied authority to do the act required to constitute an acceptance and receipt on the part of the buyer and to take the case out of the statute. 29 *Am. & Eng. Ency. Law* (2d Ed.) 988. So it has not been shown that the defendant received and accepted the goods or any part of them so as to make the contract good under the statute.

The entry in the plaintiff's account book was not a memorandum signed by the party to be charged within the meaning of the statute.

Even if proof of an account stated, under the circumstances of this case, could suspend the statute of frauds (1 *Ency. L. & Pr.* 710; 1 Cyc. 368), the evidence does not make out an account stated.

To give an account rendered the force of an account stated because of silence on the part of the defendant, the evidence must show the rendition of the account to the defendant. 1 *Ency. L. & Pr.* 700, 705; 1 *Ency. of Ev.* 160; *Lockwood v. Thorne*, 18 N. Y. 285; *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 South. 445.

J. H. Jones, the only witness testifying on this point, said: "I never did present a bill to K. A. Blue for these articles enumerated in the bill of particulars. It was not my duty. I do not know as to whether my concern ever presented a bill prior to the bringing of this suit." The plaintiff's usual custom of sending out statements to different parties, including the defendant, the first of every month, showing the goods bought during the preceding month and the balance remaining over, is not sufficient to establish the fact that bills were rendered to defendant. *Davis v. Fromme*, 23 App. Div. 498, 48 N. Y. Supp. 474.

J. E. James, president of the United Hardware-Furniture Company, testified that the said company paid for the conveyor outfit, the Gandy belt, and the circular saw. He was asked: "Do you know what they

paid for the Gandy belt?" He answered: "No, sir; only by reference." The defendant objected to this line of examination. The court sustained the objection, and refused to allow said examination to be proceeded with on this line of examination. The witness afterwards said that he had the book of original entry where these articles were charged, and introduced the book in evidence showing charges for the Gandy belt to be \$66.71, and the witness had already testified that the plaintiff company paid for said belt. There is no error here.

The witness was asked: "Did your company have any use for these articles, and would they have needed them at all had it not been for the order received from K. A. Blue for them?" An objection was sustained, but, as the witness had just stated, "My company would not have made these orders for these items had it not been for the orders received for them from K. A. Blue," the defendant was not harmed by the ruling, and the court made no reversible error thereby.

The court did not err in refusing to allow plaintiff to introduce further testimony after it had rested its case, and after the court struck the testimony. Before counsel may be heard to complain of the action of the court in proceeding to judgment notwithstanding the offer to introduce further testimony, he should have disclosed to the court what that testimony was, and, before this court may review it, the bill of exceptions should set it forth. *Franklin v. Matoa Gold Mining Company*, 158 Fed. 941, 86 C. C. A. 145, 14 Am. & Eng. Ann. Cas. 302.

The testimony offered by the plaintiff having been theretofore admitted in evidence and afterwards properly stricken, the court did not err in refusing to allow a repetition of it.

There being no error, the judgment is affirmed. All concur, except TAYLOR, J., absent on account of illness.

PENSACOLA ELECTRIC CO. v. BISSETT et al. (two cases).

(Supreme Court of Florida. March 4, 1910.
Rehearing Denied May 18, 1910. Head-
notes Filed May 20, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 558*)—EXAMINATION OF EXPERT WITNESSES—HYPOTHETICAL QUESTIONS.

Although an expert witness may not be questioned, either upon his direct or cross examination, upon an hypothesis having no foundation in the evidence, yet it is not required that the hypothetical case put to him should be an exact reproduction of the evidence, or an accurate presentation of what has been testified to. Counsel may present to him any hypothetical case in accordance with any reasonable theory based upon the evidence; but, in the event that the jury should find that the facts upon which such hypothesis or theory of the case was based

have not been proved, the answer of the expert necessarily falls with the hypothesis.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

2. EVIDENCE (§ 558*)—CROSS-EXAMINATION OF EXPERT WITNESSES.

An expert witness who has given his opinion upon any question or hypothesis submitted to him may be further interrogated upon his cross-examination as to the reasons for such an opinion. And for this purpose it is within the discretion of the trial court to widen the range of such cross-examination, even so as to include matters not strictly pertinent to the issues, in order to test the witness' means of knowledge, the extent of his information, memory, accuracy, or credibility, and an appellate court will not interfere with the exercise of such discretion, unless a clear abuse thereof is made to appear.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 558.*]

3. TRIAL (§ 296*)—INCOMPLETE INSTRUCTIONS—CURE BY OTHERS.

Where an instruction, so far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in accordance with the facts of the case, such defect is cured if subsequent instructions are giving containing the required qualifications or exceptions. It is not required that a single instruction should contain all the law relating to the particular subject treated therein.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—TO BE CONSIDERED AS A WHOLE.

In determining the correctness of charges and instructions, they should be considered as a whole, and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs or portions, which, standing alone, might be misleading, must fail. In passing upon a single instruction or charge, it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instruction must fail, unless under all the peculiar circumstances of the case the court should be of the opinion that such instruction or charge was calculated to confuse, mislead, or prejudice the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. APPEAL AND ERROR (§ 1031*)—REVIEW—INSTRUCTIONS.

In determining the correctness of charges and instructions, they should be considered as a whole; but, where a special charge or instruction in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4043; Dec. Dig. § 1031.*]

6. TRIAL (§§ 256, 296*)—INSTRUCTIONS—DUTY TO ASK ADDITIONAL CHARGES.

In an action brought by a passenger against a railroad or electric company to recover damages for personal injuries alleged to have been caused by the negligence of such company, if the defendant conceives that the charges and instructions already given by the court are not sufficiently full or specific upon any point, it should prepare such additional instructions as it may deem proper and request that they be given, and where such additional instructions

are given by the court, and they cure and supply the supposed or real defect, error, or omission in the previous charges or instructions, then the defendant has no ground for complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641, 703-713, 715, 716, 718; Dec. Dig. §§ 256, 296.*]

7. APPEAL AND ERROR (§ 1026*)—REVIEW—PREJUDICIAL ERROR.

An appellate court should not reverse a judgment, however erroneously an isolated point may have been ruled by the judge below, when it is clearly apparent that the party complaining was in no way injured by such improper ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. § 1026.*]

8. CARRIERS (§ 320*)—INJURIES—BURDEN OF PROOF—QUESTION FOR JURY.

Section 3148 of the General Statutes of 1906 creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, and thereby casts upon such company the burden of showing that its agents exercised all ordinary and reasonable care and diligence. In an action brought by a passenger against such company seeking to recover damages for personal injuries alleged to have been caused by the negligence of such defendant, it is primarily for the jury to determine from the evidence, under appropriate instructions from the trial court, whether or not the defendant company has met and relieved itself of such burden so cast upon it by the statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118-1325; Dec. Dig. § 320.*]

9. APPEAL AND ERROR (§ 1001*)—REVIEW—SUFFICIENCY OF EVIDENCE.

In passing upon an assignment based upon the ruling of the trial court in denying a motion for a new trial, which questions the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

10. APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT.

When a jury has rendered its decision through its verdict, it should be regarded as settling all controverted questions of fact submitted for determination, unless it clearly appears that the jurors in arriving at such verdict must have been improperly influenced by considerations outside the evidence. So the trial judge is given a supervisory power over verdicts and the right to set them aside and grant new trials. In an action, where the trial judge has exercised such supervisory power, being of the opinion that the damages allowed were excessive, and directed the filing of remittiturs but upon other points refusing to interfere with the verdicts, an appellate court will do likewise, unless the amounts of such verdicts, after the filing of the remittiturs, are still such as to shock its judicial conscience.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

Parkhill and Hocker, JJ., dissenting on denial of rehearing.

In Banc. Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Consolidated actions by Elizabeth M. Bissett and husband, and by Richard Bissett, against the Pensacola Electric Company. Judgments for plaintiffs, and defendant brings error. Affirmed.

Blount & Blount & Carter, for plaintiff in error. Jones & Pasco and E. T. Davis, for defendants in error.

SHACKLEFORD, J. Two actions were brought against the plaintiff in error, one by Elizabeth M. Bissett, joined by her husband, Richard Bissett, and the other by Richard Bissett, seeking to recover damages for personal injuries received by Elizabeth M. Bissett, alleged to have been caused by the negligence of the plaintiff in error. The declarations in the two actions are practically identical, except, as to the allegations of damages, the husband in the action brought by him as sole plaintiff seeking to recover for the loss of the society and services of his wife and for expenses incurred by him for medical attention, medicines, nursing, etc., resulting from the injuries inflicted upon his wife. No point is made on the pleadings, so there is no occasion to set them forth. Each declaration contains four counts, to which the defendant filed a plea of not guilty. Suffice it to say that it is alleged that the plaintiff Elizabeth M. Bissett was a passenger upon one of the defendant's cars; the allegations or specifications as to the negligence of the defendant being, in the first count, "that the employes of said defendant did then and there run and operate said car in such a negligent, careless, and reckless manner and at such high rate of speed," and that the motorman or brakeman in charge of defendant's car did "then and there operate and handle said machinery of said car in such a careless and negligent manner"; in the second count, "by reason of defective machinery which the defendant had used and had thereto attached for the purpose of manipulating and operating said car"; in the third, in "not providing safe appliances and cars for the plaintiff to be transported on"; and, in the fourth, "in the operation of its said car aforesaid and in failing to fit the same with proper and safe appliances and keep them in a reasonable condition of repair."

The two actions were tried together before a jury, but separate verdicts were rendered; the amount in the first action being for \$7,603, with interest from the date of the institution thereof, and in the second action for \$3,574, with like interest. In passing upon the motion for a new trial filed in each action, the court directed remittiturs, in the first action of \$2,263, and in the second of \$353, and overruled the motions upon the entry of such remittiturs. Relief is sought here from each judgment, upon separate writs of

error, though the two cases are argued and submitted together, by agreement of counsel, upon one bill of exceptions. Quite a number of errors are assigned, including the one based upon the overruling of the motion for a new trial, which contained 34 grounds; but all of the assignments are not argued. We shall consider such of those argued before us as we deem necessary for a proper disposition of the two cases.

The first assignments argued are the second and twenty-fifth, which are treated together. We find that the defendant had introduced as one of its expert witnesses Dr. Louis De M. Blocker, who, after testifying as to his qualifications and experience as a physician, had testified at some length as to having been called to examine and treat the injured plaintiff, either the very day on which the accident occurred or the next day, and the result of his examination, the condition in which he found her, and the extent of her injuries. We do not deem it necessary to set forth his testimony in detail. It seems sufficient to say that he identified a certain chart as being "a correct representation of the human frame and the nerves leading from it," which was offered and admitted in evidence, and had entered into a full explanation thereof in order to enable the jury to understand it as well as to comprehend his testimony. It may also be well enough to say that testimony had previously been adduced by the plaintiffs to the effect that the accident was caused by the motor coming up from underneath the trapdoors of the car on which the injured plaintiff was a passenger and was seated with her feet upon such trapdoors, by which such trapdoors were thrown violently up against the feet of such plaintiff, and the blows and concussion occasioned thereby caused serious injuries to her, the nature of which had been detailed by herself and several other witnesses, including the testimony of Dr. William S. King, by whom she was treated after her return to her home in Ash-tabula, Ohio, some seven or eight weeks after the accident, as also the testimony of Dr. J. A. Dickson, also of such city, who had been called in consultation by Dr. King. These two physicians had testified as to having made an examination of such plaintiff, the condition in which they found her, the nature and extent of her injuries, and had given their opinion as to the cause of plaintiff's condition. The testimony of each of these two physicians had been taken on commission, and a number of cross-interrogatories had been propounded by the defendant to each. Prior to introducing Dr. Blocker, the defendant had placed Dr. F. G. Renshaw on the witness stand, and subsequently introduced Dr. Clarence Hutchinson. As is frequently, if not generally, the case, the expert physicians of the plaintiffs, and the defendant did not agree in their testimony upon all points, but in a number of respects were at variance with each other. Dr. Blocker had

testified upon his direct examination that he did not see how such a blow upon the trap-door with the feet of the plaintiff in such a position as had been testified to could produce paralysis in the lower limbs. He further testified that "it could not produce a fracture or breaking of the lower portion of the coccyx." On cross-examination, counsel for the plaintiffs were proceeding to test his knowledge, skill, and qualifications as a physician and medical expert and had asked him a number of questions along that line. He had just testified, in response to some of such questions, that, "if a lean person should suddenly fall on the coccyx on a hard substance, it would not be sufficient to produce paralysis in the lower limbs. The fracture of the coccyx would not affect the nerves of the spinal cord. If you had a fall on the coccyx, the jar would be all along everywhere, if it has got violence enough to do it. If you come down on a hard substance here in that manner with great force, it would not produce paralysis without great injury to those bones. In our medical works we learn of spinal concussion or spinal paralysis." This question was then propounded to him by counsel for the plaintiffs:

"Suppose, for instance, a person would fall in that way, and a morbid growth was to cover these nerves here, if the jar had affected the nerves here, and a morbid growth had accumulated, around those nerves going off to the left, wouldn't that produce paralysis of the legs?"

The bill of exceptions then discloses the following proceedings: "And the defendant did then and there object to said hypothetical question because it is not based upon the evidence. But the court did then and there overrule said objection and permitted said question to be answered, pronouncing its opinion as follows: 'I think the question is relevant in view of other testimony.' To which ruling and decision the defendant did then and there except. The witness answered said question as follows: 'A. Yes it would produce paralysis to the back part of the leg. It would not affect the whole leg. The injury would not be very extensive. There is such a thing as partial paralysis; that is, there could be paralysis of the part of the body if the injury was to that part. The spine could be affected without any outside showing at all. It could be affected without my detecting it in the examination I made. I remember writing out for Mr. Davis (plaintiff's attorney) a statement of the examination made by myself and Dr. Renshaw.' Question by plaintiff's attorney: 'Did you or not in that statement state that you had found a tumor and cancerous growth?' Answer: 'That is what I described as the indurated prolapsed womb or tumor mass as I described it; yes, sir. If that mass had been a natural growth, it would not have disappeared as it has in this manner. I don't see how that condition that I found could

have been produced by an injury. Disease would bring it about. A diseased condition.'"

The ruling of the trial court overruling the objection and permitting the question to be answered forms the basis for the two assignments now under consideration. We held in *Baker v. State*, 30 Fla. 41, 11 South. 492, that: "Whereas, an expert may not be interrogated upon an hypothesis having no foundation in the evidence, it is yet not necessary that the hypothetical case put to him should be an exact reproduction of the evidence, or an accurate presentation of what has been proved. Counsel may present a hypothetical case in accordance with any reasonable theory of the effect of the evidence, and, if the jury find that the facts on which his hypothesis or theory of the effect of the evidence is based are not proved, the answer of the expert necessarily falls with the hypothesis." We approved and followed this holding in *Williams v. State*, 45 Fla. 123, 34 South. 279. We also held in the last-cited case that "an expert witness who has given an opinion upon a question submitted to him may be further examined as to the reasons for his opinion." It should be borne in mind that the question so objected to was propounded on cross-examination of the witness. In *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 South. 348, the court held that: "Where an expert testified for defendant in an action for injuries to a servant, it was within the discretion of the court to widen the range of cross-examination, even to include matters not pertinent to the issues, to test the witness' means of knowledge, memory, accuracy, or credibility." The same court held that "expert witnesses may be cross-examined on purely imaginary and abstract questions, in order to get their opinions on all the possible theories of the case, and in order to test the value and accuracy of their opinions." *Parrish v. State*, 139 Ala. 16, 36 South. 1012. Also, see *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 South. 276; *West Chicago Street Ry. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; 1 *Wigmore on Evidence*, par. 684, and authorities cited in note. It is not necessary for us to go as far as some of the cited authorities, nor do we wish to be understood as so doing; but we are clear that no error was committed in overruling the objection to the question propounded in the instant case. We have examined *Nichols v. Oregon Short Line R. Co.*, 25 Utah, 240, 70 Pac. 996, cited to us by the plaintiff in error, as well as the authorities referred to therein, but, after doing so, are still of the opinion that the two assignments under consideration have not been sustained.

The next assignments presented to us for consideration are those numbered from 3 to 10 inclusive and the one numbered 12, which counsel for plaintiff in error say may be considered together, though they "insist that

there is error in each." These assignments are all based upon certain portions of the charge given by the court of its own motion. It is settled law in this court that where an instruction, so far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured if subsequent instructions are given containing the required qualifications or exceptions. It is not required that a single instruction should contain all the law relating to the particular subject treated therein. In determining the correctness of charges and instructions, they should be considered as a whole, and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs or portions, which, standing alone, might be misleading, must fail. In passing upon a single instruction or charge, it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instruction must fail, unless under all the peculiar circumstances of the case the court is of the opinion that such instruction or charge was calculated to confuse, mislead, or prejudice the jury. In determining the correctness of charges and instructions, they should be considered as a whole; but, where a special charge or instruction in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed, or the judgment should be reversed. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and authorities there cited; *Davis v. State*, 54 Fla. 34, 41 South. 757; *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 South. 761; *Cross v. Aby*, 55 Fla. 311, 45 South. 820; *Lewis v. State*, 55 Fla. 54, 45 South. 998; *Stearns & Culver Lumber Co. v. Adams*, 55 Fla. 394, 46 South. 156; *Johnson v. State*, 55 Fla. 41, 46 South. 174; *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 South. 23. Applying these principles to the assignments under consideration, we are of the opinion that no reversible error has been made to appear to us. We see no useful purpose to be accomplished by copying either the assignments or the portions of the charge upon which they are based. If we did this, in order to make this opinion intelligible, we would have to copy other portions of the charge, as well as some of the instructions given. In support of its contention, the plaintiff in error cites *Southern R. Co. v. Thompson*, 129 Ga. 367, 58 S. E. 1044, and *Central of Ga. R. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956, each of which we have examined and are of the opinion that they do not sustain the contention as made, but, whether so or not, the assignments for the reasons stated must fail.

We have noted that special stress has been laid by the plaintiff in error upon the twelfth assignment, which is recurred to after the argument of the eleventh assignment. We shall likewise pursue this course. The eleventh assignment is based upon the following portion of the charge:

"In this case, the court charges you that if you find that the plaintiff Elizabeth M. Bissett was injured, on or about the 16th day of February of last year, in this county, while riding on a car of the defendant company; that the injury was occasioned by the breaking loose of the motor under the car, by means of which it forced up a trap-door against the plaintiff's feet, causing her physical injury—if the plaintiff has made it appear by a preponderance of testimony that that accident occurred, that that was the way it occurred, then the presumption arises that the defendant company was negligent, and the plaintiff would be entitled to recover damages on such showing."

It is contended that this error is well assigned for the reason that such portion of the charge is too broad, in that the jury were told that the "presumption arises that the defendant company was negligent, and the plaintiff would be entitled to recover damages on such showing; that is, the presumption was not confined to the particular matters charged as negligence in the declaration." There would be force in such argument, if the portion of the charge complained of stood alone; but, unfortunately for the contention of the plaintiff in error, in the preceding portions of the charge the court had fully and properly defined the presumption of negligence cast upon the defendant company by our statute, and, to make assurance doubly sure that the jury could not be misled upon this point, later on gave several instructions bearing thereon, at defendant's request. We would refer particularly to defendant's instructions numbered 1, 9, and 11. We copy such eleventh instruction, which is as follows:

"The plaintiffs cannot recover against the defendant unless you believe from the evidence that Mrs. Bissett was injured by the negligence of the defendant or its agents in the manner alleged in the declaration. If she was injured in any other manner or from any other cause than from those set out in the declaration, plaintiff cannot recover."

If the charge of the court was not sufficiently full and explicit upon the points questioned, then such defect, error, or omission therein was fully cured and supplied by these instructions, given at the defendant's own asking. In requesting additional instructions, the defendant was but following the course pointed out in the two Georgia cases cited supra. As was said in *Southern Ry. Co. v. Thompson*, supra: "In the absence of a request for more specific instructions on this subject, the charge in general terms as to a presumption of negligence arising from

proof of damages by fire from the engine, taken in connection with the entire charge, would not require a new trial." To the same effect is *Central of Ga. Ry. Co. v. Weathers*, supra, and *Central of Ga. Ry. Co. v. Bagley*, 121 Ga. 781, 49 S. E. 780. If the defendant desired still more specific instructions, it should have asked for them. Under the authorities previously cited, this assignment must fail.

We return now for the moment to a further consideration of the twelfth assignment, which is based upon the following portion of the charge of the court:

"But, if the defendant company by evidence has made it appear to your satisfaction that in and about the construction and operation of the car in which the plaintiff was riding they exercised all due and reasonable care and diligence, they by that evidence have discharged themselves from liability, and plaintiff would not be entitled to recover without some other evidence showing negligence on the part of the defendant."

This portion of the charge immediately follows that portion thereof upon which the eleventh assignment was predicated, which we have copied above, and should be read in connection therewith. It is earnestly urged before us that error was committed by the court in using the words, "to your satisfaction," thereby imposing a greater burden upon the defendant than under the law it was called upon or requested to bear. Technically, this is probably true, but the defendant admits in its brief that in subsequent instructions, given at its request, the court "announced a contrary rule." Complaint is made, however, that "the jury was nowhere told which rule to follow," and it is insisted that "the giving of contradictory instructions is in itself error and ground for reversal."

It must be conceded that the selection of the words, "to your satisfaction," to say the least of it, was unfortunate. While the authorities are somewhat divided as to the meaning of and the proper construction to be placed upon the words "satisfy" and "satisfaction," when used in charges and instructions, this court has rather clearly defined its position. See *Murphy v. State*, 31 Fla. 166, 12 South. 453, *Hubbard v. State*, 37 Fla. 156, 20 South. 235, and *Galloway v. State*, 47 Fla. 32, 36 South. 168, all cited to us by the plaintiff in error, as is also the cases of *Torrey v. Burney*, 113 Ala. 496, 21 South. 348, and *Foley v. State*, 11 Wyo. 464, 72 Pac. 627, all of which we have examined, as well as the authorities cited by the defendant in error, but which we do not deem it necessary to cite. A number of authorities bearing thereon will also be found in 7 Words & Phrases, 6332. We do not feel called upon to enter into any discussion of the matter. It may also be conceded that the contention of the plaintiff in error as to the law governing the giving of contradictory instruc-

tions is correct, and is sustained by the cited authorities. *Lane v. State*, 44 Fla. 105, 32 South. 896; *Cleveland, C. & St. L. Ry. Co. v. Best*, 169 Ill. 301, 48 N. E. 684; *Hughes' Instructions to Juries*, § 247, and authorities collected in notes. We would also call attention to the holding in *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, especially the twenty-ninth headnote, which we copied above, in discussing assignments from 3 to 10. But, conceding so much, we are of the opinion that no reversible error has been made to appear. We do not think that the instructions given upon this point can fairly be said to be contradictory. It seems to us that the instructions given at the request of the defendant could more appropriately be said to be explanatory of the charge of the court. Be this as it may, viewing all the charges and instructions, which were given upon this point, together, in connection with the testimony, all of which is incorporated in the bill of exceptions, we do not see how the jury could have been misled by the words used, of which complaint is made. On the contrary, we think it affirmatively and clearly appears that the presumptive harm caused thereby, if such existed, was entirely removed, and that no prejudice to the defendant's rights could have resulted therefrom. See the discussion and authorities cited in *Cross v. Aby*, 55 Fla. 311, text 323, 45 South. 820, text 824. We would also refer to *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922, from which the instant case is clearly distinguished, in that in it we have all the evidence adduced as well as all the charges and instructions given. Still the discussion and authorities collected in that case throw light upon the point we are now considering in this case. As we have already said, this assignment has not been sustained.

Assignments 14 to 19, inclusive, are all based upon portions of the general charge of the court relating to the measure of damages. We think it well to copy in full all that part of the charge bearing upon this point, which is as follows:

"If the plaintiffs are entitled to recover—that is, if the plaintiff Elizabeth M. Bissett and her husband are entitled to recover—then the plaintiff Richard M. Bissett is entitled to recover, provided he has shown as a result of the accident he has paid out, or obligated himself to pay out, any moneys for nurse hire, physicians' bills, drug bills, and hospital dues, and provided that the result of the accident he has lost wholly or in part the society of his wife as a wife. If you find that the plaintiffs in either or both suits are entitled to recover, in estimating the damages recoverable you can take into consideration anything in the case bearing upon the injuries, suffered, if plaintiff so suffered, its nature and character, and amount of physical pain suffered in consequence of it; the length

of time that physical pain has been suffered in the past since the date of the accident. If the accident occurred, or will be suffered in the future, if any; also the earning capacity of the plaintiff Elizabeth M. Bissett, if any has been shown by the testimony; the extent, if any, that the earning capacity has been diminished as a result of the injuries suffered, if any injuries were suffered. The two elements—that is, the loss of earning capacity and the amount of physical pain and suffering endured by her as a result of the injury—you will reduce to a money value, and allow as damages in the suit of Elizabeth M. Bissett and her husband against the defendant company. In estimating the amount to be allowed for physical pain suffered or to be suffered, the jury should exercise reasonable discretion; the law leaving that element of damage to be estimated from the testimony by the exercise of ordinary and reasonable judgment. If you find that the plaintiff Richard Bissett is entitled to recover damages, then in allowing damages you will take into consideration the amount of money, if any, which he has paid or obligated himself to pay by reason of the injury to his wife, if any injury occurred, for physicians' services, nurse hire, hospital dues, medicines, and in addition to that you will allow such sums as appears to be right and proper in your judgment, under the evidence, for any loss which he has suffered as a result of the accident in the way of being deprived of the society of his wife as a wife, and in estimating that element of damages the jury will exercise reasonable discretion in fixing the amount. If you find for the plaintiff or plaintiffs in either or both of these cases, the form of your verdict will be in each case where you find such a verdict, after entitling the case at the top, we, the jury, find for the plaintiff or plaintiffs, whichever suit it is, and assess the damages at so much, naming the figure, with interest from date of bringing suit, the date can afterwards be ascertained from the records, and one of your number will sign such a verdict or verdicts as foreman. You cannot find in either case in excess of what we call the *ad damnum* clause in the declaration. That clause in the suit of Elizabeth M. Bissett and husband is laid at \$10,000, and in the suit of Richard Bissett is laid at \$5,000."

Assignments 20, 21, and 22 are all based upon instructions given at the request of the plaintiffs, which also relate to the measure of damages, and are as follows:

"Charges requested by the plaintiff and given by the court:

"(1) The court charges you that, in assessing damages, if you find under the charge and the evidence that the plaintiffs are entitled to recover, that in the suit by the husband you may take into consideration arriving at the damages so suffered, if any were suffered, the expenses such as physicians'

fees, nurse hire, medicine, and also the loss of the society of his wife, both prior to this trial and in the future, provided you find from the evidence that the injuries are of such a nature that he has been or will be deprived of her society.

"To the giving of which said charge No. 1, the defendant did then and there except.

"(2) In the action by the husband and wife, for injuries to the wife, if you find under the charge of the court and the evidence that they are entitled to recover, you may take into consideration in assessing the damages the physical pain and suffering attendant upon the injury, if any, the loss or diminution of earning power, if any, and if you find that such injuries are permanent, or that she will continue to suffer therefrom, you may take into consideration her future sufferings as well as her past, and also the future diminution or loss of her earning power, if any. If you find from the evidence that her injuries are permanent, then, in estimating the damages that she is entitled to recover, you may consider the mortality tables introduced in evidence and all other evidence bearing on the subject in estimating the amount, if any, she is entitled to recover as a result of being incapacitated from working if you find that she is or will be so incapacitated.

"To the giving of said charge No. 2, the defendant did then and there except.

"(3) The court charges you that if you should find from the evidence that the physical condition of Mrs. Elizabeth M. Bissett, at the time of the accident, was of such a nature as to aggravate the injury, the plaintiff's previous infirmity will not excuse the defendant from answering in damages to the full extent of the injury suffered, provided, of course, the negligence of the defendant was the proximate cause of such injury.

"To the giving of which charge No. 3, the defendant did then and there except."

It may well be true that, if some of the paragraphs or portions of the charge or instructions given stood alone or isolated, the assignments predicated thereon would be well assigned; but, construing together the entire charge and instructions bearing upon the subject, as we must do under prior decisions of this court, previously cited in this opinion, we are of the opinion that the plaintiff in error has failed to make any reversible error appear. It may also be further true that, in the limited time at his disposal during the trial of the case, with the pressure of many duties upon him, and the confusion necessarily engendered thereby, in the midst of which the circuit judge had to prepare his charge, he may not have used sufficiently guarded language. He may not have been always happy in his choice of words. If we reach the conclusion, after an examination thereof, that the legal principles enunciated therein are substantially correct, that is all that could be reasonably expected or required. The fact that we might have clothed such principles in different verbiage, or that

we may not altogether approve of the language in which they were couched by the circuit judge, furnishes in itself no ground for a reversal of the judgment. We have at our disposal whatever amount of time may be desired, or at least required, for research, for an examination of the authorities, and for weighing and comparing them, before reaching and announcing our conclusion. Of such privilege and opportunity a nisi prius judge is necessarily largely deprived. If we can see and should reach the conclusion that substantial justice has been done, we must decline to reverse the judgments, even though we should find that technical error had been committed. As was said in *McKay v. Lane*, 5 Fla. 263, text 276: "This court has uniformly proceeded upon the practice not to reverse a judgment, however erroneously an isolated point may have been ruled by the judge below, when it is clearly apparent that the party complaining had been in no way injured by the improper ruling." We would also refer to the other decisions of this court upon that point collected in *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922, text 929. Upon these assignments, as the others, we have examined all the authorities cited by counsel for the respective parties, and we listened with attention to their oral arguments. This opinion has already been extended to a greater length than is desirable, and yet other assignments still remain to be treated. We cannot be expected to treat in detail every assignment presented. Therefore we must content ourselves with announcing that as a result of our examination and investigation we have reached the conclusion that these assignments have not been sustained. See *Dime Savings Institution v. Allentown Bank*, 65 Pa. 116, text 123. We must decline even to set forth the different authorities cited, as, in view of the manner in which we have disposed of them, we see no useful purpose to be accomplished by so doing. Since the plaintiff in error insists so earnestly that the charge was faulty in not clearly informing the jury that in estimating the prospective losses in the future such future damages should be reduced to their present value, and relies, in support of such contention, upon *Florida East Coast Ry. Co. v. Lassiter*, 58 Fla. —, 50 South. 428, we will add that we fully approve of the principle enunciated upon that point in the cited case. It would have been safer and better practice for the trial judge to have inserted the word "present" before the words "money value," in that portion of his charge dealing with such point; but, as we are of the opinion that it is readily apparent from the charge as an entirety that present money value was meant, we do not see how the jury could well have been misled by such omission, and we must decline to reverse the judgment therefor, for the reasons already given and under the authorities previously cited. If the defendant had desired a more explicit instruction upon such

point, it should have prepared and submitted it for consideration to the trial judge. We find as a matter of fact that the defendant did request 15 special instructions, all of which were given, except the one numbered 4, the refusal of which forms the basis for the twenty-third assignment, but which is not urged before us. Even so, the court had already given the substance of such refused instruction, in so far as it embodied correct principles of law, in the third requested instruction of the plaintiffs, which we have copied above, and upon which error was also assigned, which assignment is earnestly insisted upon. All that we deem it necessary to say concerning it is that such instruction finds full support, in our opinion, in the case of Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 South. 23, and we fully approve of the principles enunciated therein.

We have now reached the last assignment urged before us, which is based upon the overruling of the motion for a new trial. As we have previously said, this motion contains 34 grounds, a number of which are earnestly insisted upon. Some of the grounds have already been disposed of in discussing other assignments. We shall not undertake to treat the remaining grounds which are argued *seriatim*, but shall discuss such of them as seem to merit consideration. Even this we must do briefly and in rather a general way. The defendant strenuously argues that the evidence adduced is not sufficient to support the verdict; its first contention being that "the evidence shows clearly that the cause of the injury was not a defective car or brake or negligent motorman, but the unexpected rising of the motor caused by the breaking of the king bolt, which held it in place." We decline to set forth the evidence upon this point, or even to attempt a summary thereof, as to do so would still further extend this opinion, and it may well be doubted if any useful purpose would be subserved thereby. As is generally true in cases of this character, there is more or less conflict in the testimony of the different witnesses for the parties litigant; but it clearly establishes that Mrs. Bissett was a passenger on one of the cars of the defendant, which was propelled by electricity, on or about the date alleged, that the king bolt which held the motor in place was either broken or out of place, by means of which the trapdoor, upon which such plaintiff's feet were resting was suddenly and violently forced up and driven against her feet, by reason of which certain injuries were inflicted upon her. Witnesses differ as to the speed of the car; their estimates ranging from 4 to 50 miles per hour. It further appears that as the car approached a curve the motorman undertook to decrease the speed, whatever the rate may have been, and that some of the machinery or appliances did not work properly. At least there is evidence to this effect, or such circumstances testified to

as existing from which the jury might have reached such conclusion as we have stated above. At any rate, an accident occurred to such plaintiff while a passenger upon defendant's car, and certain injuries were inflicted upon her. There is no gainsaying that these two matters were established beyond contradiction. The statute, which has often been construed by this court, creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, and casts upon the railroad company the burden of showing that its agents have exercised all ordinary and reasonable care and diligence. See *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and authorities there cited; *Seaboard Air Line Ry. v. Thompson*, 57 Fla. 155, 48 South. 750. It was primarily for the jury to determine, under appropriate instructions from the trial court, whether or not the defendant company had met this burden and relieved itself of such burden so cast upon it by the statute. By the verdict returned the jury found against the defendant upon the question of negligence, and we are not prepared to say, after a careful examination of all the evidence adduced, that as reasonable men the jurors could not have found such verdict.

The next contention of the defendant is that, even if we should hold that the evidence warranted or justified the jury in finding the defendant negligent, the amounts given the respective plaintiffs are grossly excessive, and for that reason the two judgments should be reversed. The counsel for the defendant state that they "hope to be able to demonstrate to the court that Mrs. Bissett is what medical men term a malingerer; that is, one who is simulating serious injury in order to recover damages." Upon the nature, character, and extent of the injuries inflicted, as upon the question of negligence, the testimony of the respective witnesses for the plaintiffs and the defendant is more or less conflicting. Especially do the two Ashtabula and the three Pensacola physicians differ upon this point. It would seem that the three Pensacola physicians were not in entire accord themselves with each other in their testimony and in the opinion that they expressed as medical experts. Be that as it may, they were residents of the city of Pensacola, went on the witness stand, and gave their testimony in person before the jury, while the two physicians of the plaintiffs reside in Ashtabula, Ohio, and gave their testimony by deposition, and yet the jury would seem to have given more credence to the testimony of the two absent medical experts. This was a matter within their province. Years ago, Alexander Pope propounded the question, "Who shall decide where doctors disagree?" If they happen to disagree in giving testimony in litigated cases, the law imposes upon the jury the duty of deciding. We think that

this is a wise and salutary provision of the law for a number of reasons, some of which have been cogently set forth by Mr. Justice Cobb, in *Kelly v. Strouse*, 116 Ga. 872, text 888, 43 S. E. 280, which language we quoted with approval in *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, text 423, 45 South. 761, text 797. Also, see there our discussion of the matter and the authorities cited. It is exceedingly difficult to get at the facts upon any controverted question over them. Dr. Johnson is reported to have said, "The hardest thing in the world, sir, is to get possession of a fact." If Judge Lacombe's definition in *Huber v. Guggenheim* (C. C.) 89 Fed. 598, text 601, that "a fact is something fixed, unchangeable," be taken as correct, to which we are not prepared to agree, then the difficulty would be enormously increased. Even, if we should be so fortunate as "to get possession of a fact," how would we know that we had it in our grasp? Where could we find an infallible test for determining it? As Prof. James has well said, "To know is one thing, and to know for certain that we know is another." Controverted questions will find their way into the courts, and they have to be determined. Absolute certitude may, indeed, be unattainable, and the law does not require impossibilities, so certain rules of evidence have been formulated and adopted for getting at facts, and litigated questions of fact have to be decided "on the best evidence obtainable for the moment," under those rules. In common-law courts this delicate and responsible task of arriving at the facts has been confided to juries. And when a jury has rendered its decision through its verdict, it should be regarded as settling all controverted questions of fact submitted for determination, unless it clearly appears that the jurors in arriving at such verdict must have been improperly influenced by considerations outside the evidence. So the trial judge is given a supervisory power over the verdicts and the right to set aside and grant a new trial. In the two cases under consideration the trial judge, in passing upon the motions for a new trial, did exercise that supervisory power, being of the opinion that the damages allowed were excessive, and directed the filing of remittiturs, as has already been stated; but upon other points he refused to interfere with the verdicts. The same motions for a new trial are now argued before us upon an assignment of error. While we have the power to reverse the judgments upon the grounds, or some of them, stated in such motions, it is a power that should be cautiously and sparingly exercised. There was testimony to the effect that Mrs. Bissett's injuries were traumatic as to cause and permanent to their nature. Now, we do not feel called upon to enter upon an extended investigation of traumatic neuroses, even if we felt competent so to do. Suffice it to say that such difference of opin-

ion prevails about them in the medical world that no one can afford to be dogmatic in discussing them. They have been a fruitful source of litigation in our courts and, perhaps, have not always received the consideration merited by their peculiar nature and far-reaching consequences. Much light has been thrown upon them, within recent years, by the researches and investigations of expert physiologists, psychologists, and psychiatrists, and the writer of this opinion has found the questions discussed and results reached by them interesting and profitable. As to the question as to whether or not the injured plaintiff was a malingerer, that was peculiarly a matter for the jury to determine. She was personally present and testified at the trial. Evidently the jury did not consider that she was "simulating serious injury in order to recover damages," and, so it would seem, neither did the trial judge, since he refused to grant the motions for a new trial. It is obvious that the jury and the trial judge were in a far better position to pass upon this matter than we could possibly be. As to the amounts of damages being excessive, the trial judge has exercised his judicial discretion in causing them to be reduced to what he conceived to be right and proper. We do not feel justified in going any further than he did. See our discussion upon this point in *Atlantic Coast Line R. Co. v. Beazley*, supra. We would also refer to *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601, as being an especially instructive case. As to this assignment generally, questioning the sufficiency of the evidence to sustain the verdict, see the guiding principles laid down by us in *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44. We would also refer to *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922, text 929; *Phoenix Ins. Co. v. Bryan*, 58 Fla. 341, 50 South. 576; *Atlantic Coast Line R. Co. v. Partridge*, 58 Fla. 153, 50 South. 634; *Williams v. State*, 58 Fla. 138, 50 South. 749; *Bexley & Osteen v. State* (decided here at the present term) 51 South. 278.

Having failed to discover any reversible error, the two judgments must be affirmed.

All concur, except TAYLOR, J., absent on account of illness.

PARKHILL, J. (dissenting). Upon a due consideration of the matters called to our attention by the petition for a rehearing herein, I believe that the court has made a mistake in its decision, and should endeavor to correct the same by granting the said petition herein for the following reasons, to wit:

The court erred in giving the first instruction requested by the plaintiff, as follows:

(1) "The court charges you that in assessing damages, if you find under the charge and the evidence that the plaintiffs are entitled to recover, that in the suit by the husband you may take into consideration in ar-

living at the damages so suffered, if any were so suffered, the expenses such as physicians' fees, nurse hire, medicine, and also the loss of the society of his wife, both prior to the trial and in the future, provided you find from the evidence that the injuries are of such a nature that he has been or will be deprived of her society."

The plaintiff in error asks for a rehearing "because in the instruction to allow, and in the verdict allowing, damages for future loss of society to the husband, without any evidence to show his age or life expectancy, is erroneous—a matter that was overlooked by the court and not considered." The proof was fatally deficient in not giving the age of the plaintiff husband.

The element of future loss by the husband of the society of his wife must be based upon the joint lives of the wife and the husband. *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149. This element of damage must depend upon the probable length of time the husband and wife would probably live together, for unless they lived together there would be no society.

The onus is upon the plaintiff to establish the amount of damage which he is entitled to recover, and one element of such proof is the number of years the husband would probably have lived with his wife. If there is no proof on this point, the plaintiff has failed to make out a case, and the verdict should be for the defendant. On this question, the verdict is contrary to law, and without sufficient evidence to support it; and this, without more, would necessitate the grant of a new trial.

There was evidence that the wife's life expectancy was about 20 years. There was no evidence of the age or the life expectancy of the husband plaintiff, and he was not a witness before the jury. He may have been much older than his wife, and his expectancy of life might have been only one year. In such a case the jury would render a verdict for the value of the future loss of the society of the plaintiff's wife for one year. In the instant case, the jury was permitted to figure on the future loss of the plaintiff of the society of his wife based upon an expectancy of life of 20 years. This was manifestly harmful to the plaintiff.

II. The court erred in charging as follows: "The two elements—that is, the loss of earning capacity and the amount of physical pain and suffering endured by her as a result of the injury—you will reduce the money value, and allow as damages in the suit of Elizabeth M. Bissett and her husband, against the defendant company"—in that the court charged the jury to reduce the two elements of damage to a money value and allow as damages, instead of telling the jury to reduce the two elements of damage to a money value and its present worth to be given as damages. *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149. In the

Duval-Hunt Case, 84 Fla. 85, 15 South. 876, we held that, where the suit was brought by defendants, their recovery was limited to an amount equal to the present worth of a future support for plaintiff, estimated upon the basis therein mentioned.

There is pointed out by this court a great difference between the money value of elements of damage and the present worth thereof that might ordinarily be overlooked by a court as well as a jury, and it seems we have overlooked this difference here. If there is no difference between reducing the elements of damage to its money value and awarding that, or reducing the elements of damage to its money value and awarding its present worth, if the one is the equivalent of the other, or includes the other, then the jury was not misled by the court's statement of the rule. But reducing or turning the elements of damage into dollars and cents or the money value thereof, and giving that as damages, is very different from converting these elements into money value and awarding its present worth.

In *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, text 17, 35 Atl. 191, 55 Am. St. Rep. 705, the court said: "When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth." See, also, *Fulsome v. Concord*, 46 Vt. 135.

In *Nelson v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 582, 62 N. W. 993, the court approved the following rule or method of finding the present worth of a sum of money payable in the future: "The present valuation of a sum of money payable in the future is what that sum is worth if paid presently—paid now. For example, the present value of \$1 at 6 per cent. at the end of one year is found by dividing \$1 by \$1.06, and the present value \$1 at the end of two years is found by dividing \$1 by \$1.12."

I believe we will make a mistake to establish the rule here as to these instructions that if the defendant had desired more explicit instructions upon these points it should have prepared and submitted them for consideration of the trial judge.

It may be that if an instruction is correct as far as it goes, but is not full enough, the party desiring it to be made full should request an instruction in the form desired, and will not be heard to assign error unless this is done. But it is well settled that the giving of an erroneous instruction is error, whether any requests to charge were made or not. *Blatchfield's Instructions to Jurors*, par. 133, and cases cited. Our reports are full of cases reversed because of erroneous instructions where a correct instruction was not asked for by the court. An erroneous instruction on murder has been held to be reversible error in the absence of a correct charge on the point. And so in many cases. The instruction about reducing the elements of damage to a money value was an erroneous

ous instruction and constituted reversible error.

If it be said that the instruction as to the jury allowing damages for future loss of the wife's society is not erroneous, but merely did not go as far as it should have done in limiting the damages to the life expectancy of the husband and the wife, yet the instruction was an erroneous one in submitting the question of future damages for loss of the wife's society at all, where there was no evidence as to the life expectancy of the husband, and, if this instruction may be passed over as not reversible error, the verdict is fatally defective in the absence of proof of the life expectancy of the husband.

I think the defendant should have a rehearing in these cases.

HOCKER, J. I concur in the above opinion of Mr. Justice PARKHILL.

ATLANTIC COAST LINE R. CO. v. COACHMAN.

(Supreme Court of Florida. March 4, 1910.
Headnotes Filed May 21, 1910.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§§ 241, 297*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS.

The provisions of chapter 5618, Acts 1907, are not confined to railroads alone, but include all common carriers, thus making a classification in accordance with the requirements of the Constitution as to due process of law and the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701, 832-834; Dec. Dig. §§ 241, 297.*]

2. CONSTITUTIONAL LAW (§ 247*)—EQUAL PROTECTION OF LAWS.

The statute (chapter 5618, Acts 1907) may not be said to offend against the equal protection clause of the state Constitution (Bill of Rights, § 1), or the inhibition of article 14 of the federal Constitution, merely because it permits a recovery of interest and attorney's fees by the plaintiff shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 247.*]

3. CONSTITUTIONAL LAW (§ 212*)—EQUAL PROTECTION OF LAWS.

It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state, but it is sufficient to satisfy the constitutional requirement of equal protection of the law if it implies equally and uniformly to all persons similarly situated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 684, 705; Dec. Dig. § 212.*]

4. RAILROADS (§ 5*)—LEGISLATIVE CONTROL.

Since railroads are created by the state for quasi public purposes and are, therefore, affected by a public interest, the Legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the char-

ter or statute under which the companies are incorporated, and subject of course to the constitutional restrictions against the impairment of vested rights, denial of the equal protection of the laws, or due process of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

5. CONSTITUTIONAL LAW (§ 81*)—POLICE POWER—SUBJECTS OF REGULATION.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

6. CARRIERS (§ 20*)—REGULATION—LEGISLATIVE POWER.

The subject-matter of chapter 5618, Laws 1907, providing for a recovery of 50 per cent. interest and reasonable attorney's fees from common carriers for failure to pay claims for any freight or express lost or damaged within 60 days, meets the test of constitutionality.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49; Dec. Dig. § 20.*]

7. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION TO AVOID UNCONSTITUTIONALITY.

A liberal rule of construction should be applied when the constitutionality of a statute is questioned, and every reasonable doubt should be resolved in favor of the validity of the statute assailed. The court should, in deference to the legislative department of the government, uphold a statute alleged to be unconstitutional, unless it is clearly made to appear beyond a reasonable doubt that the statute is unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48; Statutes, Cent. Dig. § 56.]

8. CARRIERS (§ 20*)—SETTLEMENT OF CLAIMS—PENALTY FOR FAILURE—REASONABLENESS.

This court cannot say beyond a reasonable doubt that the penalty of 50 per cent. per annum interest on the principal sum of a claim for freight or express lost or damaged by a common carrier allowed by the provisions of chapter 5618, Laws 1907, for failure to pay said claim within 60 days from its filing with or presentation to said common carrier, is so exorbitant and unreasonable as to render the statute unconstitutional.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

9. CARRIERS (§ 20*)—PENALTIES—REASONABLENESS—DISCRETION OF LEGISLATURE.

The reasonableness of a penalty for the failure to perform a public duty is primarily for the judgment of legislators, and courts will not interfere with the discretion of the Legislature in this regard as long as it keeps within the fair and reasonable scope of its powers. If such liabilities be considered inexpedient or illogical, the court cannot say the Legislature had transcended its power.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

10. CARRIERS (§ 227*)—INJURY TO LIVE STOCK—ACTION—PLEA OF NOT GUILTY—FACTS PUT IN ISSUE.

Under a plea of not guilty, the contention that the testimony does not show that the consignee of live stock was the agent of the plaintiff, as alleged to be in the declaration, cannot be considered, as this allegation is merely one of the facts stated in the inducement of the declaration, and such fact was not put in issue by the plea.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 227.*]

11. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—REFUSAL OF SPECIAL PLEAS.

The action of the referee in refusing to allow the defendant to file additional pleas during the trial of the case, if error, was without injury, as the defendant was permitted to introduce evidence to support the matters set up in the additional pleas proffered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

12. APPEAL AND ERROR (§ 1017*)—INJURY TO STOCK IN TRANSIT—ACTIONS—QUESTION FOR REFEREE.

In a suit against a railroad company for injuries to live stock, the question whether one of the animals was thrown down in the car and injured by the negligent moving of the car is one of fact for the referee acting as the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3906-4005; Dec. Dig. § 1017.*]

13. CARRIERS (§ 218*)—CONTRACT FIXING VALUE OF SHIPMENT—VALIDITY.

Where the shipper and the carrier fairly enter into a contract whereby the parties agree on a valuation of the property, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract will be upheld as simply fixing the rate of freight and liquidating the damages, a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight he receives, and also of protecting himself against extravagant and fanciful valuations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696; Dec. Dig. § 218.*]

14. CARRIERS (§ 228*)—RESPONSIBILITY FOR FREIGHT—PRESUMPTION.

In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute; and, if lost under circumstances rendering the carrier liable by the general rule of law, it must respond, unless it can show that there was a contract, or a special acceptance equivalent to a contract, which exempts it from the ordinary liability of common carriers. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

15. CARRIERS (§§ 218, 228*)—LIMITING COMMON-LAW LIABILITY—PRESUMPTIONS.

Contracts limiting the common-law liability of carriers are not favored by the courts. Exemption from liability will not be presumed, but must be found clearly expressed in the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. §§ 218, 228.*]

16. CARRIERS (§ 218*)—CARRIAGE OF FREIGHT—RATES—EFFECT OF RULE OF CARRIER OR PUBLISHED SCHEDULE.

If by a rule of the carrier or a published schedule of tariff rates its liability is fixed by the rate of freight paid, and for the purpose of obtaining a certain rate of freight the shipper reports to the carrier a valuation on live stock shipped, having notice or actual knowledge of these terms at the time or before the delivery of the stock by him to the carrier to be transported and assenting thereto, the liability of the carrier is fixed by such agreement. If,

however, the shipper has no notice of the rule or tariff rates of the carrier, and does not assent thereto, the rule is different.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696; Dec. Dig. § 218.*]

17. CARRIERS (§ 207*)—CARRIAGE OF STOCK—SHIPMENT AT RISK OF CARRIER OR SHIPPER—OPTION OF SHIPPER.

Under the rules and regulations of the Railroad Commission of this state prescribing the maximum valuation in the shipment of horses and mules of \$75 each for a certain released rate, and for every increase of 100 per cent. or fraction thereof in valuation there shall be an increase of 50 per cent. in rate, the shipper has the option to ship at his own or the carrier's risk, and he will not be bound, in the limit of his recovery, by the payment of the release rate, unless it be shown that he knew the rate paid was a released rate, and there was a fair meeting of the minds of the shipper and the carrier that, by payment of the released rate, the recovery of the shipper would be limited to a certain maximum sum clearly agreed upon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. § 207.*]

18. APPEAL AND ERROR (§ 1020*)—INJURY TO STOCK IN TRANSIT—ACTION—QUESTION FOR REFEREE ACTING AS JURY.

Where the evidence is not so clear as to forbid any other inference than that the shipper consented to a specified valuation, the question must be left to the referee's determination acting as a jury in a trial of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4011, 4012; Dec. Dig. § 1020.*]

19. CARRIERS (§ 229*)—INJURY TO STOCK—FAILURE TO SETTLE CLAIM—ACTIONS—ATTORNEY FEES—CONSTRUCTION OF STATUTE—"AMOUNT RECOVERED."

The maximum sum allowed by the statute as a reasonable attorney's fee, in a suit against a carrier upon a claim for freight or express lost or damaged, where the carrier has failed to pay said claim in 60 days after its presentation, is 15 per cent. on any amount recovered greater than the sum of \$100. The "amount recovered" means the amount of the claim recovered, and not that amount plus the 50 per cent. per annum interest also allowed by the statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 1, p. 376; vol. 8, p. 7574.]

Shackleford, J., dissenting.

In Banc. Error to Circuit Court, Suwannee County; J. F. Harrell, Referee.

Action by B. P. Coachman against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition that a remittitur be made.

Doggett & Smith and J. B. Johnson, for plaintiff in error. Roberson & Small and F. L. Rees, for defendant in error.

PARKHILL, J. The defendant in error sued the plaintiff in error in the circuit court for Suwannee county for loss and damage occasioned by the railroad company in the negligent and careless transportation of horses and mules belonging to the plaintiff.

By agreement of the parties, the cause

was referred to J. F. Harrell, Esquire, a practicing attorney of the court, for trial.

The finding of the referee, upon a plea of not guilty, was as follows:

"I, J. F. Harrell, to whom the above-stated cause was heretofore referred as referee by the judge of the circuit court in and for Suwannee county, Fla., for trial, as such referee do hereby find upon the evidence taken before me for the plaintiff B. P. Coachman, and assess his damage at \$450. I further find that plaintiff is entitled to the further sum of \$225, or 50 per cent. interest on the above amount under the statute.

"I further find that the plaintiff is entitled to the further sum of \$200 as attorney's fees."

Afterwards, in accordance with an order made by the referee on a motion for a new trial, the plaintiff entered a remittitur for the sum of \$98.75. Thereupon a final judgment for \$776.25 was entered by the referee in favor of the plaintiff and against the defendant.

On writ of error the defendant below contends that the statute authorizing the award of interest and attorney's fees herein is unconstitutional, because it offends against the equal protection clause of the state Constitution and the inhibition of article 14 of the Constitution of the United States.

The provisions of chapter 5618, Laws 1907, under which recovery of interest and attorney's fees herein was had, are as follows:

"Section 1. That it shall be the duty of all common carriers operating within this state, and they are hereby required when any person files with, or presents to, them or any station agent of said common carrier to be filed, his claim for any freight or express lost or damaged by said common carrier, or for any overcharge made by such common carrier on any freight or express, to pay the said claim within sixty days from its filing with, or presentation to, said common carrier or any station agent of such common carrier.

"Sec. 2. That should any common carrier fail to comply with the provisions of section one (1) of this act, then the said common carrier making such failure shall be liable to the claimant for the amount of his claim and fifty per cent. per annum interest on the principal sum of said claim from the date of the filing of the same with, or presentation of the same to, the common carrier or any station agent of such common carrier, and when the said claimant shall bring suit and recover judgment for his claim against said common carrier, he shall be allowed the said fifty per cent. per annum, in addition to the principal sum of said claim, and the same shall be allowed in the verdict giving him judgment; provided, however, that the claimant shall not recover and have judgment for the said fifty per cent. per annum, unless he recovers judgment for a sum which fixes the principal sum of said claim at an amount greater than the amount which said common carrier had offered and tendered to the claimant in set-

tlement of his claim before the expiration of said sixty days in which the said common carrier is required to pay such claims under the provisions of section one (1) of this act.

Sec. 3. That any common carrier who fails to comply with the provisions of section one (1) of this act, shall, in the event that the claimant shall prevail in an action to recover on his claim, be liable for a reasonable attorney's fee and it shall be the duty of the court to allow the claimant such reasonable attorney's fee, which shall be fixed by the court, not to exceed fifteen dollars, if the amount recovered does not exceed one hundred dollars, and not to exceed fifteen per cent. on any amount recovered greater than the sum of one hundred dollars."

In *Seaboard Air Line Ry. v. Simon*, 56 Fla. 545, 47 South. 1001, 20 L. R. A. (N. S.) 126, we held that, in providing for the regulation of settlement for goods lost in transit by "any person, firm, or corporation operating any railroad in this state," a subject applicable alike to all common carriers of goods (chapter 5424, Acts 1905), made a separate classification of persons, firms, or corporations operating railroads that is not based upon legal or natural, practical and reasonable differences in conditions with reference to the subject regulated, and violated in this respect the constitutional guaranties of due process of law and the equal protection of the laws. To the like effect is the holding of the Supreme Court of the United States in *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

The provisions of chapter 5618, Acts 1907, however, are not leveled against railroads alone, but include all common carriers, thus making a classification in accordance with the requirements of the Constitution as to due process of law and the equal protection of the laws.

The statute will not be said to offend against the equal protection clause of the state Constitution (Bill of Rights, § 1), or the inhibition of article 14 of the federal Constitution merely because it permits a recovery of interest and attorney's fees by the shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit. The shipper and the carrier are not similarly situated. The shipper assumes the discharge of no duty to the public. He injures no one. And so the statute applies to the carrier—to all carriers similarly situated—and places its penalty or burden upon the carrier and not upon the shipper, because the carrier only is within the sphere of its operation. This court, therefore, has held, as not in conflict with the state or federal Constitutions, statutory provisions for attorney's fees when judgment is rendered in favor of the plaintiff in the enforcement of mechanics' liens (*Dell v. Marvin*, 41 Fla. 221, 26 South. 188, 45 L. R. A. 201, 79 Am. St. Rep. 171); also, in case of recovery for live stock killed (*Jacksonville, T. & K. W. Ry. Co. v.*

Prior, 84 Fla. 271, 15 South. 760); also, in suits upon policies issued by insurance companies (*Tillis v. Liverpool & L. & G. Ins. Co.*, 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 South. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118).

It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state, but it is sufficient to satisfy the constitutional requirement of equal protection of the law if it applies equally and uniformly to all persons similarly circumstanced. *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338.

We think, too, the subject-matter of this statute is within the power of the Legislature, or comes within the limits of constitutionality.

From considerations of public policy, the differences between the private and common carrier have led to rules respecting the duty of the latter which do not apply to the former. The common or public carrier of goods exercises a sort of public office, and his business, therefore, is affected with a public interest. *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

Since railroad companies are created by the state for quasi public purposes, and are thereby affected by a public interest, the Legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated, and subject of course to the constitutional restrictions against the impairment of vested rights, denial of the equal protection of the laws, or due process of law.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare as well as those designed to promote the public safety or the public health. *Chicago, B. & Q. R. Co. v. People of State of Illinois ex rel. Drainage Com'rs*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702.

The police power includes legislative authority to make regulations reasonably necessary or conducive to the public welfare. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500.

In speaking of the provisions of the Texas statute whereby life insurance companies failing to pay a loss within a time specified in the policy after demand therefor are made liable to the payment of a certain per cent. damages on the amount of the loss, and all reasonable attorney's fees for the prosecution and collection of such loss, *McCormick, J.*, in *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56, said: "The purpose of this statute is not to compel the payment of debts. * * * The obvious purpose of the act is to secure a righteous degree of care in writing policies

of insurance. To enforce the exercise of this righteous care on the part of the very strong in contracting with the weaker and less learned * * * would seem to be within the legislative power." See, also, *Fidelity Mutual Life Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Fidelity & Casualty Co. of New York v. Dorrough*, 107 Fed. 389, 46 C. C. A. 364; *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123; *New York Life Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336.

In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, 19 Sup. Ct. 609, the court held the provision of the Kansas statute requiring a reasonable attorney's fee for the plaintiff to be allowed and made a part of the judgment on a recovery against a railroad company for damages from fire caused by the operating of its trains is in the nature of a police regulation designed to enforce care on the part of railroad companies to prevent the escape of fire from their moving trains, which subjects the property of adjacent owners to peculiar hazard, and has a reasonable relation to the object sought to be accomplished, although the statute imposes no specific duty by way of precaution; and the provision is not in violation of the fourteenth constitutional amendment, as an arbitrary classification of suitors, which deprives those affected of the equal protection of the laws. The Supreme Court of the United States, in speaking of the purpose of the statute, said: "Its monition to the railroads is not, 'Pay your debts without suit or you will, in addition, have to pay attorney's fees;' but rather, 'See to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed.'" See, also, *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Grissell v. Housatonic R. Co.*, 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138; *Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165, 50 S. W. 281; *Choctaw, O. & G. R. Co. v. Alexander*, 7 Okl. 591, 54 Pac. 421.

In *Porter v. Charleston & S. Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, the court held that 22 St. at Large, p. 443, of South Carolina, providing a penalty on common carriers for failure to pay or to refuse to pay damages on freight within 60 days, is not in violation of Const. U. S. Amend. 14, as denying equal protection of law. See, also, *Frasier v. Charlestown & W. C. Ry.*, 73 S. C. 140, 52 S. E. 964.

And so, the Supreme Court of the United States, in upholding the constitutionality of a statute providing that every claim for loss or damage to property in possession of a common carrier shall be adjusted and paid within a specified time, and if not then paid the carrier should be liable to a penalty, shows that "the object of the statute was not to

penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims; the penalty, in case of recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108. "Further," the court remarked in that case, "it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions."

One of these duties which the carrier assumes is to carry safely and deliver goods intrusted to it for carriage. Whenever a railroad company receives live stock and undertakes to transport the same for hire, such company assumes the relation of a common carrier and is held to a very strict accountability for the loss thereof; such accountability being independent of contract and imposed by law on grounds of public policy. *Summerlin v. Seaboard Air Line Ry.*, 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191. By providing for the increase of damages where the loss or injury results from the want of care and the negligence of the carrier in transportation of freight, the statute causes the carrier to exercise more care in the handling of the freight by its servants and agents. The Legislature is presumed to have full knowledge of the conditions within the state and to intend no arbitrary selection or punishment, but to subserve merely the general interest of the public. *Atchison, T. & S. F. R. Co., v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.

This statute designs, also, to bring about a reasonably prompt settlement of all proper claims, and a reasonably speedy trial thereon, for the statute is so framed that the penalty of 50 per cent. per annum interest which acts as a deterrent of the carrier in refusing to settle just claims, becoming included in the verdict, ceases to run thereafter, and the judgment therefor only bears 8 per cent. per annum. The statute tends to avoid expensive and annoying delays in litigation. "The corrosion of time acts on the causes of action, and wears out justice." These delays become annoying to lawyers, expensive and damaging to litigants, and, affecting as they must do large numbers of people in all parts of the state, become the source of much irritation and the cause of much friction between the carriers and the people, resulting sometimes in drastic legislation harmful to the carriers. Giving full force to the presumption that the Legislature had full knowledge of the conditions within this state, we may well conclude that this statute was real-

ly designed to accomplish a legitimate public purpose. Legislation of this nature will tend to lessen litigation, prevent a multiplicity of suits, save to the state and litigants expenses thereof, remove a source of friction and unrest in the state, bring the shipper and the carrier to walk hand in hand, promote the public welfare and the good order of the people, increase the industries of the state, develop its resources, and add to its wealth and prosperity—results devoutly to be wished by all lovers of good government whether on or off the bench. "Regulations for these purposes," said the Supreme Court of the United States, in *Barbier v. Connolly*, 118 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, "may press with more or less weight upon one than upon another; but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the public good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its applications, if within the sphere of its operations it affects alike all persons similarly situated, is not within the amendment." *Seaboard Air Line Ry. v. Seegers*, supra; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Thomes v. Hannibal & St. Joseph R. R. Co.*, 82 Mo. 538.

Verily, the subject-matter of this statute meets the test of constitutionality; the test being whether it has some relation to the public welfare, and whether such is, in fact, the end sought to be attained. *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676.

We know that there are limits beyond which legislation and penalties may not go, even in cases where the classification is concededly legitimate and the subject-matter admittedly proper. It remains to be seen, then, whether the statute under review has gone beyond that limit in the nature and method of the regulations.

It requires no argument to show that the limit of time, 60 days, fixed by the statute for the investigation and settlement of these claims, is reasonable. There is no conflict either in the authorities on this point.

Now, as to the reasonableness or legality of the penalty imposed for a failure to pay the claim within 60 days: It will be observed that the penalty imposed is not 50 per cent. of the amount of the claim. The penalty is interest on the claim—interest at the rate of 50 per cent. per annum, or a fraction over 4 per cent. per month, not until the claim be paid, but interest only until a trial is had and judgment for the plaintiff is rendered, and thereafter the judgment only bears 8 per cent. per annum interest until paid. If the

carrier will meet the plaintiff halfway in seeking a speedy trial of the cause, the payment of this penalty may be avoided within about three months on claims within the jurisdiction of our inferior courts and about four to six months on claims in the circuit courts. Thus the penalty recoverable on a claim for \$100, if collected by suit in three months, would be only \$12.50 interest; or, if the \$100 claim were collected in six months, the penalty recovered would be only \$25. And yet the courts have upheld the constitutionality of statutes making life insurance companies failing to pay a loss within the time specified in the policy after demand made therefor liable to the payment of 12 per cent. damages on the amount of the loss and all reasonable attorney's fees. *Merchants' Life Ass'n v. Yoakum*, 98 Fed. 251, 39 C. C. A. 56. Under such a statute the penalty imposed would be \$12 on a \$100 policy, or within 50 cents of the amount recoverable under our statute in a reasonable time for the collection of the claim by suit.

In *Harp v. Firemen's Fund Ins. Co.*, 130 Ga. 726, 61 S. E. 704, 14 Am. & Eng. Ann. Cas. 299, and comprehensive note thereto on page 301, the court held that a statute providing for the recovery of 25 per cent. damages and attorney's fees against insurance companies is not violative of the Constitution of the state or the United States. Under this statute, on a \$100 claim, the plaintiff would be allowed \$25, while under our statute he would recover the same amount only if the suit were tried and judgment rendered in six months after refusal to pay the claim.

This court, in *Pensacola & A. R. Co. v. Braxton*, 34 Fla. 471, 16 South. 317, has sustained the recovery under section 2 of chapter 3742, Acts 1887, of interest at the rate of 50 per cent. per annum in addition to the actual damages together with attorney's fees upon the failure of railroad companies to pay, within 30 days, for the cattle killed by them, where the companies fail to fence their tracks as required by the statute. See, also, *Jacksonville, T. & K. W. Ry. Co. v. Prior*, 34 Fla. 271, 15 South. 760.

In 1891, by chapter 4069, the Legislature authorized the recovery of double damages and attorney's fees from the railroad companies failing to pay claims, within 30 days, for cattle killed when there was a failure to fence their tracks.

In 1899, by section 5 of chapter 4706, again the Legislature increased the penalty for a failure to pay, within 30 days, the claim for cattle killed where the railroad track was not fenced, to double the value of the animal killed and for attorney's fees, instead of 50 per cent. per annum interest, and such remains the penalty to this day (section 2871, Gen. St. 1906); the time for payment of the claim being enlarged to 60 days.

If the question comes before us under this statute, will this court say that the penalty of double damages awarded thereby is exorbitant and excessive, because forsooth it at one time was only 50 per cent. per annum in-

terest? Certainly not, for this court has already said, in *Florida E. C. R. Co. v. Hazel*, 43 Fla. 263, 31 South. 272, 99 Am. St. Rep. 114, while considering the act of 1891, that there can be no doubt "it would be competent for the Legislature to provide the means for its enforcement, and in doing so to authorize the recovery of double damages and attorney's fees."

Under the statute and the decision of this court, if the railroad company fail to pay within 60 days a claim of \$100 for stock killed by it, when the track is not fenced, the owner of the property may recover \$100 in addition to the actual value of the property, besides attorney's fees.

Under the statute sued upon here, if the railroad company fail to pay within 60 days a claim of \$100 for freight, it may be stock, lost or damaged (killed perhaps) by it, the owner of the property may recover, after six months' delay for a trial, the value of the property, plus 50 per cent. per annum, or \$25, besides attorney's fees. Thus we have a recovery of a penalty of \$100 under one statute as against \$25 under this statute. It may be that a much larger recovery is proper under the fencing statute than under the freight statute; but, if \$100 recovery be proper and reasonable under the one statute, we fail to see how we may say beyond a reasonable doubt that a recovery of \$25 here is exorbitant and unreasonable so as to make the statute unconstitutional.

In *Missouri, K. & T. Ry. Co. v. Board of Com'rs of Labette County*, 9 Kan. App. 545, 59 Pac. 383, the court held the statute imposing a penalty of 50 per cent. per annum interest for a refusal to pay taxes and bringing injunction proceedings, instead of paying the taxes under protest, did not contravene the Constitution of Kansas, or the fourteenth amendment of the Constitution of the United States.

In Iowa, by statute common carriers are made liable for damages occasioned to baggage or other property of travelers through careless or negligent handling thereof and compensation of not less than \$3 for every day's detention to travelers in consequence of such damage and necessary delay in suit for same. *Anderson v. Toledo, W. & W. R. R. Co.*, 32 Iowa, 86.

In *Kingsbury v. Missouri, K. & T. Ry. Co.*, 156 Mo. 379, 57 S. W. 547, the court held to be constitutional a statute authorizing a recovery of double damages against railroad companies sustained by reason of stock entering adjoining lands from the right of way in consequence of insufficient fences.

In *Gorman v. Pacific R. R.*, 26 Mo. 441, text 450, 72 Am. Dec. 220, single damages only were recoverable; afterwards double damages were authorized by statute.

Sometimes statutes authorize four times the actual damages to be recoverable.

How may this court say that the penalty imposed by this statute is not reasonably necessary to accomplish the purposes of the statute, and that this statute is unconstitu-

tional for that reason? What is to guide us?

The fixing of a rate of interest by the Legislature is a matter of judgment. The rate of interest where no public duty is involved is necessarily an arbitrary one. It is now 8 per cent. per annum. The Legislature could make it 10 or 12 per cent. to-morrow. May not the Legislature impose a penalty of 25 per cent. for the failure of the public duty here involved, and, if experience and the conditions demonstrate that it does not accomplish the purpose of the statute, may not the Legislature increase the rate of interest, or penalty, within the bounds of reason, until the result arrived at be accomplished? Whether for this reason we do not know, but the fact is the rate of interest was fixed at 25 per cent. by the statute of 1905, while by the statute of 1907, and again by the statute of 1909 (Laws 1909, c. 5894), the rate is fixed at 50 per cent.

In *Western Union Tel. Co. v. State of Indiana*, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725, in speaking of the amount of the penalty of 50 per cent. (not 50 per cent. per annum) for nonpayment of taxes by a telegraph company, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, said: "The amount of the penalty was a matter for the Legislature to determine in its discretion, and the Supreme Court refers to the imposition of penalties in other instances under the statutes of Indiana, varying according to the particular subjects of taxation, apparently calculated to operate with quite as much harshness." Police regulations may not be declared void because deemed contrary to natural justice and equity, but only because they violate a constitutional right. *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491. Courts will certainly not interfere with the discretion of the Legislature in its exercise of the power to provide for the public welfare, as long as it keeps within the fair and reasonable scope of its powers. *Brady v. Mattern*, 125 Iowa, 158, 100 N. W. 338, 106 Am. St. Rep. 291.

In *Hayes v. Walker*, 54 Fla. 163, 44 South. 747, this court said: "A liberal rule of construction should be applied when the constitutionality of a statute is questioned, and every reasonable doubt should be resolved in favor of the validity of the statute assailed. The court should, in deference to the legislative department of the government, uphold a statute alleged to be unconstitutional, unless it is clearly made to appear beyond a reasonable doubt that the statute is unconstitutional." In the same case, this court held: "Classifications for purposes of legislation may be made with reference to similarity of situation, circumstances, requirements, and convenience to best subserve the public interest. The test as to the validity of classification for purposes of legislation is good faith, not wisdom." In *Seaboard Air Line Ry. v. Simon*, 56 Fla. 545, text 551, 47 South. 1001, 20 L. R. A. (N. S.) 126, citing *Billings v. Illinois*, 188 U. S. 97, 23 Sup. Ct. 272, 47

L. Ed. 400, this court said: "Great latitude should be accorded to the Legislature in the exercise of its proper powers."

In *Judy v. Thompson*, 156 Ind. 533, 60 N. E. 270, the court said: "The penalty in such cases is imposed upon grounds of public policy. The motives of the Legislature are not open to judicial inquiry."

In *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 24 L. Ed. 463, quoted with approval in *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, Mr. Justice Field, speaking for the court, said: "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

In *Trice v. Hannibal & St. Joseph R. R. Co.*, 49 Mo. 438, the court said: "Even if we considered such liabilities to be inexpedient or illogical, we could not say that the Legislature had transcended its power."

In *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618, the court said: "The measure of the damages or failure to fence as well as the disposition of recovery in excess of actual compensation, was wholly within the legislative discretion."

In considering the reasonableness of this legislation, it must be observed that the 50 per cent. interest provided for by this statute is not to be collected in all cases, even though the carrier refuses to pay the claim within 60 days. The claimant may not recover the interest at all "unless he recovers judgment for a sum which fixes the principal sum of said claim at an amount greater than the amount which said common carrier had offered and tendered to the claimant in settlement of his claim before the expiration of said sixty days in which the said common carrier is required to pay such claims under the provisions of section one (1) of this act." This provision is apparently designed to prevent the making of excessive claims. The statute may not be said to be unconstitutional because it puts the burden upon the carrier to prove an amount equal to its tender or offer, instead of making the recovery of the interest conditioned upon the proof by the plaintiff of the full amount of his claim. This would be a mere matter of detail or expediency or wisdom—not a matter of power. As said by the Supreme Court of the United States in *Seaboard Air Line Ry. v. Seegers*, supra: "The matter is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment,

and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than any one else."

In *Pensacola & A. R. Co. v. Braxton*, 34 Fla. 471, 16 South. 317, this court, considering the statute allowing recovery of 50 per cent. per annum damages for cattle killed by railroad companies, and for attorney's fees, said: "Our construction of the two sections, when taken together, is that it is not necessary that the plaintiff shall recover the exact or full amount of damages as claimed in the written notice that he is required to give to the defendant as a prerequisite to his suit, in order to entitle him to the recovery of interest at the special statutory rate, and to attorney's fees."

The statute does not fix an arbitrary sum for attorney's fees; but the court may allow only a reasonable attorney's fee, not exceeding a maximum allowance on the amount recovered, if the claimant is entitled thereto.

In view of the safeguards thrown around the collection of the penalty, in view of the differences in human judgment, remembering that this question is one primarily for the judgment of legislators, who live in and represent all parts of the state, and who must necessarily know the conditions therein upon this matter and what penalty is necessary to cause a compliance with the provisions of section 1 of the statute, we are not prepared to say, beyond a reasonable doubt, that the penalty is so exorbitant and unreasonable as to render the statute unconstitutional; on the contrary, the regulations herein appear to be reasonably necessary and conducive to the public welfare.

The trial was had upon the plea of not guilty, and the contention that the testimony does not show that S. S. Coachman, consignee, was the agent of the plaintiff as alleged to be in the declaration, cannot be considered under this plea. This allegation is merely one of the facts stated in the inducement, and such fact was not put in issue by the plea of not guilty. *Gainesville & Gulf R. Co. v. Peck*, 55 Fla. 402, 46 South. 1019, and the cases cited; also, *Atlantic Coast Line Ry. Co. v. Partridge*, 58 Fla. 153, 50 South. 634.

The defendant complains that the referee refused to allow it to file additional pleas during the trial of the case. The action of the referee, if error, was without injury, as the defendant was permitted to introduce evidence to support the matters set up in the additional pleas. These pleas appear to have been regarded by the trial court, and for the purposes of this case have been considered here, as equivalent to the general issue. *Gainesville & Gulf R. Co. v. Peck*, 55 Fla. 402, 46 South. 1019.

For the same reason, we cannot consider the contention that the plaintiff failed to give notice in writing to some officer or agent of the company before moving the stock.

As to the contention that the shipper agreed to load and unload the stock at his own risk, and that the injury was due to improper loading, it may be said that the evidence on this point is conflicting; but there is evidence that the stock was loaded properly, and this contention is not sustained.

Whether one of the animals was thrown down in the car and injured by the negligent manner of moving the car is a question for the referee acting as the jury, and on the evidence before us we do not see any reason for reversing his finding thereon. 2 *Hutchinson on Carriers*, par. 639; *Illinois Cent. R. Co. v. Light*, 39 Ill. App. 530.

It is contended that the plaintiff is limited in the amount of his recovery, if entitled to recover at all, to the maximum sum of \$75 each as the stipulated value of his horses and mules; and that the finding of the referee is in excess of that amount.

A common carrier of goods cannot legally stipulate for exemption from liability for losses occasioned by its own negligence, and all stipulations for exemption, whether gross or ordinary, are ineffectual. *Summerlin v. Seaboard Air Line Ry.*, 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191. The shipper, however, by his representations or agreements as to the value of the goods, may estop himself from recovering their full value, notwithstanding they are lost through the carrier's negligence. This would be the case when the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith, as their real value, the rate of freight being fixed in accordance therewith. Such a contract, fairly entered into whereby the shipper and the carrier agree on a valuation of the property carried with a rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation simply fixes the rate of freight and liquidates the damages, and will be upheld as a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight he receives and also of protecting himself against extravagant and fanciful valuations. *Atlantic Coast Line R. Co. v. Dexter & Connor*, 50 Fla. 180, 39 South. 634, 111 Am. St. Rep. 116; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Harvey v. Terre Haute & Indianapolis R. Co.*, 74 Mo. 538.

In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute; and, if lost under circumstances rendering the carrier liable by the general rule of law, it must respond, unless it can show that there was a contract, or a special acceptance equivalent to a contract, which exempts it from the ordinary liability of common carriers. *Moore on Carriers*, p. 298. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts. *Baltimore &*

O. R. Co. v. Hubbard, 72 Ohio St. 302, text 316, 74 N. E. 214.

If the agreement is in writing, it must be expressed in such manner and form as to be understood by a person of average intelligence, or, if not so expressed, it must be shown to have been explained to the shipper, unless he has such knowledge as will enable him to understand the meaning of the writing. *Carpenter v. Baltimore & O. R. Co.*, 6 Pennewill (Del.) 15, 64 Atl. 232. See the valuable and extensive note on these questions appended to the case of *Donlon Bros. v. Southern Pacific Company*, 12 Am. & Eng. Ann. Cas. 1118, and comprehensive note on page 1124.

Contracts limiting the common-law liability of carriers are not favored by the courts. Exemption from liability will not be presumed, but must be found clearly expressed in the contract. Clauses inserted in a contract granting immunity to the carrier from its common-law obligations will be strictly construed against the carrier. Such clauses must be clear and distinct expressions free from ambiguity, leaving nothing to implication or inference. *Moore on Carriers*, pp. 330, 351; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 28 N. E. 394; *Edsall v. Camden & Amboy Railroad & Transportation Co.*, 50 N. Y. 661.

As to the shipment of stock from Lakeland to Live Oak, the following clause in the bill of lading or special contract is relied upon as limiting the liability of the defendant company:

"And it is further agreed, that should damage occur for which the said company may be liable, the value at the place and date of shipment shall govern the settlement in which the amount claimed shall not exceed for a stallion or jack, \$——; for a horse or mule, \$——; cattle, \$—— each; for hogs, \$——; and for sheep, \$——." There was no evidence that the blank places above were not filled out through mistake, and there is an entire failure to show that the shipper and the carrier in fact agreed upon any valuation of the horses or mules whatsoever. Neither was there any evidence of the value of the stock at the place and date of shipment. And the plaintiff testified without contradiction that he did not agree upon a limited valuation of his stock for shipment.

Clearly the language of the bill of lading quoted above does not in itself bind the plaintiff, in the amount of his recovery, to the maximum sum of \$75 each as the stipulated value of his horses and mules.

The shipment of stock from Live Oak to Clearwater was not made under any written contract or bill of lading.

The attempt is made, however, to set up a special contract as to both shipments by showing that the plaintiff paid for the transportation of his stock at a tariff of charges under which, by the published schedule of rates of the defendant and the published rules

and regulations of the Railroad Commission of this state, the defendant's liability is limited to the maximum sum of \$75 for each horse or mule injured. This alone is not sufficient for it is not shown that these tariff rates were brought home to the plaintiff, or that he knew that the payment of the special tariff charge by him would bind him to a special maximum valuation of his stock. It was necessary to show that the plaintiff had notice or actual knowledge of these terms at the time or before the delivery of the stock by him to the defendant company to be transported, and that they were assented to by him. *Baltimore & O. R. R. Co. v. Brady*, 32 Md. 333; 3 Am. & Eng. Ency. Law 10; 19 Central Law Journal, 163.

If, by a rule of the carrier, of which the shipper has notice its liability is fixed by the rate of freight paid, and for the purpose of obtaining a certain rate of freight the shipper reports to the carrier a valuation on the goods shipped, the liability of the carrier is fixed by such agreement. If, however, the shipper has no notice of the rule of the carrier, the rule is otherwise. *Klair v. Wilmington Steamboat Co.*, 4 Pennewill (Del.) 51, 54 Atl. 694.

As the evidence is not so clear as to forbid any other inference than that the shipper consented to a specified valuation, the question of consent must be left to the referee's determination. *Taylor v. Weir (C. C.)* 162 Fed. 585; *Carpenter v. Baltimore R. R. Co.*, 6 Pennewill (Del.) 15, 64 Atl. 254.

The rules and regulations of the Railroad Commission of this state prescribe the maximum valuation, in the shipments of horses and mules, of \$75 each for a certain released rate, and, for every increase of 100 per cent. or fraction thereof in valuation, there shall be an increase of 50 per cent. in rate; but the shipper has the option to ship at his own or the carrier's risk, and he will not be bound, in the limit of his recovery, by the payment of a released rate, unless it be shown that he knew the rate paid was a released rate and there was a fair meeting of the minds of the shipper and the carrier that by payment of the released rate the recovery of the shipper would be limited to a certain maximum sum clearly agreed upon. See the comprehensive note to *Donlon Bros. v. Southern Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Am. & Eng. Ann. Cas. 1118, text 1124.

Mr. Lane, in his report for the Interstate Commerce Commission (volume 13, p. 562), has well said: "The carrier occupies a position of strategic advantage with respect to matters of transportation. The tariff rules and regulations are of its own making; the bills of lading and shipping receipts are drafted by its own attorneys. The shipper, on the other hand, has no such vantage ground. It cannot be expected that he will always be familiar with the terms of the carrier's rate schedules and bills of lading, or that he will invariably know his legal

rights. Practically he often has no choice but to accept the terms that are offered him. * * * Much of the friction that has developed between the public and the railroads in this regard is due doubtless to the fact that shippers, at the time of tendering their property for carriage, are not clearly advised of their rights, and do not understand fully the nature of the receipt which they sign. In the ordinary course of business few shippers are well informed as to the carrier's regulations. Many shippers are in ignorance of the different rates, are given bills of lading providing for limited liability, and become aware of the limitation clause only when a claim for damages is presented. It is, therefore, peculiarly the duty of the carrier's agents to give every reasonable assistance to shippers, in order that they may know what are the lawful and most advantageous terms upon which the carrier's services may be secured. The provisions of tariffs and bills of lading should be fair and unambiguous, and free from suspicion of illegality. The shipper should be allowed his choice of rates which leave the carrier's liability unlimited as at common law, or lower rates based upon such a limited liability as the law sanctions. The rate finally fixed would not then be open to attack upon the ground that it was imposed upon the shipper, and that he did not knowingly accept its terms."

The referee first allowed the sum of \$200, as attorney's fee, and then ordered a remittitur of \$98.75, leaving an award of \$101.25, or 15 per cent. on the principal sum of the claim plus the 50 per cent. per annum interest. In this, the referee erred. The maximum sum allowed by the statute is 15 per cent. on any amount recovered greater than the sum of \$100. We think the amount recovered means the amount of the claim recovered, and not that amount plus the 50 per cent. interest. The amount of claim recovered is made the basis of the 50 per cent. interest and the attorney's fee allowed by the statute. This is the plain meaning and intention of the statute. It provides that: "when the said claimant shall bring suit and recover * * * for his claim, * * * he shall be allowed the said fifty per cent. per annum." The amount of recovery relates to the disputed amount of the claim; the 50 per cent. not being recovered in this sense, but allowed and fixed by the statute. Especially is this clear in that part of the statute providing that the attorney's fee "shall be fixed by the court, not to exceed fifteen dollars, if the amount recovered does not exceed one hundred dollars."

The referee should have awarded as attorney's fees not more than 15 per cent. on \$450, or \$67.50. The amount awarded was \$101.25. If the defendant in error, therefore, within 30 days enters a remittitur for the sum of \$33.75, being the excessive award of attorney's fees, the judgment will be affirmed; otherwise the judgment stands reversed.

The costs on this writ of error will be taxed against the defendant in error.

HOOKEE, J., concurs.

SHACKLEFORD, J., dissents.

WHITFIELD, C. J. Chapter 5618, Laws 1907, differs materially from the South Carolina statute considered in the case of Seaboard Air Line Ry. Co. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108, and it may be that the Florida statute is not within the limitations formulated in broad general language by the Supreme Court of the United States in the Seegers Case; but counsel have not argued the points that give me difficulty, and, as all doubts should be resolved in favor of a legislative enactment, the validity of chapter 5618, Laws 1907, is assented to in this case.

COCKRELL, J. (concurring). Under the decision in the Seegers Case the Legislature has the power to penalize a common carrier for failure to pay damages for freight injured or lost, and the amount of the penalty imposed by the act under consideration would seem to be within constitutional limits.

My doubt as to the validity of the act rests upon the failure to penalize the claimant for making an exorbitant demand. The legislation is not, however, wholly one sided. There is a special privilege granted the common carrier, in this: the act suspends the right of action for 60 days, and, should the carrier within that time pay the claim, it does so without any interest, whereas as to other delinquents the right of action begins with the demand, and interest at the rate of 8 per cent. per annum begins also at once, without 60 or other days of grace.

I resolve the doubt in favor of the Legislature, and vote to sustain the act.

TAYLOR, J., absent on account of illness.

(126 La.)

No. 18,066.

COLEMAN v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. May 9, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting, and the solution of the question of negligence depends on the credit to be attached to the testimony of witnesses, the judgment below will not be reversed, unless clearly contrary to the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Richard Coleman against the New Orleans Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry O. Hollander, B. B. Howard, and Jewell A. Sperling, for appellant. Dart, Kernan & Dart, for appellee.

LAND, J. This is a suit for damages for personal injuries, in the shape of a broken arm, alleged to have been occasioned by the sudden starting of one of the defendant's cars as the plaintiff was attempting to board the same, at the corner of Camp and Lyon streets. The gist of plaintiff's complaint is that:

"While he was on the step of said car * * * the motorman started said car so violently and rapidly, so as to jerk and wrench petitioner's arm, breaking it and causing a fracture of the right forearm near the shoulder."

The defendant set up the usual defenses in cases of this kind, and specially averred that, if plaintiff was injured as alleged, the injury was due to plaintiff's own want of care in attempting to board one of the respondent's cars while in motion.

On the face of the record this is a case that might have been decided either way by the trial judge, hinging, as it does, on the credit to be attached to the testimony of the witnesses.

Plaintiff's version, corroborated in the main by the testimony of a woman friend, is that he was standing on the uptown crossing of Camp and Lyon, and signaled the motorman to stop; that the car came to a full stop, and that, as plaintiff put one foot on the step and grasped the handhold with one hand, the conductor rang the bell, and the car started suddenly, jerked his arm, and threw him up against the dashboard of the car, breaking his arm; that plaintiff told the conductor that he had broken his arm, and the conductor replied that it was not his fault. On the third day after the accident the plaintiff signed a written statement reciting, among other facts, that the car slacked up, but never stopped, at the upper crossing of Lyon street. The woman witness also signed a statement at the same time containing a recital that when the car reached Lyon street it slowed up and a white man jumped off the car before the step reached the gutter bridge of the uptown side of Lyon street, and that she saw the conductor pull the bell strap, and by that time Richard Coleman had taken hold of the handbar on the body of the car, and jumped on the step, and remained on the step until the car reached Upperline street.

The defendant's surgeon testified that on the third day after the accident he visited the plaintiff, and found his arm bandaged as is usual in cases of fracture, and that he took down from plaintiff's dictation his account of how the accident happened. We quote as follows:

"He said it was still going slowly when he caught hold of the grab handle." "He said, before he could put his foot on the step, the conductor gave two bells, the car started rapidly ahead, and he was jerked upon the platform of the car."

The motorman of the car testified that he knew nothing of the accident, did not hear of it until the next day, and did not see any

negro standing on the corner of Camp and Lyon streets.

The conductor's testimony may be stated in substance as follows:

There was a white passenger on the car who wished to get off at Lyon street, and the conductor gave the proper stop signal to the motorman. The car slowed down, and the passenger alighted at or near the lower crossing of Lyon street. As soon as he did so, the conductor gave the motorman two bells to go ahead, and when the car reached the upper crossing, the plaintiff jumped on the car and got on the platform, saying:

"You gave these two bells too quick."

The conductor replied:

"I didn't see you, my friend."

Plaintiff then said:

"I have got a sore arm already without that."

And the conductor replied that plaintiff could have waited until the car stopped. Plaintiff asked for a transfer, and the conductor gave him one. Plaintiff got in the car and sat down. He never said he was hurt, or anything of the kind.

The conductor made no report of the alleged accident, as is required by the rules of the company in all cases of personal injury, but treated the incident as a trivial matter, not worth mentioning even to the motorman.

The surgeon who bandaged plaintiff's arm was not called as a witness, and plaintiff testified that the same arm was broken at the same place about a year later as a result of a fall while walking on a sidewalk. Plaintiff's arm bone must have been unusually brittle to have been broken by the starting of the car. If plaintiff's foot was on the step, as he says, it seems that the sudden forward lurch would have thrown him backward, and not forward, as he stated.

The plaintiff is impeached to some extent by his statement that the car never *stopped*, and the declaration to the surgeon that the conductor gave two bells and the car started rapidly *before* he got his foot on the step. The woman's statement and her testimony also differ as to the stop of the car.

Considering the conflict in the evidence, and that the burden of proof is on the plaintiff, we are not prepared to hold that the judgment below is manifestly erroneous on the facts.

Judgment affirmed.

(126 La.)

No. 18,004.

McFALL v. TEBAULT.

(Supreme Court of Louisiana. May 9, 1910.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

Action to recover money loaned. Defense payment. No question of law involved.

Appeal from Civil District Court, Parish of Orleans; Thos. C. W. Ellis, Judge.

Action by Edwin H. McFall against William G. Tebault. Judgment for plaintiff, and defendant appeals. Affirmed.

Edgar M. Cahn and Edward M. Robbert, for appellant. Frank McGloin, for appellee.

LAND, J. On July 29, 1907, plaintiff loaned the defendant \$5,000, and sues to recover a balance of \$3,000, alleged to be due and unpaid. The defense is payment. There was judgment for the plaintiff, and the defendant has appealed.

Defendant contends that the balance of \$3,000 was paid August 30, 1907, by his check to order of E. M. Stafford, who was his son-in-law and agent. Both McFall and Stafford testified that the plaintiff never received this check, or the proceeds thereof, and the testimony of Stafford, corroborated by contemporary written evidence, shows that said check was used by him in the payment of a note of defendant for \$5,000, given in another transaction, and falling due on August 30, 1907. Judgment affirmed.

(126 La.)

No. 18,173.

EVANGELINE OIL CO. v. TRAHAN,
Assessor, et al.

In re TRAHAN et al.

(Supreme Court of Louisiana. May 9, 1910.)

(Syllabus by the Court.)

CERTIORARI (§ 40*)—WRIT OF REVIEW—APPLICATION—TIME OF FILING.

Under article 101 of the Constitution, an application for a writ of review must be filed in the office of the clerk of the Supreme Court within 30 days after the final decision of the Court of Appeal has been noted on the minutes, or after the refusal of an application for a rehearing; and this time cannot be extended by adding to it the time it took to notify the attorneys in interest of the decision of the Court of Appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 58; Dec. Dig. § 40.*]

Action by the Evangeline Oil Company against Albert Trahan, Assessor, and others. On application of defendants for certiorari or writ of review to the Court of Appeal. Application dismissed.

Walter Gulon, Atty. Gen., and John J. Robira, Dist. Atty. (Ralph W. Elliott, R. G. Pleasant, of counsel), for applicants. Carlton & Townes and Story & Pugh, for respondent.

BREAUX, C. J. The plaintiffs in the suit, originally respondents, here move to dismiss the application for a writ of review on the ground that it was not timely filed and that it cannot be entertained.

This court has said that under article 101 of the Constitution applications must be filed in the clerk's office of the Supreme Court not later than 30 days after the final deci-

sion of the Court of Appeal has been noted on the minutes, or after refusal of application for a rehearing. *Rimmer v. Jones Bros.*, 117 La. 910, 42 South. 421; *Landry v. Ramos*, 124 La. 599, 50 South. 593; section 2, Act 191, of 1898.

Considering the dates of filing from any point of view, over 30 days had elapsed from the day the rehearing was refused, to wit, the 11th day of February, 1910, to the date the application was filed in this court, to wit, the 15th day of March, 1910.

Notice of defendant's intention to apply for the issuance of a writ of certiorari was accepted on the 14th of February.

The decision was rendered by consent, we infer, after the court at the session at which the case was argued had adjourned. We note that one of our Brothers of the Court of Appeal, at the time that the refused rehearing was filed, directed the clerk of court to notify the attorneys in interest of the court's refusal to grant a rehearing.

The time required to give this notice to attorneys in interest cannot be considered in calculating the delay within which the application must be filed.

We cannot do otherwise than dismiss the application. The terms of the law are imperative.

The time that elapsed having been called to our attention, it only remains for us to dismiss the application.

For reasons stated, the application of Albert Trahan, assessor, et al., for a writ of certiorari or review, is dismissed at applicants' costs.

CANTERBURY & GILDER v. MARENGO
ABSTRACT CO.

(Supreme Court of Alabama. April 21, 1910.)

1. JUDGMENT (§ 777*)—LIEN—PROPERTY AFFECTED—"THINGS IN ACTION."

Code 1907, § 4157, provides that a judgment, when filed for record in the probate office, shall be a lien on the property of defendant in the county, subject "to levy and sale under execution." Section 4091 provides that executions may be levied on personal property of defendant, except "things in action." *Held*, that, where one had obtained judgment, his judicially declared rights were in the nature of "things in action," within section 4091, and the judgment was not subject to a lien created by recording in the probate office a judgment against him (citing 2 Words and Phrases, p. 1144 et seq.).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1338; Dec. Dig. § 777.*]

2. GARNISHMENT (§ 108*)—PROPERTY SUBJECT.

A garnishment is subordinate to all pre-existing equitable assignments; and hence where an assignment of interest in a judgment, based on a valuable consideration, was made 17 days prior to action by the sheriff on execution under the judgment, and the like period anterior to service of garnishment on the sheriff, the asserted lien of the garnishment was subordinate to the assignment.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 108.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Garnishment proceedings by the Marengo Abstract Company, in which Canterbury & Gilder interpose as claimants. Judgment for garnishor, and claimants appeal. Reversed and remanded.

I. Canterbury, for appellants. Abrahams & Taylor, for appellee.

McCLELLAN, J. G. E. Small secured, in 1904, a judgment in a justice's court against Tim and Susie Fritz. Levy of execution having been made on property as that of the defendants in execution, Ballew interposed a claim thereto. This claim suit was decided in favor of the plaintiff in execution. Ballew's effort to review that judgment, both by appeal and certiorari, respectively, failed in the circuit court of Marengo. Ballew's claim bond was forfeited, and execution was thereupon issued against him and his sureties. On November 19, 1908, the sheriff collected under that execution the sum of \$73.04. On that day the appellee caused to be issued and served a writ of garnishment, running to the sheriff, in aid of a judgment rendered in the circuit court of Marengo, and seasonably recorded by appellee in the year 1904, for the sum of upwards of \$200, against G. E. Small. Without objection, Canterbury & Gilder, attorneys, interposed as claimants of said sum so shown by the sheriff's answer to appellee's writ of garnishment to be in the custody of the sheriff. The ground of their claim was stated to be an assignment, by G. E. Small to Canterbury & Gilder, on November 2, 1908, of his interest in the "judgment which he had recovered against Tim Fritz et al., R. C. Ballew, claimant," and that the money in the hands of the garnishee was proceeds arising from an enforcement of an execution by the sheriff in that proceeding.

The agreed statement of facts on which the trial—contest between appellee and appellants for the sum referred to—was had confirms the facts we have stated. But the agreed statement goes further, and upon it appellants assert a claim of a lien, under Code 1907, § 8011, for services to Small as attorneys in the proceedings wherefrom the sum on controversy was derived. The recordation of the appellee's judgment, rendered by the circuit court against G. E. Small, did not avail to subject Small's judgment against the Fritzes or Ballew to the statutory lien created by the recordation of such judgment in the probate office, for the reason that that lien is imposed only upon such property as was subject "to levy and sale under execution." Code 1907, § 4157. Small's judicially declared rights against the Fritzes, or Ballew, were in nature "things in action" merely. Code, § 4091; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W. 241; *Gardner v. M. & N. R. R. Co.*, 102 Ala. 635, 642, 15 South. 271, 48 Am. St. Rep. 84; *Henderson v. Hall & Farley*,

134 Ala. 455, 32 South. 840, 63 L. R. A. 673; 2 Words and Phrases, p. 1144 et seq. Accordingly appellee can take nothing, in this instance, as the result of the lien asserted to have been created by the recordation of the judgment in its favor against Small.

This ruling remits the appellee to its right to this money to the garnishment proceeding. The service of the writ was effected on November 19, 1908. The answer was filed July 19, 1909. The assignment to Canterbury & Gilder, based upon valuable consideration, was made on November 2, 1908, 17 days prior to the collection by the sheriff of the money on Small's execution from the justice's court, and the like period anterior to the service of the writ of garnishment. The inquiry then is: Must the rights, equitable only, let it be granted for the occasion, created by the assignment, be postponed to the satisfaction of the asserted lien of the garnishment? We cannot improve upon the full response to the stated question to be found in 1 Freem. on Ex. p. 859, § 170: "By the common law the assignment of choses in action was not recognized, though the assignee was generally permitted to make the assignment productive by conducting an action in the name of the assignor. But, even under the systems of jurisprudence in which an assignment is not recognized at law, it is enforced against a garnishment. In other words, whether an assignment is recognized at law or not, a garnishment is subordinate to all pre-existing equitable assignments. It is not essential that the assignment should be perfect at law. It is sufficient if it is a good equitable assignment; and it is a good equitable assignment whenever, by its terms, the person to whom the obligation is due authorizes the payment thereof to another, either for his own use, or for that of some other person, or authorizes any one to receive or hold the moneys and to apply them to any specific purpose other than for the use or benefit of the assignor." 1 Freem. on Ex. § 170. Investigation of the numerous decisions noted to the cited section discloses their support of the text. This court, in *Wellborn v. Buck*, 114 Ala. 277, 21 South. 786, and in *Harrison v. L. & N. R. R. Co.*, 120 Ala. 42, 23 South. 790, recognized and applied a principle within the declaration of the quoted text.

There is nothing in this record to impeach, or so tending, the bona fides of the assignment by Small to appellants. That assignment expressly covered the source from which the sum in question came. The view prevailing below enforced appellee's right to the sum involved as superior to that of appellants. The converse, we hold, should have prevailed.

Accordingly the judgment must be reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

CHINNABEE COTTON MILLS v. STATE. (Supreme Court of Alabama. April 12, 1910.)

LICENSES (§ 18*)—LICENSES TO CORPORATIONS —OPERATION OF TAX.

Code 1907, § 2361, requires licenses of all persons engaged in any business, and requires all domestic corporations "not otherwise specifically required to pay a license tax" to pay privilege taxes according to their capital stock in specified amounts. Subdivision 27b requires every corporation operating a cotton mill to pay a license tax. *Held*, that a cotton mill company, organized under the laws of the state and doing business therein, is required to pay a license tax under subdivision 27b, and is not required to pay a privilege tax under subdivision 28.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 18.*]

Appeal from City Court of Talladega; G. K. Miller, Judge.

The Chinnabee Cotton Mills was found guilty of failing to take out a privilege license, and fined, and it appeals. Reversed, and judgment rendered.

Knox, Acker, Dixon & Blackmon, for appellant. Alexander M. Garber, Atty. Gen., for the State.

EVANS, J. The appellant, the Chinnabee Cotton Mills, a corporation organized under the laws of the state of Alabama, with a capital stock of \$50,000, and organized and operated for the sole purpose of running a cotton factory, paid for the year 1909 the license tax for operating, as provided by subdivision 27b of section 2361 of the Code of Alabama of 1907. It failed and refused to take out a privilege license required of certain corporations, as provided by subdivision 28 of section 2361 of the Code of 1907. For failing to take out this privilege license, a warrant, on information, was sworn out against appellant, and it was arrested, tried, adjudged guilty, and fined as the law provides where licenses due the state are not paid. The defendant below, appellant here, duly excepted to the ruling of the court in thus rendering judgment against it.

Section 2361, subd. 28, of the Code of 1907, is as follows: "All corporations, organized under the laws of this state and doing business in this state, not otherwise specifically required to pay a license tax, shall pay annually the following privilege taxes: Corporations whose paid up capital stock is under ten thousand dollars, ten dollars; corporations whose capital stock exceeds ten and is less than twenty-five thousand dollars, fifteen dollars; corporations whose paid up capital stock is twenty-five thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars," etc., grading them on up and increasing the license until the capital stock exceeds \$1,000,000. Section 2361 of the Code of 1907 is as follows: "Licenses are required of all persons engaged in or carrying on any

business or doing any act in this section specified, for which shall be paid for the use of the state the following taxes: * * * 27b. Cotton Seed Oil Mill.—For every person, firm or corporation operating any cotton seed oil mill, cotton mill, or cotton factory, ten dollars, where the investment for plant and fixtures is less than twenty thousand dollars; on every plant where the investment is twenty thousand dollars and less than fifty thousand dollars, thirty dollars; on every plant where the investment is fifty thousand dollars and under one hundred thousand dollars, fifty dollars," etc., grading them on up and increasing the license tax until the capital stock exceeds \$1,000,000.

The appellant is a corporation organized under the laws of this state, and doing business in this state, and is specifically required to pay a license tax under subdivision 27b, above quoted, before it can do any of the business for which it was organized. We are therefore of opinion, and so hold, that appellant was not required to pay a privilege tax under subdivision 28. The case of *Montgomery Traction Co. v. State*, 150 Ala. 666, 44 South. 541, is directly in point. Cotton factories fall within the class of corporations which are "otherwise specifically required to pay a license tax." It follows that the court erred in rendering judgment against defendant.

The judgment of the trial court is reversed, and a judgment is here rendered discharging the defendant.

Reversed and rendered.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

SCHULER v. FISCHER.

(Supreme Court of Alabama. April 7, 1910.)

1. LIBEL AND SLANDER (§ 54*)—ACTIONS—SPECIAL DEFENSE—TRUTH OF WRITTEN OR SPOKEN WORDS.

Code 1907, § 3746, authorizing defendant to give in evidence in mitigation of damages the truth of words spoken or written, or the circumstances under which they are written or spoken, does not preclude him from setting up the truth of the words as a special defense as a bar to action.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 152; Dec. Dig. § 54.*]

2. LIBEL AND SLANDER (§ 94*)—PLEADING—SPECIAL PLEAS—TRUTH OF STATEMENTS.

Special pleas to a complaint for slander, based on words charging plaintiff with being a thief, alleged that the words referred to the certain transactions of plaintiff with a railroad company from which it appeared that he was entrusted to make certain purchases and to have certain work done for it, and that he rendered statements and fraudulently collected from it more than he in fact expended; the company being ignorant of the true amounts expended. *Held*, not to put in issue the truth of the slanderous words charged in the complaint, or set

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

up facts going to show he was a thief, and to be bad as a bar to the right of action therefor.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 219-225; Dec. Dig. § 94.*]

3. LIBEL AND SLANDER (§ 100*)—PLEADING—SPECIAL PLEAS.

The facts could be proved under the general issues.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

4. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURRERS.

If sustaining demurrers to certain pleas was error, because the demurrers were not sufficiently specific to comply with Code, 1907, § 5340, it was without injury, where the pleas could not have been amended so as to meet the objections without a radical departure from the facts therein set up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 493-496; Dec. Dig. § 1040.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by Otto E. Fischer against E. T. Schuler. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 51 South. 1038.

The complaint declares that defendant spoke of and concerning plaintiff, in the presence of divers persons, in substance as follows: "He is a thief"—laying the date as on or about the 15th day of August, 1908.

The first and second pleas are the general issue. Plea 3: "Further answering the complaint, the defendant says that, in speaking of and concerning plaintiff as being a thief, he had reference to the fact that plaintiff purchased four steel roller doors for the Alabama City, Gadsden & Attalla Railway Company, at and for the sum of \$668.50, and fraudulently collected the sum of \$1,098 from said railroad company for said doors; said railroad company being ignorant of the fact that the said doors did not cost \$1,098 at the time of payment." Plea 4: Same as 3, with the allegation additional that Fischer was intrusted by the railroad company with the purchase of the doors, and that he purchased them for the sum first named, and rendered a statement to the railroad company, and collected the sum last named. Plea 5: Same as 3, except that the purchase was alleged to have been of fire brick for the use of the railroad company, and that Fischer purchased them at \$25 per thousand, and rendered an account and collected for them at the rate of \$30 per thousand. Plea 6: Practically the same as 5. Pleas 7 and 8: Plaintiff was intrusted by the railroad company with the purchase for it of fire clay, and that he purchased the clay at three-quarters of a cent per pound, but rendered the statement and fraudulently collected from the railroad company at the rate of one cent per pound. Plea 9: That plaintiff was intrusted by the railroad company to set one large Heine boiler,

and that in setting said boiler plaintiff used 17,450 bricks, and rendered a statement and fraudulently collected from said railroad company for the use and setting of 29,931 bricks. Plea 10: Same as 8, except as to the setting of an Atlas boiler, and the use of 17,135 bricks, and the rendering of a statement and collecting for the use and setting of 28,576 bricks. Plea 11: For the setting of one small Heine boiler and the use of 14,280 bricks, and the fraudulent statement and collection for the use and setting of 20,128 bricks.

Demurrers were assigned to plea 3, were assigned to each plea separately, and are as follows: "(1) Because said plea does not deny the complaint, or set up facts in confession and avoidance thereof. (2) The plea does not aver that defendant made known to his hearers that he had reference to the matters set up in said plea. (3) Said plea does not aver that the defendant informed his hearers, at the time of making the charge against plaintiff, that he had reference to the matters alleged in said plea. (4) The matter defendant alleges he had reference to in said plea was not communicated to his hearers at the time of making the charge against plaintiff. * * * (6) Because, if the facts which the defendant alleges he had reference to are material and competent, they can be proven under the general issue. (7) Said plea does not allege that the defendant disclosed to or that his hearers knew he had reference to the matters alleged in said plea."

The pleas were afterwards amended by setting up that defendant was justified in charging plaintiff with being a thief, and alleging as the reasons therefor the allegations contained in the original pleas, with the additional allegation that the plaintiff knew that he was receiving the amount named as the difference between the price paid and the price received, and that, knowing this, he feloniously took and carried the same away, with the intent to deprive the railroad company thereof. The same demurrers were relied to these amended pleas, and were sustained.

Hood & Murphree, for appellant. George D. Motley, for appellee.

ANDERSON, J. While section 3746 of the Code of 1907 authorizes the defendant, in actions of slander and libel, to give in evidence, in mitigation of damages, the truth of the words spoken or written, or the circumstances under which they were written or spoken, the defendant is not thereby precluded from setting up as a special defense, in a civil action for slander and libel, the truth of the matter constituting the slander or libel as a bar to the action. *Ferdon v. Dickens*, 49 South. 888, wherein the case of *Hereford v. Combs*, 126 Ala. 369, 28 South. 582, is explained.

The slanderous words charged in the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaint are that the plaintiff was a thief, and the special pleas did not put in issue the truth of this charge, or set up facts going to show that he was a thief. The plaintiff may have been guilty of the things charged in the special pleas, and yet he would not be a thief in law or in common parlance, and the pleas were bad as a bar to the plaintiff's right of action. On the other hand, if they attempted to detail the circumstances under which the slanderous words were uttered, and which fell short of a bar to the action, and which we hold they did, they were, at most, to be considered only in mitigation of the damages, and could have been proven under pleas 1 and 2, to which no demurrer was interposed.

It is insisted by the appellant's counsel that, whether the pleas were defective or not, the defects were not properly pointed out by the demurrer, as required by section 5340 of the Code of 1907. The first ground of demurrer points out the defect; but, if it is not sufficiently specific as to comply with the statute, the action of the trial court in sustaining same was error without injury, as the pleas could not have been amended so as to charge that the plaintiff was a thief without a radical departure from the facts therein set up. *Sunflower Co. v. Turner Co.*, 158 Ala. 191, 48 South. 510; *Ryall v. Allen*, 143 Ala. 222, 38 South. 851.

The judgment of the city court is affirmed. Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur in the conclusion, and think that the demurrers were sufficient and were properly sustained to the special pleas.

GULSBY v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. April 21, 1910.)

1. SEARCHES AND SEIZURES (§ 7*)—CONSTITUTIONAL PROVISIONS.

Const. 1901, § 5, providing that the people shall be secure in their persons, houses, and possessions from unreasonable seizure or searches, and that no warrant shall issue to search any place, or to seize any person or thing without probable cause, supported by oath, is declaratory of the common-law right of the citizens.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. § 5; Dec. Dig. § 7.*]

2. MALICIOUS PROSECUTION (§ 12*)—ACTIONS FOR WRONGFUL SEARCH—MALICE—PROBABLE CAUSE.

Where a search warrant is issued on oath, which oath is the product of malice, and is not supported by probable cause therefor, and a search is made in accordance with the search warrant, the person injured may sue in case to redress the wrong inflicted.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 5; Dec. Dig. § 12.*]

3. MALICIOUS PROSECUTION (§ 50*)—MALICE.

A complaint for maliciously and without probable cause procuring the issuance of a

search warrant, which omits the allegation of malice, is demurrable, though it avers want of probable cause; since an action on the case for the violation of the right infringed is in the nature of an action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 97; Dec. Dig. § 50.*]

4. MALICIOUS PROSECUTION (§§ 31, 32*)—MALICE.

Malice in procuring a search warrant may be inferred by the jury from want of probable cause or from the facts attending the procurement of the warrant.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 64-67; Dec. Dig. §§ 31, 32.*]

5. MALICIOUS PROSECUTION (§ 27*)—"MALICE."

Whatever is done willfully and purposely, whether the motive is to injure accused, to gain some advantage to prosecutor, or through mere wantonness or carelessness, if at the same time wrong or unlawful within the knowledge of the actor, is done maliciously, and personal ill will or desire for revenge is not essential to the existence of "malice."

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 60; Dec. Dig. § 27.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

6. MALICIOUS PROSECUTION (§ 20*)—"PROBABLE CAUSE."

"Probable cause" is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, but mere suspicion and belief, though honestly entertained, do not afford a basis for probable cause, but it is essential that the actor knows of facts or circumstances justifying a reasonable and cautious man in believing that accused is guilty.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 27; Dec. Dig. § 20.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5618-5620; vol. 8, p. 7763.]

7. MALICIOUS PROSECUTION (§§ 56, 64*)—BURDEN OF PROOF.

One suing for the issuance of a search warrant without probable cause, and maliciously, has the burden of proving malice and want of probable cause, and the fact that the search warrant directing the search for stolen property was returned "no property found," after diligent search, prima facie established that the property was not in his possession, and that he did not steal or conceal it.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 114, 152; Dec. Dig. §§ 56, 64.*]

8. MALICIOUS PROSECUTION (§ 71*)—PROBABLE CAUSE—QUESTION OF LAW.

Where the facts are undisputed, probable cause vel non is a question of law.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 161; Dec. Dig. § 71.*]

9. MALICIOUS PROSECUTION (§ 19*)—PROBABLE CAUSE.

The question whether one procuring the issuance of a search warrant to search for stolen property procured the warrant maliciously, and without probable cause, depends on whether the facts known to him justified a reasonable and cautious man in believing that the person against whom the warrant was issued was guilty, and not whether the latter was in fact guilty, and not whether there was sufficient evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence to convict the latter of the offense charged.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 25; Dec. Dig. § 19.*]

10. MALICIOUS PROSECUTION (§ 71*)—WANT OF PROBABLE CAUSE—QUESTION FOR JURY.

In an action for the issuance of a search warrant without probable cause, and maliciously, evidence held to justify the submission to the jury of the issue of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 161; Dec. Dig. § 71.*]

11. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

An instruction which ignores the effect of evidence, or which omits the consideration of evidence tending to prove a fact, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

12. MALICIOUS PROSECUTION (§ 72*)—ACTIONS—INSTRUCTIONS.

In an action for the issuance of a search warrant without probable cause, and maliciously, an instruction that if defendant wrongfully, vexatiously, and purposely made the affidavit, and procured the issuance of the warrant, and had no probable cause for so doing, defendant was guilty, properly submitted the issue of malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 172; Dec. Dig. § 72.*]

13. MALICIOUS PROSECUTION (§ 72*)—ACTIONS—INSTRUCTIONS.

Where, in an action for the issuance of a search warrant without probable cause, and maliciously, the evidence showed that the affidavit for the warrant was made by an agent of defendant, an instruction that, unless the agent was at the time of the making of the affidavit in possession of facts justifying a reasonable man in believing that plaintiff was guilty of the offense charged, it made no difference whether he suspected and believed that plaintiff was guilty, and the jury must find against defendant on their finding that the agent was acting within the scope of his employment in making the affidavit, or if defendant authorized the act, or ratified it, properly submitted the issue of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 169; Dec. Dig. § 72.*]

14. MALICIOUS PROSECUTION (§ 68*)—DAMAGES—PUNITIVE DAMAGES.

In an action for issuing a search warrant without probable cause, and maliciously, a charge authorizing the jury to award such damages above actual damages as would be a punishment to defendant and serve as an example to him and others in the future, was properly refused.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. § 68.*]

15. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for issuing without probable cause, and maliciously, a warrant to search plaintiff's premises for property alleged to have been stolen by him, the evidence showed that an agent of defendant procured the warrant by making the affidavit, the error in a charge that to find for plaintiff the jury must believe that the agent was personally liable in damages to plaintiff for the injury to his char-

acter, because argumentative, was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

16. MALICIOUS PROSECUTION (§ 63*)—DAMAGES—REPUTATION OF PLAINTIFF.

The bad reputation of one suing for the issuance without probable cause, and maliciously, of a warrant to search his premises for property alleged to have been stolen by him is admissible on the question of damages, and a charge that the bad reputation is not a factor in determining a right to recover, where the prosecution was instituted maliciously and without probable cause, was improper.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 149; Dec. Dig. § 63.*]

17. TRIAL (§§ 240, 252*)—EVIDENCE—INSTRUCTIONS—ARGUMENTATIVENESS.

Where, in an action for the issuance, without probable cause and with malice, of a warrant to search the premises of plaintiff for property alleged to have been stolen by him, the evidence showed that an agent of defendant, who procured the warrant, was a deputy sheriff, that in the affidavit for the warrant he described himself as agent of defendant, but there was no evidence to show that in making the affidavit he acted in his official capacity, a charge that if the agent acted in his official capacity, he was not acting within the scope of his employment, and the verdict must be for defendant, was erroneous, because the agent might have acted in both capacities, and because it was argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. §§ 240, 252.*]

18. TRIAL (§ 51*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

On a trial for the issuance, without probable cause and with malice, of a warrant to search the premises of plaintiff for property alleged to have been stolen by him, the court should admit the evidence of plaintiff's bad reputation in the community, and should exclude it on motion where it was not followed by testimony showing that the person making the affidavit for the warrant did not, before or at the time, know thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 125; Dec. Dig. § 51.*]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

Action by W. J. Gulsby against the Louisville & Nashville Railroad Company for maliciously, and without probable cause, procuring the issue of a search warrant directed against the premises of plaintiff. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The search warrant was procured upon the affidavit of one Hudson, agent of the Louisville & Nashville at Drewry, Ala., following the commission of the offense of robbery or larceny of goods while in the possession of the defendant railroad company. The facts sufficiently appear from the opinion of the court.

The following charges were refused: (6) "The court charges the jury that if you believe that the defendant, through its servant, wrongfully, vexatiously, and purposely made the affidavit complained of, and procur-

ed the issuance of the search warrant, and without probable cause for so doing, then you must find the defendant guilty, provided you find that Hudson was acting within the scope of his authority, or was authorized by the railroad to so act, or that the railroad company has since ratified his action." (7) "The court charges the jury that, if you find for the plaintiff in this case, you are authorized to award such damages over and above actual damages as will be a punishment to the defendant and serve as an example to him and others in the future." (9) "The court charges the jury that unless Hudson, the agent of the defendant, was at the time of making the affidavit complained of in possession of sufficient facts to justify a reasonable and cautious man to believe that the plaintiff had broken open a car and taken the goods alleged to have been stolen, then it makes no difference if he did suspect and believe that Gulsby was guilty, however honestly and earnestly he may have entertained such suspicion and belief; and you must find the defendant guilty if you also find that Hudson was acting within the general scope of his employment in making said affidavit and procuring the issuance of said warrant, or if you find that the defendant authorized the act, or has since ratified his said act."

The following charges were given at the request of the defendant: (2) "If the jury believe from the evidence that the agent, Hudson, was not acting within the scope of his employment or duties when he made the affidavit before W. C. Neville on November 28, 1908, the defendant cannot be held liable for such act." (10) "The court charges the jury that, if the jury is reasonably satisfied from the evidence that the agent, Hudson, was not acting within the scope of his employment or duties when he made the affidavit before W. C. Neville, on November 28, 1908, the defendant, the Louisville & Nashville Railroad Company, cannot be held liable under count 1 of the complaint." (26) "The court charges the jury that, before you can find for the plaintiff, you must believe that H. E. Hudson, the defendant's agent, is personally liable in damages to plaintiff for the alleged injury to his character." (29) "The court charges the jury that, if they believe from the evidence that plaintiff's character is bad, they may consider this fact in determining whether or not he was damaged by the issue of a search warrant complained of in this cause." (4) "The court charges the jury that, if the jury is reasonably satisfied from the evidence that Henry E. Hudson was acting as special deputy sheriff of Monroe county when he made said affidavit on November 28, 1908, then he was not acting within the scope of his employment, and you must find for the defendant under counts 1 and 4 of the complaint."

McCorvey & Hare, for appellant. Barnett & Bugg, for appellee.

McCLELLAN, J. Section 5 of the Constitution of 1901 provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches," and that "no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation." In a leading and well-considered case in this country (*Carey v. Sheets*, 67 Ind. 375) it is said that the quoted declaration, in substance, is an affirmation of the common-law right of the citizen not to be searched or seized without probable cause. Where a search warrant is regularly issued upon oath or affirmation, but such oath or affirmation is the product of malice, and is not supported by probable cause therefor, and search of the place is made by the officer in accordance with the mandate of the search warrant, the party injured thereby may maintain an action on the case to redress the wrong so inflicted. *Carey v. Sheets*, 67 Ind. 375; *Elssee v. Smith*, 16 Eng. Com. Law Rep. 19; *Beaty v. Perkins*, 6 Wend. (N. Y.) 382; *Whitson v. May*, 71 Ind. 269; *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914; *Harlan v. Jones*, 16 Ind. App. 398, 45 N. E. 481; 25 Am. & Eng. Ency. Law, p. 151. As a matter of pleading, a count omitting the allegations of malice, though carrying the averment of want of probable cause, would be demurrable on account of the omission indicated, since the action on the case, for the violation of the right infringed, is, in nature, a malicious prosecution. *Carey v. Sheets*, supra. But proof of the averment of the malice infecting the oath or affirmation on which the search warrant issues may be inferred, by the jury, from want of probable cause, or from the facts and circumstances attending the procurement of the writ. *Lunsford v. Dietrich*, 93 Ala. 565, 9 South. 308, 30 Am. St. Rep. 79.

Malice has been thus well defined by this court: "Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if at the same time wrong and unlawful within the knowledge of the actor, is in legal contemplation maliciously done." *Lunsford v. Dietrich*, supra; *Jordan v. A. G. S. R. Co.*, 81 Ala. 220, 8 South. 191. Personal ill will, or desire for revenge, is not essential to the existence of malice as the law views it. *Lunsford v. Dietrich*, supra.

Probable cause was also defined in *Lunsford v. Dietrich*, supra, as follows: "A reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." Mere suspicion and belief, even though honestly, bona fide entertained, of the guilt does not, as readily appears, alone, rise to the dignity of affording a basis for probable cause, it is essential that, at the time the oath or affirmation is taken or made, the actor then knew of facts or circumstan-

ces such as would have justified a reasonable and cautious man in believing that the accused was guilty. *Lunsford v. Dietrich*, supra. Less than that cannot be *probable cause*.

The burden is of course on the plaintiff to show that the search warrant was maliciously and without probable cause therefor, secured. But if the search warrant was executed by diligent search within its mandate, and the officer's return is "no property found," this, if shown, establishes *prima facie* that the property was not in plaintiff's possession, and that he did not steal or conceal it. *Olson v. Trette*, 46 Minn. 225, 48 N. W. 914. If the facts are undisputed, probable cause vel non is a question of law. *Ewing v. Sanford*, 19 Ala. 605; *McLeod v. McLeod*, 75 Ala. 483. In this instance the search warrant appears to have been regularly issued; and the official return was *executed* by search, but none of the property was found in the plaintiff's possession or on his premises. There are no errors assigned as upon rulings on the pleadings; so no consideration of their sufficiency is invited or undertaken.

Appellant insists that the evidence was not sufficient to authorize the submission of probable cause vel non to the jury. The court below took the opposite view and so submitted the issue. Whether the plaintiff was *in fact* guilty of the offense is not a controlling inquiry on this issue. *McLeod v. McLeod*, supra. The question is, Were the known (to the prosecution) facts and circumstances sufficient, regardless of the unfavorable (to the state) event of the prosecution, to justify a reasonable and cautious man in believing the plaintiff guilty? The consequence necessarily is that a want of knowledge of sufficient evidence to convict the accused of the offense charged is not the test of probable cause vel non. And it is necessarily a corollary that the facts and circumstances known to the prosecution, and on which, under the doctrine of probable cause, he was authorized to act, need not be legally admissible evidence on the trial of the accused.

Between the evident policy of the law to bring the guilty to justice, which is usually begun by steps taken by the citizen, and, on the other hand, the right of the other citizen to be free from the accusation of crime *without probable cause* therefor, the law must hold an even hand, never so exaggerating the latter protective right as to render the exercise of the means afforded for the detection and punishment of crime against the state an act of peril and penalty to the citizen who, in good faith and with probable cause therefor, starts the machinery of the penal law against the accused. Neither right nor policy, of the two mentioned, is superior in the eyes of the law. Ignoring one is as grave in consequence as ignoring the other. Both must be fairly considered, when occasion arises, to determine such issues as are here presented.

Our view concludes consistent appellant's insistence that the facts and circumstances, or either, known to the actor, must have relation, and refer to the accused as the guilty party. Such, we understand, to be the doctrine of *Lunsford v. Dietrich*, where it is said that the circumstances must be *sufficiently strong in themselves to warrant a cautious man in the honest belief* that the accused is the guilty party. But that accord with appellant's stated insistence does not solve the question to appellant's advantage. The inquiry still is, Did the facts and circumstances refer the felonious act, within the requirements of *probable cause* vel non, to the accused as the guilty agent? In this instance it was open to the jury to find that a robbery had been committed; that plaintiff lived in the community; that affiant had been informed of his commission of two other offenses of like character; that affiant knew of his bad reputation in the community; and that he had been "loitering around Drewry, Alabama (the scene of the alleged offense), for several months prior to the robbery without any employment." It does not appear in this record that the plaintiff was a man of means. It does appear that he was a man of family, and that the property taken was flour and meat. The property taken from the affiant's master was subsistence. Where such an act is committed, reason, at least, suggests that the culprit took it either for use or for sale. It is not irrational, in such cases, to attribute the motive for the act to those, about the scene of the crime, who from the absence of industry were in need. Whether the fact was true or not, from the evidence here the jury would have been reasonably justified in finding that plaintiff was of that class and that affiant knew the fact. Besides this, the evidence warranted the further finding, whether in fact true or not, that plaintiff had a bad reputation in the community, and that he had taken, on two occasions, the property of others, and that affiant had been so informed. Without further statement, we think, and so hold, the submission to the jury of the issue of probable cause vel non free from error.

There was evidence before the jury from which it was reasonably inferable that the affiant's (Hudson's) act in securing the search warrant was ratified by the defendant (appellee), viz., that it paid the costs of the prosecution, as also that the defendant directed the proceeding.

It follows that charge 2, given at the instance of defendant, was erroneously so treated, since it ignores the effect of the phase of the evidence tending to show ratification of Hudson's action.

Charge 10 was faulty, in that it omitted consideration of the evidence tending to show that Hudson made the affidavit by direction of the defendant.

Charge 6 was free from vice, as applied to

this case. The terms "*wrongfully*," "*venalously*," and "*purposely*," conjoined in the charge unquestionably describe such concurrence of act and accompanying motive as is the legal equivalent of malice in law, as defined above. See, also, *Spivey v. McGehee*, 21 Ala. 417, 422.

Charge 9 was also without fault, when referred to the evidence in the case. It squared to the definition of *probable cause* as often stated by this court. The refusal of charges 6 and 9 was error.

Charge 7 was not erroneously refused to plaintiff. *Coleman v. Pepper*, 159 Ala. 310, 49 South. 310; *Cox v. B. R. L. & P. Co.*, 50 South. 975.

Charge 26, given for defendant, might well have been refused, because argumentative. The giving of such charges does not constitute reversible error.

Charge 29, given for defendant, might have been properly refused. At most, the plaintiff's bad repute in the community, aside from its legitimate bearing upon the issue of probable cause *vel non*, was considerable alone as bearing on the quantum of damages to be awarded plaintiff, if he was entitled to recover. This instruction was capable of the interpretation that plaintiff's bad repute was a factor in determining his right to recover at all, even though the prosecution was, maliciously and without probable cause, instituted by direction of defendant to Hudson, or was ratified by defendant.

Charge 4, given for defendant, should have been refused. He might have acted in both capacities. There was evidence that Hudson was a deputy sheriff at the time the affidavit was made. In it he described himself as agent for the defendant. There was no evidence that in making the affidavit he was acting in his official capacity. Besides, the deduction the charge assumed to make from the finding that he acted as an official in the premises, rendered the instruction argumentative.

The rulings on the admission or exclusion of evidence wrought no prejudicial errors. On the trial to be had, if the plaintiff's bad repute at McWilliams, Ala., is offered, it should be admitted, though if it is not followed up by testimony tending to show Hudson's knowledge thereof before, or at the time, he instituted the prosecution, it should be excluded on proper motion.

There are a number of questions discussed in brief for appellee; but the errors assigned, and with which alone we can now deal, forbid the consideration of other matters.

For the errors indicated, the judgment is reversed and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

SMITH v. STATE.

(Supreme Court of Alabama. April 14, 1910.)

1. JURY (§ 80*)—SUMMONING JURORS—PANEL FOR TRIAL OF CAUSE.

Code 1907, § 7265, provides that, when the day set for the trial is a day of a subsequent week of the term, "the special jurors so drawn, together with the jurors drawn for such subsequent week, shall constitute such venire." On the trial of a criminal cause the court entered an order that "the 48 special jurors drawn for the trial of defendant, together with the jurors drawn and summoned for the fourth week of the court, shall constitute a venire from which the jury to try this case shall be selected." *Held*, that the inclusion of the word "summoned" was reversible error, since it was an unauthorized limitation upon the number of persons to constitute the venire.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 360-367; Dec. Dig. § 80.*]

2. CRIMINAL LAW (§ 1092*)—APPEAL—BILL OF EXCEPTIONS—EXTENSION OF TIME FOR PRESENTATION.

Code 1907, § 6248, provides that the provisions of this Code relating to the time and manner of taking bills of exception in civil cases shall apply to criminal cases. Section 3019 provides that bills of exception must be presented within 90 days from the entry of the judgment, and signed within 90 days thereafter. *Held*, that a bill of exceptions in a criminal case must be presented within 90 days from the entry of the judgment of conviction, and the trial judge is without power to extend such time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2847-2861; Dec. Dig. § 1092.*]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Will Smith, alias Jim Wallace, was convicted of homicide, and appeals. Reversed and remanded.

Almon & Andrews, for appellant. Alexander M. Garber, Atty. Gen., for the State.

EVANS, J. On the trial of this case the court entered an order "that the 48 special jurors drawn for the trial of defendant, together with the jurors drawn and summoned for fourth week of the court, should constitute the venire from which the jury to try this case should be selected. The court further ordered that a copy of the indictment against defendant in this case, and a copy of said venire for the trial of his case, be served on defendant, or his attorney of record, one entire day before the day set for the trial of this case." This order was in accordance with the law as it was prior to the time that the Code of 1907 went into effect. The Code of 1907 went into effect on May 1, 1908, and the date of this order is October 15, 1908. The law as it is in the Code of 1907 was, therefore, in effect at the time this order was made. Under its provisions, "when the day set for the trial is a day of a subsequent week of the term, the special jurors so drawn, together with the jurors drawn for such subsequent week, shall

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

constitute such venire." Code 1907, § 7265. The order in this case was made on October 15th, and the case set for trial October 30, 1908, a day of a subsequent week. Several of the jurors drawn for said fourth week of the term were not summoned. We cannot, therefore, say that the error of the court in making the order containing the word "summoned" was without injury, as it was a further limitation upon the number of names to constitute the venire than the law directed.

The bill of exceptions in this case cannot be reviewed, for the reason that it was not presented to the presiding judge within 90 days from the day on which the judgment was entered. Section 6248 of the Code of 1907 reads as follows: "The provisions of this Code relating to the time and manner of taking, signing, and establishing bills of exceptions in civil causes apply to criminal cases, so far as applicable." Section 3019 of said Code reads as follows: "Bills of exceptions may be presented at any time within ninety days from the day on which the judgment is entered, and not afterwards; and all general, local, or special laws, or rules of court, in conflict with this section are repealed, abrogated and annulled. The judge must indorse thereon, and as a part of the bill, the true date of presenting, and the bill of exceptions must, if correct, be signed by him within ninety days thereafter." It will be seen, from the two foregoing sections, that the court was without authority to make any order extending the time for presenting the bill of exceptions to the trial judge, and such order was void. The time is now fixed by law, and cannot be altered or changed by an order of court.

For the error of the court heretofore pointed out, the case is reversed and remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

ENGLE v. PATTERSON et al.

(Supreme Court of Alabama. April 12, 1910.)

1. APPEAL AND ERROR (§ 105*)—DECISIONS REVIEWABLE—VOLUNTARY NONSUIT.

In the absence of statute authorizing it, an appeal or writ of error will not lie from a voluntary nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

2. APPEAL AND ERROR (§ 866*)—DECISIONS REVIEWABLE—VOLUNTARY NONSUIT.

Code 1907, § 3017, providing that if from any ruling upon the pleadings or the admission or rejection of evidence, or upon charges to the jury, it becomes necessary for plaintiff to suffer a nonsuit, the ruling may be reserved for the decision of the Supreme Court by bill of exceptions or by appeal on the record as in other cases, does not authorize a review of questions or rulings, which did not superinduce the

nonsuit, and a party suffering a nonsuit is not entitled to review of rulings anterior to the one causing the nonsuit, and hence, where a plaintiff suffered a nonsuit on account of a ruling of the court on a question of evidence and took a bill of exceptions thereon, he was not entitled to a review of the court on the pleadings and on a motion for a continuance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.*]

3. EVIDENCE (§ 181*)—BEST AND SECONDARY EVIDENCE—PRELIMINARY PROOF.

In an action for false imprisonment and malicious prosecution, secondary evidence of the affidavit and warrant of arrest was properly excluded where plaintiff failed to lay a proper predicate by showing that the original documents were not available.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600; Dec. Dig. § 181.*]

4. FALSE IMPRISONMENT (§ 20*)—MALICIOUS PROSECUTION (§ 55*)—PLEADING AND PROOF.

Where, in an action for false imprisonment and malicious prosecution, plaintiff alleged that defendant preferred a charge against him, the court did not err in excluding all of plaintiff's evidence where he failed to introduce the affidavit and warrant on which the prosecution was based.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-97; Dec. Dig. § 20.*; Malicious Prosecution, Cent. Dig. §§ 106-110; Dec. Dig. § 55.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by J. M. Engle against M. F. Patterson and others for false imprisonment and malicious prosecution. Judgment for defendants, and plaintiff appeals. Affirmed.

A good many rulings are invoked on the pleadings; but they are not necessary to be here set out, in view of what is said in the opinion. It appears that, after the trial was entered upon, the plaintiff stated that, the action being for false imprisonment, under the rulings of the court it was necessary for them to procure a certain void affidavit and warrant, upon which the plaintiff was arrested at the instance of the defendant, and that these papers were issued by T. L. Simpson, a certain justice of the peace, and that they had ordered a subpoena duces tecum issued to said Simpson, requiring him to produce his docket, and also the affidavit and warrant, but that for some reason the justice had neither the docket nor the paper with him, and hence they desired the case postponed until the papers could be obtained. The court declined to grant the request, and required the plaintiff to go to trial, whereupon they attempted in various ways to show the contents of the affidavit and warrant, and of the trial had upon said affidavit and warrant. No effort seems to have been made to show, by Simpson or any one else, that the warrant and affidavit had been lost and destroyed. The court declined to permit proof of the papers or of the docket, and as a consequence plaintiff took a nonsuit, with bill of exceptions.

John R. Sample and Wert & Lynne, for appellant. Callahan & Harris, for appellees.

ANDERSON, J. In the absence of a statutory provision authorizing it, a writ of error, or appeal, would not lie from a voluntary nonsuit, or a nonsuit taken by the plaintiff in consequence of adverse rulings of the court. *Rogers v. Jones*, 51 Ala. 354. The statute, however, which has existed for many years, originally authorized the review of a ruling when the plaintiff suffered a nonsuit in consequence thereof, when the fact, point, or decision was reserved by bill of exceptions. This court, in construing this statute, has repeatedly held that it related exclusively to rulings of the court which could only be properly introduced into the record by bill of exceptions, and that the rulings of the court upon the pleadings were not within the purview of the statute. *Prichard v. Sweeney*, 109 Ala. 653, 19 South. 730. The statute was amended by the act of 1903, and now appears as section 3017 of the Code of 1907, and which is as follows: "If, from any ruling or decision of the court on the trial of a cause, either upon pleadings, admission or rejection of evidence, or upon charges to the jury, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, ruling, or decision may be reserved for the decision of the Supreme Court by bill of exceptions or by appeal on the record as in other cases." While the statute as amended extends the right to review on appeal from a nonsuit, to pleadings as well as points that should properly be introduced by bill of exceptions, it was not the intent or policy of the lawmakers to authorize the review of questions or rulings which did not superinduce the nonsuit. In other words, if there is an adverse ruling to the plaintiff on the pleading, he can suffer or take a nonsuit and review, by appeal, the ruling on the pleading. Or if he gets beyond the pleading and takes a nonsuit because of adverse ruling on the evidence, he can upon appeal review the ruling upon the evidence, or if the giving of a charge causes him to take a nonsuit he can review the action of the court in that respect; but he cannot use a nonsuit so as to review rulings anterior to the one causing the nonsuit, and is confined to the right to assign error only as to the ruling which superinduced the "nonsuit." This statute was not intended to authorize a plaintiff to escape a final judgment by taking a nonsuit, perhaps on the last ruling, and then review all anterior adverse rulings, but was intended to enable a review upon appeal only the ruling causing the nonsuit. To hold otherwise would enable a plaintiff to go on with a case and at the last moment, owing to an adverse charge of the court, take a nonsuit and escape a final judgment, but, upon ap-

peal, review all of the rulings in the same manner as if there had been a final judgment against him. The judgment entry and the bill of exceptions. In the present case each recite that the nonsuit was taken in consequence of the adverse ruling of the court on the evidence, and we must consider only the rulings on the evidence, and not those which did not cause the nonsuit. We therefore decline to consider the assignments relating to the rulings on the pleading. Nor can we consider the action of the trial court in not allowing a continuance of the cause. *Dundee v. Nixon*, 95 Ala. 318, 10 South. 311.

The trial court cannot be put in error for not permitting secondary proof of the affidavit and warrant of arrest, as a proper predicate was not shown. For aught that appears, Simpson had them at home, and it does not appear that the proper efforts were made to get them to court. There was no proof that a *duces tecum* had been issued directing him to have them at this term of the court. Counsel stated that a *duces tecum* had been ordered, but this was not done under oath or as a witness, and was not proof of the predicate.

In the absence of the affidavit and warrant the plaintiff did not make out a *prima facie* case, and the trial court did not err in excluding all of the plaintiff's evidence. It is insisted that there was *prima facie* evidence to support count 1, but we think not. There may have been evidence independent of the warrant and affidavit connecting the defendants with the arrest, but said count avers that they caused him to be arrested upon a charge, and the proof showed that the charge was preferred in writing, and under the averment of the complaint. The arrest must have been made on a charge, and the charge should have been proven by the best evidence. For the same reason, there was no injury to the plaintiff in the exclusion of the evidence of Harris, whether a privileged communication or not, as the prosecution of the case did not suffice to relieve the plaintiff from proving the arrest as charged in his complaint.

The judgment of the law and equity court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

SMYTHE v. DOTHAN FOUNDRY & MACHINE CO.

(Supreme Court of Alabama. April 21, 1910.)

1. ACCOUNT, ACTION ON (§ 6*)—COMPLAINT—ALLEGATION OF BALANCE DUE.

In an action for a balance due on an account, a count in the complaint which alleges that "the plaintiff claims of the defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

\$202.28, balance due on account, on, to wit, the 1st day of August, 1908," is demurrable for failure to allege that the account was due from defendant, according to the form laid down in the Code.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 8-12; Dec. Dig. § 6.*]

2. PLEADING (§ 392*)—VARIANCE—PARTIES.

Where a suit on a contract is joint, and the proof shows that only one defendant is liable, it is a fatal variance, and judgment cannot be rendered against one alone, unless the other is discharged on some personal defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1316; Dec. Dig. § 392.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by the Dothan Foundry & Machine Company against J. M. Smythe. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Espy & Farmer, for appellant. R. P. Coleman, for appellee.

SIMPSON, J. This suit is by the appellee against the appellant. The first assignment of error is to the overruling of defendant's demurrer to the first count of the complaint. The count is in these words: "The plaintiff claims of the defendant \$202.28, balance due on account, on, to wit, the 1st day of August, 1908." The ground of demurrer is that the count does not aver by whom the account is due. By reference to the form laid down in the Code (Code 1907, p. 1195, No. 10), it will be noticed that the words "from him," in the form, are omitted in this count, so that the count does not show whether the account sued on is due by the defendant or some one else. The forms in our Code have reduced the allegations of the complaint to a minimum, and this court does not feel called upon to reduce them further by construction.

This court has held that counts which alleged that goods, wares, and merchandise were "delivered to the defendant," at his instance and request, or that were "had and received by the defendant," were subject to demurrer, because they "aver no promise to plaintiff by defendant to pay for the value of the goods alleged to have been delivered, or received by the defendant; nor are sufficient facts alleged out of which an implied promise arose." Kelly v. Burke, Guardian, 132 Ala. 235, 241, 31 South. 512. A count for work and labor done was held subject to demurrer because it failed to state "at defendant's request." McCrary v. Brown, 157 Ala. 518, 50 South. 402. So in this count no fact is alleged which shows that the account was due by the defendant. The demurrer should have been sustained.

The suit is against J. M. Smythe and N. H. Jordan. The evidence showed without conflict that if any one was liable under the contract it was only J. M. Smythe, and the jury

rendered the verdict against Smythe alone, and the judgment was so rendered. It has frequently been decided by this court that when suit on a contract is joint, and proof shows that only one of the defendants is liable, it is a fatal variance, and judgment cannot be rendered against one alone, unless the other is discharged on some personal defense. Lord et al. v. Calhoun, 50 South. 402; Garrison v. Hawkins Lumber Co., 111 Ala. 308, 20 South. 427, and cases cited; Gamble v. Kellum, 97 Ala. 677, 12 South. 82.

The defendant was entitled to the general affirmative charge. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

CAMPBELL v. STATE.

(Supreme Court of Alabama. April 19, 1910.)
HABEAS CORPUS (§ 76*)—RETURN—PRIMA FACIE CASE.

A return to a writ of habeas corpus in extradition proceedings, showing a demand or requisition for the petitioner by the executive of another state, from which he is alleged to have fled, a copy of the indictment found or affidavit made before a magistrate, charging the alleged fugitive with the commission of a crime, certified as authentic by the demanding state, and the warrant of the Governor authorizing the arrest, is prima facie sufficient to show that all the necessary prerequisites have been complied with prior to the issuance of the Governor's warrant, and that the prisoner is properly held.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 67; Dec. Dig. § 76.*]

Appeal from Probate Court, Colbert County; Oscar G. Simpson, Judge.

Petition for habeas corpus by Caleb Campbell against the State of Alabama. From an order remanding the prisoner, he appeals. Affirmed.

Jackson & Deloney, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. The return to the writ of habeas corpus, made by the sheriff in whose custody the petitioner was, showed that the petitioner was held under a warrant issued by the Governor of Alabama on a requisition by the Governor of the state of Texas. The Governor's warrant contained the usual recital of the requisition by the Governor of the demanding state, based on certified copy of affidavit charging the offense, and that the prisoner was a fugitive from justice of such state.

In Ex parte State of Alabama, In re Mohr, 73 Ala. 511, 49 Am. Rep. 63, speaking in this connection, it was said: "It may be considered, therefore, as the settled doctrine of the courts, that a prima facie case is made when

the return to the writ of habeas corpus shows: (1) A demand or requisition for the prisoner, made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found, or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, certified as authentic by the executive of the state making the demand; (3) the warrant of the Governor authorizing the arrest. Where these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is *prima facie* under legal restraint"—citing authorities that need not be repeated here.

We are of the opinion, and so hold, that the warrant of the Governor, reciting these jurisdictional facts, is itself *prima facie* sufficient to show that all of the necessary prerequisites have been complied with prior to its issue by him. *Singleton v. State*, 144 Ala. 104, 42 South. 23. The demurrer to the return of the sheriff to the writ, was properly overruled. The only evidence offered on the hearing was that contained as exhibits in the sheriff's return to the writ. On this the probate judge properly remanded the prisoner to the custody of the sheriff.

Affirmed.

ANDERSON, McCLELLAN, and SAYRE, JJ., concur.

McDANIEL v. STATE.

(Supreme Court of Alabama. April 21, 1910.)

1. WITNESSES (§ 388*)—IMPEACHMENT—PREDICATE.

To impeach a witness by proof of contradictory statements, a predicate must be laid by asking the witness whether he made the statements, giving time and place and person to whom the statements were made, and the question put to the impeaching witness must be so definite in describing the time, place, and person as to identify the statements as those included in the predicate.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

2. WITNESSES (§ 389*)—IMPEACHMENT—INCONSISTENT STATEMENTS—ADMISSION BY WITNESS.

The exclusion of evidence that the state's witness had made a statement which she admitted making was not erroneous.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1243-1245; Dec. Dig. § 389.*]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Joe McDaniel was convicted of murder in the first degree, and he appeals. **Affirmed.** See, also, 50 South. 324.

C. E. Waller and H. G. Benners, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the crime of murder in the first degree, and the only question raised by the

record is as to the correctness of the ruling of the court in sustaining the objection to the question by the defendant to the witness R. B. Evins, "Did you hear Emma Williams make a statement about this, this morning?" The previous question to the witness was, "Did you hear Emma Williams' testimony on the trial of Ed Howard?" to which he answered, "No, sir; I was not here." The objection to this question might have been sustained, on account of its indefiniteness. Taking the connection with the preceding question, the "statement about this" must refer to the testimony of Emma Williams on the previous trial, and the question evidently sought to elicit some statement made by Emma Williams in regard to her testimony at the previous trial. What she testified to at the previous trial could not be proved by relating what she said about it, as that would be mere hearsay. If the object was to impeach the witness, a predicate should have been laid, by asking Emma Williams whether she made such statements, giving time and place, person to whom the statements were made, persons present, etc.; and the question to this witness should be as definite, in describing the time, place, etc., so as to identify the statements as to those included in the predicate. 4 Mayfield's Dig. p. 1198, § 168; *Price v. State*, 117 Ala. 113, 23 South. 691.

The witness Emma Williams had stated, on cross-examination, that she did not know what she had sworn to when she was examined before in this case, and acknowledged that on the morning of the present trial she had stated that she had never heard any such talk, and that she had said what she did before because she was scared, because they had a rope around another girl's neck and were going to hang her if she did not tell about the killing. No testimony, by any one else, as to her making such statements, could add anything to the witness' own acknowledgment that she had made the statements. This testimony as to her statements was not admissible for any purpose, except to impeach said Emma Williams, and we cannot see that the mere statement by another witness that she did say what she acknowledged saying could add any force to her statement.

In the case of *Griffin v. State*, 50 South. 962, referred to by appellant, the matter sought to be proved was a material fact in the case, to wit, whether the letter which was sent anonymously to the defendant was sent by the deceased. Witnesses had testified that the deceased had denied the authorship of the letter, yet the defendant offered the letter in evidence. The state then offered, "as a witness, a female relative of the deceased, who was permitted to testify, over defendant's objection, that she had written the letter, and that the deceased had no

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter's Cases

agency in procuring the letter to be written, nor any knowledge that the witness had written it." This court said: "When the defendant, under his plea of self-defense, offered the letter in evidence, notwithstanding the denial of the deceased that he was responsible for it, he affirmed, by his offer, the responsibility in some sort of the deceased, notwithstanding his denial. On no other theory did it have any relevancy to the issue being tried. The letter, then, having been introduced by the defendant as a threat to show the mental attitude of the deceased towards him, at the time of the homicide, for so it must be taken, it was competent for the prosecution to show that the deceased had no connection with the writing or sending of the letter, as a fact tending to rebut the inference of hostile temper on his part, which the jury might draw from the letter, if not explained. Being entitled to show that the deceased was not responsible for the letter, the state was not limited, in proof, to the denial of the deceased, but might support that denial by other evidence to the same effect." In that case the jury might have disbelieved the mere denial of the deceased, and it was proper to corroborate him by positive proof that another had written the letter, without his knowledge.

There was no error in sustaining the objection to the question to the witness Evins. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

KERN v. COX.

(Supreme Court of Alabama. April 21, 1910.)

1. TRIAL (§ 86*) — EVIDENCE — OBJECTIONS — SUFFICIENCY.

A general objection to testimony is insufficient, where the testimony is admissible for any purpose, and where the objection is overruled; but where the objection is sustained the court will not be placed in error, where the evidence is inadmissible for some purpose, in the absence of a special objection, which might have been obviated if called to the attention of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 226; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in detinue, defendant claimed the goods as a buyer from a third person, and there was no conflict in the evidence that the third person was claiming the goods as his own, the exclusion of a mortgage of the goods made by the third person, offered as a declaration by him, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

3. SALES (§ 221*)—TITLE ACQUIRED.

One buying chattels from one who had bought them from a former owner without paying the price acquires title as against the original owner.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 221.*]

4. TRIAL (§ 244*) — INSTRUCTIONS — UNDUE PROMINENCE TO EVIDENCE.

Where, in detinue, defendant claimed that plaintiff had sold the chattels to a third person, who sold them to defendant, and plaintiff claimed that the chattels were not sold, a charge that the jury might look to the fact that the third person had possession of the chattels for several months, in determining whether or not plaintiff sold the same to him, was properly refused, because giving undue prominence to a part of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 578, 579; Dec. Dig. § 244.*]

Appeal from Circuit Court, Butler County; J. C. Richardson, Judge.

Action by A. C. Cox against J. S. Kern. There was a judgment for plaintiff, and defendant appeals. Reversed and remanded.

The facts sufficiently appear in the opinion of the court. The following charges were refused to the defendant: "(A) The court charges the jury that, if they believe from the evidence that Cox sold Hindman a mule, then you must find for the defendant, although you may believe from the evidence that Hindman has never paid Cox for the mule. (B) The court charges the jury that they may look to the facts that Hindman had possession of the mule from February until the last day of April, 1908, in determining whether or not Cox sold the mule to Hindman."

Powell, Hamilton & Lane, for appellant. L. M. Lane, for appellee.

SIMPSON, J. This is an action of detinue, by the appellee against the appellant, for a mule. The evidence on the part of the plaintiff tended to show that the plaintiff had agreed to sell the mule in question to E. A. Hindman in February, 1908, for \$175, and said mule was delivered to Hindman under an agreement that, if he liked it and it matched another mule which he had, he (Hindman) would pay \$175 therefor, but, if not, he would return it to the plaintiff; also that, before Hindman traded the mule off, he informed plaintiff that it did not suit him, and it was agreed that, as soon as Hindman finished hauling some guano, he would deliver it back to the plaintiff.

The evidence of the defendant tended to show that, on the 29th day of April, 1908, he bought the mule in controversy from said Hindman, paid him \$100 for it, and took possession of it; that he did not ask Hindman from whom he had gotten the mule, but that Hindman told him that it was his mule. A witness—Johnson, a livery man—testified for the defendant that, several weeks after Hindman took possession of the mule, Hindman had offered to sell the mule to him for \$275, and that Cox, the plaintiff, told him that Hindman had not paid that much for the mule, and that, while he did not tell Cox that Hindman had offered to sell him the mule,

he had a talk with Cox, who said that he had sold the mule to Hindman, who was to pay him \$175 for it. He testified, later on, that Hindman wanted \$275 for the mule, and Cox said Hindman knew it was not worth that, and was to pay him only \$175 for it. The plaintiff denied the conversation as related by Johnson, but said that he had told him merely that Hindman had the mule on trial, and that if he liked it he was to pay \$175 for it.

The defendant offered in evidence a mortgage, signed by E. A. Hindman, dated March 10, 1908, conveying, in connection with other personal property, a mule answering the description of the mule sued for. The plaintiff objected, "upon the ground that it was illegal and irrelevant," and the court sustained the objection. This mortgage was *res inter alios acta*, and inadmissible, unless for some special purpose, and the appellant insists that it was admissible for the purpose of showing the declaration of Hindman, while in possession of the property, that it was his. Whether it could be admissible for that purpose or not we do not decide; but, if the defendant desired to have it admitted for a qualified purpose, he should have so stated to the court, and the court cannot be placed in error for excluding the evidence.

The appellant cites a number of cases, all relating to overruling general objections to testimony, to the effect that a general objection to testimony is insufficient, if the evidence offered is admissible for any purpose, which is a correct principle where the objection is overruled; but, where the objection is sustained, the rule is to the contrary, to wit, that the court will not be placed in error if the evidence was inadmissible for any purpose, unless it be some special objection, which might have been corrected if called to the attention of the court, such as failure to offer proof of the proper execution of an instrument offered. *Hurlburt v. Hall*, 39 Neb. 889, 58 N. W. 538, 540 (first column); *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483, 485 (first column); *Davey v. So. Pac. Co.*, 116 Cal. 325, 48 Pac. 117. At any rate, no injury could occur to the defendant, as there was no conflict in the evidence to the effect that Hindman was claiming the property as his own by selling it.

Charge A, requested by the defendant, should have been given. The contention of the plaintiff was that the mule was not sold, and that of the defendant was that plaintiff had sold the mule, merely leaving an indebtedness to plaintiff for the purchase money. If the latter were true, the title to the mule had passed, and defendant would be entitled to a verdict.

Charge B was properly refused, as giving undue prominence to a part of the evidence. *L. & N. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Southern Railway Co. v. Reaves*,

129 Ala. 457, 29 South. 594; *Pearson v. Adams*, 129 Ala. 157, 29 South. 977; *Decatur Car Wheel Co. v. Mehaffey*, 128 Ala. 242, 29 South. 646; *O'Neal v. Curry*, 134 Ala. 216, 32 South. 897.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

SMITH et al. v. PITTS.

(Supreme Court of Alabama. April 21, 1910.)

1. FRAUDULENT CONVEYANCES (§ 218*)—BILL BY SURETY—JURISDICTION.

Equity has jurisdiction of a bill by a surety to set aside alleged fraudulent conveyances by the principal and subject the land conveyed to the reimbursement of the surety for the sum paid by him in the discharge of the principal's debt to the creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 650; Dec. Dig. § 218.*]

2. FRAUDULENT CONVEYANCES (§ 218*)—BILL BY SURETY—RIGHT TO SUE—PAYMENT OF DEBT.

In order that a surety may sue to set aside alleged fraudulent conveyances by the principal debtor and to subject the realty conveyed to the surety's reimbursement, he must have actually paid the original debt prior to the commencement of the suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 643-650; Dec. Dig. § 218.*]

3. FRAUDULENT CONVEYANCES (§ 218*)—VACATION—RIGHT OF SURETY—PAYMENT OF DEBT.

Though a surety, in order to sue to set aside fraudulent conveyances by the principal debtor and subject the land to the surety's reimbursement, must have paid the principal debt before suit brought, such payment need not necessarily be in money, but may be effected by delivery to and acceptance by the creditor of anything of value taken in satisfaction of the debt.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 643-650; Dec. Dig. § 218.*]

4. PRINCIPAL AND SURETY (§ 182*)—RIGHTS AS AGAINST DEBTOR.

A surety's right of action against a debtor for reimbursement is limited to the value with interest and costs with which the surety has parted in satisfaction of the debt, and not necessarily to the sum demandable under the contract wherein he is surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 524; Dec. Dig. § 182.*]

5. LIMITATION OF ACTIONS (§ 56*)—ADVERSE POSSESSION (§ 42*)—PAYMENT BY SURETY—REIMBURSEMENT—LIMITATIONS.

Since a surety's cause of action for reimbursement does not accrue until he has paid the debt of his principal, neither limitations nor adverse possession will begin to run against the surety's right until after such payment.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 307-311; Dec. Dig. § 56.* *Adverse Possession*, Cent. Dig. §§ 207-212; Dec. Dig. § 42.*]

6. FRAUDULENT CONVEYANCES (§ 218*)—SURETY AS CREDITOR—"CREDITOR."

A surety is a "creditor" of the principal debtor from the inception of his contingent liability, and will be protected in an action for reimbursement against a fraudulent conveyance by his principal pending such liability.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 643-645, 650; Dec. Dig. § 218.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

7. FRAUDULENT CONVEYANCES (§§ 69, 271*)—SUBSEQUENT CREDITORS—ACTUAL VALUE.

As to subsequent creditors, a conveyance not infected with actual fraud is valid; the burden being on the assailant of the conveyance to show such fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 796-798, 821; Dec. Dig. §§ 69, 271.*]

8. BILLS AND NOTES (§ 495*)—CO-MAKERS—PRESUMPTION.

Where two names are signed to a note, there is an evidential, rebuttable presumption that they are co-makers and equally bound.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1663-1668; Dec. Dig. § 495.*]

9. FRAUDULENT CONVEYANCES (§ 69*)—VACATION BY SURETIES—SUBSEQUENT CREDITOR.

Where a conveyance assailed by the grantor's surety as fraudulent was executed before the original engagement by which the surety became bound, the surety's relation is that of a subsequent creditor who is bound to show actual fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 178-180, 182, 183; Dec. Dig. § 69.*]

10. PAYMENT (§ 1*)—WHAT CONSTITUTES.

In order to constitute payment, there must be a delivery by the debtor or his representative to the creditor or his representative of money, or something accepted by the creditor as equivalent thereof, with the intention on the debtor's part to pay the debt in whole or in part and accepted as payment by the creditor.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5247-5253; vol. 8, p. 7749.]

11. PAYMENT (§ 24*)—ACCEPTANCE OF OTHER OBLIGATION.

While a debt is not extinguished by the acceptance of an obligation of equal dignity, in the absence of an express agreement to that effect, the creditor's acceptance of one security in satisfaction of another discharges the debt.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 28, 29; Dec. Dig. § 24.*]

12. FRAUDULENT CONVEYANCES (§ 295*)—VACATION BY SURETY—PAYMENT OF DEBT—EVIDENCE.

In an action by a surety to set aside certain alleged fraudulent conveyances by the debtor in order to reimburse the surety for paying the principal debt, evidence held to require a finding that the surety did not pay the original obligation before suit brought and was therefore not entitled to maintain the same.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 295.*]

13. FRAUDULENT CONVEYANCES (§ 266*)—VACATION—PLEA—HOMESTEAD.

In an action by a surety to set aside alleged fraudulent conveyances of certain land, a plea of the debtor's wife, asserting that the

land conveyed to her was her husband's homestead and therefore exempt from liability for satisfaction of the debt in question and could not be subjected by complainant to his reimbursement, was sufficient and not objectionable for failure to answer the whole bill; it being sufficient that it answered the aspect of the bill to which it referred.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 266.*]

14. FRAUDULENT CONVEYANCES (§ 69*)—ACTUAL FRAUD—ANTICIPATORY CONVEYANCES.

Where a conveyance by a debtor is infected by actual fraud with an anticipatory intent to defraud subsequent creditors, the conveyance is voidable.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 178-180, 182, 183; Dec. Dig. § 69.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Bill by C. A. M. Pitts against G. A. Smith and others to declare certain deeds from J. M. Smith and wife to M. M. Smith and Rosa H. Smith fraudulent and void as against complainant unless J. M. and G. A. Smith paid to complainant certain sums of money paid by him as surety for said Smiths. From a decree for complainant, respondents appeal. Reversed and dismissed without prejudice.

James W. Strother, for appellants. Lackey & Bridges, for appellee.

McCLELLAN, J. Bill by surety to set aside alleged fraudulent conveyances by an alleged principal debtor and to subject the realty purported to be conveyed therein to the reimbursement of the surety for the sum paid by him in the discharge of the alleged principal's debt to the creditor.

The theory of the bill would invoke a well-recognized phase of equity jurisdiction. 4 Pom. Eq. § 1417 et seq.; *Bragg v. Patterson*, 85 Ala. 233, 4 South. 716. To sustain a bill for relief on that theory, it is essential that the original obligation was paid by the surety. 1 *Brandt on Suretyship* (3d Ed.) §§ 232, 331, 332; *Pinkston v. Talliaferro*, 9 Ala. 547; *Owen v. McGehee*, 61 Ala. 440, 447; *Knighton v. Curry*, 62 Ala. 404, 413; *Washington v. Norwood*, 128 Ala. 382, 30 South. 405; *Lane v. Westmoreland*, 79 Ala. 372; 27 Am. & Eng. Ency. Law, pp. 470-472.

Since the surety's cause of action, against his principal, comes into existence only upon the payment by the surety of the original obligation, he cannot prevail if his suit be commenced before requisite payment. *Dennison v. Soper*, 33 Iowa, 183; *Newell v. Morrow*, 9 Wyo. 1, 59 Pac. 429; *Washington v. Norwood*, supra; 27 Am. & Eng. Ency. Law, p. 272. That payment need not necessarily be made in money. It may be effected by the delivery to and acceptance by the creditor of any value, if the same is taken in satisfaction and discharge of the debt. The note of the surety, payable to the creditor, though

never actually paid, will, if accepted as payment, avail to clothe the surety with his right of action against his principal for reimbursement and, if otherwise available, to invest him with all the rights, against his principal, that may flow from subrogation. *Owen v. McGehee*, supra; 1 Brandt on Suretyship, § 232, and note 23 thereto, collating numerous decisions in support of the propositions stated; *Pinkston v. Taliaferro*, supra; *Knighton v. Curry*, supra; *Lane v. Westmoreland*, supra. And the surety's right is limited to the value, with interest and costs, he parts with in satisfaction of the debt, and not always to the sum demandable under the contract wherein he was surety. *Owen v. McGehee*, supra; 1 Brandt, §§ 232, 233.

Since the surety's cause of action, in such cases, does not accrue until he has paid the debt of his principal, neither the statute of limitations nor adverse possession will begin to run until such payment. *Washington v. Norwood*, supra; *Bragg v. Patterson*, supra; 27 Am. & Eng. Ency. Law, pp. 481, 482.

The surety is a creditor, from the inception of his, even contingent, liability, and will be protected, in an action for reimbursement, from fraudulent conveyances by his principal pending that liability. *Bragg v. Patterson*, supra; *Keel v. Larkin*, 72 Ala. 493, 500.

As to subsequent creditors, a conveyance, not infected with actual fraud, is valid and operative, and the burden to show the fraud rests on the assailant of the conveyance. *Elyton Land Co. v. Iron City Bottling Works*, 109 Ala. 602, 20 South. 51; *Rike v. Ryan*, 147 Ala. 497, 41 South. 959; among others.

Where two names are signed to a note, the prima facie presumption is that the signers are co-makers and are equally bound. *Jackson v. Wood*, 108 Ala. 209, 19 South. 312. The presumption is, of course, evidential only, and is rebuttable. *Jackson v. Wood*, supra.

If the conveyance assailed by a surety as fraudulent was executed before the original engagement by which the surety became bound, the surety's relation is necessarily that of a subsequent creditor, who, to avoid the assailed conveyance, must allege and prove actual fraud, as before stated. *Keel v. Larkin*, 72 Ala. 493.

We think the evidence establishes that complainant became, in January, 1897, the surety, indorser, of two notes, given by G. A. and J. M. Smith as principals, to the Tallapoosa County Bank for a loan thereby, which notes were repeatedly renewed, the complainant reindorsing each time, until the indebtedness was evidenced by the three notes maturing in the fall of the year 1903; and that these last notes were paid by the complainant after maturity and after just reason existed to anticipate that compulsory steps would be taken to enforce payment by complainant, the two Smiths being insolvent at that time, if the conveyances to M. M. and Rosa Smith were valid and operative. It is not necessary,

we think, to discuss the evidence leading to these conclusions. It is circumstantial as well as positive, and points with requisite certainty, to the conclusions stated.

As said before, on the theory of this bill, it is essential, to clothe complainant with a right of action, that payment of the debt to the bank should have been made before this bill was filed; and, if paid after the bill was filed, the complainant's attitude is that of one who sues without a right of action to enforce. This presents the first issue of fact that must be decided.

From Cyc. vol. 30, p. 1181, we appropriate this as correctly stating the several elements necessary to constitute payment: "There must be (1) a delivery, (2) by the debtor or his representative, (3) to the creditor or his representative, (4) of money or something accepted by the creditor as the equivalent thereof, (5) with the intention on the part of the debtor to pay the debt in whole or in part, and (6) accepted as payment by the creditor."

For practical purposes here, we treat complainant as occupying, in order to effect the payment asserted, the position of a debtor. Another well-sustained rule, serviceable in this instance, is that, "where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged." 30 Cyc. p. 1191. Still another is "that a debt is not extinguished by the acceptance of an obligation of equal dignity," as said in *Lee v. Fontaine*, 10 Ala. 755, 765. Of course, if the obligation of equal or lower dignity is expressly accepted in satisfaction, a discharge necessarily results. *Lee v. Fontaine*, supra. See 30 Cyc. pp. 1192, 1193.

Bearing in mind the essential elements of payment, it is too evident for doubt that on complainant's own testimony, omitting that given by Corprew, payment of the notes was not made until the issuance of the check which, Corprew said, was taken as money. Complainant's evidence, in this connection, was: First, that he paid the notes "after the suit was brought"; second, that he "assumed" the debt to the bank before the suit was begun. These statements are not necessarily in conflict. But assumption of the indebtedness, under the circumstances, was not, as is obvious, payment thereof. There was nothing to assume beyond or different from that his written obligation as surety for two insolvent co-makers then imposed on him. His original obligation was to pay the debt evidenced by the notes he had indorsed, and the justness and economy (to him) of the demand of the cashier was recognized by the complainant when he chose to avoid suit and added costs. The asserted assumption of the indebtedness, as stated by complainant, was but an echo. It was at most no more than a promise to pay that which he had already promised to pay. It is payment, satisfaction, in whole or in part, that is the condition precedent to the existence of a cause of action in favor of a surety against his principal

debtor, and a promise is not payment. *Newell v. Morrow*, 9 Wyo. 1, 59 Pac. 429; 27 Am. & Eng. Ency. Law, p. 472.

Complainant being asked when, before or after suit was begun, the bank first turned the notes over to him, responded, "Before suit was begun I took them down to the office of Lackey & Bridges." It will be noted that the witness did not answer the question categorically. He was an officer of the bank payee at the time. Whether or not he so took them as a representative of the bank does not appear. Whether the notes were delivered to him as paid, the debt discharged, does not appear from any evidence of the witness (complainant). As thus viewed, complainant's testimony does not show payment before suit; but, on the contrary, tends strongly to refute, rather than support, the insistence of payment before suit—to refer the payment to the date of the check. The ordinary presumption attending possession of his obligation (30 Cyc. p. 1268) is not important here, since the facts and circumstances surrounding the possession, in this instance, are shown in the evidence.

Does the testimony of Corprew alter the matter, alone or when taken in connection with that of complainant himself? The substance of Corprew's testimony, both on original examination and on the reference before the register, is that, before suit, he having made a futile attempt to collect the money from the Smiths, he told complainant that it was up to him to pay the notes; that to sue would but add cost; that complainant came, the next day, to the bank, asked for the notes, the witness, cashier, gave them to him, and complainant told witness to charge them to him (complainant); that, thereupon, witness made a debit slip (i. e., charged the amount of the notes, we assume, to complainant); that the following May (1908), months after the suit was begun, he called complainant's attention to a "memorandum (L) he had charged to him of the notes, and he told me to issue his check for it"; that the check was paid.

It will be observed that the gist of the inquiry, on this witness' testimony, is whether the charging, as he described it, to complainant, was, in effect, payment, a discharge, of the indebtedness evidenced by the notes.

In order to effect payment, two of the elements are: Intention to pay the debt; and acceptance by the creditor, as payment. Intention is a controlling element, on both sides, in cases of this character.

There is no evidence in the record that complainant had on deposit, at the time Corprew delivered the notes to him, any sum of money to his credit. Nor does the evidence show that complainant's direction, at that time, to the cashier was to pay the notes out of his deposit or to charge the sum of the notes against his existing (if so) deposit, as was, in effect, the case in *First National Bank v. Hall*, 119 Ala. 64, 24 South.

528. Nor does it appear from the evidence that there was any effort at cancellation of the notes when the cashier turned them over to complainant. The whole act of the cashier, on that occasion, may be summed up in the statement that he gave the notes to complainant and made a memorandum of charge of the "amounts and numbers of the notes" against complainant at complainant's request.

This court, in *Lee v. Fontaine*, supra, laid down several propositions serviceable here in attaining a sound conclusion. Additional to that before adopted, viz., that a debt is not extinguished by the mere acceptance of an obligation of equal dignity, it was therein ruled "that a bill or note of a debtor, or any other person, is not payment of a precedent debt, unless it be expressly so agreed." Again: "The mere giving of a promissory note is not the payment of a pre-existing book debt, and upon default of the payment of the note, the creditor may recover upon the original consideration." Again: "A promissory note given to a creditor, if it is not intended by the parties as a payment, shall not operate as such." The following decisions here accord with the quoted doctrine of *Lee v. Fontaine*: *Mooring v. Mobile Company*, 27 Ala. 254; *Marshall v. Marshall*, 42 Ala. 149; *McDonnell v. Alabama G. L. Ins. Co.*, 85 Ala. 401, 5 South. 120; *Lee v. Green*, 83 Ala. 491, 3 South. 785; *Hetherington v. Hixon*, 46 Ala. 297. As presently applicable, the conclusion must be that in order to avail complainant as payment, discharge, of the debts evidenced by the Smith notes, indorsed by complainant, the acts of complainant, on the one hand, and of the cashier, on the other, must have amounted to an express, at the time, agreement, at least by the cashier for the bank, to accept the sole responsibility of complainant in lieu and stead of the indebtedness evidenced by the notes, and hence the extinguishment of that indebtedness.

We do not think, and so hold, that, from the acts and circumstances shown by the evidence, any such unequivocal result was contemplated. Corprew, the cashier, furnishes the evidence of the attitude of the bank toward the "debit slip" charge he made against complainant. He said it was a "memorandum I had charged to him of the notes"; and, as if to clinch the fact against the act's being accepted by the bank as payment of the Smith notes, he also, in the same connection, said, "And he (complainant) told me to issue his check for it." From such a memorandum of charge it cannot be inferred, with any degree of requisite certainty, that the intention of the bank, acting through its cashier, who was dealing with an important officer of the institution, was to evince an express acceptance of complainant's sole responsibility in lieu and stead of the obligation tokened by the Smith notes, indorsed by complainant, and to dis-

charge that indebtedness. A persuasive reason is found in the fact that it does not affirmatively appear from the evidence descriptive of the memorandum that the amount of the indebtedness was ascertained and set down on the "debit slip," the "memorandum." Corpnew said: " * * * I made a debit slip of the amounts and the numbers of the notes. * * * " Evidently, the "memorandum" taken or made—the "debit slip" charge—was only a description of the notes then given by the cashier to the complainant on complainant's request. This conclusion is confirmed when reference is had to complainant's affirmative statement that he had paid the notes by check (of date May 14, 1908) and "after the suit was begun." The cashier nowhere undertook to expressly say when the indebtedness represented by the notes was paid. It is nowhere shown that any entry of satisfaction of that indebtedness was made on the books of the bank. The "debit slip" seems to have been the only record evidence kept by the bank of the acts of the cashier and of complainant in this connection.

A fair test, in the premises, is found in this inquiry: Could the bank, pending the period between the time when the debit slip memorandum was made and the date of the check (May 14, 1908), which was unquestionably accepted as payment, have prevailed, in an action against the Smiths on the notes, on a plea of payment by them, supported by the evidence presented on this issue in this cause? We think so. The burden would, then, have been on the Smiths to show an acceptance, by the bank, of complainant's sole responsibility for the indebtedness evidenced by the notes—an express acceptance thereof, in discharge of that indebtedness. Again, if the bank had brought, pending the stated period, suit on the notes, against the principals and the indorser, could the indorser (complainant) have prevailed, on the evidence before us, on a plea of payment by him? We think not. Again, if the bank had failed, during the period stated, would the indebtedness evidenced by the notes have been an asset of the institution? We think so.

For the reasons indicated, drawn from the evidence, we, therefore, feel impelled to conclude that at the time this bill was filed the indebtedness, evidenced by the Smith notes, was not paid, satisfied; though that was accomplished on May 14, 1908.

In conformity to the doctrine stated in the first part of the opinion, the court correctly ruled the pleas of the statute of limitations and adverse possession to be insufficient; the cause of complainant's action not having accrued until the payment of the indebtedness, evidenced by the Smith notes, was effected on May 14, 1908.

The plea of Rosa M. Smith, asserting that

the land conveyed to her was the homestead of J. M. Smith, and, hence, exempt from liability for the satisfaction of the indebtedness in question, and also, whether voluntary or not, exempt from subjection, by complainant, to his reimbursement for the sum expended by him in discharging that indebtedness should have been sustained, instead of ruled insufficient. *Bank of Talladega v. Browne*, 128 Ala. 560, 29 South. 552, among others. Whether it could have been supported in the proof is, of course, another inquiry.

The insistence, for appellee, that the plea last referred to did not answer the whole bill, cannot be approved. It did answer, fully, the bill in the aspect that it assumed to impeach the conveyance to Rosa M. Smith. We do not understand that one of several respondents, impleaded as here, must, in order to state a good defense by plea, answer separable, nonapplicable to him, features of the bill.

If the true date of the transaction, whereby J. M. Smith conveyed a part of his land to M. M. Smith, was December 6, 1896—a date prior to the time complainant became, originally, the indorser on the Smith notes—it would be immaterial whether that conveyance was with or without consideration, for the obvious reason that at that date complainant was not even a contingent creditor. However, if actual fraud, to which both J. M. and M. M. Smith were parties (*Rike v. Ryan*, 147 Ala. 497, 41 South. 959), infected the transaction at the time it was effected, with anticipatory intent to defraud subsequent creditors, the conveyance is void and inoperative.

Since payment of the indebtedness by the surety had not been effected before this suit was begun, the decree below must be reversed, and one will be here entered dismissing the bill without prejudice.

Reversed and rendered.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

ALABAMA GREAT SOUTHERN R. CO. v. DEMOVILLE.

(Supreme Court of Alabama. April 20, 1910.)

1. RAILROADS (§ 470*)—FIRES—PROPERTY ON RIGHT OF WAY—LIABILITY OF COMPANY.

If the owner of property is a mere trespasser in placing it on a railroad right of way without the company's consent, he cannot recover for its negligent destruction by fire, but, if the company licenses one to erect buildings on its right of way, it will be liable for negligently destroying them by fire, unless it has contracted for exemption from liability.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1666; Dec. Dig. § 470.*]

2. RAILROADS (§ 469*)—FIRES—LIABILITY OF COMPANY—CONTRACT FOR EXEMPTION.

Where property is placed on a railroad right of way under a contract by which the owner releases the railroad company from liability for damage to the property by fire, the company is not liable for negligently destroying the property by fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. § 469.*]

3. RAILROADS (§ 481*)—FIRES—ACTION—ADMISSION OF EVIDENCE.

In an action against a railroad company for damages for the destruction of cotton seed stored in a building on defendant's right of way by plaintiff, claimed to have been caught from fire in a car load of cotton loaded by defendant, evidence was admissible that defendant's station agent, while superintending the loading of the cotton the day before the fire, was drunk and went into the car in which the cotton was loaded with his pipe in his mouth, though no fire was seen in the pipe and no smoke was seen coming therefrom, and that the smell of burning cotton was discovered near such cars after they were loaded some ten or twelve hours before they broke into flames, leading defendant's porter to search for the fire, and that the odor was stronger where the cars were loaded than elsewhere, tending to show that the fire was negligently set out by defendant's agent, and that he was negligent in failing to discover and extinguish it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.*]

4. NEGLIGENCE (§ 134*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Negligence need not be proved by direct and positive evidence, but may be shown by circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 272; Dec. Dig. § 134.*]

5. RAILROADS (§ 469*)—EXEMPTION CONTRACTS—AGREEMENTS WITH THIRD PERSON.

An agreement between defendant railroad company and another, by which the latter agreed to save the company harmless from damage by the destruction of a seedhouse erected by it on the railroad company's right of way, in consideration of the privilege of erecting it there, would not prevent plaintiff, who was not a party thereto, and had no knowledge thereof, from recovering against the railroad company for the destruction of seed stored therein with the consent of such other, though the company was not notified that plaintiff was using the seedhouse; the agreement not binding him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. § 469.*]

6. TRIAL (§ 139*)—DIRECTION OF VERDICT.

Where there was sufficient evidence on every count to carry all material questions to the jury, defendant's request for the general affirmative charge was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

7. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY.

In an action against a railroad company for the destruction by fire of cotton seed stored in a building on defendant's right of way, claimed to have been caught from fire in a car load of cotton loaded by defendant because of the negligence of its agent in going into the car with a lighted pipe, a requested instruction that smoking a pipe while in close proximity to cotton is not negligence invaded the jury's province, and was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 429; Dec. Dig. § 191.*]

8. RAILROADS (§ 485*)—INJURIES BY FIRE—MISLEADING INSTRUCTION.

The requested charge also tended to mislead the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1747; Dec. Dig. § 485.*]

9. TRIAL (§ 188*)—PROVINCE OF JURY—INFERENCES FROM EVIDENCE.

A charge forbidding the jury to infer legitimate and reasonable facts from facts in evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 412; Dec. Dig. § 188.*]

Appeal from Circuit Court, Greene County; S. H. Sprott, Judge.

Action by Albartus Demoville against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. & E. D. Smith, for appellant. Harwood & McKinley, for appellee.

MAYFIELD, J. Appellee sued appellant to recover damages for the destruction of a lot of cotton seed. The seed were destroyed by fire which was communicated to the building in which they were stored from burning cars of cotton left by defendant on its side tracks near the building. The building in which the seed were stored was located on the defendant's right of way, and was built by the Eagle Cotton Seed Oil Company, another corporation, under a written agreement between it and the defendant. This agreement, license, permit, or lease (whatever its name) contained a clause, or clauses, by which the Eagle Company agreed to save the defendant railroad company harmless from all damages which might arise from the destruction or injury of such building or its contents. The negligence relied upon for a recovery was in allowing the cotton in these cars to become ignited, which fire was communicated to, and destroyed, plaintiff's cotton seed. No damages were sought to be recovered for the destruction of the seedhouse in which plaintiff's seed were stored. It is agreed, and conceded, that the building belonged to the Eagle Company, and the seed therein to the plaintiff.

Plaintiff had for some seasons prior to the fire represented the Eagle Company as its purchasing agent at Boligee, and, as such agent, purchased seed for such company, storing same in this seedhouse, for shipment out over the defendant's road. However, during the season in which the fire occurred, he was not so active for the Eagle Company, but was purchasing seed on his own account; and, under an arrangement with the Eagle Company, he stored his seed in the seedhouse of the company, in consideration of which he gave the Eagle Company the refusal of purchasing the seed from him, and the seed purchased by plaintiff were so stored in this seedhouse, and some were shipped out by the plaintiff over defendant's road. Plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff was not shown to have had any knowledge or notice of the agreement or contract between the defendant railroad company and the Eagle Company as to the erection and maintenance of the seedhouse upon the right of way of the former further than such knowledge or notice might be implied by the fact that the seedhouse was upon the right of way of the railroad company.

The two principal questions of difference involved in the trial and on this appeal are: (1) Was any actionable negligence alleged or proven? (2) If so, was the agreement or contract between the Eagle Company and the defendant railroad company binding upon plaintiff, so as to preclude a recovery in this suit?

Many of the questions involved depend upon one or both of these two. These questions (one or both) were raised by demurrer to the complaint, by several special pleas and the demurrers thereto, and by the rulings upon the evidence, and by instructions of the court given and refused. The demurrers to the complaint were properly overruled. Each of the counts by comparison appears to be a duplicate of counts heretofore held good by this court in similar actions. Certainly, in legal effect, they are substantial duplicates of approved charges. *Marbury's Case*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Clark's Case*, 136 Ala. 450, 34 South. 917; *Taylor's Case*, 129 Ala. 238, 29 South. 673; *Wilson's Case*, 138 Ala. 510, 35 South. 561. It was not necessary under the averments of any one of the counts to allege wanton negligence or willful injury. Simple negligence was sufficient. Cases of injury to personality upon the right of way of a railroad company are different from cases of personal injury to mere licensees. This is certainly true as to the negligent destruction of property by fire under circumstances such as are alleged in this complaint. *Elliott on Railroads*, § 1235 et seq., and *Wilson's Case*, supra.

To the complaint the defendant filed pleas of the general issue and several special pleas.

Plea 2 set up the special contract before alluded to, between the Eagle Company and the defendant company, as to the erection and maintenance of the seedhouse, containing an indemnity against loss or destruction of such house or its contents by fire or otherwise, and alleged that said contract was transferred or assigned by the Eagle Company to the plaintiff, and that plaintiff's possession of such house and the right of storage therein was by virtue of such contract or license, and that the indemnity clause of such contract was therefore binding upon plaintiff.

Pleas 3 and 4 were the same as plea 2, except that they omitted the allegation that the contract of indemnity was transferred or assigned to plaintiff, and that the cotton seed were stored thereunder; but averred that plaintiff used such seedhouse as a mere li-

censee, and denied any wanton or intentional wrong.

Plea A sets out the contract between the Eagle Cotton Oil Company and the defendant at length as an exhibit. It avers that the seedhouse was erected and maintained under and by virtue of said contract, and that the cotton oil company had used it continuously up to September 28, 1907; that the plaintiff, for several years prior to the fire, had stored said company's seed in said house, as the agent of said company; that on September 28, 1907, without the knowledge or consent of the defendant and its agents, the Eagle Cotton Seed Oil Company gave the plaintiff the right to use the said seedhouse for the storage of his own seed, and that plaintiff, from then to the time of the fire, did so use the said seedhouse without notice to the defendant, and without the knowledge or assent of the defendant or its agents; that the said contract between the Eagle Cotton Seed Oil Company and the defendant, except as affected by this arrangement between the plaintiff and the cotton oil company, remained in full force and effect. This plea also denied subsequent negligence.

The court sustained demurrers to all the special pleas except plea 2, to which a demurrer was overruled; and the trial was had on the general issue and upon special plea 2. The trial court correctly ruled upon these special pleas 3, 4, and A.

The law upon the subject is, we think, correctly stated in 3 *Elliott on Railroads*, §§ 1235, 1236, as follows:

"Sec. 1235. Property on Right of Way.—It frequently happens that property of third persons located on the railway right of way is destroyed by fire communicated by locomotives of the company using the right of way. In cases of this kind the railway company is sometimes liable and sometimes not. The test of liability is generally whether or not the property situated on the right of way was rightfully there. If the owner of the property is a mere trespasser and placed his property on the right of way without the consent of the railway company, he cannot recover for its negligent destruction by fire. Thus, where a person intruded upon the right of way of a railway company and without the consent of the company erected a building which was afterwards destroyed by fire, it was held that there could be no recovery. But, where a company expressly licenses third persons to erect buildings within the limits of its right of way, it will be liable if it negligently destroys such buildings by fire, unless it has contracted with the persons erecting such building that it shall not be liable if the buildings are destroyed by fire. And where property is placed on the right of way of a railway company by agreement, either express or implied, and such property is negligently destroyed by fire, the company will be liable. The complaint in an action to recover damages for property burned on the

right of way must show that the property was rightfully there.

"Sec. 1236. Contracts Limiting Liability.—

As a general rule contracts which seek to confer upon a person immunity from the consequences of his negligent acts to be performed in the future are held void as being contrary to public policy, but there is some conflict among the authorities, and decisions may be found which support a contrary doctrine. Contracts by which railway companies attempt to excuse themselves from liability on account of negligence in the carriage of freight are almost, if not quite, universally held void. And, in the case of the carriage of gratuitous passengers, a provision in the pass on which the person rides that there shall be no liability on account of negligence of the company has been held void, although there are cases maintaining a different rule. So far as we have been able to discover, there are few cases in the books involving the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that ordinarily a contract exempting the company from liability for negligently burning property not on the right of way or premises of the company would be held void. But where property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by the railway company, the contract is not void, and the company cannot be held liable. In such a case, as placing the property upon the right of way is an inconvenience to the company and increases the danger of fire, and as the contract in no way relieves the company from any public duty, it is not against public policy, and is therefore binding upon the parties. Where, however, a railway company leased its property and there was a provision in the lease that the company would not be liable to the lessee for property of his destroyed by fire, it was held that the company was liable to an employé of the lessee who had property which was stored on the leased premises destroyed by fire through the negligence of the railway company."

None of these pleas alleged any facts to show that this indemnity contract was binding on the plaintiff. It was not alleged that he had any knowledge or notice, actual or constructive, of such provision; nor was it alleged that his use of the seedhouse was wrongful. At most, it was only alleged that he was a mere licensee of the premises. This was sufficient, under the authorities, to render the defendant liable if the seed were destroyed on account of negligence of the defendant as alleged.

Plea 2 was not proven, and hence the correctness of the verdict and judgment must depend upon whether or not any one of the counts was proven, so as to authorize the

finding of the jury. It is not contended in this case that the fire was communicated by means of sparks emitted from defendant's engines, nor was there any evidence tending to support such a theory. It is, however, clearly shown that plaintiff's property was burned, and that the fire was communicated to the building in which it was stored from some box cars which were loaded with cotton in bales, which cars were placed on a side track near plaintiff's property. It is also reasonably certain from the evidence that the fire originated in these bales of cotton thus stored in these cars. This cotton was loaded onto these cars by defendant's agents on the day preceding the destruction of plaintiff's property, which occurred about 2 o'clock a. m. After the cotton was thus loaded onto these cars, the cars were sealed, being closed ones; and hence it is not probable that sparks could have been communicated to the cotton after the cars were thus sealed.

The plaintiff offered, and had admitted, over the objection and exception of the defendant, evidence that defendant's depot agent at Bolligee, while aiding in or superintending the loading of the cotton onto these cars on the day preceding the fire, was drunk or intoxicated, went amongst the bales of cotton, and into the car in which the cotton was loaded, and after it was loaded, with his pipe in his mouth, and that the odor of burning cotton was detected near these cars soon after they were so loaded and sealed, and that defendant's porter was caused to thereby search for the fire or burning cotton, and that the odor of the burning cotton was stronger at the depot, where these cars were located, than elsewhere. These were all circumstances tending to show that the fire was set out by defendant's agents, and that it was negligently set out, and that defendant's agents were guilty of negligence in failing to discover the fire in time to extinguish it, and to thus prevent the damage to plaintiff by the spreading of the fire to his property 12 or 14 hours thereafter. This evidence certainly tended to show that the bales of cotton caught on fire while they were being loaded, and before the cars were sealed; or that they were on fire when so loaded, and that the defendant's agents were guilty of actionable negligence in so setting the cotton on fire, or in failing to discover that it was on fire when loaded and before the cars were sealed, and in failing to discover the fire after the cars were loaded. This was the only probable theory as to the origin of the fire. The fire smoldered in these bales of cotton for 12 or 14 hours. Then, kindling into flames and bursting or burning through the cars, it was communicated to plaintiff's property at about 2 o'clock of the morning following the afternoon on which cotton was loaded. And the drunken condition of defendant's agent, together with the fact that he had a pipe in his mouth at the time he was handling the cotton or superintending the loading of same on

the cars, was a circumstance tending to show the negligence complained of, resulting in plaintiff's damage. True, the witnesses who testified to his having the pipe in his mouth did not see any fire in the pipe, nor any smoke from the pipe or from the agent's mouth; but the failure to show that fire was in the pipe did not render the evidence inadmissible.

Had it been shown that there was fire in the pipe, and that smoke and sparks were being emitted from it, the evidence would have been much more convincing to show negligence; but the failure to show any one of these additional evidentiary facts did not render the fact that the agent was drunk at the time of the loading of the cotton and had a pipe in his mouth when handling the cotton inadmissible. It was open to the jury to infer that fire was in the pipe at the time in question, and that it was communicated to the cotton, and that it was so communicated by reason of the drunken condition of defendant's agent who was handling it, and that such acts were actionable negligence as alleged. It was likewise open to the jury to infer from this and other evidence in the case that but for the drunken condition of this agent while handling the cotton, and but for the fact that he had a pipe while drunk and while so handling the cotton, the fire would not have occurred; and that, if it did so occur on this account, it was actionable negligence. It was likewise open for the jury to infer that but for the drunken condition of this agent the fire would have been discovered sooner, and the spreading to plaintiff's property have been prevented. But for the drunken condition of this agent the fire might have been discovered when the odor of burning cotton was detected—which was eight or ten hours before the fire broke out. It was open to the jury to infer this from all the evidence, and also to infer that the fire was at that time smoldering in the bales of cotton, and that a reasonable inspection of the cars or premises would have discovered the fire, and thus admitted of its being extinguished, to the preservation of plaintiff's property. If the fire did not originate and occur on account of the negligence of the defendant's agent in the manner in which the evidence of plaintiff tended to establish, it is difficult to conceive any reasonable cause. This evidence, in connection with other undisputed facts in the case, we think authorized the inference that the fire originated or spread on account of the actionable negligence of defendant's agent, and that the defendant was answerable for such negligence of its agent.

While the fact that the agent was drunk when the cotton was being loaded into the car or the fact that he had a pipe in his mouth while he was working with the cotton, or the fact that the odor of burning cotton was detected soon after these acts of the agent, and eight or ten hours before the fire broke out of the cars and was communi-

cated to plaintiff's property, standing alone, would not be sufficient to justify the verdict against the defendant, yet each circumstance was competent and admissible, and, when all are considered together and in connection with all the other evidence, we are not prepared to say that the evidence was insufficient to support the verdict. The fire occurring in the nighttime, as it did, and originating among the bales of cotton, closed as they were in the car, the evidence to prove how the cotton was first ignited would almost of necessity depend upon circumstantial evidence. This court has several times held that evidence may be sufficient to prove the origin of the fire and the negligence of the defendant in setting it out. *Johnston's Case*, 128 Ala. 283, 29 South. 771; *Malone's Case*, 109 Ala. 509, 20 South. 83; *Elliott on Railroads*, § 1243. The court having limited the evidence as to the drunkenness of the agent and his having a pipe in his mouth to the time during which he was engaged in handling and loading the cotton which caught on fire, there was clearly no error in its admission. *Wigmore on Ev.* § 85, and notes. The rule is thus stated in 1 *Shearman & Redfield on Negligence*, § 58: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's fault; but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not bound to prove his case beyond a reasonable doubt; and, although the facts shown must be more consistent with the negligence of the defendant than with the absence of it, they need not be inconsistent with any other hypothesis. It is well settled that evidence of negligence need not be direct and positive. Circumstantial evidence is sufficient. In the nature of the case the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases, open to clearer proof. This is on the general principle of the law of evidence, which holds that to be sufficient or satisfactory evidence which satisfies an unprejudiced mind. Proof that similar accidents do not happen from similar things, when properly managed, is competent to raise a presumption of negligence, where an accident has happened."

It may be true, as contended by appellant, that the burden of proof and the presumptions of negligence are somewhat different in cases in which property is fired directly by sparks emitted from engines from cases like the one under consideration, in which the fire spread from other property on fire upon the right of way of the railroad company. Elliott on Railroads, § 1242, contains the following statement of the rules in the two cases: "Where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way, the authorities are pretty well agreed that the burden of proving negligence rests upon the plaintiff. In such cases, it is but just that the burden should rest upon the plaintiff, for the means of proof are as equally available to the plaintiff as to the defendant. The gist of such action in such cases is negligence in suffering the fire to escape, and the burden in showing negligence in that respect rests upon the plaintiff. But where a fire is set directly by sparks from a locomotive, and the action is predicated on negligence of the company in using a locomotive with defective apparatus or equipments or in negligently and unskillfully managing a locomotive, the authorities are in direct conflict as to who has the burden of proof." Shearman & Redfield on Negligence, § 676, states the rule as to the burden of proof as follows: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be), which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in the federal courts and in the state courts. * * *" The evidence in this case having conclusively shown that the fire originated in the box car loaded with cotton, which was on defendant's right of way and side track, and that it was not probable that it was fired by any other means than the negligence of defendant's agents, and there being sufficient circumstantial evidence from which the jury could infer such negligence on the part of defendant's agent, we hold that there was sufficient evidence to carry the case to the jury and to support the verdict rendered. It is matter of common knowledge that fire in bales of cotton which are well packed burns very slowly, and that it may so burn for a long time before blazing, and that, while so burning, it gives out an odor like that of rags or cloth burning, and that fire in bales of cotton may be detected by this odor long before there is any other evidence of the fire, unless it should be small quantities of smoke. The evidence, therefore, that this odor was detected and the attention of defendant's agents

called to it was admissible, though this happened eight or ten hours before the cotton in the cars blazed up, or was discovered by the plaintiff.

The contract or agreement between the defendant and the Eagle Company, by which the latter agreed to indemnify the former, or to save it harmless against all damages on account of the destruction of the seedhouse or its contents, in consideration of the privilege of erecting such house on defendant's right of way, was not relevant or material evidence on this trial. It was not shown that plaintiff was a party or privy to the contract, and it was shown that he had no knowledge or notice of it prior to the loss sustained. The mere fact that he had the permission or consent of the Eagle Company to store his seed in the house did not render him liable to the provisions of that contract. The contract on its face did not purport to bind the plaintiff or any one except the parties to it, and plaintiff was conclusively shown not to have had any knowledge or notice thereof. The mere facts that the house was on the right of way of the defendant, and that plaintiff had placed his seed therein without the knowledge or consent of the defendant, did not and could not defeat or prevent plaintiff's right of action, if it otherwise existed. Plaintiff was shown to have obtained the consent to so store his seed from the proper party—the Eagle Company. It was not shown that defendant had ever attempted to control the use to which the building should be put. Moreover, it is shown that it was being used for the express purpose for which it was built. It could be no defense of justification in this action that the seedhouse was erected and maintained on defendant's right of way under the contract in question. As before stated, the plaintiff was not a party or privy to it, and was not bound by it. It was not necessary for the plaintiff to show that the Eagle Company had notified defendant of his use of this property. The contract did not so provide; and, had it done so, it was shown that plaintiff had no knowledge or notice of the contract.

All the charges which were in effect the general affirmative charge for defendant, as to any one or more of the counts, were properly refused for the reasons that there was sufficient evidence to carry all material questions to the jury as to each count, and that the defendant had failed to prove its special plea numbered 2.

Charge 7 was properly refused. The fact that plaintiff used the seedhouse as a licensee of the defendant if the jury had or could have so found would not have authorized a verdict for defendant. The charge in effect was that, if plaintiff was so occupying the seedhouse, he could not recover. As we have shown above, this is not the law.

It was not necessary for plaintiff to have

had the permission of the defendant to so use the seedhouse in question, in order to render the defendant liable; nor was the fact that he so used it without defendant's knowledge or consent a bar to his right to recover, if otherwise he was entitled to recover. For this reason, charge 8 was properly refused.

Charge 11 assumes as matter of law that smoking a pipe while in close proximity to cotton is not negligence. It might or might not be, depending upon other attending circumstances. The charge invaded the province of the jury, and had a tendency to mislead them, and for these reasons was properly refused. A charge which denies to the jury the right to infer legitimate and reasonable facts from other facts proven is properly refused. It was, as we have before stated, a question for the jury to say whether or not the smoking of a pipe under the circumstances was negligence.

Finding no error in the record, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

PEOPLE'S BANK OF EVERGREEN v. ROBBINS.

(Supreme Court of Alabama. April 21, 1910.)

1. CHATTEL MORTGAGES (§ 211*) — ASSIGNMENT — BONA FIDE PURCHASER — TRANSFER FOR COLLECTION.

Where a bank to which a chattel mortgage had been assigned returned it to the assignor "for collection," with authority to the assignor's president to renew all past-due paper, and to include in the renewals any advances to be made in the ensuing year, as was the assignor's custom, the bank was not a purchaser for value of the renewed note and mortgage, including an amount which the assignor had agreed to advance to the mortgagor for the ensuing year, but which was never in fact advanced, so as to entitle it to recover more than the true indebtedness represented by the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 458; Dec. Dig. § 211.*]

2. ESTOPPEL (§ 25*)—MORTGAGES.

Complainant executed a chattel mortgage to a banking company in 1904, and in February, 1905, owed the company \$108.45, less certain interest. On that date he renewed the 1904 mortgage, but the amount was fixed at \$300, the excess to cover advances to be made in 1905, but on March 17, 1905, the company was adjudged bankrupt, and the advances were never made. During 1904 the mortgage was transferred as collateral to plaintiff bank, and later turned over to the banking company for collection for plaintiff's account. In March, 1905, the 1905 mortgage was transferred to plaintiff, and on February 15, 1906, that mortgage was taken up by the mortgage in question, which was executed by complainant to plaintiff bank for \$328. *Held*, that the bank having parted with no value other than that inhering in the surrender of the 1905 mortgage, for which forbearance it was only entitled to interest on the true amount due at 8 per cent., complainant by

executing the 1906 mortgage was not estopped to question the sum for which the 1905 mortgage was given.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 25.*]

Appeal from Chancery Court, Conecuh County; L. D. Gardner, Chancellor.

Bill by T. C. Robbins against the People's Bank of Evergreen. Decree for complainant, and defendant appeals. Affirmed.

Hamilton & Crumpton and B. M. Powell, for appellant. Edwin C. Page and Fitts & Leigh, for appellee.

MCCLELLAN, J. Bill by mortgagor against mortgagee for an accounting and to redeem upon payment, which he offers to do, of the averred true amount of the mortgage debt.

These facts must be taken, after careful review of the testimony, as established: Robbins, appellee (complainant below), executed in 1904 to the Evergreen Mercantile & Banking Company a mortgage on his crops for that year and on his personal property. On February 18, 1905, Robbins owed the named company \$108.45, less the interest on the due sum, from that date to October 1, 1905. On that date he renewed the 1904 mortgage, but the amount was fixed at \$300, the excess in amount being inserted in order to cover advances for the year 1905 agreed to be made to him by the company. On March 17, 1905, the company ceased to do business, being adjudged an involuntary bankrupt. The advances intended to be covered by the excess sum were never made. During the year 1904 the company became indebted to the People's Bank of Evergreen, and, as collateral security for that indebtedness, the Robbins mortgage of 1904, among other choses in action, was transferred to the bank. In August, 1904, this mortgage, with others so transferred to the bank, was turned over to the company "for collection" for account of the bank. It was not specifically controverted that "the understanding between the Evergreen Mercantile & Banking Company and the People's Bank of Evergreen was that the Evergreen Mercantile & Banking Company should renew all past-due papers, and let the papers include future advances to be furnished during the ensuing year." In March, 1905, the mortgage of date February 18, 1905, was transferred to the bank. On February 15, 1906, this mortgage was taken up by a mortgage, the foreclosure of which was enjoined in response to this bill, for \$328, executed to the bank by Robbins.

The respondent (appellant) invokes two defenses against the relief sought by the bill and granted by the decree appealed from, viz., first, that it was an innocent purchaser for value and without notice of the mortgage for \$300 of date February 18, 1905; second, that the complainant is estopped to contro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vert the sum for which the mortgage of February 16, 1905, was given, viz., \$300, for the reason that by the adjustment between appellee and appellant, evidenced by the mortgage of February 15, 1906, the sum due the appellant was fixed at \$328, interest being added.

There can be no doubt on the evidence in this record that the relation created by the delivery of the 1904 Robbins mortgage to the company by the bank "for collection" for account of the bank was that of principal and agent, and that the bank conferred on Brooks, as president of the company, the authority generally to include a sum to cover advances for the year 1905 in handling past-due paper. It also appears, with certainty, that the bank was fully aware of the character of business then being done by the company, viz., that of making advances, which, in our legal parlance, has acquired a definite meaning. Within the scope of the agent's authority knowledge of, or notice to, the agent is that of the principal. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336, 346; *Goodbar et al. v. Daniel*, 88 Ala. 533, 7 South. 254, 16 Am. St. Rep. 76. In the first case cited it is said: " * * * Upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows." The application in this instance of the principle just stated precludes the respondent from the benefit of the protection accorded innocent purchasers for value and without notice. Even if the respondent paid full value for the mortgage of February 16, 1905, by the application of its face value to the Bush Grocery Company note previously assigned to the bank, the bank, through its authorized agent, the company, was then charged with notice that, while the mortgage (of 1905) represented on its face an indebtedness of \$300, yet, in fact, its real evidence of obligation, its consideration, was for approximately \$100, unless the agreement to make advances for 1905 was carried out—a condition never met, either by the company or the bank. Being so charged with notice of the paper's infirmity in the particular indicated, the bank was not an innocent purchaser for value and without notice of the Robbins 1905 mortgage beyond the sum of the true indebtedness evidenced thereby.

The second defense, before stated, cannot be sustained. It does not appear that the surrendered (by the bank to Robbins) mortgage of 1905 and the taking of the mortgage of 1906 wrought any impairment of the bank's security for the true sum really represented by the 1905 mortgage. Indeed, the complainant's offer to do equity by satisfying all real liability against him on account of the 1905 mortgage debt, and that being a condition to his relief as prayed, precluded the possibility of respondent's suffering loss by reason of the surrender and cancellation of the mortgage of 1905. It is further shown,

without dispute, that the bank parted with no value other than that inhering in the surrender and cancellation of the mortgage of 1905. At most, forbearance to enforce the payment of the 1905 mortgage debt was the effect of the arrangement and acts of the parties in canceling the 1905 mortgage, and in taking the mortgage of February 16, 1906. The legal limit of exaction for this forbearance was 8 per cent. interest on the true sum due when the last-mentioned mortgage was given and taken. Beyond that the contract would be usurious and unenforceable. *Darden v. Schuessler*, 154 Ala. 372, 45 South. 130. Under the circumstances present in this case—the respondent not being an innocent purchaser without notice as indicated—it is obvious that the mortgagor was clearly within his rights when he invoked, and was sustained in, an investigation of the real consideration for his obligations, being only accountable therefor.

For appellant we are referred, as bearing upon the stated second ground of defense, to five decisions of this court. We have considered each of them. *Perdue v. Brooks*, 85 Ala. 459, 5 South. 126, *Gee v. Bacon*, 9 Ala. 690, and *Palmer v. Severance*, 8 Ala. 53, were cases where, in effect, the payor or mortgagor induced a third party, ignorant of the fact that the contract was usurious, to part with value or to assume obligations in respect thereto. It was correctly held, of course, that the payor or mortgagor was estopped as against such innocent third person from asserting that the original contract was usurious. *Jackson v. Henry*, 10 Johns. (N. Y.) 195, 204, 6 Am. Dec. 328, also cited, belongs to the same class of cases as those referred to. To like effect, in principle, is the case of *Tapscott v. Gibson*, 129 Ala. 503, 30 South. 23, though there the payor undertook to assail the consideration of the note which he had induced the third party to purchase. *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 South. 918, was an action by a materialman to enforce a lien for brick furnished to construct defendant's (appellant's) house. While the report of the appeal is not very satisfactory on this point, it seems that the defendant undertook to avoid loss by recouping damages for delay in completion of the structure consequent upon the failure of the plaintiff to deliver the brick promptly. Defendant had paid the contractors in full, less a sum equal to the demand of the plaintiffs, and had agreed to claim no damages for delay in completion of the building. The court held that defendant had cut himself off from the right to sustain recoupment on that ground. Among other elements differentiating *Cook v. Rome Brick Co.* from the case at bar it will suffice to suggest this one: That there the defendant was concluded by his acts against a claim for damages, whereas, here the complainant invokes inquiry into the consideration of an obligation purchased (we assume) by one charged, as before stated, with no-

tice of its infirmity in that regard. *Cook v. Rome Brick Co.* is without bearing on the controversy here. *Henderson v. Boyett*, 128 Ala. 172, 28 South. 86, involved rescission of a contract, and announces the familiar rule of duty of the rescinder to place the adversary in statu quo. This case deals with a field of the law foreign to that in hand, viz., the right, unless an estoppel intervene, to inquire into the consideration of the obligation sought to be enforced.

We find no merit in the appellant's criticisms of the decree appealed from, and it is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

MILLER-BRENT LUMBER CO. v. DOUGLAS et al.

(Supreme Court of Alabama. April 21, 1910.)

1. RAILROADS (§ 480*)—FIRES—BURDEN OF PROOF.

Where fire is communicated to property from an operated locomotive, the burden is on defendant to show prima facie that the fire was thus communicated without negligence of defendant in the construction, equipment, or operation of the locomotive.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1713; Dec. Dig. § 480.*]

2. EVIDENCE (§ 595*)—"INFERENCE"—"SUPPOSITION."

"Inference," in legal parlance, as respects evidence, is a very different thing from "supposition." The former is a deduction from proven facts, while the latter requires no such premise for its justification. Courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, cannot pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference (citing *Words & Phrases*, vol. 4, p. 3579; vol. 8, p. 6807).

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2444, 2445; Dec. Dig. § 595.*]

3. RAILROADS (§ 480*)—FIRES—BURDEN OF PROOF.

In an action for the destruction of property by fire alleged to have been communicated by the operation of a locomotive, the burden was on defendant to exclude prima facie the three means, namely, negligent construction, equipment, and operation, by which the fire could have been negligently communicated to the property.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1714; Dec. Dig. § 480.*]

4. RAILROADS (§ 484*)—FIRES—QUESTION FOR JURY.

In an action for the destruction of property alleged to have been caused by a fire communicated by defendant's locomotive, evidence that 20 or 30 minutes after a locomotive that might have emitted sparks passed a building of undefined distance from the track, on a day when the wind condition was not shown, the building was discovered to be on fire, on its roof, on the side next the track, was insufficient to require

submission to the jury of the question whether the locomotive set fire to the building.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1743; Dec. Dig. § 484.*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Action by A. S. Douglas and another against the Miller-Brent Lumber Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

W. O. Mulkey and J. F. Sanders, for appellant. John H. Wilkerson and Claude Riley, for appellees.

MCCLELLAN, J. Action, by appellee against appellant, for loss of property, by fire alleged to have been negligently communicated to a depot of the Louisville & Nashville Railroad Company, where it was for shipment, by a locomotive operated by appellant over the track of the Louisville & Nashville Railroad Company.

It is settled with us, by repeated decision, that, where fire is communicated to property from an operated locomotive, the burden of proof is upon the defendant to show, prima facie, that the fire was thus communicated without negligence of the defendant in the construction, equipment, or operation of the locomotive. *L. & N. R. R. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Sullivan Co. v. L. & N. R. Co.*, 50 South. 941; *L. & N. R. Co. v. Sherrill*, 152 Ala. 213, 44 South. 631 (treating charge 5, among others).

It was admitted, on the trial below, that the engine in this instance charged to have communicated the fire "was not equipped with proper spark arrester."

If the fire was communicated to the roof of the Louisville & Nashville Depot, at Pink, Ala., the defendant did not discharge the burden of proof resting on it to show, prima facie, that the fire's communication was not the result of its negligence. In such case, where the communication of the fire is shown, positively or circumstantially, the obligation is on the defendant to exclude, prima facie, the three means, viz., construction, equipment, and operation, by which the fire may have been negligently communicated to the property. So that, in this case, the chief question is: Was the fire, destroying appellee's property, communicated by defendant's locomotive?

When taken with the utmost favor for appellee, the evidence in this record is not sufficient, even circumstantially, to have required the submission of the stated inquiry to the jury. It was shown that "no one saw any sparks being emitted or thrown from the engine (defendant's) on this occasion." The evidence was in conflict on the issue whether steam was being "worked" when this engine passed the depot. If the engine was not under steam, all the witnesses testify that the

emission of sparks was impossible; and, on the contrary, it seems to have been the theory that, if the engine was under steam, sparks might be emitted.

It may be granted that sparks may be emitted by an engine under steam; yet that, as is obvious, is, alone, far short of affording evidence, even inferentially, that in fact sparks were emitted. The possibility that a thing may occur is not alone, under any fair, reasonable deduction, evidence, even circumstantial, that the thing did, in fact, occur.

But it is insisted that the possibility stated is not the sole evidence of the asserted fact, viz., that sparks emitted from the engine ignited the roof of the depot. The supplementary evidence to support the asserted fact is said to be present in the evidence that the depot was discovered to be on fire, on the roof, on the side next the railroad, 20 or 30 minutes after this engine passed, and that a trash heap, about 15 feet from the track and north of the depot, was also discovered to be on fire a few minutes before the depot was discovered to be on fire, and that the trash pile was not on fire before the defendant's train passed, "nor was there any person standing near the trash pile from the time the train passed and until it was discovered to be on fire."

The cause of a known effect may be often ascertained, with reasonable certainty, by excluding other causes that may have produced the known effect; whereas, if such other causes are not excluded, the effect is ascribable, in point of fact, to many causes, and is, hence, incapable, for practical purposes of ascertainment, of definite ascription to any one cause. Such indefiniteness cannot lead to the certainty requisite to discharge a burden, in proof, to designate the cause. While not of course in immediate point, this underlying principle led the court to hold, in *Tinney v. Central of Georgia Ry. Co.*, 129 Ala. 523, 80 South. 623, that the presumption of negligence, in construction, equipment, or operation of an engine setting out fire, would not avail a plaintiff where his complaint omitted, in averment of negligence, one of the three presumptively negligent causes for the ignition of plaintiff's property by fire. Or, to state it otherwise, that the presumption, arising from property destroyed by fire set out by a locomotive, would not refer the cause thereof to those charged, in the pleading, and omit its reference to a negligent cause not counted on in the complaint. The principle, though not here, as there, involving presumption, but inference only, must lead to the conclusion, on the inquiry of fact with which we are here concerned, that the plaintiff does not discharge his burden, in the absence of positive evidence of the fact asserted, unless the reasonably possible causes of the fire destroying his property are winnowed, at least by tendencies of the evidence, to that for which (if negligent) the

defendant is responsible. Inference, in legal parlance, as respects evidence, is a very different matter from supposition. The former is a deduction from proven facts (4 Words & Phrases, p. 3579); while the latter requires no such premise for its justification (8 Words & Phrases, p. 6807). And the courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, cannot pronounce upon mere supposition that the burden has been met.

In this case, circumstantial at best, we find no evidence tending to exclude the reasonable possibility that the roof of the building was ignited by, for instance, fire within or about the building. There is no evidence of the direction of the wind (if such there was) on the occasion, whether toward (from the track) the building or not. There is no evidence of the distance of the building from the track. The trash pile, we may assume for the argument only, was set by this engine. The evidence shows that to have been 15 feet from the track—whether on the same side as the depot does not appear—and 100 yards north of the depot. In the absence of evidence tending to show the distance of the depot from the track, and of evidence that the trash pile was ignited by sparks from the engine's smokestack, and of evidence tending to show the relative location of the trash pile to the depot, whether on the same side of the track, it is obvious that the firing of the trash pile could not avail as evidence, affording inference even, that the roof of the building was set on fire by sparks emitted as the result of the action of applied steam producing "exhaust" of the engine—a theory to which the plaintiff committed the success of his cause. The trash pile may have been ignited by fire from beneath the engine, from its fire box; and, if so, the plaintiff's stated theory could get no support from the fact that the trash pile was ignited by fire from that part of the engine.

The case, then, is simply this: Twenty or 30 minutes after a locomotive, that might have emitted sparks, passes a building of undefined distance from the track, on a day when the wind conditions are not shown, the building is discovered to be on fire, on its roof, on the side next the track. We feel assured that such evidence was insufficient to require the submission of the inquiry to the jury whether the locomotive in question set fire to the building.

This court has dealt often with the inquiry here presented. It is not, of course, the same question that arises where the issue is negligence vel non in setting out a fire shown, positively or circumstantially, to have been set out by a locomotive. In most of the cases (the *Malone Case*, 109 Ala. 509, 20 South. 33, and *Sherrill's Case*, 148 Ala. 1, 44 South. 153, and *Louisville & N. R. Co. v. Sherrill*, 152 Ala. 213, 44 South. 631, being instances) there was some evidence tend-

ing to show emission of sparks, by the engine, at or about the place where the fire started; also, the relative location of the point of inception of the fire; and, also, evidence tending to warrant the inference, from circumstances it may be, that the fire had its inception in no other reasonably possible cause than the locomotive. Our numerous other decisions, bearing on the inquiry, are readily accessible. It is unnecessary to undertake their review, or to assume here to lay down any rule that must be conformed to in order to afford evidence justifying the inference that a fire was set by a locomotive. Counsel for both litigants cite and rely upon the recent decision of *Southern Railway Co. v. Dickens*, 49 South. 766. The facts and circumstances there reviewed, and on review of which the judgment below was affirmed, readily distinguish that case from this. A notable difference is that one witness testified that the engine in question set out the fire. It was ruled, aside from the discussion *arguendo*, that the inquiry whether that engine set out the fire was properly submitted to the jury's determination.

The affirmative charge, requested by defendant, was due it on the evidence in the record before us. For its refusal, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

McALLISTER-COMAN CO. v. MATHEWS et al.

(Supreme Court of Alabama. April 21, 1910.)

1. APPEAL AND ERROR (§ 681*)—INSUFFICIENT RECORD FOR REVIEW—DEMURRER TO AMENDED PLEA.

The overruling of a demurrer to an amended plea cannot be reviewed when the amendment does not appear in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2883, 2884; Dec. Dig. § 681.*]

2. SALES (§ 117*)—RESCISSION OF CONTRACT—FAILURE TO DELIVER SHOWCASE WITH JEWELRY.

Failure of the seller of jewelry to deliver a showcase therewith the very moment or day or hour the jewelry was delivered is not of itself sufficient to warrant rescission, in absence of a provision or stipulation to that effect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 291; Dec. Dig. § 117.*]

3. CONTRACTS (§ 261*)—RESCISSION—GROUNDS.

A contract is made by the joint will of two parties, and can only be rescinded by their joint will; but one party may so wrongfully repudiate it as to authorize the other to renounce it and refuse to be longer bound thereby, as when his acts and conduct evince an intent to no longer be bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174-1180; Dec. Dig. § 261.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1534; vol. 8, pp. 7613-7616.]

4. CONTRACTS (§ 261*)—RESCISSION—GROUNDS. Merely because a given act or course of conduct of one party is inconsistent with the contract is not sufficient to authorize the other to renounce it, but it must be inconsistent with an intent to be longer bound by it, and, while every breach is inconsistent with the contract, every breach by one party does not authorize the other to renounce the contract in toto.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174-1180; Dec. Dig. § 261.*]

5. SALES (§ 354*)—ACTION FOR JEWELRY SOLD—INSUFFICIENT PLEA.

A plea in assumpsit averred that the debt sued on was based on an account which was for a lot of jewelry, and as a part of the contract plaintiff agreed to furnish defendant a showcase, said contract being in writing, and same being set out in one of the counts of the amended complaint, and that, relying on such, defendant agreed to purchase the jewelry, and that, when plaintiff shipped the same, it failed to furnish the showcase, and defendants thereupon returned the jewelry to plaintiff, who thereafter sent a showcase which defendants declined to accept. Held neither to show a rescission of the contract, nor to allege facts authorizing defendants to renounce it, and hence to be insufficient.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1022; Dec. Dig. § 354.*]

Appeal from Circuit Court, Lowndes County; J. C. Richardson, Judge.

Assumpsit by McAllister-Coman Company against Charles J. Mathews and others. From a judgment for defendants, plaintiff appeals. Reversed.

The fourth plea, as amended, is as follows: "The defendants say that the alleged debt, the foundation of this suit, is based upon an account which was for a lot of jewelry, and as a part of the contract the plaintiff agreed to furnish the defendants a showcase, said contract being in writing, and same being set out in the fourth count of the amended complaint; and, replying upon such, the defendants agreed to purchase said jewelry, the foundation of this suit, and that when the plaintiff shipped the defendants said jewelry, it failed to furnish said showcase, and defendants thereupon returned plaintiff the jewelry shipped to defendants, and after defendants returned the jewelry to plaintiff that plaintiff then sent to defendants a showcase, which defendants declined to accept." The demurrers were the same as those set out in a former appeal of this case.

W. P. McGaugh and H. S. Houghton, for appellant. Powell, Hamilton & Lane, for appellees.

MAYFIELD, J. The only errors assigned are to the overruling of demurrers to pleas 3 and 4 as last amended. We cannot review the overruling of the demurrer to plea 3 as last amended, for the reason that the plea as last amended does not appear of record. By the judgment entry it is made to appear that demurrer was sustained to the plea as it here appears of record. The judgment entry shows that the plea was subse-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quently amended, and that the demurrer was thereafter overruled; but this last amendment is not shown, nor is the plea set out as last amended. So we cannot review this last ruling on plea 3.

Plea 4 was held bad on the former appeal of this case. 150 Ala. 173, 43 South. 747. We then said of this plea: "The demurrer to the fourth plea should have been sustained. Said plea does not set out the contract, either in words or by reference, nor does it allege that the showcase was not furnished, nor that the plaintiff had failed or refused to furnish it, but only that the plaintiff failed to ship it with the jewelry."

There was an attempt to amend this plea in accordance with the above decision; but the attempt is a failure. It does refer to the contract of sale which is set out in one count of the complaint; but it wholly fails to show any sufficient ground for a repudiation of the contract of sale by the defendant. It merely alleges that, when "the plaintiff shipped the defendant said jewelry, it failed to furnish said showcase." This, without more, is not sufficient to authorize a repudiation. No actual fraud, whatever, is alleged. A mere failure to deliver the showcase the very moment or day or hour the jewelry was delivered is not of itself sufficient to warrant a rescission, in the absence of a provision or stipulation to that effect. It does not appear that there was any refusal to deliver; but it affirmatively appears that it was subsequently delivered. It was not shown to be necessary that the jewelry and the showcase should arrive on the same day, or that the showcase should precede the jewelry. The demurrer should have been sustained to this plea as amended.

A contract is made by the joint will of two parties, and can only be rescinded by the joint will of the two parties; but one party may so wrongfully repudiate the contract as to authorize the other to renounce it and refuse to be longer bound thereby. This happens when the acts and conduct of one of the parties evinces an intention to no longer be bound by the contract. Merely because a given act or course of conduct of one party to a contract is inconsistent with the contract is not sufficient; it must be inconsistent with the intention to be longer bound by it. Every breach of a contract is, of course, inconsistent with the contract; but every breach by one party does not authorize the other to renounce it in toto.

The plea, of course, did not show a rescission of the contract, nor did it allege facts which would authorize the defendant to renounce it, and hence it was insufficient, as before decided.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

SANDERS v. STATE.

(Supreme Court of Alabama. April 19, 1910.)

1. LARCENY (§ 56*)—EVIDENCE—CORPUS DELICTI.

In a prosecution for larceny of goods from a store, evidence held insufficient to prove the corpus delicti.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 149; Dec. Dig. § 56.*]

2. LARCENY (§ 51*)—EVIDENCE—ORDER OF PROOF—CORPUS DELICTI.

On a trial for larceny, evidence of the possession by accused of the goods alleged to have been stolen was inadmissible, where there was not sufficient evidence that the goods had been stolen at all.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 144-146; Dec. Dig. § 51.*]

3. CRIMINAL LAW (§ 680*)—EVIDENCE—ORDER OF PROOF.

On a trial for receiving stolen goods, evidence of the possession by accused of the goods alleged to have been stolen and received by him was inadmissible, where there was no evidence authorizing an inference that the goods had been stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609-1613; Dec. Dig. § 680.*]

4. RECEIVING STOLEN GOODS (§ 2*)—ELEMENTS OF OFFENSE.

To constitute the offense of receiving stolen goods, the goods must first have been stolen.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. § 2.*]

5. LARCENY (§ 56*)—EVIDENCE—WEIGHT—CORPUS DELICTI.

The unexplained possession by one of property does not raise the presumption that a larceny has been committed; but there must be additional evidence to establish the corpus delicti under the rule that, before possession of property is evidence of a crime, the crime must be proved.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 149; Dec. Dig. § 56.*]

6. CRIMINAL LAW (§ 563*)—CORPUS DELICTI—NECESSITY OF PROOF.

A criminal charge involves the commission of an offense and the guilt of accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 563.*]

Appeal from Circuit Court, Greene County; S. H. Sprott, Judge.

Frank Sanders was convicted of crime, and he appeals. Reversed and remanded.

Harwood & McKinley, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted of larceny, and of receiving stolen goods. The property alleged to be stolen, and received as such, consisted of 16 pairs of pants and 3 pairs of shoes, the property of G. A. Horton.

The corpus delicti was not proven, and for this reason the accused should have been acquitted.

The alleged owner of the property testified on his direct examination as follows: "That

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he knew the defendant. That in January, 1909, before the finding of the indictment, he recovered from the defendant 16 pairs of pants and 3 pairs of shoes. That he (the witness) had never sold any goods like these to the defendant. That the pants were worth from \$1 to \$2.50 wholesale, and some of them \$3, a pair. That the shoes were worth \$5 a pair. That these shoes and pants came out of the witness' store at Pleasant Ridge, and, so far as the witness knew, they were obtained from said store without the witness' knowledge or consent. That witness' store is located in Greene county, Ala. That some of said goods had defendant's cost mark on them." This was all of his testimony on direct examination. On his cross-examination he testified to no other fact tending to prove the corpus delicti; but, among other things, testified: That for a number of years prior to the indictment, and at that time, he was engaged in the mercantile business at Pleasant Ridge, Greene county, Ala.; that during this time there were eight persons besides himself who were authorized to sell goods from his store, and that they did sell same; that he could not swear that the goods in question were not sold out of his store in the due course of trade; that witness was absent from his store a great deal of the time; "that witness had quite a large stock of pants in his store, and quite a large stock of shoes also; that he could not swear that he missed these goods, or any of them, out of his stock, and does not know when they went out of his store; that it was not customary for the cost mark to be removed from goods when they were sold; that witness did not sell these pants and shoes himself, but could not swear that said 16 pairs of pants and three pairs of shoes, or any of them, were stolen; that he could not swear that said shoes were not sold from witness' stock in the regular course of business." This was all the evidence that, in the slightest, tended to prove the corpus delicti.

The goods in question were found in the house of the defendant, and when questioned as to where he got them—the parties questioning him at the time threatening to tie him—he ran away from his house, but did not leave the neighborhood; and subsequently he removed the goods in question to a neighbor's house, but, further than this, made no attempt to conceal them.

All the evidence offered as to the defendant's possession of the goods would have been proper and admissible if the corpus delicti had been proven, or any sufficient evidence offered which would authorize the jury to infer that the goods had been stolen by defendant, or by any other person; but, in the absence of such proof, it was all, of course, inadmissible.

It is but a truism to say that there can be no receiving of stolen property, unless the

property in question is first stolen. It is likewise true that, in order for the possession of property to be evidence of a crime, the crime must be proven. In the recent case of *Smith v. State*, 133 Ala. 150, 31 South. 807 (91 Am. St. Rep. 21), this court reviewed some of our former cases on this subject, and spoke as follows: "It must now be regarded as settled in this state that the unexplained possession of property recently stolen does not as matter of law raise a presumption of guilt from the circumstance. Nor does the unexplained possession by one person of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is a thief. Additional evidence is necessary to establish a corpus delicti. Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief. *Orr v. State*, 107 Ala. 35 [18 South. 142]; *Thomas v. State*, 109 Ala. 25 [19 South. 403]. 'Proof of a charge, in criminal causes, involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged and by none other. In other words, proof of the corpus delicti and of the identity of the prisoner.' *Winslow v. State*, 76 Ala. 47. It is undoubtedly true that both of these essential propositions are generally for the determination of the jury, and both must be proved beyond a reasonable doubt. But where there is no proof of the corpus delicti, no testimony tending in the remotest degree to prove that the property charged to have been stolen was in fact stolen, no larceny shown to have been committed, then there can be no conviction of the prisoner, should the goods described in the indictment charged to have been stolen be found in his possession, though no explanation as to how he came by them be given by him, or, if given, is entirely unsatisfactory. In such case, the evidence is not prima facie sufficient to establish the corpus delicti, and the court should not allow the introduction of evidence of possession by the prisoner of the goods charged in the indictment to have been stolen."

There was no proof that these particular goods in question were stolen from Horton or any other person. There was no proof that these or similar goods had ever been stolen from the alleged owner. The most that it showed was that a part of these goods, or goods like them, were once in the store of Horton. But there was no evidence that they were ever stolen or thought to be stolen, other than the fact that they were found in defendant's possession; and whether this was one day, or one or two or three years, after they were in defendant's store, did not appear. Nor was there any evidence tending to fix the time when the goods were

in Horton's store, or when defendant acquired them.

To repeat, there was no evidence tending to show that the property was ever stolen by any one. The fact that it was once in Horton's store, and was subsequently found in the defendant's possession, does not tend to show that it was stolen. There was not a particle of evidence to show that any theft was ever committed, as to the property in question, or as to any other. There was some evidence of the "corpus," but none of the "delicti."

The rule as to sufficiency of the evidence to support a conviction, in cases like this, is thus stated in Russell on Crimes, vol. 2, pp. 294, 295: "Where the prosecutor kept a large toyshop, and the prisoner, a little boy, came into the shop dressed in a smock frock, and after remaining there some time, from suspicion exerted, he was searched, and under his smock frock were found concealed a doll, six toyhouses, and such other things, and the prosecutor swore that he believed the six toyhouses to be his property, because they exactly resembled other toyhouses of the same sort which he had in his shop, and he gave the same evidence with regard to all the other articles except the doll, and he swore that the doll had been his, as he found upon it his private mark; but he could not say that he had not sold it, and he had not missed, and could not miss, from the nature of the stock, any of the articles which the prisoner was charged with stealing, Erle, J., said: 'It seems to me that you have failed to establish in this case the corpus delicti. It is true the prosecutor swears that the doll was once his, but he cannot state that it was taken from him; and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner.' And an acquittal was directed."

It will be observed that there was no proof that the goods found in defendant's possession were ever lost; much less, stolen.

Mr. Best states the rule as to the sufficiency of evidence in criminal cases as follows: "There must be clear and unequivocal proof of the corpus delicti. Every criminal charge involves two things: First, that an offense has been committed; and, secondly, that the accused is the author, or one of the authors, of it. 'I take the rule to be this,' says Lord Stowell, in his judgment in *Evans v. Evans*: (1) 'If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual corpus delicti. * * * But to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doc-

trine of presumptions.' Sir Matthew Hale, also, in his Pleas of the Crown, laid down the two following rules, which have met with deserved approbation: 'I would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods.' " 2 Best on Ev. pp. 751, 752.

It follows that the general affirmative charge should have been given for defendant.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

FAIRCLOTH-BYRD MERCANTILE CO. v. ADKINSON.

(Supreme Court of Alabama. April 21, 1910.)

1. BILLS AND NOTES (§ 464*)—ACCEPTANCE—PLEADING.

In declaring on the acceptance of a bill of exchange, it is not necessary to allege that it is in writing, though written acceptance must be proved.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1446; Dec. Dig. § 464.*]

2. BILLS AND NOTES (§ 69*)—"BILL OF EXCHANGE"—WRITTEN ACCEPTANCE.

An order drawn by one person on another in favor of a third person for a specific amount is a "bill of exchange" which can only be accepted by a writing signed as required by Code 1896, § 880.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 116; Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 1, pp. 784-787.]

3. EVIDENCE (§ 217*)—ADMISSIONS—ORAL ACCEPTANCE OF BILL OF EXCHANGE.

Where, in an action on an orally accepted order, for the rent of certain mules, plaintiff also declared on defendant's original promise to pay the rent of the mules, evidence of defendant's oral acceptance of an order for the amount due, while inadmissible to fix a liability on the order, was competent to show defendant's original promise to pay.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 217.*]

Appeal from Geneva County Court; P. N. Hickman, Judge.

Action by W. A. Adkinson against the Faircloth-Byrd Mercantile Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The first and third counts were the common counts. The second count was as follows: "Plaintiff claims of the defendant the sum of \$123.75, due by order given by J. C. Hinson on defendant for \$123.75, on May 22, 1907, and payable to the plaintiff, which said order defendant accepted and promised to pay, and on which it did pay \$22, which is admitted as a credit, but failed and refused to pay the balance." The pleas were that the

order declared upon was not accepted in writing and signed by the defendant drawee; second, special promise to answer for the debt, default, or miscarriage of another. The following charge was requested by the defendant: "(3) If the jury believe the evidence in this case, they cannot find for the plaintiff on the second count of the complaint."

C. D. Carmichael, for appellant. W. O. Mulkey, for appellee.

SIMPSON, J. This suit is by the appellee against the appellant; the first and third being common counts, and the second being on the acceptance of an order.

Defendant demurred to the second "paragraph" of the complaint, but in its assignments refers to the count, and the court treated it as a demurrer to the second count and overruled it. While this is irregular, yet, as no point was made on the wording of the demurrer, we will treat it as the court did.

The insistence of the appellant is that the demurrer should have been sustained to said second count, because it does not allege that the acceptance of the order was in writing. There was no error in overruling the demurrer. This court has held that, in declaring on the acceptance of a bill of exchange, it is not necessary to allege that it is in writing, although that must be proved. *Whilden & Sons v. M. & P. Nat. Bank*, 64 Ala. 1, 29, 38 Am. Rep. 1.

Defendant then interposed a plea stating that the said order was not accepted in writing and signed by the defendant, the drawee. A demurrer was interposed to this plea and sustained by the court. In this there was error.

This court has held that an order drawn by one person, upon another, in favor of a third person, for a specific amount, is a "bill of exchange," and that an acceptance, to be binding, must be in writing and signed as the statute requires. *Anderson & Co. v. Jones*, 102 Ala. 537, 538, 539, 14 South. 871; Code 1886, § 1766; Code 1896, § 880.

While the order, itself, and the testimony as to its verbal acceptance, were not admissible in order to fix a liability on the order, yet, in view of the testimony tending to show an original promise to pay the rent of the mules, if plaintiff would let Hinson have them, and of the further testimony tending to show that when the account was presented to the defendant's president he requested the plaintiff to get a statement from Hinson, as to the amount due, said evidence was properly admitted as applicable to the first and third counts of the complaint, and as tending to show that he accepted the statement made by Hinson, as showing the amount due. For the same reason the second order for \$37.50 was admissible; but its probative force should have been limited and explained.

For reasons stated the court erred in refusing to give charge 3, requested in writing by the defendant.

What has been said sufficiently indicates the law of this case, and it is unnecessary to mention specifically the other charges refused and given.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

BUTT et al. v. McALPINE.

(Supreme Court of Alabama. April 21, 1910.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 184*)—EFFECT—TITLE VESTING IN GRANTEE.

A general assignment of all a debtor's property to pay debts generally vests in grantee the entire, indefeasible title, leaving to grantor no title, legal or equitable.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 555; Dec. Dig. § 184.*]

2. TRUSTS (§ 365*) — RESULTING TRUST IN SURPLUS—IN ASSIGNOR FOR CREDITORS — ENFORCEMENT—LACHES.

If the recitals of an assignment for the benefit of creditors do not negative the creation of a resulting trust in the surplus over the sum employed to satisfy debts, or in the unconverted corpus, the law creates an implied trust in favor of the assignor; but this right is no more than an equity which the assignor must assert within due time in order to avoid the imputation of laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

3. TRUSTS (§ 365*) — RESULTING TRUST — LACHES.

Failure of the assignor in such case for nearly 40 years to assert a resulting trust in lands embraced in the assignment, without excuse, while innocent persons interested adversely to such trust, as shown by the public records, invested considerable money in the land, and executed warranties of title, gives rise to a conclusive presumption that the trust has been extinguished.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

4. EQUITY (§ 67*) — LACHES — EQUITABLE RIGHT TO LAND—ENFORCEMENT.

An equitable right to land not accompanied by possession presupposes title in another, and to enforce such right appropriate and timely appeal to equity is essential in order to obviate the rule as to laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

5. EQUITY (§ 70*)—GROUNDS OF "LACHES."

"Laches" rests in a large degree on acquiescence, which presupposes notice of a status opposed to the title or equity sought to be enforced.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 200-203; Dec. Dig. § 70.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

6. EQUITY (§ 69*)—LACHES—EQUITY IN LAND — EXTINGUISHMENT—PRESUMPTION.

The presumption of extinguishment of an equity in land arising from laches in asserting

the same does not depend on action or inaction of the bona fide claimant of the title itself, unless such action or inaction is infected with fraud or deception.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 197-199; Dec. Dig. § 69.*]

7. TRUSTS (§ 365*)—ENFORCEMENT OF RESULTING TRUST—LACHES.

The assignor and his successors in right not having been in possession, their equity could not be enforced in such case, irrespective of whether complainant and his predecessors in bona fide claim of title were in actual possession in whole or in part.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

Appeal from Chancery Court, Mobile County; Saffold Berney, Chancellor.

Bill by John W. McAlpine against Cary W. Butt and others. From a decree for complainant, respondents appeal. Affirmed.

Gallyard & Mahorner, for appellants. Gregory L. & H. T. Smith and Ervin & McAleer, for appellee.

MCOLLELLAN, J. John W. McAlpine filed his bill to quiet title to certain lands in the county of Mobile against Cary W. Butt et al. The respondents (those with whom we are concerned) propounded, by answer, their claim to the land and, also, constituted their answer a cross-bill by which it was prayed that their title to the lands be vindicated and quieted, as against original complainant. The court below sustained the title of original complainant, and declared the cross-complainants to be without right or title to, or interest or claim in, the lands in question.

On December 5, 1846, Franklin C. Heard owned the real estate in controversy. Being unable, at that time, to discharge his just debts, Heard executed to James Elder and Benjamin M. Woolsey a general assignment of all his property for the benefit of his creditors. The consideration of the conveyance to Elder and Woolsey is recited therein to have been the "premises" we have indicated and "a just distribution of his (Heard's) estate and effects among his creditors as also of the sum of \$5.00 to him (Heard) in hand paid by the said James Elder and B. M. Woolsey, the receipt whereof is hereby acknowledged." (Italics supplied.) The conveyance, by express reservation, excepted from its operation the properties settled upon Emily W. Woolsey, who subsequently became the grantor's wife.

The general declaration of trust proceeds along the usual lines of such instruments. The specific directions for the application of the trust funds coming into the hands of Elder and Woolsey may be thus summarily stated: First. To retain and reimburse themselves for expenditures and expenses incurred in the creation and administration of the trust. Second, third, fourth, and fifth. Out of the residue, and evidently in the order named, to pay and satisfy a demand to G.

W. Matthews and also the following notes: One to the Fireman's Insurance Company, made by James Elder and indorsed by the grantor; one to the same company, made by the grantor and indorsed by James Elder; one held by the Bank of Mobile, made by the grantor and indorsed by James Elder; one held by Bancroft, made by the grantor and indorsed by James Elder; and one held by Ames, made by the grantor and indorsed by James Elder; two notes to the Matthews named. And, sixth, to distribute the "residue of the trust moneys, after fulfilling the trust aforesaid, * * * ratably and without preference or distinction to the creditors" of the grantor. James Elder and Benjamin W. Woolsey, as also of course the grantor, signed the instrument; and it was promptly filed for record in the probate office of the county of Mobile.

The title or rights asserted by the respondents (appellants) rest upon their being heirs at law of Franklin C. Heard, the grantor in the general assignment described. And the doctrine upon which they rely to sustain their asserted title or rights is, to state it generally, that where a trust of the character under consideration is created, and the trust is closed, the grantor or his successor in title or right is entitled to the surplus of the funds, or unconverted, corpus of the originally created trust estate, remaining after the satisfaction of the purposes of the trust; and, if a great period of time elapses after the time the money was demandable by the beneficiaries of the trust, viz., the creditor or creditors, a presumption of payment of the debts, or satisfying arrangement with the creditors, will be indulged, to the end that the unused residuum may revert to the grantor or his successor in right.

The complainant grounds his claim to title to the real estate in question upon an unbroken chain of record title extending over a period of more than 40 years; but the absent link, back of that period, is that no deed from Elder and Woolsey is shown to have been, in fact, executed. The issue of adverse possession vel non, by those from whom complainant deduces his asserted title, is controverted in the evidence; but in the view of the cause prevailing with us that issue cannot control the conclusion here.

The complainant, assailing the basis of the appellant's assertion of title or right to this real estate, invokes the rule of repose implied in the doctrine of laches, or upon the presumption arising after 20 years or more of inactivity in assertion of the right claimed, and this upon the further insistence that the grantor's interest, or that of his successor in right, is unconverted, after discharge of all debts of the grantor, corpus of the trust estate, was, at most, a resulting trust, and not a legal or equitable estate therein.

The respective contentions may have suf-

ferred, in force and breadth of statement, as the result of our effort to condense; but the general reason and effect of each insistence is at least indicated.

The decree below must be affirmed; and so in consequence of the application of well-recognized doctrine to the status presented by this record. That result may be justifiable upon other grounds; but it will suffice for present purposes of complete decision of this litigation, determining the rights vel non of the parties, to set down the reasons controlling, and on which we rest, our conclusion in affirmance of the decree now assailed.

Generally speaking—that is, without reference to conveyances expressly providing for reverter to the grantor-debtor—a general assignment of all of a debtor's property for the purpose of paying his debts vests in the grantee the entire, indefeasible title, leaving in the grantor no title, legal or equitable. *Comer v. Constantine*, 86 Ala. 492, 5 South. 773, and authorities therein cited; 4 Cyc. p. 218, and notes; 3 Am. & Eng. Ency. Law, p. 37.

If the recitals of the conveyance do not thwart the creation by operation of law of a resulting trust in the surplus over the sum employed to satisfy the debts of the grantor, or in the unconverted corpus, in whole or in part, of the trust estate, then in either or both the law creates the character of implied trust, viz., resulting in the grantor, in such surplus or unconverted part of the whole. 4 Cyc. p. 284, and authorities cited in note 26. In the very nature of things such an implied trust, to one's advantage, is an equity only. *Nettles v. Nettles*, 67 Ala. 599; *Tilford v. Torrey*, 53 Ala. 120.

This trust was created in 1846; and if to this we arbitrarily add 24 years, bringing the time up to 1870, and apply to that status the presumption of satisfaction of the purposes of the trust after the elapsing of so great a period, and further assume that the land in question was unconverted in the payment of the debts of the grantor, the appellants were then (1870), we grant for the argument only, entitled to a resulting trust therein. From 1870—24 years after the creation of the trust and substantially a like period after the money was demandable by the creditors (In re Estate of Potter and Page, 54 Pa. 465)—up to the filing of the bill in this cause, nearly 40 years had elapsed without any assertion by appellants, or their predecessors in right, of the resulting trust in these lands. In the meantime the predecessors, in asserted right, of the original complaint, had paid taxes on these lands and the judicial and recordation records of the county of Mobile bore repeated evidences that others were interested adversely to the resulting trust claimed by appellants, investing in the lands considerable sums of money, and subjecting themselves to the liabilities of warranties of title. In the light of these recorded acts of innocent grantors and grantees of this land, the appellants, on the most favorable view to their asser-

tion, at this time, of implied trust, we cannot avoid the application, against appellants, of the conclusive presumption, strongly pressed by the solicitors for appellee, that, after complete inactivity in the assertion of their claimed trust for nearly 40 years, and without any semblance of excuse therefor, it has been extinguished in any one of the forms by which that right could become extinct. Such is the doctrine now well settled in this court, as will appear by reference to the following authorities: *Black v. Pratt Coal Co.*, 85 Ala. 504, 5 South. 89; *Roach v. Cox*, 49 South. 578; *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894; *Woodstock v. Roberts*, 87 Ala. 436, 6 South. 349; *Bass v. Bass*, 88 Ala. 408, 7 South. 243.

The basis and hope of the doctrine is repose—repose in titles bona fide claimed and repose against litigation, to resist which the passing of so great a period as 20 years is well anticipated to operate to the uninvited prejudice of those called upon, at that late day, to defend.

But it is urged for appellants that there was no such possession of the land in question as effected to bring notice of adverse claim to their trust. That argument might have force if the reliance of appellants was a character of title drawing to it constructive possession. In that event, doubtless, there would be no necessity, as indeed there would be no occasion, to take account of mere proclamations of adverse claim to the land—a claim unsupported by actual possession in whole, or in part under color of title of the land. But such is not appellants' reliance. Granting all that could be well insisted on, they had an equity only. Such a right, practically lying in action only, so far as possession is concerned, in itself recognizes legal title in another. To reduce such right to a tangible form, appropriate appeal to equity is essential, unless, of course, the parties in interest themselves effect the like result. It, accordingly, necessarily follows that the beneficiary of a resulting trust must, himself, become the actor in order to have the right to the possession of that to which the implied trust entitles him. The very existence of the implied trust is a constant warning that some other holds the legal title, ordinarily drawing to it constructive possession, to the subject of the trust in his favor. Whether, in point of fact, the adverse claimant has the true legal title, cannot be important when the inquiry is: Has the beneficiary of the implied trust remained, with respect to the assertion of his right, wholly inactive for 20 years or longer, and so without excuse or recognition of his right by those against whom he could enforce it?

If it should be ruled that only actual possession, in whole or in part under color of title extending such partial possession to the whole, not otherwise actually adversely possessed, would operate to impose the duty on the beneficiary of a resulting trust to act, if

he would avoid the presumption arising from inactivity for 20 years or more, in assertion of his mere equity, the result would be to create the anomaly of relieving the beneficiary of the application of the presumption on a condition that was entirely consistent with the implied trust right of the beneficiary; to, in effect, shift the inspiration to activity to the bona fide claimant of the legal title to voice his claim by actual possession, at least in part, of the land in which the resulting trust existed. That might be, doubtless is, good doctrine when laches is the answer relied on to defeat an asserted title or equity, because laches rests, in a large degree, upon acquiescence, and acquiescence presupposes notice of a status opposed to the title or equity sought to be enforced. *Haney v. Legg*, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81, and authorities cited therein. But the presumption with which we are concerned does not depend upon the action or inaction of the bona fide claimant of the title itself, unless such action or inaction is infected with fraud or deception. The shoe is on the other foot—that of the beneficiary. He it is who must first move, unless excused by fraud or deception avoiding the imputation of his lack of diligence. The principle cannot be so different as to deny the influence of the analogy of an inactive mortgagee out of possession. In such case, after 20 years of inactivity to enforce undoubted (originally) right, the mortgagee cannot prevail. Authorities supra.

In that instance, no act is required, in the absence of fraud or deception, to put into operation the running of the period, which, when completed, concludes against such right; and this, we apprehend, is due to the fact that on the mortgagee out of possession rests the obligation to become the actor in the enforcement of his rights.

That original complainant and those through whom he claims, reaching back for more than a third of a century, are and were claimants in good faith of the title to these lands, appears without doubt. Covering this great period, as respects these lands, deeds thereto, based on reasonably valuable considerations, were recorded, mortgages were so recorded, litigation followed upon the assertion of rights in the premises, reaching this court in the case of *Masich v. Shrearer*, 49 Ala. 226, and taxes were paid.

No fraud or deception appears to have been practiced by these consecutive claimants; nor, on the other hand, is any semblance of excuse offered or suggested for such complete, long-continued inactivity on the part of the beneficiaries of the trust running to them.

To conclude, on this theory of the case, we hold that such inactivity, without justification or excuse, closes the courts to the enforcement of the equity of appellants, in these lands, they or their predecessors in right not having been in possession of the land; and

so, whether original complainant and his predecessors in bona fide claim of title were in actual possession of the land, in whole or in part.

The decree is therefore affirmed.
Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

ROQUEMORE & HALL v. MITCHELL BROS. et al.

(Supreme Court of Alabama. April 21, 1910.)

1. SPECIFIC PERFORMANCE (§ 73*)—CONTRACTS ENFORCEABLE — CONTRACTS FOR PERSONAL SERVICES.

Equity will not specifically enforce a contract for personal services which are material or mechanical, and not peculiar or individual.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206, 207; Dec. Dig. § 73.*]

2. SPECIFIC PERFORMANCE (§ 73*)—RELIEF—ANCILLARY RELIEF—INJUNCTION.

Where a contract is for special or extraordinary personal services or personal services purely intellectual and individual, equity will grant an injunction in aid of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

3. SPECIFIC PERFORMANCE (§ 73*)—CONTRACTS ENFORCEABLE — CONTRACTS FOR PERSONAL SERVICES.

Equity will not specifically enforce a contract for personal services requiring skill, judgment, and discretion, but will leave the parties to their action at law for damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

4. INJUNCTION (§ 60*)—PURPOSES OF RELIEF—ENJOINING BREACH OF CONTRACT — CONTRACT FOR PERSONAL SERVICES.

Injunctions to enjoin the breach of a contract for services, continuous in their nature, involving special skill, are granted with great caution, even though the legal remedy by damages may be inadequate.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117-119; Dec. Dig. § 60.*]

5. SPECIFIC PERFORMANCE (§ 75*)—SUBJECTS OF RELIEF—CONTINUOUS DUTIES.

Equity will only decree specific performance when it can dispose of the subject-matter by a decree capable of present enforcement, and cannot award specific performance of a continuous duty extending over a series of years, but will leave the party to his legal remedy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

6. SPECIFIC PERFORMANCE (§ 108*)—RELIEF—INCIDENTAL RELIEF—INJUNCTION.

An injunction is granted in a suit for specific performance only as incidental to the execution of the decree; and, where the decree of specific performance cannot be enforced, an injunction will not be granted, complainant being left to his legal remedy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

7. SPECIFIC PERFORMANCE (§ 73*)—CONTRACTS UNENFORCEABLE — CONTRACTS FOR PERSONAL SERVICES.

A contract to permit complainants to carry out defendant's contract with a county to load gravel from a pit belonging to the county, and to sell gravel therefrom, and to assign defendant's contract with the county to complainants if the county consented, will not be specifically enforced, being a contract for personal services.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

8. SPECIFIC PERFORMANCE (§ 114*)—BILLS—ALLEGATIONS—PERFORMANCE BY COMPLAINANT.

A bill for specific performance was defective where it did not allege that complainants paid the amounts and furnished the security for deferred payments agreed, in the contract sought to be enforced, to be paid and furnished within the time and in the manner provided therein.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 365, 368; Dec. Dig. § 114.*]

9. SPECIFIC PERFORMANCE (§ 114*)—BILL—ALLEGATIONS—OFFER TO PERFORM—SUFFICIENCY OF OFFER.

A bill for specific performance which merely alleges generally complainants' offer to perform, but does not allege an offer to perform which will comply with the terms of the contract, is insufficient.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

10. SPECIFIC PERFORMANCE (§ 114*)—ALLEGATIONS—BILL.

Great accuracy of averment is required in bills for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

11. SPECIFIC PERFORMANCE (§ 14*) — CONTRACTS UNENFORCEABLE.

Complainant cannot compel specific performance by defendant of his contract to permit plaintiff to carry out defendant's contract with a county to load gravel from a pit belonging to the county, where the county did not consent to the contract between plaintiff and defendant, since to do so would involve compelling the county to allow complainant to perform its contract with defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 33; Dec. Dig. § 14.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Suit by Roquemore & Hall against Mitchell Bros. and another. From a judgment dismissing the bill, complainants appeal. Affirmed.

Ray Rushton, for appellants. Gunter & Gunter, for appellees.

MAYFIELD, J. The bill is one to enforce specific performance of a contract, and to enjoin respondents from interfering with the performance thereof pending the suit. The respondents demurred to and answered the bill, denying its equity, and moved to dissolve the injunction issued upon its filing. On the hearing upon those issues the injunction was dissolved and the bill dismissed for want of equity. The chancellor also declined to fix

bond and reinstate the injunction pending appeal. From this decree complainants appeal.

The contract is one not susceptible of specific performance. It is a contract for personal service or employment, to continue five years, but on condition that, if Montgomery county will consent to a transfer of a certain contract which it had with a part of the respondents to the complainants by such respondents, then it is to become a contract to transfer and assign such other contract. The condition subsequent is not shown to have happened, nor is the contract sought to be enforced upon this theory, but on the theory that it is one of employment.

The bill alleges that Mitchell Bros. made a contract with the county of Montgomery to load gravel from the pit of the county, and also to sell gravel to others from such pit, and to be paid therefor by the square yard of gravel loaded for the county, and to pay the county so much per square yard for the gravel sold to third parties. The bill then alleges that Mitchell Bros. employed complainants to carry out this contract with the county for the respondents Mitchell Bros., and for the same consideration that the respondents were to receive from the county. The contract then concludes as follows: "It is further mutually agreed that if the board of revenue of Montgomery county, Alabama, will consent for the said Mitchell Bros. to transfer and assign the above-described contract to Roquemore & Hall, then said Mitchell Bros. upon request of them will so transfer and assign said contract to them, but, if the said board of revenue will not agree for an assignment of said contract, then the foregoing provisions and agreement to employ said Roquemore & Hall to load gravel in said contract shall be and remain in full force and effect." Such contracts are not susceptible of specific performance.

Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary personal services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of a specific performance. *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278. If a contract implies the performance of personal services requiring special skill, judgment, and discretion, a court of equity will not undertake its specific performance. *South, etc., Alabama R. R. Co. v. Highland Ave., etc., R. R. Co.*, 98 Ala. 400, 13 South. 682, 39 Am. St. Rep. 74. Courts of equity will decline jurisdiction to decree specific performance of contract for personal services involving the exercise of special skill, judgment, and discretion, continuous in their nature, and run-

ning through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution by the courts, although the remedy by damages at law may be inadequate. *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758. A court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance, but it cannot decree a party to perform a continuous duty, extending over a series of years, but will leave the aggrieved party to his remedies at law. *Electric Lighting Co. v. Mobile, etc., Ry. Co.*, 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927. A contract for the personal services of an adult, as a general thing, is a matter for courts of law; and for a violation of it the remedy is in damages, and a specific performance will not be enforced. *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 533; *Haight v. Badgley*, 15 Barb. (N. Y.) 501. See *Kemble v. Kean*, 6 Sim. 333; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; *Smith v. Gould*, 2 Ld. Raym. 1274; *Rutland Marble Co. v. Ripley*, 77 U. S. 339, 19 L. Ed. 955; *Cooper v. Pena*, 21 Cal. 403; *Randall v. Latham*, 38 Conn. 48; *Richmond v. Dubuque & S. C. R. Co.*, 38 Iowa, 422; *Ford v. Jermon*, 6 Phila. (Pa.) 6; *Palmer v. Scott*, 1 Russ. & M. 391; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411. Defendant, having contracted to perform at plaintiff's theater at a fixed compensation for a certain time, and not to perform elsewhere during that time, might be restrained by injunction from carrying out an agreement to perform elsewhere, there being no demand in the complaint for a decree of specific performance, and no uncertainty in the contract as to time, place, or substance. *Hayes v. Willio*, 11 Abb. Prac. N. S. (N. Y.) 175. See *Montague v. Flocton*, L. R. 16 Eq. 189. Injunction is only granted as auxiliary to the execution of the decree; and, where the decree itself cannot be enforced, the court will not attempt to restrain, but will leave the party complaining of the breach to his remedy at law. *Fredricks v. Mayer*, 13 How. Prac. (N. Y.) 568; 1 Bosw. (N. Y.) 231. See *Morris v. Colman*, 18 Ves. Jr. 437; *Clarke v. Price*, 2 Wils. Ch. 157; *Kemble v. Kean*, 6 Sim. 333; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393. But see, contra, *W. U. Tel. Co. v. Union Pac. R. Co.* (C. C.) 3 Fed. 423, 1 McCrary, 558; *W. U. Tel. Co. v. St. Joseph & W. R. Co.* (C. C.) 3 Fed. 430, 1 McCrary, 565; *Singer S. M. Co. v. Union B. H. & E. Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904.

The bill is also defective, in that it fails to allege that complainants paid the amounts agreed to be paid by them under the contract sought to be enforced, and furnished the security contracted to be furnished for the deferred payment, within the time and in the manner provided in the contract. This neces-

sity, of course, is attempted to be avoided by showing the refusal of the respondents to accept the payment and security. While the bill avers a tender and an offer to perform, it does not aver a tender or an offer to perform as provided in the contract. This material fact (if it exists) is not averred, but must rest in inference—which is not sufficient. The answer specifically denies that the tender or offer to perform was made in accordance with the terms of the contract sought to be enforced. In bills for specific performance great accuracy of averment is required. *Daniel v. Collins*, 57 Ala. 625; *Johnston v. Jones*, 85 Ala. 287, 4 South. 748. Equity, in this suit, could not (if it would) compel the county of Montgomery to allow complainants to perform the contract which it made with the respondents. This, so far as the bill shows, would be necessary to a specific performance. Certain it is that it fails to show that the county has consented to the arrangement or contract between the parties to this suit.

The decree is affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

BARDIN et al. v. GRACE et al.

(Supreme Court of Alabama. April 21, 1910.)

1. VENDOR AND PURCHASER (§ 220*)—BONA FIDE PURCHASERS.

If a deed is void, a subsequent innocent purchaser is not protected; but, if it is merely voidable, he is protected.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 461-465; Dec. Dig. § 220.*]

2. DEEDS (§ 32*)—NECESSITY FOR GRANTEE.

A deed without a grantee named therein is void, and if the grantor signs a deed, leaving the space for the name of the grantee blank, and authorizes some one as his agent to fill in the name of the grantee, and that person fills it in with the name of the designated grantee, the deed will be valid; but, if the blank is filled with the name of another, it is void.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 64; Dec. Dig. § 32.*]

Appeal from City Court of Montgomery; William H. Thomas, Judge.

Action by Sandy Grace and others against George R. Bardin and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

L. A. Sanderson, for appellants. Hill, Hill & Whiting, for appellees.

SIMPSON, J. The original bill in this case was filed by Sandy Grace, one of the appellants, against J. H. Shreve and George R. Bardin, and afterwards amended by bringing in the other parties complainant and respondent. The bill seeks the cancellation of certain deeds as clouds on the title of the complainants, and rests upon the allegations

that the original complainant is an ignorant negro man; that about February 20, 1908, said Sandy Grace had several lots of land which he wished to sell, and was told by a negro—G. W. Smith—to go to said Shreve, who would purchase same; that he agreed with Shreve to sell the lots to him for \$1,000, and Shreve was to prepare the papers; that the next day G. R. Bardin came to Sandy with the papers, stating that he and Shreve were in the same company; that the deed was signed by Sandy and his son, who had a half interest in the lots, with their wives, \$100 was paid, and a note given for \$900, which would be paid the following day, but, as that day was a legal holiday, Bardin put him off until the following Monday—February 24th—and that since that time it has been impossible to find Bardin; that Shreve denies receiving the deed; that complainant has since learned that when said deed was signed, no grantee was named therein, but subsequently the blank space was filled in with the name of O. T. Mallett, who had the deed recorded, and on February 28th said Mallett conveyed the lots to his wife for a recited consideration of \$10, and on March 2d said Mallett and wife conveyed the property to the defendants W. W. Patrick and T. M. Beck.

The charge is that the entire transaction was a fraud practiced on complainant, in which all of the several purchasers conspired. Mallett claims that he gave \$1,100 for the property and conveyed it to his wife, because \$700 or \$800 of the purchase money belonged to her, and that they sold it on March 2d for \$750. It is evident that the entire transaction was a fraud, up to the time when Patrick and Beck purchased; but the evidence does not show that they participated in the fraud. They claim to be innocent purchasers.

The respondents, by their answers, rely entirely upon the facts of the transaction, denying the allegations of the bill, and do not, by any pleading, raise the question of estoppel, which should have been pleaded in this case, if available at all. The authorities hold that if a deed is void a subsequent innocent purchaser is not protected, but that if it is merely voidable he is. 13 Cyc. 591. A deed without a grantee named therein is void. 13 Cyc. 540; *Allen v. Withrow*, 110 U. S. 119, 128, 3 Sup. Ct. 517, 28 L. Ed. 90; *Golden v. Hardesty*, 93 Iowa, 622, 61 N. W. 613; *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 803, 806.

It is true that there are authorities to the effect that if a person signs a deed in which the space for the name of the grantee is blank, and authorizes some one as his agent to fill in the name of the grantee, and that person does fill it in with the name of the designated grantee, the deed will be valid. *Allen v. Withrow*, supra. But in this case there

was no such agreement. Sandy thought he was selling to Shreve, and the deed was in fact taken by a man of straw, and subsequently filled in by the name of a man unknown to the grantor. It was consequently void, and the subsequent purchaser is not protected. Sandy acted promptly, in placing the matter in the hands of his lawyer and having the suit commenced as soon as he discovered the fraud that was perpetrated on him. The evidence shows that the space for the name of the grantee was blank when the deed was signed.

The court properly found that the complainants were entitled to relief prayed. The decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

BYRD v. HICKMAN.

(Supreme Court of Alabama. April 21, 1910.)

1. FRAUDS, STATUTE OF (§ 33*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—ORIGINAL PROMISE.

If, for a consideration moving from a debtor, or for a detriment suffered by a debtor, a third person engages with the debtor to pay the debt to the creditor, the agreement is not within the statute of frauds, since the engagement is independent and supported by new consideration.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.*]

2. APPEAL AND ERROR (§ 195*)—AMENDMENT OF PLEADINGS—OBJECTIONS.

A request for the general affirmative charge cannot serve in lieu of an objection to the allowance of an amendment to the complaint alleged to introduce a new cause of action, or of a motion to strike on that account.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1490; Dec. Dig. § 195.*]

3. ACTION (§ 38*)—COMPLAINT—CONJOINING DISTINCT ACTIONS IN COUNT.

A count in a complaint alleged that L. was indebted to plaintiff, that defendant, to obtain payment from L. of a debt owing him, out of the money L. intended to pay plaintiff, agreed with L. that, if L. would give defendant the money in question, defendant would pay plaintiff L.'s note and take up the mortgage securing it when due, that L. paid defendant such sum, and defendant failed to pay L.'s note to plaintiff, that plaintiff elected to accept the promise made by defendant, and that defendant in a conversation with L. asked her to call his attention to the fact a few days before L.'s note became due to plaintiff, which she did, whereupon defendant again promised L. to pay it, but before doing so required her to agree to transfer to defendant a rent note, which was assigned to defendant as promised. Held, that it did not join two distinct causes of action, the second engagement declared upon being the same as that first set forth, with the addition of an element incorporated therein by mutual assent of the parties, viz., the agreement of L. to transfer to defendant the rent note, and no new consideration other than the mutual assent was necessary to support the addition so made.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 549; Dec. Dig. § 88.*]

4. CONTRACTS (§ 75*)—CONSIDERATION.

{One's doing, or agreeing to do, or not to do, that which he is in duty bound to do or not to do, is not a sufficient consideration to support a promise by another, and hence a promise of one owing a debt to make a payment thereon would be no consideration for a promise of the creditor to pay a debt of the promisor to a third person.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.*]

5. FRAUDS, STATUTE OF (§ 33*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

The assignment of a rent note to a creditor of the assignor for such creditor's promise to pay a debt of the assignor to a third person would be a good consideration for the promise, if such assignment and delivery was not merely a payment on the assignor's debt to the creditor.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.*]

6. CONTRACTS (§ 1*)—VALIDITY.

That a contract, offending against no law, is peculiar and may bear grievously upon one of the parties thereto, will not render it invalid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. § 1.*]

7. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.

The addition of a count to a complaint will not be deemed the introduction of a new cause of action, where it refers to the same transaction, property, title, and parties as the original, under the express provisions of Code 1907, § 5367, and hence is not of itself subject to the plea of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Appeal from Geneva County Court; R. D. Crawford, Special Judge.

Action by P. N. Hickman against R. E. Byrd. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

In addition to the pleadings had on the former appeal in this case, plaintiff filed an amendment to his complaint, consisting of the following additional counts:

"(4) Plaintiff claims of the defendant the further sum of \$120, with interest thereon, for that Mrs. M. J. M. Lewis, was on, to wit, during the month of May, 1906, indebted to the plaintiff in the sum of \$120, due October 1st of that year, and for the purpose of paying such debt the said Mrs. Lewis had in her possession 'a check for \$150; and the plaintiff avers that the said defendant went to the said Mrs. Lewis, and asked the said Mrs. Lewis if she could help the defendant, meaning thereby to ask her if she could pay the defendant any money on an account which the defendant claims that she owed him. Whereupon the said Mrs. Lewis stated that she was indebted to the plaintiff, and had in her possession the money with which to pay the plaintiff, and that she did not want to pay it out. Whereupon the said R. E. Byrd then and there, in order to get said

money, did promise and agree with the said Mrs. Lewis that, if she would let him have as much as \$75, he, the defendant, would pay P. N. Hickman the amount due him, and then take up the mortgage held by Hickman against Mrs. Lewis when the same came due, when plaintiff avers that the said Mrs. Lewis thereupon paid the said Byrd \$75, relying upon said promise, and that the said Byrd failed and refused to perform his part of the said promise, and failed and refused to pay said sum to the plaintiff, and plaintiff avers that he has elected to accept said promise made by Byrd. Wherefore this suit.

"(5) The plaintiff adopts the entire portion of said fourth count down to and including the words, 'and plaintiff avers that he has elected,' etc., and adds thereto the following: And plaintiff avers that in said conversation the defendant told Mrs. Lewis to call his attention to the fact a few days before the note to plaintiff became due, and that accordingly the said Mrs. Lewis did, on or about October 1, 1906, call at the office of the defendant, and call his attention to the promise. Whereupon the defendant did then and there again promise the said Mrs. Lewis to pay said debt, but, before doing so, required the said Mrs. Lewis to agree to transfer to the defendant the rent going to her for the rent on the place for 1907, in the sum of \$150, which rent was by the said Mrs. Lewis assigned and turned over to the defendant as promised. And the plaintiff further avers that as a part and parcel of said transaction the said defendant did call the plaintiff over the phone and ascertain the amount due, and did promise to the said Mrs. Lewis to pay the amount thus due on January 1, 1907, less the interest from October 1, 1906, to January 1, 1907; and the plaintiff avers that he has elected to accept said promise and to sue thereon. Hence this suit."

The following charge was refused to the defendant: "(5) The court charges the jury that there is no consideration for the alleged promise of Byrd to Mrs. Lewis down in the fields."

C. D. Carmichael, for appellant. W. O. Mulkey, for appellee.

MCLEILLAN, J. This is the second appeal in the case. Byrd v. Hickman, 159 Ala. 505, 48 South. 609. The sole question considered and decided on that appeal was whether the agreement made by Byrd to Hickman, over the phone and not in writing, to pay, as Hickman contended, the Lewis mortgage debt to Hickman, mortgagee, was within the statute of frauds pleaded in the cause.

It is now contended, upon amended (after reversal here) counts 4 and 5, that Byrd's alleged promise to the Lewises to pay their

mentioned debt to Hickman, a third person, for a consideration passing from Mrs. Lewis to Byrd or in consequence of a detriment suffered by the Lewises, or either of them, as the immediate result of a reliance upon Byrd's promise to pay Hickman's mortgage debt, vested Hickman with a right of action against Byrd on that promise. In short, the decision on former appeal dealt only with the inquiry whether the promise over the phone was within or without the statute of frauds. In deciding the question, necessarily requiring the construction of that agreement and the determination of its legal effect, it was ruled that forbearance was the sole consideration moving from Hickman to Byrd and supporting Byrd's promise to subsequently pay the Lewis mortgage debt; that forbearance is a sufficient consideration to support the promise of a third person to pay the debt of another to the debtor's creditor; and that such an engagement, not being a new and independent agreement, to which the payment of the debt or the other is a mere incident, is precisely the character of undertaking or obligation which the statute of frauds was intended to include and to which that statute does apply. The decision was rested distinctly upon the case of *Westmoreland v. Porter*, 73 Ala. 452, which was in immediate point. It was delivered in 1883, and has been repeatedly referred to since without intimation that its rule, in the particular in question, was of doubtful soundness. Its doctrine is expressly recognized in *Clark v. Jones*, 85 Ala. 127, 4 South. 771. That the doctrine of the case is generally regarded as sound may be seen by reference to 20 Cyc. p. 192, and notes to subhead 3.

After determining the question presented, as indicated, in the former appeal, out of the abundance of caution we expressly excluded an intent to consider or pass upon the application vel non of the statute of frauds to the promise, both affirmed and denied in the evidence, by Byrd to the Lewises, to pay the Hickman mortgage debt. That excluding expression might well have been omitted, since if for a consideration moving from the debtor, or for a detriment suffered by a debtor, a third person engages with the debtor to pay the debt to the creditor, the agreement is not within the statute of frauds, because that engagement is new and independent and is supported by a new consideration, thereby excluding the idea that the engagement is one of mere suretyship which, to avoid the condemnation of the statute of frauds, must be in writing. *Clark v. Jones*, 85 Ala. 127, 131, 4 South. 771.

The amendment was made by the addition of counts 4 and 5. They will be set out in the report of this appeal. As appears, these counts proceed on the theory that Byrd's promises to the Lewises to pay the Hickman debt was based upon a new consideration of advantage to Byrd or of detriment to the

Lewises, or both advantage and detriment, respectively. If supported by a consideration, that promise of Byrd's was without the statute of frauds and enforceable by the beneficiary, the creditor, Hickman, though not in writing.

It is insisted in brief that counts 4 and 5 effected to bringing a new cause of action. The question was not presented or decided below. After demurrers to counts 4 and 5 were overruled, the defendant pleaded, besides the general issue, want of consideration and the statute of frauds. There was no plea of the statute of limitations to the cause of action averred in counts 4 and 5. On these counts (4 and 5) the issues were only those raised by the pleas indicated. It follows, of course, that the general affirmative charge requested by defendant invoked only a ruling of the court upon the issues of fact created by the averments of the counts and the pleas interposed thereto, and the statute of limitations was not one of them.

We can conceive of no case where the general affirmative charge could serve in lieu of objection to the allowance of an amendment alleged to work the introduction of a new cause of action, or of motion to strike on that account. *Tenn. & Coosa R. R. Co. v. Danforth*, 112 Ala. 80, 20 South. 502; *Stewart v. Goode*, 29 Ala. 476.

The contention, grounded on some of the assignments of demurrer to count 5, that that count undertook to conjoin two distinct causes of action, cannot be sustained. Reading count 5 in connection with count 4, as adopted by count 5, it is clear that the engagement declared on in count 5 was that averred in count 4, with the addition thereto of an element incorporated therein by mutual assent of the parties, viz., the agreement of Mrs. Lewis to transfer to Byrd the rent note for 1907. No new consideration other than mutual assent of Lewis and Byrd was necessary to support the addition so made to the agreement set forth in count 4. *Cooper v. McIlwain*, 58 Ala. 296; 2 Mayfield's Dig. p. 798.

The chief matter of controversy on this appeal is whether the promise of Byrd, as described in count 4, to pay the Hickman debt, was supported by a new and independent consideration. It is insisted for appellant that the rule that one's doing, or agreeing to do, or not to do, that which he is in duty bound to do, or not to do, is not a sufficient consideration to support a promise by another.

The rule is of course sound. 1 Pars. Contr. p. 475, and notes.

We see no escape from the conclusion that, as far as the case made on count 4 is concerned, the application of the just-stated rule to the evidence before the court required the giving of charge 5, requested for defendant. That instruction declared that the promise of Byrd, made "down in the field," was without consideration. We quote *Mrs.*

Lewis' testimony bearing on this matter, and nowhere in the bill is its force or effect qualified in respect of the promise relied on in count 4: "In the spring or early summer of 1906, the defendant came to my field where I, my husband, and Wes Dunn were at work, there being no one present at the time except those named, and asked me if we could help him out on what we owed him. At that time, I and my husband both were indebted to R. E. Byrd & Co., of which defendant was a member, as well as to the Bank of Coffee Springs, of which defendant was cashier; but I cannot say how much we owed said company or said bank. I told the defendant that I could and would help him on what we were owing him, provided he would help me on what I owed plaintiff when it was due; that I then held a check for \$100 which was the proceeds of the sale of my timber, which I had and held to pay to plaintiff on the note and mortgage due him on the 1st of October, and already mentioned, having sold the timber to get the money to pay plaintiff. Defendant then told me, if I would pay him the money, he would pay the amount I owed plaintiff when it fell due, and, defendant having made this agreement, I said: 'On your promise to pay plaintiff said debt of mine, when it falls due, I will pay you \$75 of said check.' I then went to the house and paid him \$75 of said check; the defendant taking the check for \$100 and returning to me \$25. The defendant in accepting said money promised me he would take up my mortgage to plaintiff when it fell due, and told me to call his attention to the matter a short time before it fell due."

The purpose of Mrs. Lewis, inducing her to convert the timber into money wherewith to pay the Hickman debt, is not material; the legal inquiry being the effect of her act in reliance upon Byrd's promise. Unquestionably, she paid the sum on the debts to Byrd or to concerns represented by him. If Byrd, or the concerns represented by him, were the actors in litigation to enforce the payment of the debts due by the Lewises to them, it cannot be doubted that on the testimony in this transcript the sum paid upon the promise made by Byrd "down in the field" would justify the affirmative instruction that that sum should be credited on those debts, consistent with the rules for the application of payments. The source from which the sum so paid came, viz., timber, has been considered, in view of the fact, as we take it, that the mortgages, by the Lewises, to secure debts other than Hickman's, did not include land from which the timber was taken; whereas, Hickman's mortgage did cover a small tract from which the timber might have been taken. The bill does not indicate that the timber came from lands covered by the Hickman mortgage. But, if so, how could that avail Hickman? The reliance for recovery on the counts added by amendment rests on Byrd's promise to Mrs.

Lewis to pay the Hickman debt, and not on any deprivation of Hickman of the sum so paid, and which (let us assume merely) was the product of a sale of timber on which Hickman, alone, had a claim or lien created by his mortgage on the land.

Count 5, and the evidence tending to its support, present a very different status from that arising out of count 4 and the evidence in its support. The count alleges that Mrs. Lewis promised to assign and deliver to Byrd, and later did so, a rent note from one Davis, for the rent of her land for the year 1907. It does not appear from the count that such note or rent was delivered to Byrd as payment on their (Lewises') debts to Byrd or to the concerns he represented; nor does it so appear, affirmatively, from the evidence in this case. If such was the case, under the principle applicable and applied to the status shown by count 4 and the evidence in support of it, the promise to pay the Hickman debt would fall of consideration, as must the promise made "down in the field."

The assignment and delivery of this rent note obviously afforded a new and independent consideration, of benefit to Byrd or his concerns and of disadvantage to Mrs. Lewis, for the promise to pay the Hickman debt, if the assignment and delivery of the rent note was not merely a payment on the Lewises' debts to Byrd or to his concerns. It was open to inference, by the jury, from the evidence, which has been carefully considered, that such assignment and delivery was not a payment on the debt. It is insisted in brief for appellant that an agreement concluding otherwise, as we have indicated, than as payment on the Lewis debts to interests represented by Byrd, would have been so irrational as to forbid credence. That argument must be addressed to the jury. Whether an asserted agreement is peculiar, or so unusual as to indicate irrationality, must in fact depend, largely, upon the point of view, as well as the circumstances surrounding the parties. A contract that offends no law may be peculiar and may bear grievously upon one of the parties thereto, yet we know of no judicial right to avoid it because the accepted terms are onerous. *Lee v. Cochran*, 157 Ala. 311, 47 South. 581.

A careful consideration of the errors assigned as upon rulings of the court in the admission and rejection of evidence shows them to be without merit.

Since a reversal must follow, we deem it proper to say, for further guide on the next trial, if it proceeds upon the status of pleading now in the case, that there can be no recovery upon the alleged promise of Byrd other than that supported by the consideration present in the assigned and delivered rent note. In short, the recovery can only be, on the present pleadings, on the case made by the facts averred in the fifth count. Accordingly, the court should, on the present

state of pleadings, expressly, if so requested, rule the right to recover down to that point.

The addition of count 5 did not introduce a new cause of action. Code, § 5367; Ala. C. C. & I. Co. v. Heald, 154 Ala. 580, 45 South. 686. Hence, even if the statute of limitations is later pleaded thereto, the court may, upon request, if the evidence is again as now, affirmatively instruct the jury that it is not sustained.

The chief issues are of fact, and nothing we have said in discussion must be taken as intimating an opinion thereon.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

MAYOR, ETC., OF CITY OF BIRMINGHAM v. GORDON.

(Supreme Court of Alabama. April 7, 1910.)

1. MUNICIPAL CORPORATIONS (§ 816*)—DEFECTIVE SIDEWALKS—INJURY TO PEDESTRIANS—COMPLAINT.

Where a complaint for injuries to a pedestrian by a defect in a city sidewalk alleged that the defect in the walk was the result of defendant's negligence, and that it caused her to fall or to be thrown on the sidewalk, and proximately caused her injury, it was not demurrable for inconsistency, nor for failure to show a violation of defendant's duty to plaintiff, or to aver facts indicating the city's failure to use reasonable care to keep the highway safe.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1724; Dec. Dig. § 816.*]

2. MUNICIPAL CORPORATIONS (§ 757*)—DEFECTIVE SIDEWALKS—DUTY OF CITY.

A municipality is bound to keep its sidewalks in a reasonably safe condition of repair for the travel of pedestrians and is prima facie liable to a person injured on account of a failure to perform such duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1591-1594; Dec. Dig. § 757.*]

3. JURY (§ 92*)—COMPETENCY OF JURORS—BUSINESS CONNECTION—BIAS.

In an action against a city for injuries to a traveler on a defective sidewalk, a policeman, an officer of the city, was subject to challenge for implied bias.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 420-422; Dec. Dig. § 92.*]

4. DAMAGES (§ 166*)—INJURIES—EVIDENCE.

Where plaintiff injured her kneecap by falling on a defective city sidewalk, and thereafter suffered from rheumatism, which she had never had before, evidence of her attending physician that such an injury was likely to invite diseases such as rheumatism was not objectionable as inadmissible or incompetent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478-481; Dec. Dig. § 166.*]

5. MUNICIPAL CORPORATIONS (§§ 807, 821*)—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

Where a defective city sidewalk on which plaintiff fell was not so defective or such a pitfall that it would be negligence as a matter of law to attempt to walk over it, and was

generally used by the public, plaintiff was not required to walk in the street or to go on another street because she knew that the walk was defective, and, having testified that she looked where she stepped and was attempting to walk carefully over the walk when she fell, she was not negligent as a matter of law because she had knowledge of the defect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1679-1681, 1745-1757; Dec. Dig. §§ 807, 821.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Carrie F. Gordon against the Mayor and Aldermen of Birmingham. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint was as follows: "Plaintiff claims of the defendant \$10,000 as damages, for that heretofore, to wit, on the 22d day of December, 1904, while plaintiff was passing along one of the public highways in the city of Birmingham, in Jefferson county, Alabama, to wit, on the sidewalk on Twenty-Second street, between Fifth and Sixth avenues, in said city, plaintiff was thrown or caused to fall, and as a proximate consequence thereof her left kneecap was dislocated. [Here follows a catalogue of injuries, some of which are alleged to be permanent in their nature, together with a claim for damages for same.] Plaintiff alleges that she was thrown or caused to fall as aforesaid, and suffered said damages and injuries, by reason of and as a proximate consequence of the negligence of defendant, whose duty it was to use due care to have and keep said highway, to wit, said sidewalk, at said point, in a reasonably safe condition for the public to pass along, and defendant so negligently conducted itself in that regard that said sidewalk at said point was not in a reasonably safe condition for the public to pass along."

The demurrers were: "(1) That said complaint was inconsistent and repugnant, in that it claims damages for a failure to use due care to keep said highway in a reasonably safe condition; whereas, in another part, it claims damages for a failure to keep the same in a reasonably safe condition. (2) It does not aver or show any violation of any duty which the defendant owed the plaintiff in the premises. (3) Said count does not aver that defendant failed to use reasonable care to keep said highway in a reasonably safe condition. (4) It avers a conclusion of the pleader, yet exhibits facts which show that defendant was not negligent."

These demurrers being overruled, the pleas of general issue and contributory negligence were interposed.

Charges 11 and 12, refused to the defendant, are as follows: "(11) The court charges you that if you believe, from all the evidence in this case, that the plaintiff knew that the sidewalk at the place where she was injured

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was defective and in a dangerous condition, and would likely or probably cause her to fall, and yet with such knowledge she walked onto such defective places, and was injured as a proximate consequence thereof, you must find for the defendant. (12) The court charges you that if you believe, from all the evidence, that the plaintiff was injured as a proximate consequence of being thrown by stepping upon a loose brick, and if you further believe, from the evidence, that plaintiff knew that the brick at said place were loose, and that she walked through said place, attempting to pick out the safer bricks upon which to step, and that she selected a brick which gave way from her stepping upon it, then you must find a verdict for the defendant."

Robt. H. Thach, for appellant. Bowman, Harsh & Beddow, for appellee.

MAYFIELD, J. The plaintiff, a woman, sued the city of Birmingham to recover damages for personal injuries alleged to be the result of her falling upon one of the defendant's sidewalks, which was alleged to be defective. The plaintiff alleges that the defect in the sidewalk was the result of the defendant's negligence; that such defect caused her to fall or be thrown upon the sidewalk, and thus proximately caused her injuries. The trial resulted in verdict and judgment for plaintiff, from which judgment the city appeals.

The complaint stated a cause of action and was not subject to any of the grounds of demurrer assigned.

It is the duty of a municipality to keep its sidewalks in a reasonably safe condition of repair, for the travel of pedestrians upon them; and it is prima facie liable to a person who suffers an injury on account of its failure to perform this duty. *Albrittin's Case*, 60 Ala. 486, 31 Am. Rep. 46; *Perkin's Case*, 68 Ala. 145; *Wright's Case*, 72 Ala. 411, 47 Am. Rep. 422.

The proposed juror, Mingea, was shown to be a policeman of the defendant city—an officer of the municipality—who might be liable or interested in the suit, and he was therefore subject to challenge for cause on this account.

There was no error in allowing Dr. Heacock, the physician who treated and attended plaintiff on account of the injuries complained of, to testify that an injury such as plaintiff received was likely to invite diseases such as rheumatism. The witness was an expert on the subject, and the plaintiff was shown to have suffered from rheumatism after the injury, and never before. Certainly the evidence was not (to repeat) inadmissible or incompetent—the only grounds assigned for excluding it.

One injured by falling while walking on a defective sidewalk is not necessarily guilty

of contributory negligence, if he had knowledge or notice of the defect. The mere fact that the plaintiff had knowledge and notice of the defect, such as was shown in this case, was not conclusive evidence of contributory negligence on her part, in walking along such sidewalk. Whether or not she was guilty of contributory negligence, under all the evidence, was properly a question for the jury. She testified that she looked where she stepped, and was thus attempting to walk carefully over it when she fell. *Starr's Case*, 112 Ala. 98, 20 South. 424; *Wright's Case*, 72 Ala. 411, 47 Am. Rep. 422.

The given, as well as the refused, charges are set out in the transcript, and the trial court seems to have correctly and fairly charged the jury as to the law applicable to the trial of the case as frequently declared by this court.

Charges 11 and 12, requested by the city, were properly refused, because each of the charges predicates a verdict for defendant, upon the hypothesis alone that plaintiff knew of the defective condition of the sidewalk and, notwithstanding such knowledge, attempted to walk over it, and fell and was injured thereby. As stated above, this alone did not constitute contributory negligence. The plaintiff testified in effect that she was careful while walking over the defective sidewalk, thus rebutting whatever presumption might otherwise arise from her knowingly using the sidewalk. It was not so defective, or such a pitfall, that it would be, as a matter of law, negligence to attempt to walk over it. It was shown to be generally used by the public, and to have been so used for a long time. Plaintiff was not required to walk out in the street, or to go down another street, merely because she knew that some of the bricks in the sidewalk were gone, or were loose or worn. She and others were shown to have used it in its then condition, without falling, or being injured thereby. The danger was not so imminent or apparent as to make it contributory negligence to attempt to pass over it.

There is no error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

McINTOSH v. COOPER et al.

(Supreme Court of Alabama. April 21, 1910.)
MORTGAGES (§ 621*)—REDEMPTION—AMOUNT OF DEBT.

Where, in a suit to redeem from a mortgage, the mortgagee filed a cross-bill to foreclose the mortgage and other mortgages by the same mortgagor to him, the evidence showed that the mortgage from which redemption was sought was substituted for the other mortgages and the amount found due covered the entire

sum due with interest, the mortgagee could not complain of the decree awarding redemption on the payment of such sum.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 621.*]

Appeal from Chancery Court, Coffee County; L. D. Gardner, Chancellor.

Suit by William Cooper and others against Kenneth McIntosh to redeem from a mortgage, in which defendant filed a cross-bill for the foreclosure of that and other mortgages. From a decree for plaintiffs, defendant appeals. Affirmed.

The report of the register is as follows:

"Pursuant to the decree of the court, made and entered on the 11th day of February, 1908, I have proceeded to inquire and take testimony as by law provided, and upon the taking of such testimony there was submitted before me the testimony in this cause taken on January 23, 1908, together with the exhibits thereto, consisting of mortgages, receipts, etc., bound in with the testimony, and of an account book, which is an exhibit and which accompanies the testimony. There has also been taken and submitted before me the testimony of Lizzie Fitzpatrick, Sam Wilkerson, and Joe Tames, taken prior to the reference. An agreement has been made as to attorney's fees. In consideration of the testimony I have had before me three of the parties to the suit and one witness, who from the testimony appears to have no interest of any sort, and who is unimpeached as to the veracity and good character. There is a vast variance between the amount alleged to be due upon the mortgage debt by the opposing parties herein, and that is the only matter that presents difficulties in the making of this report.

"As to usury, the register finds no testimony as to sufficient rate and definiteness upon which to cause a serious consideration of that phase of the case. Proof as to the admissions of the respondent and cross-complainant that he generally charged 12½ per cent., that he charged the Coopers that rate, etc., in the absence of proof that the Coopers entered into a usurious contract for the payment of interest at a rate higher than 8 per cent., fails to make out the averment of usury in any sum. In the event that usurious interest was charged, or, rather, in the event that a rate of interest was charged which was higher than 8 per cent., there is no evidence before me on which I could take out the overcharge, or surplusage of interest greater than 8 per cent., charged as a part of the mortgage debt claimed. According to the testimony of McIntosh, he bought the mortgage given by the Coopers to B. J. Stevens, paying therefor the sum of \$66.75, on December 18, 1903. On December 15, 1903, he took a mortgage from them for \$169.14. There is no testimony to show that he made them the loan of the 15th inst., and included therein as part of the consideration the mortgage that he took up

from Stevens three days later, though this would not be an unnatural thing to do. In the spring of 1905 he took a mortgage for \$169.75, and in January, 1906, he took a mortgage for \$147. The testimony of McIntosh is to the effect that he did not take up and carry forward the balance unpaid into the new mortgage, but that each time he let the old mortgage stand for what was unpaid on it, and took a new mortgage for the new advances. He also testified that the odd amount of cents came in by the old negro just telling him how much he wanted, and that it did not come from interest calculation. Immediately after McIntosh had taken the 1906 mortgage, he had, according to his testimony, advanced the old negro a total of about \$550, and had been paid considerably less than \$200 during the time.

"In the light of the fact that McIntosh's accuracy and recollection must be weighed against the accuracy and recollection of Lizzie Fitzpatrick and Tom Wilkerson, opposing parties, and of Joe Tames, who is not a party to the suit, it is well that the manner of keeping the account book, which is in evidence, and such deductions and presumptions as may be therefrom reached in connection with the testimony, and in the light of common knowledge of men and things, to be considered, in making up the findings of this report. The book goes from rear to front, according to the testimony of Mr. McIntosh. The items were charged as the advances were made, on the book which is in evidence, and were not charged elsewhere and posted forward to the book. In view of this, it is noteworthy that the guano for the three years is all charged in one bunch on entries near the bottom of page 194 of said account book. Another noteworthy point about the account book is the fact that in nearly or quite all of the charges for flour, of which there are a number, in the whole three years' dealings, the price remained the same, 3 cents per pound. Other items carried the same prices through the whole period, or very nearly the same price; the ordinary variations of the commodity price that so frequently occur in the necessities of life, not having occurred during the three years previous, or, if they did occur, they affected the prices charged Cooper and his wife by McIntosh very little. Then the prices are very remarkably reasonable for credit prices to customers that were paying only 8 per cent. interest. These matters are, of course, of secondary weight; but the register has considered them along with the other testimony, and his common knowledge in making up his findings. The physical condition of the books in which the accounts were kept was pointed out to the register by counsel for Cooper, and it is a matter not improperly to be considered.

"This book has been kept all three of the years; the manner of its keeping having been

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

several times referred to herein. The register takes note of the fact that the book is unusually clean and neat for a pencil account book, and that the pencil entries appear to be such that they could have been all made with one pencil at one time; the lighter colored marks with the pencil point dry, and the dark-colored with the pencil moistened in the mouth. The account book is of soft, cheap paper, on which the impression of the pencil makes an indentation on the reverse side of the paper. Use and handling of the book, along with the lapse of time, frequently smooths down the indentations in paper. The account for 1908, on page 196, was first made; in writing the 1904 account on page 195, the indentations made on page 195 in keeping of the 1908 account on the reverse side of the leaf which is page 196, were not rubbed or smoothed down, indicating to the register a remarkably great care and neatness. It is not unreasonable from the conditions of the account as to all guano entries, prices, freshness of the book, and condition of colors of pencil marks, similarity of prices all through, reverse indentations not smoothed down, etc., noted to a length that is also prolix, and other indications not here mentioned, but which are noteworthy, from a careful examination of the book, to conclude that the witness McIntosh may be in error in regard to the manner in which he kept the book, the time when the entries were made, etc.; and this will be and is considered by the register along with other testimony in making up this report. The admissions made to Joe Tames (who stands in this matter as without interest in the premises) by McIntosh are that the debt was between \$150 and \$175. The two negroes (who are interested) swear that the amount that was stated to them by McIntosh was \$147, or thereabouts. Mr. McIntosh makes the amount a great deal larger in his testimony; but, for the reasons herein stated, I am constrained to believe that he is in error in his contention. About the amount paid Tames there was no controversy. About the attorney's fees there is an agreement in writing.

"I beg leave to report as follows: (1) I find no usury in the mortgage debt. (2) I find the mortgage debt to be as follows:

Amount due Sept. 1, 1906.....	\$175 00
Interest to June 29, 1908.....	25 85
Amount paid Tames.....	12 00
Interest on same.....	2 08
Advertising fee.....	5 00
Total	\$219 71

"I report the attorney's fee for respondent to be \$75."

Claude Riley and J. F. Sanders, for appellant; C. W. Simmons, for appellees.

MAYFIELD, J. This bill was filed by appellees, as mortgagors, to redeem. Respond-

ent (appellant) answered the bill, and filed a cross-bill, by which he sought to foreclose the mortgage from which redemption was sought and several other mortgages by the same parties to him. Appellees answered the cross-bill, denying the facts set up therein, in so far as it sought to show that the several mortgages were to secure separate and distinct debts or liabilities; but alleged that the first or oldest mortgage was merged into the second, and the second into the third, and so on, and that the last mortgage embraced and covered all the indebtedness due from the mortgagors to the mortgagee, and that it was substituted for all previous mortgages between the parties. This, and the amount of the indebtedness, were really the only controverted questions in the case; the appellees contending that the balance due on the mortgage was something between \$140 and \$175, with interest thereon, and appellant contending that it was \$400 or \$500, with interest.

The register held a reference to ascertain the amount of the indebtedness, and reported it to be \$219.71. This report was very full and went into details, reviewing the evidence at length and stating the reasons which had led the register to his conclusions. We have examined carefully the evidence, including the original papers, mortgages, books, and accounts, certified to this court for inspection; and we agree and concur with the register and the chancellor as to the correctness of the report and of the decree confirming it. It would serve no good purpose to review in detail the various items of the account, with the evidence to support each. Suffice it to say that we feel sure no injury was done appellant by either the report or the confirmatory decree. While it is difficult, if not impossible, to ascertain the exact amount due, owing to the manner in which the account was kept and the transactions were had, yet we are satisfied that the amount found by the register covers the entire sum due, with interest thereon; and, as the amount of the attorney's fee was agreed upon, appellant has no reason to complain.

The reporter will set out the report of the register as a part of the statement of facts of this case.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

ROBERT M. GREEN & SONS v. LINEVILLE DRUG CO.

(Supreme Court of Alabama. April 21, 1910.)

1. SALES (§ 82*)—CONSTRUCTION OF CONTRACT—TERMS OF PAYMENT.

Where a contract for the sale of a soda fountain was made out upon a printed form, in which the blanks for amounts of payments were not filled, but the words, "This is to be de-

livered at this price \$130.00 on arrival of goods at Lineville," were written in, the words written in constituted the only agreement as to payment, which was not changed by writing in as the line for shipment, "L. & N. Ry.," and as the shipping address, "Oxford, Ala."

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 82.*]

2. PLEADING (§ 115*)—GENERAL ISSUE—FORM.

In an action for breach by the buyer of a contract to purchase a soda fountain, the plea "that the allegations of the complaint are untrue" is the proper form of the general issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 240; Dec. Dig. § 115.*]

3. SALES (§ 116*)—RESCISSION—"COUNTERMAND."

While a party may in his contract to purchase make a valid agreement not to countermand the order, a rescission because of a breach by the other party is not a "countermand" within the meaning of such a provision.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 116.*]

4. SALES (§ 117*)—RESCISSION—RIGHT TO RESCIND—EFFECT.

Where a contract for the sale of a soda fountain made the price payable when the goods arrived at L., a shipment to O., with instructions that the goods were to be held there till the buyer paid the price, was a violation of the contract, giving the buyer the right to rescind, and, having rescinded, any propositions thereafter made by either side could not reinstate it unless it was so agreed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 291; Dec. Dig. § 117.*]

5. SALES (§ 382*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—EVIDENCE.

In an action by the sellers of a soda fountain for the buyers' refusal to accept it, where one of the buyers testified that he went to the point to which the soda fountain was shipped and found the goods in the depot, with notice to get the bill of lading at the bank, on payment of the price, his testimony as to whether he called at the bank for the bill of lading was properly admitted.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 382.*]

6. TRIAL (§ 121*)—REMARKS OF COUNSEL—COMMENTS ON EVIDENCE.

Where defendant's counsel, after calling attention to discrepancies in plaintiffs' testimony, remarked, "What monumental liars these plaintiffs are!" this was a comment on the evidence, and not a statement of fact in evidence, and need not be excluded by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.*]

7. APPEAL AND ERROR (§ 1033*)—REVIEW—HARMLESS ERROR—CONTRADICTORY INSTRUCTIONS.

A party cannot complain that instructions are contradictory, when the erroneous instruction is favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

8. SALES (§ 388*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—INSTRUCTIONS.

Where a contract of sale of a soda fountain made the price payable on its arrival at L., and the goods were shipped to O., with instructions to hold them there till the price was paid, whereupon the buyers rescinded the contract, instructions, in an action for the buyers' breach of the contract, that if they ordered the soda fountain, and after it was shipped refused to re-

ceive it, except at a reduced price, such refusal dispensed with the necessity for further tender, and the sellers are entitled to recover such damages as resulted therefrom, were properly refused as misleading, since they omitted to state that the goods were shipped in accordance with the contract, and since, after the buyers' rescission of the contract, their subsequent offer to purchase at a reduced price did not reinstate it.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 388.*]

9. SALES (§ 161*)—PERFORMANCE OF CONTRACT—DELIVERY TO CARRIER.

While, as a general proposition, a delivery to a carrier is a delivery to the purchaser who orders goods shipped to him, that principle does not apply where there is a special contract by which the shipper agrees to deliver the goods to the purchaser at a certain place, and retains the title until the purchase money is paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

10. SALES (§ 388*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—INSTRUCTIONS.

In an action for the refusal of buyers to accept a soda fountain, charges that if the buyers waived all rights to countermand their order, and the sellers shipped the soda fountain, a countermand would not avail the buyers, and they are liable for damages resulting therefrom to the sellers, were properly refused as misleading and as instructing the jury to find for the sellers, whether they had complied with all the terms of their contract or not.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 388.*]

Appeal from Circuit Court, Clay County; John Pelham, Judge.

Action by Robert M. Green & Sons against the Lineville Drug Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

For a former report of this case, see 150 Ala. 112,¹ where the contract was set out. The general issue is in form as follows: "That the allegations of the complaint are untrue." The pleas demurred to are also set out in a former report.

The oral charge of the court is as follows: "Gentlemen of the jury, this contract requires plaintiffs to deliver the goods at Lineville before they are entitled to recover. If you find that plaintiffs shipped the goods to Oxford, Ala., and refused to let the defendant have them without paying \$130 in Oxford, Ala., before delivery of the goods of defendant at Lineville, they breached the contract and cannot recover in this suit." Charge 13, referred to, is as follows: "I charge you as a matter of law that the contract only required the delivery of the soda fountain and apparatus to defendant at the shipping point. Oxford, Ala., and did not require plaintiffs to dray said soda fountain and apparatus to Lineville, as a condition precedent to payment."

The following charges were refused to the plaintiffs: (2) "I charge you, gentlemen of the jury, that if you find from the evidence in this case that the defendant ordered from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the plaintiffs a soda fountain and apparatus, and agreed to pay \$130 therefor, and, after said fountain and apparatus was shipped by plaintiffs to defendant, that defendant refused to receive the same, except at a price of \$90.00, said refusal to receive said soda fountain and apparatus dispensed with the necessity for further tender or delivery, and plaintiffs are entitled to recover such damages as the evidence shows they sustained."

(4) "I charge you that, if you find from the evidence in this case that defendant ordered from the plaintiffs a soda fountain and apparatus at a price of \$130, and, after the same had been shipped, refused to accept delivery of same, except at a price of \$90, that defendant breached said contract, and plaintiffs are entitled to recover all damages proximately resulting therefrom." (5) "I charge you, gentlemen of the jury, that it was not necessary for the soda fountain and apparatus to have been delivered by the plaintiffs for defendant to have become bound to pay for same." (6) "I charge you that the contract of sale of the soda fountain and apparatus was complete, and plaintiffs delivered same to the transportation company, and that a delivery to the carrier by the seller, in accordance with the terms of the contract, or with the specific request of the purchaser, is a delivery to the purchaser, and if the purchaser refuses to receive the same that he thereby breaches the contract, and is liable for damages proximately resulting therefrom." (8) "I charge you that, if you find from the evidence in this case that the salesman of the plaintiffs sold a soda fountain and apparatus to the defendant, and that defendant signed a written order to the plaintiffs, stating that defendant waived all rights to countermand, and that after the plaintiffs shipped said soda fountain and apparatus to the defendant that a countermand would not avail defendant, and defendant is liable for all damages proximately resulting from the giving of said order and the shipment of said soda fountain, and apparatus, suffered by plaintiffs." (10) "If you find from the evidence in this case that the defendant waived all right to countermand the order for the soda fountain and apparatus which forms the foundation of this suit, and that the defendant countermanded said order after the fountain and apparatus were shipped, then defendant breached the contract, and plaintiffs are entitled to recover all damages proximately flowing from said breach.

Walter S. Smith, for appellants. E. J. Garrison, for appellee.

SIMPSON, J. This is an action by the appellants against the appellee, claiming damages for the breach of a contract by which the plaintiffs agreed to ship a soda fountain, etc., to the defendant, to be paid for on delivery; and it is alleged that the defendant

countermanded the order after the goods were shipped, contrary to the express terms of the contract, that it also refused to receive and pay for the goods, etc.

This case was before this court at a previous term. *Green & Sons v. Lineville Drug Co.*, 150 Ala. 112, 43 South. 216, 124 Am. St. Rep. 17.

It is true, as contended by the appellants, that this court has held that where a party signs a written contract, specifying that there is no verbal agreement, aside from the order, the written contract expresses the agreement, and the principal is not bound by verbal statements made by the salesman, unless he is informed of the same before shipment (*Fulton v. Sword Medicine Co.*, 145 Ala. 331, 40 South. 393); and in this case we will take the written order as the contract between the parties. When this case was here before, the court expressed some doubt about the proper construction of it, because it was evidently written by filling out a form, and the record did not show what part of it was printed, and what part written, but said that "the shipment of the goods in such way that the plaintiff could not get possession of them, until he paid the stipulated price in Oxford, was evidently not in compliance with the terms of the contract." Page 118 of 150 Ala., page 218 of 43 South. (124 Am. St. Rep. 17).

As the case now comes before the court, those parts of the contract which were in writing are identified by being in red ink, and in print are the words, "Terms and conditions: \$—— paid on signing hereof; \$—— upon receipt of ——." And in writing, immediately following, are the words, "This is to be delivered at this price \$130.00 on arrival of goods at Lineville." And then follow the printed words, "until the total sum of \$—— is paid." Then follow other printed words about settlement by notes, etc.

It is evident that the parties wrote into the contract the only agreement as to payment, which was that the goods were to be paid for when delivered at Lineville. This is not changed by the memorandum at the close of the contract, opposite the printed words: "State by what line to ship, if any special one is preferred; Ship via"—the written letters, "L. & N. Ry," and opposite the printed words, "Shipping address to," the written words, "Oxford, Ala., Lineville Drug Co." The goods were shipped to the plaintiffs themselves, at Oxford, Ala., with bill of lading which was sent to a bank in Oxford, with instructions to deliver the goods to the defendant on payment of the purchase price, \$130, less the amount of freight to that point. The defendant wrote to the plaintiffs, calling attention to the terms of the contract, and stating that, as the season was already so far advanced, and it would take some time to adjust the matter, the goods would not be received at all, and thereon ensued a spicy correspondence.

The form of the plea of the general issue

was proper; this being an action on the contract.

While it is true that a party may, in his contract of purchase, make a valid agreement not to countermand the order, yet a rescission of the contract because of a breach, on the part of the other contracting party, is not a "countermand," within the meaning of that expression.

When the plaintiffs shipped the goods to Oxford, with instructions that they were to be held there until defendant paid the purchase price, that was a violation of their contract, and the defendant had a right to rescind the contract, and, having done so, was not longer liable on it. The contract was then at an end, and any propositions thereafter, made by either side, could not re-instate the contract unless it was so agreed.

From what has been said, it is evident that there was no error in the court's ruling overruling the demurrers to the pleas.

While Wyath J. Greene, a member of the defendant firm, was on the stand as a witness, after stating that he had gone to Oxford, and found the goods in the depot there, shipped to Robert Green & Sons, with bill of lading attached, or with notice to get the same at the bank, on payment of \$130, he was asked to state whether he called at the bank for the bill of lading. There was no error in overruling the objection to this question and the motion to exclude the answer. Under the circumstances, the only proper thing for the defendant to do was to go to the bank and ascertain what the condition of delivery of the goods were. The bank was made the agent of the plaintiffs for that purpose.

Defendant's counsel, after calling attention to discrepancies in plaintiff's testimony, remarked, "What monumental liars these plaintiffs are!" While we do not approve of such language, yet it was a comment on the evidence, and not a statement of a fact in evidence, and does not come within the rule requiring the court to exclude improper remarks. *L. & N. R. R. Co. v. York*, 128 Ala. 306, 311, 30 South. 676; *Davis v. Alexander City*, 137 Ala. 206, 210, 33 South. 863; *Brown v. Johnston Bros.*, 135 Ala. 609, 613, 33 South. 683; *Florence Cotton & I. Co. v. Field*, 104 Ala. 472, 480, 16 South. 538.

That part of the court's oral charge excepted to is without error, in accordance with the construction we have given the contract, and if charge 13, given at the request of the plaintiff, is contradictory thereto, the appellants cannot complain of it, as it was in their favor.

There was no error in the refusal to give charge 2, requested by the plaintiffs. The charge is misleading, and omits to state that the goods were shipped in accordance with the contract. After the defendant had, in accordance with its contractual rights, refused

to receive the goods, its subsequent offer to purchase the goods at a reduced price did not reinstate the contract.

Charge 4, requested by the plaintiffs, was properly refused, for the same reasons.

There was no error in the refusal to give charge 5, requested by the plaintiffs, as it is not in accordance with the interpretation we have given to the contract.

There was no error in the refusal to give charge 6, requested by the plaintiffs. While it is a correct general proposition that, where one party orders goods to be shipped to him, a delivery to the carrier is a delivery to the purchaser, yet that principle does not apply where there is a special contract, whereby the shipper agrees to deliver the goods to the purchaser at a certain place, and retains the title until the purchase money is paid at the point of delivery.

Charges 8 and 10, requested by the plaintiffs, were properly refused. They are misleading, and instruct the jury to find for the plaintiffs whether the plaintiffs had or had not complied with all the terms of the contract on their part.

As heretofore explained, a mere countermand, and a countermand based on a breach of the contract by the other party, are two entirely different matters.

The judgment of the court is affirmed.
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

COULSON et al. v. SCOTT et al.

(Supreme Court of Alabama. April 14, 1910.)

1. DEEDS (§ 59*)—DELIVERY—RECORDATION.

Though the recordation of a deed be prima facie evidence of its delivery, yet if there was no delivery thereof to the grantee, and no intention that what was done should be a delivery to the grantee, but there was merely a sham delivery to the recording officer for the purpose of having it recorded, to delude the grantor's creditors, and after being recorded it was returned to and retained by the grantor, no title passed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.*]

2. JUDGMENT (§ 747*)—EJECTMENT—CONCLUSIVENESS.

Shortly after O. executed a deed of land to his daughter, his creditors obtained judgment against him, and had the land sold on execution, a bank being the purchaser, and receiving a sheriff's deed. Thereafter in ejectment the bank recovered the land; the judgment recognizing its superior title and invalidity of the deed to the daughter. Held, in ejectment by persons claiming under her against persons claiming under the bank, that even if she was not a party to the action by the bank, and such judgment was not conclusive, it was evidence that the deed, even if delivered, was void against the bank, and that it got a title superior to hers.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.*]

3. EJECTMENT (§ 95*)—TITLE—EVIDENCE.

After C. had deeded land to his daughter, it was sold, on execution against C., to a bank, and thereafter the widow of C.'s daughter took a deed of it from the bank. *Held*, in ejectment by her grandchildren against persons claiming under him as grantee of the bank, that his deed showing a straight-out purchase, after expiration of time to redeem, and the fact that he claimed as purchaser, and not through curtesy, was evidence that he bought the land, instead of redeeming for the benefit of his wife's heirs.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 95.*]

4. TRIAL (§ 85*)—OBJECTION TO EVIDENCE—EVIDENCE ADMISSIBLE IN PART.

Objection to records offered in evidence being general, and some of them being competent, overruling the objection was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

5. EVIDENCE (§ 576*)—TESTIMONY IN PRIOR SUIT—DECEASED WITNESS.

Testimony given in a prior suit involving the present issue is admissible; witness being dead.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2401-2405; Dec. Dig. § 576.*]

6. EVIDENCE (§ 83*)—PRESUMPTION.

A bank having had property sold on execution 60 years ago, and having bought it at the sheriff's sale, and having subsequently recovered it in ejectment, it will be presumed it received a deed from the sheriff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

7. PROPERTY (§ 8*)—TITLE.

Where C. gave a deed of land to his daughter, and a bank, a creditor of C., attacked it, had the land sold on execution against C., and, after recovering it in ejectment, sold it to the husband of C.'s daughter, his purchase did not operate as a ratification of C.'s deed, as he acquired title through a source hostile to said deed, and which was based on invalidity of said deed.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 8.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Ejectment by James L. Coulson and others against Felix Scott and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The chain of title relied on will be found stated in a former report of this case in 156 Ala. 450, 47 South. 60. Upon this trial the facts were the same, with the additional facts set out in the opinion.

The following was the oral part of the charge excepted to: "I charge you, gentlemen of the jury, that the plaintiffs by their deed and evidence make out a prima facie case, and are entitled to recover the land sued for, unless from the evidence you are reasonably satisfied that the deed made by Isaac Clark and wife to Jerusha Clark (afterwards Gullatt) was made to defraud the creditors of the said Isaac Clark, and, further, that the said deed was never delivered to said Jerusha Clark. If you find these to be the facts, then the plaintiff cannot recover."

The plaintiff also requested the general affirmative charge.

The following charges were also given to the defendant: "(6) If the deed executed by Isaac Clark to his daughter Jerusha Clark, expressing a consideration of \$2,000, was intended by said Clark as a sham, and the consideration was simulated, and the purpose of said Clark was to hinder, delay, or defraud his creditors, and if he delivered said deed to the county court clerk to be recorded, and after the same was recorded said Clark kept said deed in his possession during his lifetime, and he never did in fact deliver it to Jerusha Clark, and Jerusha never claimed the land under said deed, and stated to her sister that it was not intended to convey the land or the title to the land to her, and if after the death of Isaac Clark his widow kept the deed until after the war, and then delivered it to the father of these plaintiffs, then the jury should find that the title to the land did not pass from Isaac Clark to his daughter Jerusha Clark, and that plaintiffs cannot recover in this case. (7) The delivery of the deed by Isaac Clark, the grantor, to the recording officer for record, is prima facie evidence of a delivery to his daughter Jerusha; but if the evidence in the case reasonably satisfies the jury that such delivery to the officer was a mere sham, and that said delivery to said recording officer was not with the intent by the said Isaac Clark to deliver said deed to his daughter Jerusha Clark, and that said deed was never delivered by Isaac Clark to his daughter Jerusha, then the jury must find for the defendant. (8) If the jury are not reasonably satisfied from the evidence that the deed of Isaac Clark to his daughter Jerusha was delivered to her by her father, then you must find for the defendant."

W. H. Norwood, L. C. Coulson, and J. H. Gregory, for appellants. J. B. Tally and Bilbro & Moody, for appellees.

ANDERSON, J. When this case was here on former appeal (156 Ala. 450, 47 South. 60), we held that the title was prima facie in the plaintiffs as heirs of Jerusha Gullatt, who held under a deed from Isaac Clark, of date 1838. We also held that the defendants did not trace their title beyond the Bank of Decatur, that it showed no title from Isaac Clark to said bank superior to the deed from the said Clark to his daughter Jerusha Gullatt. Upon the next trial, the one from which this appeal is taken, there was evidence tending to show that the deed from Clark to his daughter, while placed on record by him, was in fact never delivered and was made by him, not to operate as a conveyance, but to delude his creditors. If the deed was never delivered, notwithstanding the recordation of same might be prima facie evidence of a delivery, the title never passed to his

daughter, and the plaintiffs could not recover upon the strength of said deed to their grandmother. On the other hand, if the deed was void as to the creditors of Isaac Clark, notwithstanding it may have been binding between the parties, and said creditors successfully impeached it and sold or acquired the land by enforcing their claim, a purchaser under the process would acquire a title superior to that of Mrs. Gullatt, who held under said fraudulent deed. The evidence tends to show that, shortly after the making of the deed of 1838, the bank and other creditors obtained judgments against Clark, had the land sold under execution, and the bank bought it at sheriff's sale. The bank brought an action of ejectment against several, including Gullatt and his wife, for the land, and got a consent judgment for the same. The record does not show that Mrs. Gullatt was a party to the suit or the consent judgment, but the deposition of Gullatt shows that she too was sued, but, whether she was or not, the presumption is that her deed was successfully impeached, else the plaintiffs could not have recovered the land under the deed from the sheriff, which was of subsequent date. The judgment recognized the superior title of the bank and the invalidity of the deed from Clark to his daughter, and, whether the judgment was or was not conclusive, it, with the other evidence in the case, tended to show that the deed, even if delivered, was void as against the bank, and that the bank got a title superior to the one claimed by Mrs. Gullatt. If the bank acquired the title, and there was evidence for the jury to show that it did, then Gullatt acquired a title superior to that of his wife or her heirs under his deed from the bank. It might be that if Gullatt merely redeemed the land, being the life tenant, it was for the benefit of the remaindermen; but the evidence shows a straight-out purchase from the bank, and after the right to redeem had expired, under the terms of the consent judgment. It also appears from the chancery record and deposition of Gullatt that he claimed as purchaser, and not through curtesy 40 years ago, and in a proceeding in which the plaintiffs' parents, the then claimants under the Clark deed of 1838, were parties, and, whether this was conclusive on them or not, it was an evidential fact that Gullatt had bought the land instead of merely redeeming it for the benefit of his wife's heirs.

The trial court did not err in so much of the oral charge as was excepted to, to the prejudice of the plaintiffs, nor in refusing the general charge requested by the plaintiffs.

There was no error in giving charges 6, 7, and 8 at the request of the defendants. They assert the law and were not abstract.

The objection to the chancery court records was general and applied to all of the papers and proceedings. Whether they were

all competent or not, some of them were, and the trial court cannot be put in error for overruling the objection that was interposed. The answer of the plaintiffs' mother and father, seeking cross-relief and claiming the land under the deed to Mrs. Gullatt, was competent to show that the title under which the present plaintiffs claim was in issue and made the deposition of Gullatt competent, and, as he was then dead, his former testimony in a controversy involving the present issue was proper. *Clealand v. Huey*, 18 Ala. 343; *Goodlett v. Kelly*, 74 Ala. 220; *Patton v. Pitts*, 80 Ala. 373; *Smith v. Keyser*, 115 Ala. 455, 22 South. 149; 1 *Greenleaf* (16th Ed.) p. 278; 16 *Cyc.* 1094.

The case of *Robins v. Wooten*, 128 Ala. 373, 30 South. 681, has no application to this case, as the proof does not show a ratification by the creditors of the conveyances, but tends to show that they attacked said deed, by having the land sold to satisfy the judgment, bought it at a sheriff's sale, and the law will presume that the sheriff made them a deed, as it was 60 years ago, and the proof shows that the sheriff sold it to satisfy the bank judgment, and that the bank bought it. Moreover, the bank also subsequently recovered the land in an action of ejectment. *Duncan v. Williams*, 89 Ala. 341, 7 South. 416; *Matthews v. McDade*, 72 Ala. 377. Nor could the purchase by Gullatt from the bank, which got the title by successfully attacking the fraudulent deed, operate as a ratification of said deed, as he acquired title through a source which was hostile to said deed and which was based upon the invalidity of said deed.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

J. L. KNOX & CO. v. PARKER.

(Supreme Court of Alabama. April 21, 1910.)

1. PARTNERSHIP (§ 183*)—MORTGAGE TO SECURE DEBT OF MEMBER—FRAUD ON FIRM CREDITORS.

A mortgage of firm property to secure the debt of a member thereof is not a fraud on firm creditors; the firm being solvent.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 331; Dec. Dig. § 183.*]

2. LIS PENDENS (§ 3*)—NATURE OF PENDING ACTION.

The rights of a mortgagee are not affected, under the doctrine of *lis pendens*, by pendency at the time the mortgage is given of an action against the mortgagor; it being merely for a money demand.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

3. PARTNERSHIP (§ 161*)—MORTGAGES—INTEREST CONVEYED.

A mortgage signed in the name of a firm "by S.," a member of the firm, conveyed all his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right, title, and interest in the property, if before it was executed the firm turned over and delivered to him for a valuable consideration all the property covered by it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 295½; Dec. Dig. § 161.*]

Appeal from City Court of Andalusia; B. H. Lewis, Judge.

Contest by J. O. Parker, execution creditor, and J. L. Knox & Co., claimant of property levied on. From an adverse judgment, claimant appeals. Reversed and remanded.

Albritton & Albritton, for appellant. Clyde E. Reid, for appellee.

MCLELLAN, J. This contest is between appellee, execution creditor of Cowart, Spicer & Co., and the appellant firm, which claims the superior right to the property levied on under a mortgage. The appellee's judgment was rendered March 3, 1908, and on March 14, 1908, execution was issued thereon and placed in the hands of the sheriff, and on April 8, 1908, was levied on the property in question. The mortgage on which claimant relies covered the property levied on, and was executed March 11, 1908, and was filed for record, in the probate office, on March 12, 1908. This mortgage was signed in the name of the firm, Cowart, Spicer & Co., "by H. L. Spicer," and recites on its face that it was given, "not to increase but to better secure one given February 23, 1907, for \$1,500.00, by H. L. and S. C. Spicer (the former a member of the firm of Cowart, Spicer & Co.) to T. B. Henderson & Co., and transferred to J. L. Knox & Co., June 20, 1907."

The evidence is without dispute that the firm of Cowart, Spicer & Co. was, when the judgment for appellant was rendered, and also when the mortgage to Knox & Co. was given, solvent. And we may here add that it cannot be inferred from the mortgage, and there is no evidence otherwise to that effect, that the mortgage to claimant conveyed all of the assets of Cowart, Spicer & Co. The mortgage to claimant was executed before any lien arose from the judgment against defendants in execution. The judgment does not appear to have been recorded. Acts 1908, pp. 273, 274, § 4. And, as before stated, execution had not then been delivered to the sheriff for enforcement, much less levied.

The case, then, in one phase, is one where property of a solvent firm is mortgaged to secure the debt of a member thereof, and a creditor of the firm attempts, at law, to avoid the mortgage on the ground of fraud, because: First, the firm, though solvent, could not, as against the creditor, devote firm property to the security of an individual debt of a member thereof; second, the mortgagee took the security charged with such notice as *lis pendens* affords. Neither of these propositions, attempting to defeat the claimant, can be sustained on the

evidence in this record. The first proposition could not be a fraud on the creditor's rights, for the obvious reason that he has not been prejudiced; the debtor being solvent. 30 Cyc. p. 543. If the debtor were solvent, there would of course be ground to complain. *Teague v. Lindsey*, 106 Ala. 268, 17 South. 538; *Pritchett v. Pollock*, 82 Ala. 169, 2 South. 735.

The second objection to the validity of the mortgage as against the creditor (appellee) is an appeal to the doctrine of *lis pendens*. The appellee's suit was, as appears from the judgment, for a money demand. It did not involve such property as comes within the rule for the application of the invoked doctrine. 25 Cyc. pp. 1450, 1451, and notes; 21 Am. & Eng. Ency. Law, p. 630. And when the mortgage was given no lien had attached to property later levied on.

There is another phase of the case presented by that aspect of the evidence tending to show that, before the mortgage to claimant was executed, Cowart, Spicer & Co., for a valuable consideration, had turned over and delivered to H. L. Spicer the property levied on, and that it was Spicer's individual property. If this testimony be credited, the mortgage to claimant conveyed all the right, title, and interest of H. L. Spicer to the property in question.

The court improperly excluded the power of attorney, given by his associate members of the firm, to H. L. Spicer.

For the error committed in giving the affirmative charge requested by plaintiff in execution, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

ADAMS, Tax Collector, v. SOUTHERN RY. CO.

(Supreme Court of Alabama. April 21, 1910.)
HIGHWAYS (§ 122*)—TAXATION—STATUTES—CONSTITUTIONAL PROVISIONS.

Acts 1903, p. 414, § 8, in so far as it assumed to authorize road districts, less in area than a county, to impose, pursuant to the public will therein ascertained, a tax on property in the district of not more than one-fourth of 1 per cent., to construct, improve and maintain public roads and bridges in such district or districts, was a violation of Const. 1901, § 215 providing that no county shall be authorized to levy a greater rate of taxation in any one year on the value of taxable property therein than one-half of 1 per cent., provided that to pay debts existing on December 6, 1873, an additional rate of one-fourth of 1 per cent. may be levied and collected to be appropriated exclusively to the payment of such debts and interest, and provided that to pay any debt or liability then existing against any county, incurred for the erection, construction, or maintenance of necessary public buildings or bridges, or that might be thereafter created for the erec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of public buildings and bridges or roads, any county might levy and collect such special taxes not to exceed one-fourth of 1 per cent. as might be authorized to be applied exclusively to the purposes for which the same shall be levied and collected.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Action by the Southern Railway Company against Q. S. Adams, as Tax Collector, to recover money paid to Marengo County under protest, as a special road tax for a road district in that county, established under Act October 10, 1903, as amended by Act August 13, 1907. Judgment for plaintiff, and defendant appeals. Affirmed.

William Cuninghame, for appellant. L. E. Jeffries, E. W. Pettus, Henry McDaniel, and Abrahams & Taylor, for appellee.

MCCLELLAN, J. But one of the several questions presented on this appeal is necessary to be considered, viz.: Does section 8 (Acts 1903, p. 414), in the particular that it assumed to authorize "road districts," less in area than a county, to impose, consonant with the popular will therein taken, a tax on property in that district, of "not more than one-fourth of one per centum," "for the purpose of constructing, improving and maintaining the public roads and bridges in such district or districts," offend section 215 of the Constitution of 1901, reading: "No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-three, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

Section 8, as presently pertinent, is as follows: "That courts of county commissioners and boards of revenue may, if they deem it expedient or proper, divide their respective counties into 'road districts,' and when such districts are created the said courts of county commissioners or boards of revenue may order elections in such districts or any of them,

for the purpose of ascertaining whether it is the will of the people of such district or districts that a tax of not more than one-fourth of one per centum on the taxable property in such district or districts shall be levied and assessed for the purpose of constructing, improving and maintaining the public roads and bridges in such district or districts. That such election shall be held in such manner as the courts of county commissioners or boards of revenue shall provide and only the qualified electors of such district or districts shall vote at such election. If a majority of the voters at such election shall vote for such tax the same shall be levied, assessed and collected as other taxes for county purposes. All taxes which may be levied and assessed under the provisions of this act shall constitute a lien on the property of the person against whom they are assessed superior to all other liens, except the state's lien for taxes. * * * Acts 1903, pp. 414, 415.

The question indicated has not been considered in this court. The recent adjudication in *Southern Railway Company v. Cherokee County*, 144 Ala. 579, 42 South. 66, treated and decided only that section 215 of the Constitution, by the use of the phrase, "or that may hereafter be created," had reference to debts contemplated by the governing bodies of the several counties, and did not condition the power to impose the special tax upon a debt existing at the time of the imposition of the tax. In short, that the power can be exercised in anticipation of payment for contemplated improvements within the provision of the section.

Section 215, in respect of its broad purpose, is a reiteration of the, generally, similar provision in the Constitution of 1875, whereby, for the first time, and as suggested by motives of the wisest prudence, a limitation was put upon the taxing power to be exercised by the Legislature. Many decisions delivered here rehearse the lamentable conditions immediately resulting from an unrestrained power to tax, out of which grew the limitation fixed in section 215. *Keene v. Jefferson County*, 135 Ala. 465, 33 South. 435.

While the wisdom of the limitation was not to be doubted, nor its broad efficacy impaired, it was considered proper and of equal necessity that for the purposes (among others not necessary to be restated) of erecting, constructing, or maintaining certain public agencies, public roads and bridges being among them, the general limitation of the taxing power expressed in the section (215) should yield to exception. The proviso with which we are now concerned raised the limitation with respect to the construction or maintenance of public roads and bridges so that "any county" may impose for that purpose a tax not exceeding one-fourth of 1 per centum.

The power to impose the special tax men-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tioned being created by proviso, an exception to a general limitation, the proviso must be so strictly construed as to confine its effect in lifting the major limitation to a status falling fairly within its terms. *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689; *Bragg v. Clark*, 50 Ala. 363; *Ex parte Lusk*, 82 Ala. 519, 2 South. 140; 2 *Lewis' Suth. St. Const.* § 352; *Endlich Int. Stat.* §§ 186, 526.

This rule of construction must have application in this instance.

Under our Constitution counties are considered and expressly treated as entirely distinctive from precincts, wards, and districts. In the suffrage department of the Constitution, dealing with registration as a prerequisite to the right to exercise the franchise, precincts and wards are recognized as being territorial areas less than a county and different, in reference, from a county. Section 178, among others. In the Declaration of Rights (section 6) the provision is for "a speedy, public trial by an impartial jury of the county or district in which the offense was committed," thereby taking cognizance of the difference between counties and districts. In *State v. McDonald*, 109 Wis. 506, 514, 85 N. W. 502, that learned court observed the distinction between districts and counties taken in the organic law of the state of Wisconsin in a provision similar to that quoted from section 6 of our Constitution. In *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730, *Brickell, C. J.*, defined "county," as well as expressed, in apt, lucid phrase, a county's relation to the state, its office, and its powers. Other parts of our organic law and statutory instances and juridical announcement might be added to reinforce the idea that, with us, the ordinary use of the term county intends "an involuntary political or civil division of the state created * * * to aid in the administration of government" (*Askew v. Hale Co.*, supra); and that, in consequence, "district" is not synonymous with "county."

Section 215 thrice employs the term "county." Its first use is in the general prohibitive sense, viz., "no county in this state shall be authorized to levy," etc. As employed in that connection, "county" intends, evidently, the unit of political authority defined in *Askew v. Hale County*, supra. The limitation is so expressed in recognition of the fact that the county is and has always been one of the two subordinate governmental agencies of the state. It is addressed, primarily, to the Legislature in denial, to that branch of the government, of the right to clothe the county with a taxing power in excess of the limit prescribed. But special circumstances, conditions, and purposes commended the incorporation in the section of the proviso under consideration, and thereupon the makers of the organic law undertook to raise the inhibition, the limitation, in the interest of these special matters of essentially important

county jurisdiction. To express the exception, the proviso, the term "county" is twice subsequently employed. Having laid a prohibition upon the authorization of the counties to tax beyond one-half of 1 per centum, the exception, for the special purposes defined, must, of necessity, have been intended to take out of the general limitation the same governmental entity as is affected by the general limitation, viz., the county, the unit. This view is further confirmed when this rule of interpretation is applied, as it should be here, if it be assumed that, as last used in the section, "county" is ambiguous in meaning; that where a word or phrase is repeated, in Constitution or statute, and in one instance its meaning is definite and clear, and in the other it is susceptible of two meanings, it will be presumed to have been employed in the former sense, unless a contrary intent appears. *State ex rel. Meyer v. Greene*, 154 Ala. 249, 257, 46 South. 268. There is nothing in the section to indicate a purpose to clothe the county, as last employed therein, with a meaning or effect different from that plainly intended by its use in the expression of the general limitation preceding.

The whole section must, of course, be read and considered, in arriving at a true interpretation of any part of it. In the first proviso a like exception to that with which we are now concerned is made that debts on the prescribed date might be paid by taxation. Obviously, the area, the unit, of taxation for that purpose is the county, and not a fraction thereof. This is rendered perfectly certain, if it were not otherwise, by the fact that the debt contemplated is and must be the debt of the county, and not that of any fraction thereof. With like intent, "county" is employed the second time in the section. As there used, it intends that the power to impose a special tax is given, by way of exception from the prohibition of the general limitation, as a means to pay existing ("now," i. e., at the time the Constitution of 1901 was adopted) debt or liability "against the county." It need not be more than summarily stated that to afford the means, by taxation, for the liquidation of county debts or liabilities, the tax must be uniform upon all subjects of taxation of the same class throughout the county. *Kennamer v. State*, 150 Ala. 74, 79, 43 South. 482. To satisfy such demands ("against a county"), we apprehend that a classification, based solely upon territorial lines, within a county, would be necessarily arbitrary, and would patently violate the rule of uniformity in matters of taxation. As interpreted in *Southern Railway Company v. Cherokee County*, supra, it is clear that the office and sole intent of the exception, proviso, under consideration, is to authorize a gathering of funds, by the imposition of the special tax, wherewith to pay debts contemplated for the construction, etc., of necessary public buildings, bridges, or roads. Such demands must, ex

necessitate, be demands "against the county." The creation of liabilities for the enumerated public agencies can only be such as are "against the county," and so for the obvious reason that under our present system (aside from municipalities) there is no governmental agency below that of a county capable of incurring liabilities of the character described, and this is expressly recognized by section 215 of the Constitution. Being a county debt or liability contemplated, funds derived from specially permitted taxation to meet the obligation of the county must be drawn uniformly from all subjects of taxation of the same class therein. Section 8 of the act in question, on its face, would violate the Constitution (section 215) by subjecting to taxation a district, less than a county, to pay a county demand warrantably contemplated; and hence, in effect, would direct a procedure and accomplish a result plainly against the undoubted rule of uniformity in taxation.

There is no factor, in the inquiry, of benefits resulting from improved roads or bridges to sections of the counties contiguous to these improvements, and of corresponding lack of equal advantage to sections remote therefrom. The Constitution takes no account, in lifting the general limitation on the power to tax for the special purposes described in section 215, of the rule of benefits recognized, upon occasion, with respect to municipal improvements. Const. § 223. On the contrary, the makers of the organic law intended that a county debt or liability for defined special purposes might be liquidated by the imposition of a special tax upon the taxable property of the county, the institution obligated to satisfy the debt or liability. We see no escape from the conclusion foreshadowed, and, hence, must pronounce section 8, in the particular indicated, unconstitutional and void.

It, accordingly, results that the judgment appealed from is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

GILBERT v. PINKSTON.

(Supreme Court of Alabama. April 21, 1910.)

1. QUIETING TITLE (§ 44*)—CLOUD ON TITLE—BURDEN OF PROOF.

A defendant in a suit to remove a cloud on title, who alleges that complainant conveyed the land to a third person, who, with his wife, conveyed the land to defendant, has the burden of showing what title he has to the land.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 44.*]

2. HOMESTEAD (§ 119*)—CONVEYANCES—ACKNOWLEDGMENT.

A deed of the homestead signed by the husband and wife is absolutely void where the sep-

arate acknowledgment of the wife does not comply with the statutory requirements.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 210-214; Dec. Dig. § 119.*]

3. HOMESTEAD (§ 123*)—CONVEYANCES—ACKNOWLEDGMENT.

Where a husband died after executing a deed of his homestead, which was void because the separate acknowledgment of the wife did not comply with the statutory requirements, no subsequent acknowledgment by the wife could make the deed effective, though she was the only heir, so that the estate vested in her.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 123.*]

4. HOMESTEAD (§§ 141, 145, 146*)—RIGHTS OF SURVIVING WIFE.

Under Code 1886, § 2543, the right of a widow in the homestead of her deceased husband is only to occupy the homestead for life, and the homestead does not vest in her absolutely unless the estate of the deceased husband has been declared insolvent, and, where she abandons the homestead or attempts to convey it, her rights cease.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 257, 261-285; Dec. Dig. §§ 141, 145, 146.*]

5. HOMESTEAD (§ 143*)—DESCENT—RIGHTS OF WIFE AND HEIRS—STATUTES.

Under Code 1886, § 1915, relating to the descent of real estate, the homestead of one who dies leaving a widow and brothers and sisters descends to the brothers and sisters as heirs, and not to the widow.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 270; Dec. Dig. § 143.*]

6. ADVERSE POSSESSION (§ 32*)—COLOR OF TITLE—RECORD.

One claiming land under a deed from the administrator of a decedent or as the heir of the decedent need not record her claim of adverse possession under Code 1896, § 1541, providing for the filing of notice of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 32.*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Suit by Rachel Pinkston against John R. Gilbert, who filed a cross-bill. From a decree for complainant, defendant appeals. Affirmed.

E. J. Garrison and Riddle & Allen, for appellant. Whatley & Cornelius, for appellee.

SIMPSON, J. The original bill in this case was filed by the appellee against the appellant to remove a cloud from her title. The respondent, by answer and cross-bill, set up the claim that the complainant had conveyed the lands in question to her brother, William Pinkston, during his life, and that said William Pinkston and his wife, Luttia Pinkston, had conveyed the land to the respondent. The point being made that the land in question was occupied by William Pinkston at the time of the execution of said deed (May 4, 1885), and that the separate acknowledgment by the wife did not comply with the requirements of the statute, the respondent amended his answer and cross-bill by showing that since the commencement of this suit the widow of said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

William Pinkston had made a proper acknowledgment. It appears from the evidence that William Pinkston died in 1887 or 1888; that at the time of his death, and for several years anterior thereto, he was living on the land in question as his homestead. There was no proof of his ownership of the lands except the testimony of several witnesses tending to show that in 1885 the complainant had executed a deed conveying said land to him, which deed was never recorded and has been lost; while the complainant produced in evidence a deed from the administrator of their father's estate of January 8, 1879, purporting to be in accordance with an order of the probate court, and sale thereunder duly advertised, conveying the land to her. She testified that the paper which was spoken of as a deed from her to William Pinkston was not a deed at all, but a paper agreeing that he might occupy the land during his life, and that she refused to sign it, and she was corroborated by other witnesses. She also testified that William Pinkston merely entered upon the land by her permission, and she had agreed to let him occupy it during his life. Her own testimony and that of others also tended to show that she has been in adverse possession of the land since shortly after William Pinkston's death. The burden being upon the respondent to show what right, title, or claim he has to the property, the testimony is not at all conclusive to the point that William Pinkston ever owned the land. In the next place, if he did own it, he was certainly occupying it as a homestead at the time the deed was attempted to be made to the respondent, and, the separate acknowledgment being defective, the deed was absolutely void. *Cox v. Holcomb*, 87 Ala. 589, 6 South. 309, 13 Am. St. Rep. 79; *Slappy v. Hanners*, 137 Ala. 202, 33 South. 900, and cases cited.

The deed being absolutely void, it is difficult to see how any subsequent act, short of an actual conveyance, could galvanize the original deed into life. Accordingly our court has held distinctly that, when a man dies, after the execution of such a deed, the land descends to his heirs, and no subsequent acknowledgment by the widow can make the deed effective. *Richardson v. Woodstock Iron Co.*, 90 Ala. 266, 269, 270, 8 South. 7, 9 L. R. A. 348; *Parks v. Barnett et al.*, 104 Ala. 438, 441, 442, 16 South. 136. The appellant insists that these decisions have no bearing on this case, because the widow of William Pinkston was his only heir, that the estate vested absolutely in her, and she had a right to convey it. Even if that were a correct statement of the situation, a mere acknowledgment of a dead deed could not be construed into a conveyance of the property. Her rights, however, were governed by the statutes found in the Code of 1886. Under section 2543 of that Code, the widow's right

was only to occupy the homestead during her life, and it did not vest in her absolutely, unless the estate of her deceased husband was duly declared insolvent; and, if she abandoned the homestead or attempted to convey it away, her rights ceased. *Munchus v. Harris*, 69 Ala. 509; *Baker v. Keith*, 72 Ala. 121; *Barber v. Williams*, 74 Ala. 331. The evidence in this case shows that within a year or two after her husband's death said widow abandoned the homestead, and is now living in the poorhouse. She testifies herself that shortly after her husband's death she gave the land up to complainant, who has been in possession of it ever since, and that she has not claimed any interest in the lands since her husband's death. According to section 1915 of the Code of 1886, the brothers and sisters of William Pinkston were his heirs, and not his widow. Whether the complainant held the land under the deed from the administrator which was at least "color of title," or as the heir of her brother, it was not necessary for her to record her claim of adverse possession under the act of 1893, afterwards embodied in section 1541 of the Code of 1896.

Under all the evidence, the court below properly held that the complainant was entitled to the relief prayed, and that the cross-complainant was not entitled to relief.

The decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

STANDARD OIL CO. v. WEEKS et al.

(Supreme Court of Alabama. April 21, 1910.)

1. SALES (§ 68*)—CONSTRUCTION OF CONTRACT. A contract for sale of oil held to require deliveries to be made in iron drums, and not in wood barrels.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 68.*]

2. SALES (§§ 166, 179*)—DELIVERY NOT IN ACCORD WITH CONTRACT—LIABILITY OF BUYER.

Where a contract for sale of oil required delivery in iron, deliveries undertaken to be made in wood, if not accepted, would not render the buyer liable, but, even if made in wood and accepted by the buyers, they would be liable only for the quantity of oil actually received by them.

[Ed. Note.—For other cases, see Sales, Dec. Dig. §§ 166, 179.*]

Appeal from Coffee County Court; J. N. Ham, Judge.

Action by the Standard Oil Company against J. T. Weeks and others. From a judgment granting inadequate relief, plaintiff appeals. Affirmed.

J. F. Sanders, for appellant. Kyle B. Price, for appellees.

McCLELLAN, J. Action by appellant against appellees on account for goods sold.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment for plaintiff being less than the sum to which it conceived it was entitled, the plaintiff appeals.

The parties entered into a written contract on September 7, 1907, a copy of which is set out in the bill of exceptions. Adopting, for the occasion, the insistence for appellant that the court should have construed the written and sole contract, rather than, as it did, submit to the jury the question of intention of the parties in respect to the character of receptacle in which it was thereby contemplated the deliveries of the deodorized gasoline should be made, we undertake the construction of the contract in the particular indicated.

The character of the receptacle in which this commodity was to be delivered is referred to three times in the instrument. As first appears, the reference is in this connection: " * * * At the price of 15½ cents per gallon f. o. b. Pensacola, Fla., all of the deodorized gasoline in iron drums. * * *" The second reference reads thus: "If deliveries are made in wood barrels the price will be 2 cents per gal. higher." The last reference appears in this wise: "Iron." Beneath "iron" are these words: "In this space insert whether delivery is to be made in wood or iron barrels or from tank wagons." It appears with reasonable certainty from the direction to "insert" in the space indicated at the bottom of the instrument the character of the receptacle to be used in deliveries that a blank contract was the foundation for the instrument executed by the parties. And it further appears that the insertion directed was made in the space indicated, and that that insertion contemplated deliveries in "iron." This feature of the contract made it in that respect consistent with the first reference to the character of the receptacle to be used, viz., "in iron drums." The second reference is to "wood barrels." It is obvious, when the entire instrument is taken into account, as must be done in the interpretation of the contract, that that reference is conditional at most. However, when it is observed that the clause beginning with the words, "if deliveries," and ending with the word, "higher," abruptly breaks into the midst of the sentence fixing the price and point of delivery and describing the character of receptacle to be used (preceding the interjected clause) and (following the interjected clause), the phrase descriptive of the amount of gasoline it was to buy, viz., "which it may require in its regular business during the life of the contract" (December 31, 1907), there is left no room for doubt that the clause referring to wood barrels was not intended to control the express provision for iron receptacles. If the contract is construed otherwise, the seller was clothed with the power to increase the price per gallon by effecting deliveries in wood in-

stead of iron, and this is the face of the evident intent of the parties to fix the price at 2 cents per gallon less than the price in wood.

Furthermore, the conclusion that a blank contract was the foundation of this engagement is emphasized in correctness when the interjected clause, with its surroundings, is considered. The effect of the interjected clause in this contract was conditioned upon the character of receptacle to be used in deliveries, and not having stipulated for deliveries in wood barrels, or not having left it open to the seller's choice, the clause can have no influence in the premises. It follows that the contract required deliveries in iron; and the defendants were not obligated by the contract to accept deliveries made in wood. Deliveries undertaken to be made in wood, if not accepted, cannot be the basis for liability against defendants; but, even if made in wood and accepted by defendants, they are liable only for the quantity of gasoline actually received by them. From this conclusion it necessarily follows that the rulings on evidence, assigned as errors, but admitted testimony in accordance with the proper construction of the contract as we have stated it, and were, hence, without prejudice to plaintiff.

The three remaining assignments of error rest upon the oral charge of the court. The theory adopted below seems to have been that it was a jury issue whether the deliveries should under the contract be in wood or iron receptacles; and that, if to be in wood, the defendants were liable for all gasoline delivered f. o. b. Pensacola in wood barrels "in good condition"; and, if not so delivered in wood barrels "in good condition," the liability of the defendants was limited to the quantity of gasoline "actually received" by them. Under the interpretation of the contract taken here, it is evident that no prejudice to plaintiff could attend the instructions given the jury in the oral extracts complained of. The court, as we view it, erred fundamentally in plaintiff's favor by not applying the contract's provisions as herein before interpreted in this regard, with the result that defendants' liability should have been limited to the gasoline delivered f. o. b. Pensacola "in iron," and that quantity actually received by defendants, though forwarded in "wood barrels," together with the interest on the sum of the price of each class of deliveries. There is no assignment of error invoking review here of the amount of the sum of the recovery awarded plaintiff.

There is no prejudicial error assigned. The judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

DICKINSON et al. v. CHAMPION et al.

(Supreme Court of Alabama. April 21, 1910.)

1. HOMESTEAD (§ 150*)—WIDOW'S EXEMPTION—TITLE TO PROPERTY.

Under the exemption statute, where a man dies leaving a widow and no minor children, his homestead, not exceeding 160 acres and not worth more than \$2,000, vests absolutely in the widow, without any proceedings to set the same apart as her homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 295; Dec. Dig. § 150.*]

2. HOMESTEAD (§ 150*)—PROCEEDINGS SETTING ASIDE HOMESTEAD—COLLATERAL ATTACK.

Proceedings in the probate court, setting aside a homestead to the widow, may not be assailed in a collateral proceeding between the heirs at law and the widow's grantee.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 303; Dec. Dig. § 150.*]

3. HOMESTEAD (§ 146*)—WIDOW'S EXEMPTION—LIFE ESTATE.

Under the exemption statute, where an intestate left a widow, but no minor children, if the homestead was worth more than \$2,000, thereby preventing the vesting of an absolute and fee-simple title in the widow, a life estate would vest in her; and, it not appearing that the widow was dead, the heirs at law could not maintain ejectment against the widow's grantee.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 257; Dec. Dig. § 146.*]

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

Ejectment by Annie Dickinson and others against G. M. Champion and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. G. Seay and W. L. Parks, for appellants. R. L. Harmon, for appellees.

MAYFIELD, J. H. W. Emfinger died intestate, leaving a widow and no minor children. All the land he owned was a homestead of 120 acres. This was duly set apart to the widow, as provided by section 2097 et seq. of the Code of 1896. It was reported and appraised at \$1,200, which report and appraisement was fully confirmed by the probate court, and set aside to the widow as exempt, thus vesting in her an absolute title thereto, as provided by section 2100 of the Code of 1896. The widow subsequently sold the lands to appellees, and the appellants (grandchildren and heirs of the intestate) brought this action of ejectment to recover the lands.

On the trial appellants objected to the introduction of the proceedings in the probate court setting aside the homestead to the widow, on the ground that they, the heirs at law, were not made parties to the proceedings. This objection was overruled, and they excepted. They then offered to prove that the land was worth \$25 per acre at the time of the death of the intestate; but the court declined to allow this proof. In consequence of these adverse rulings, the plaintiffs (ap-

pellants here) took a nonsuit, with a bill of exceptions.

There was no reversible error in any of the rulings of the trial court. If the lands were worth less than \$2,000, they vested absolutely in the widow by virtue of the statute, without any proceedings to set the same aside as a homestead to the widow. *Tartt v. Negus*, 127 Ala. 301, 28 South. 713; *Faircloth v. Carroll*, 137 Ala. 243, 34 South. 182. The proceedings in the probate court, setting aside the homestead, could not be assailed in a collateral proceeding between these parties. If the lands should be conceded to be worth more than \$2,000, thereby preventing the vesting of an absolute and fee-simple title in the widow, a life estate thereto certainly vested in her; and, it not appearing that the widow is dead, of course, the plaintiffs could not recover in any event.

It follows that the judgment of the circuit court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

HUSON ICE & MACHINE WORKS v. BLAND & CHAMBERS.

(Supreme Court of Alabama. April 7, 1910.)

1. SALES (§ 119*)—REMEDIES OF BUYER.

Where the sellers of an ice plant guaranteed the plant and all the machinery connected therewith for 12 months, agreeing to replace any part that broke or proved defective, and also to test and insure the capacity of the plant, but the contract contained no provision for its own rescission, and the plant which the sellers offered to deliver was different from that contracted for, the buyers were not limited to their remedy on the warranty, but were entitled to rescind the contract and refuse to accept the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.*]

2. SALES (§ 166*)—PERFORMANCE OF CONTRACT—DUTY OF BUYER TO ACCEPT.

Where an ice plant shipped by a seller was not that sold, the buyers were under no duty to accept it, even if it were of a better quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391-400; Dec. Dig. § 166.*]

3. PLEADING (§ 173*)—REPLICATION—SUFFICIENCY.

Replications, which neither denied the facts stated in the pleas, nor confessed and avoided, nor set up matters of estoppel, were insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 339, 340, 385; Dec. Dig. § 173.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Charges ignoring a defense set up by special pleas, which there was evidence tending to prove, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Those parts of the charge which related to the measure of damages, if error, were with-

out injury, where the jury found for the defendants as to all right of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1063.*]

Appeal from Circuit Court, Henry County; A. A. Evans, Judge.

Action by the Huson Ice & Machine Works against Bland & Chambers. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Ben F. Reid, for appellant. Espy & Farmer, for appellees.

MAYFIELD, J. The first two counts declare on a breach of a written contract of sale by which plaintiff sold to defendants a certain ice plant, complete, together with all the iron work necessary for the completion and setting up of the plant—the property to be delivered f. o. b. the cars at the shipping point, and the title to remain in the plaintiff, the vendor, until the purchase price was fully paid. The total purchase price was \$3,000, \$800 of which was to be paid in cash, on the receipt of the plant for operating purposes, and the balance of the purchase price was to be evidenced by two promissory notes, executed by defendants to plaintiff, each for \$1,100, one payable 6 months and one 12 months from the date the property was received by defendants for operating purposes. By the terms of the contract of sale the plaintiff agreed to furnish a competent and skilled superintendent to assist in setting up and installing the plant; and plaintiff, the vendor, by the terms of said contract, guaranteed the plant and all the machinery connected therewith for a period of 12 months, with the condition that, if any part thereof broke or proved defective during that time, plaintiff would repair or replace the same, and further agreed to test and insure the capacity of the plant to manufacture six tons of ice per day. These two first counts allege that plaintiff performed fully its part of the contract, in so far as it could do so, but that the defendants wholly failed and refused to perform their part, in that they refused to accept the property when shipped and offered for delivery and installation, or to allow plaintiff to install it, or to test the capacity or efficiency of the plant, in accordance with the provisions of the contract. The other and third count set up the same state of facts, but declared on a breach of contract, growing out of the contract, in that defendants negligently failed, in disregard of their duty, to perform their obligations under the contract alleged.

The defendants pleaded the general issue, and several special pleas, setting up fraud and deceit on the part of the plaintiff, and that defendants thereby were induced to make or enter into the contract as alleged—that is, specifically, that plaintiff made false representations to the defendants as to the char-

acter, quality, capacity, and worth of the machinery and plant sold; that defendants relied upon these false representations, and were thereby induced to make the purchase and contract; that they had no opportunity to inspect the property before executing the contract, but relied solely upon these representations; that when the property arrived, and they had the opportunity to inspect, they did so, and found it not to be as represented, but much inferior and of much less value, and not the property they contracted to purchase, and not the property they desired; and that on account of this fraud on the part of the plaintiff they declined to receive the property or to carry out the contract.

Demurrers to these pleas were overruled, and the plaintiff replied, and demurrers were sustained to all except one of the replications, which it is unnecessary to consider, as the rulings thereon were in favor of plaintiff, the appellant here. These rulings on the demurrers, pleas, and replications, adverse to the appellant, raised the questions which are considered by counsel to be the most important on this appeal.

The pivotal question is thus stated by counsel for appellant: "The first, second, and third assignments of error raise the question of law in the case. Defendants in the court below relied on special pleas setting up that the machinery and plant shipped was not the machinery and plant bought; that plaintiff in the action represented the condition of the machinery to be one thing, and upon that they relied in making the contract, while the machinery shipped was of a different and inferior character, hence they refused to allow it set up or to accept it. This contention certainly cannot be supported. Under the contract appellees were bound to accept the machinery and pay for it according to the terms of the contract, if, after it was set up and tested, the contract requirements were met. In other words, they had no legal right to pass on the machinery until and after it was set up and tested, whereupon their right to determine whether it came up to the contract requirements came into existence only."

Appellant relies upon the case of Schleicher, Schumm & Co. v. Montgomery Light Co., 114 Ala. 235, 21 South. 1014, to support its contention as stated above. We do not doubt the soundness of the propositions announced in that case, and have no criticism or modification to make concerning them. But the facts in that case, and the issue to which they applied, are clearly distinguishable from those in this case. The sale, or contract of sale, in that case, was absolute (as was the one in this); but it contained a condition subsequent to the effect that the purchaser could and should be released upon the happening of that condition—the condition being that he should test the property within a stipulated time, and, if found not to suit his purposes,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

then, and not until then, he was to be released from the purchase—while this contract had a provision by which the vendor guaranteed for 12 months the property sold, and guaranteed that it would manufacture six tons of ice per day, and that if any part of the machinery should prove defective or break within that time the plaintiff would replace or repair it. There was no such condition in this case, as was in the other, that the defendant could, on the happening of that event or condition, rescind or abandon the contract of sale. The defendants in this case were bound in any event, though they might have a defense pro tanto, or a cross-action, in the event plaintiff breached its warranties or failed to make good its guaranty; that is, this contract does not provide for its own rescission or avoidance, as did that one, but the conditions here are only warranties or guaranties, at most.

The purchasers in this case were not compelled to accept property different from that which they bought, and to rely solely upon the warranties or guaranties of the vendor. They were not compelled to set up machinery different from that purchased or contracted to be purchased merely because the contract of sale provided certain warranties and guaranties. Resort to them was not made their exclusive mode of redress, if the plaintiff shipped them property which was not sold or purchased. The warranties and guaranties in this contract were necessarily as to specific property sold. If the plaintiff had shipped and offered to deliver the specific property sold, then the duty would have rested upon the defendants to accept, and to perform their part of the contract—at least until there was a breach by the plaintiff. The pleas, however, allege (and on demurrer we must take them as true) that the plaintiff first breached the contract, in that it did not ship or offer to deliver the property sold or contracted to be sold, but shipped inferior property, though of a similar kind.

If the property shipped was not that sold, and this is in effect what the pleas allege, then it needs no argument to prove that there was no duty on the defendants to accept that offer, even though it was of a better quality and of greater value. The plaintiff had no right to offer or tender any property except that sold, and the defendants were under no duty or contract to accept any other than that purchased. These pleas raised and tendered the issue whether or not the property shipped and tendered to defendants by the plaintiff was the property sold or contracted to be sold. The issue was, therefore, a material one, and one which determined the rights of the parties to this contract and suit. The pleas were sufficient for this purpose, and the court properly overruled the demurrers thereto.

The replications were clearly not answers

to the pleas which they purported to answer. They neither denied the facts stated in the pleas, nor confessed or avowed, nor set up matters of estoppel. This much is necessary to the sufficiency of replications. *H. A. & B. R. R. Co. v. South*, 112 Ala. 642, 20 South. 1003; *Mothershed's Case*, 110 Ala. 143, 20 South. 67. The demurrers to these replications pointed out the defects, and the court properly sustained them.

The charges requested by the plaintiff were properly refused. They ignored the defense set up by the special pleas, and which there was evidence tending to prove. Those parts of the oral charge of the court as to the measure of damages, going to certain items thereof, if error, were without injury, because the jury found for the defendants as to all right of recovery.

It results that the judgment of the circuit court must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

LOWE MFG. CO. v. PAYNE.

(Supreme Court of Alabama. April 21, 1914.)

MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—NEGLIGENCE.

Where the operator of a spinning frame was perfectly familiar with the machine, and fully aware of the danger of cleaning it while in motion, she was negligent in obeying an order to do so, though given by one in authority, and cannot recover from the master for resultant injuries.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 781; Dec. Dig. § 245.*]

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Action by Clara Payne against the Lowe Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lawrence Cooper and George P. Cooper, for appellant. Taylor & Drake, for appellee.

SIMPSON, J. This is an action, by the appellee against the appellant, for damages on account of an injury to the hand received by the plaintiff as an employé of the defendant. The injury complained of is the loss of a portion of one of the fingers of plaintiff, and the first count alleges defects in the ways, works, etc., in that the cogs were not sufficiently covered to prevent injuries, and that said defect had not been remedied, etc. (in the language of subdivision 1 of section 3910, Code of 1907). The second count alleges that plaintiff was a minor, 12 years old, working at a spinning frame, under the orders of a section hand, who ordered her to work at said spinning frame machine, and to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whose orders she was bound to conform and did conform, etc., and that "the said Jim Hudgins, as section hand," failed to inform plaintiff of the defective and dangerous condition of the machine, which he knew, and ordered her to clean the cogs while the machine was in rapid motion, etc. The third count is based upon the inexperience of the plaintiff, the failure to warn her of the dangers, and ordering her to clean the cogs while in motion. Demurrer was sustained to count 4, and count 5 relies upon the negligence of said Hudgins, who had superintendence, etc., in directing plaintiff to perform dangerous work; she being inexperienced, etc. Pleas of contributory negligence and assumption of risk were interposed.

No evidence was offered by the defendant. The plaintiff testified that she was 14 years old last December; that she received the injury while cleaning the frame, and that "Jim Hudgins, section hand," ordered her "to clean the frame when it was running"; also that she had been engaged in the work for nearly a year, that she cleaned around the cogs every day, but that she always stopped the frame before cleaning, until the day of the injury; that she was rubbing around the cogs with a piece of cotton when her hand was caught; that the cogs were all covered by a case, but she got behind the case and put her hand in under the case, where the wheels were, and got caught; that she could have stopped the frame, and the cogs would have stopped running, in which case there would be no danger; that the lever by which the cogs would be stopped was easily movable by the hand; that she knew the cogs were turning when the frame was running; that she knew it was dangerous to touch the cogs when in motion; that she had done the same work at the knitting mills for several months before going to work at defendant's mill; that she knew the spinning frame well, and knew all about the frame, that there was nothing about it that she did not fully understand; that when she first went to work she was told that the cogs were under the casing, and that it was dangerous to handle them when the frame was running; that the frame was in good order, and there was no defect about it; that she had attended school for four years, and could read and write very well.

Jim Hudgins was examined as a witness by the plaintiff, and testified that he had not given any orders to clean the cogs; that it was dangerous to clean them when the machine was running, and against the rules to do so. Tom Pruitt, a witness for plaintiff, testified substantially to the same effect, and

also testified to a copy of the rules which were printed and hung on the wall at the entrance of the spinning room, one of which is: "Cleaning of machinery must be done after stopping time. All help are cautioned not to clean machinery while running, as it is dangerous." He also testified that he had spoken to the plaintiff about the danger of cleaning while the frame was running, had told her of this danger not more than an hour before she was hurt, had seen her wiping off the frame while it was in motion, and told her to keep her hand away from the gear head, that she stopped while he was there, and in a half or three-quarters of an hour she had been hurt and was being carried out.

It will be noticed that the only evidence which has the least tendency to sustain any allegation of the complaint is the statement by the plaintiff that "Jim Hudgins, section hand," ordered her "to clean the frame when it was running." Whether that expression means that his order was that she should clean it while it was running, or merely that the order was given while it was running, does not clearly appear; but, however that may be, the plaintiff does not testify that he was one whose orders she was bound to obey, etc., nor that he had any superintendence, nor is there any testimony tending to show that. On the contrary, her witness, Hudgins, testified that Tom Pruitt was overseer and acting section hand, and that it was his duty to give orders to the hands. In addition, her own testimony shows that she was perfectly familiar with the machine, and fully aware of the danger; and, even if such order had been given by a proper person, she should not have obeyed it. 1 Labatt, Master & Servant, § 438, p. 1234 et seq. See, also, as to the general liability in such cases, *Mundhenke v. Oregon City Co.*, 47 Or. 127, 81 Pac. 977, 1 L. R. A. (N. S.) 278; *Townsend v. Langles (C. C.)* 41 Fed. 919; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; *Ennis v. Maharajah*, 49 Fed. 111, 1 C. C. A. 181; *Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900, 25 C. C. A. 220; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Moss v. Mosely*, 148 Ala. 168, 41 South. 1012.

The plaintiff was guilty of contributory negligence. The court should have given the general affirmative charge, as requested by the defendant. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

ILLINOIS CENT. R. CO. v. WHITE.
(No. 14,051.)

(Supreme Court of Mississippi. May 30, 1910.)
CARRIERS (§ 280*) — PASSENGERS — FREIGHT
TRAINS — "TRAIN FOR BOTH PASSENGERS
AND FREIGHT."

An ordinary local freight train, carrying a caboose, is not a "train for both passengers and freight," within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on freight trains not so intended.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 280.*]

Appeal from Circuit Court, Choctaw County; G. A. McLean, Judge.

Action by Mrs. Alice White against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes & Longstreet, for appellant. Alexander & Alexander and Daniel & Adams, for appellee.

SMITH, J. Appellee was a passenger on one of appellant's local freight trains, and was going from Kosciusko to Durant. Upon arriving at Durant, and in attempting to alight from the platform of the car in which she was traveling, the train was moved or jerked, causing her to fall and become injured. At the close of the evidence appellant requested and was refused a peremptory instruction, and the cause was submitted to the jury, resulting in a verdict and judgment for appellee.

Section 4054 of the Code of 1906, provides: "But for injury to any passenger upon any freight train, not being intended for both passengers and freight, the company shall not be liable, except for the gross negligence or carelessness of its servants." It is not contended that any gross negligence was shown on the part of appellant's employees; but the contention is that the train upon which appellant was traveling was intended for both passengers and freight. This train was strictly a freight train, with only the appliances of such, but had attached to it a caboose, or way car, in which all persons desiring so to do were permitted to travel. One of the witnesses stated, without contradiction: "That train, the same as other local freight trains, is equipped with a caboose, known as a 'way car.' That car is divided into two partitions, and one is where the train crew carry their tools, lanterns, and other necessary equipment, which is carried on the caboose in case of accident, such as frogs and chains, and the other part of the caboose is where people would ride, and in that part of the caboose, also, is carried chains and brasses and coupling pins and so forth, underneath the seats." Such a train cannot be said to be intended for both passengers and freight, as was held by this court

in Perkins v. Chicago, St. Louis & New Orleans Railroad Company, 60 Miss. 726, wherein this court said: "A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose."

The peremptory instruction requested by appellant ought to have been given.

Reversed and remanded.

PRATHER et al. v. PRATHER et al. (No 14,375.)

(Supreme Court of Mississippi. May 30, 1910.)
1. WILLS (§ 93*) — ESTABLISHMENT — PAROL
EVIDENCE — ADMISSIBILITY.

Whether a writing was intended as a will may be shown by parol evidence, alone or in connection with the writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 223; Dec. Dig. § 93.*]

2. WILLS (§ 96*) — LETTER AS WILL.

A letter written by decedent to a brother, including a statement that if anything should ever happen to decedent he wanted certain brothers to have what he had, and to be sure not to let any one beat them out of it, is a valid will, if decedent did not intend to deliver it to his brother during his own lifetime, but kept it, treating and intending it as his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 229; Dec. Dig. § 96.*]

Appeal from Chancery Court, Franklin County; J. S. Hicks, Chancellor.

Petition by H. E. Prather and another against J. C. Prather and others to probate a will. From a decree overruling a demurrer to the petition, defendants appeal. Affirmed and remanded.

This is an appeal from the chancery court of Franklin county, overruling the demurrer to the petition of W. H. and H. E. Prather, appellees, to which the brothers and sisters and nieces and nephews of the petitioners are made parties, to probate, as the last will and testament of their deceased brother, P. P. Prather, the following writing: "Office of Prather & Byrd, Dealer in General Merchandise, Meadville, Miss., 1/3. Mr. H. E. Prather, Hamburg, Miss.—My Dear Brother: This leaves me as well as could expect. Business is very dull here at present. Hope you are all enjoying good health, Say Bro. if anything should ever happen to me, I want you and Bro. Walter to get what I have, and be sure and not let no one beat you out of it in days to come. As far as Willie is concerned he will treat you right, for he is strictly honest and a gentleman in every respect. Come out some time. Keep this to yourself, and oblige. Yours truly, P. P. Prather."

The petition sets up that the petitioner, H.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

E. Prather, is the party to whom this letter is addressed, and "Walter" mentioned therein is the other petitioner, and both are brothers of the decedent, P. P. Prather, and that the defendants to the petition are the brothers and sisters of the decedent and of the petitioners, and their nieces and nephews; the decedent having died single without issue. The petition alleges further: "Petitioners would show that the above instrument is the last will and testament of P. P. Prather, deceased, and that it was written in the form of a letter and addressed to the said H. E. Prather, and marked 'Personal,' and was by the said P. P. Prather, deceased, wholly written, dated, and signed in the handwriting of the said P. P. Prather, deceased, and sealed and deposited by the said P. P. Prather in his trunk with his personal and private papers, and was found therein duly written, signed, and dated as aforesaid, after the death of the said P. P. Prather, and was duly turned over to H. E. Prather. Petitioners would show that when the said P. P. Prather wrote 'Bro. Walter' he meant and intended his brother Walter H. Prather. Petitioners would show that although the said will in the form of a letter was addressed to H. E. Prather, Hamburg, Miss., and from the face of the letter it was to be mailed, yet in truth and in fact the said P. P. Prather, intending the said letter as a will, and knowing that it was necessary for the same to be preserved, he never intended mailing the said instrument, but intended, when he wrote it, that it should be his last will and testament, and that he would write it in the form of a letter, and that he would keep it in his private papers for safe-keeping, so that at his death the said H. E. Prather and Walter Prather would come into possession of the same, and thereby take under it all of his property, as was the intention of testator. Petitioners would further show that the said P. P. Prather, a short while before the date of the said will, went to Dr. T. K. Magee, a personal friend of his, seeking advice as to the disposition of his property, saying that he wanted to leave what he had to his brothers, Walter and H. E. Prather, and wanted to fix it so that no one would beat them out of it, and that he was advised by Magee to make a will, and for him to be sure that it was in his own handwriting, for then it would not require witnesses; that the said Prather remarked that he thought he knew how to write a will that would stick, and that he (Prather) would write it and place it in his trunk, and that if anything ever happened to him for said T. K. Magee to tell H. E. Prather or Walter Prather where they could find it; that, acting under the instructions of said Magee, the said testator made and executed the above instrument in the form of a letter and in his own handwriting, and placed the same in his trunk, where same was found after his death; that when the testator wrote the letter he intended it as

his last will and testament, and never intended to mail, but to keep the same in his trunk, as per conversation to said Magee, for safe-keeping, and to retain the same within his possession and control, and the said instrument is the last will and testament of the said P. P. Prather, and under and by virtue of the same all the property of testator, P. P. Prather, both real and personal, passes to your petitioners in equal parts."

R. L. Corban and Bennett & Torrey, for appellants. McKnight & McKnight, for appellees.

ANDERSON, J. (after stating the facts as above). In *Young v. Wark*, 76 Miss. 829, 25 South. 660, it was held that: "Want Sarah relatives have all property. S. A. M. Sadler"—was neither in form nor substance a will, and, in the absence of evidence to show that it was intended as a will, it was not in fact such; and in *Redhead v. Redhead*, 83 Miss. 141, 35 South. 761, the following was held to be a valid will: "Realizing the uncertainty of life at all times, and the dangers incident to travel, I leave this as a memoranda of my wishes *should anything happen to me* during my intended trip to Buffalo and other places"—followed by a disposition of his estate. In *Buffington v. Thomas*, 84 Miss. 157, 36 South. 1039, 105 Am. St. Rep. 423, it was held: "A letter, testamentary in its character and wholly written and dated and signed by the testator, is a valid holographic will, although it contains a request to the person to whom it was addressed, to keep its contents private"—and the fact that it requested an answer from the person to whom it was addressed did not make it dependent upon a contingency, although it was never answered, and the testator lived several months after writing the letter.

Whether a writing was intended as a will may be shown by parol testimony alone, or by such testimony together with the writing. The letter under consideration by its language is testamentary in character. It purports to be a will. However, the language: "This leaves me as well as could expect. Business is very dull here at present. * * * Come out some time"—clearly shows it was written to reach the hands of the brother at an early date, and before the death of the writer; and the fact that it did not, and was found in possession of the latter at his death, unexplained, would sufficiently prove that he had abandoned treating it as his will, that he did not intend it as his will. On the other hand, if the allegations of the petition are true, that for sufficient reasons to be shown the decedent never intended to deliver the writing to his brother during the former's lifetime, but kept it, treating and intending it as his will, then it is his will.

Affirmed and remanded, and defendants given 30 days after mandate filed in court below in which to answer.

HAMMOND et al. v. COWART. (No. 14,240.) (Supreme Court of Mississippi. May 2, 1910.) **QUIETING TITLE (§ 44*)—EVIDENCE—SUFFICIENCY.**

Defendants established title to a tract on a showing that the land was allotted and deeded to one or two of their remote grantors on partition of an estate in 1891, and that continuous possession has since been held under such allotment and under a claim of ownership, with complainant's acquiescence.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 44.*]

Appeal from Chancery Court, Greene County; T. A. Wood, Chancellor.

Bill by Louisa Cowart against V. H. Hammond and another. From a decree dismissing the bill and the cross-bill, complainant and defendants respectively appeal. Reversed and rendered as to bill; affirmed as to cross-bill.

The appellee filed a suit in chancery against the appellants to cancel as a cloud the title of appellants as to a three-fourths interest in 80 acres of land, described in the bill. The appellee made no claim to the remaining one-fourth interest in same. Appellants answered, and made their answer a cross-bill, praying a confirmation of their title. There was a decree dismissing both the bill and the cross-bill without prejudice, from which this appeal is prosecuted.

The facts disclosed by the record are as follows: The land in controversy, along with other land, was owned by one Jeremiah Miller, Sr., who died, leaving a wife and four children. The wife died shortly afterwards, and the heirs, who were the appellee, Louisa Cowart, Jeremiah Miller, Jr., Eli Miller, and Mrs. M. J. Williamson, all of whom were adults, by mutual agreement met on the 6th day of July, 1891, before a justice of the peace, and agreed upon a division of the land, when mutual deeds were executed. It is not clear from the record, though there is testimony on the point, as to whether the 80 acres in controversy fell to the lot of Jeremiah Miller, Jr., as a whole, or to him and Mrs. M. J. Williamson; the deeds not all being placed of record, and their loss being proven in court. At any rate, in the year 1892 Jeremiah Miller, Jr., conveyed his interest in said 80 acres to E. C. Williamson, the husband of Mrs. M. J. Williamson, and E. C. and M. J. Williamson afterwards conveyed the land in controversy to appellants' vendors.

It is contended for appellee, however, that the tract was never allotted to any of the heirs, and that, therefore, the appellants, through their vendors, only acquired a one-fourth interest in the land, to wit, that of Mrs. M. J. Williamson, and that the appellants subsequently acquired the interest of Jeremiah Miller and Eli Miller by purchase. It is shown, however, that both of the Mil-

lers are illiterate, and they claim that they did not know that they were deeding this particular 80 acres of land. It is also shown that the appellants, and those through whom they claim, had secured title to the land, for many years were asserting ownership and paying taxes on the same with the knowledge of the appellee, who lived near said land, and she had never attempted to exercise ownership of it.

H. P. Heidelberg, Harrison & Gex, and Flowers, Fletcher & Whitfield, for appellants. C. H. Wood, for appellee.

SMITH, J. It appears from the evidence, without material conflict therein, that in the division of the estate of Jeremiah Miller, Sr., which occurred in July, 1891, the land in controversy was allotted either to Jeremiah Miller, Jr., or to him and Mrs. M. J. Williamson jointly; that they and their immediate and remote grantees have been in possession thereof from that to the present time, claiming the ownership thereof, which claim was known to and acquiesced in by appellee. It is also clear from the evidence that a deed conveying said land either to Jeremiah or to Jeremiah and Mrs. M. J. Williamson jointly was duly executed and delivered by the other heirs of the said Jeremiah Miller, Sr., at the time of this partition. It is claimed by appellants that this deed, which was never recorded, is now in possession of appellee. This is denied by appellee, and the fact is wholly immaterial, as the execution of the deed is abundantly shown. The chancellor was correct in dismissing appellee's bill, but erred in dismissing appellants' cross-bill.

The decree of the court below is therefore reversed, and decree here for appellants, quieting and confirming their title to the land in controversy.

GARRETT et al. v. ELLIS et al. (No. 13,875.)

(Supreme Court of Mississippi. May 16, 1910.)

1. QUIETING TITLE (§ 44*)—SUFFICIENCY OF EVIDENCE.

In an action to quiet title against defendant's claim to property as a cloud upon complainant's title, in which defendant claimed under a purchase upon foreclosure of a trust deed, followed by entry and collection of rents, evidence held to show that defendant entered as mortgagee after condition broken, and took actual possession, and received the rents and profits for more than 20 years before the action was begun.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 91; Dec. Dig. § 44.*]

2. MORTGAGES (§ 614*)—REDEMPTION—ACTIONS TO REDEEM—LIMITATIONS—POSSESSION OF MORTGAGEE.

Code 1906, § 3092, provides that when a mortgagee after condition broken obtains actual possession of, or receipt of the profits or rents

of, the mortgaged land, the mortgagor may only sue to redeem within 10 years next after the mortgage obtained such possession or receipt, in absence of written acknowledgment of the mortgagor's title or right to redeem, etc. *Held*, that the mortgagee's title is complete, either upon obtaining and holding actual possession after condition broken, or the receipt of the profits or rent, for the statutory period, and it was immaterial that only a part of the mortgagors surrendered possession; the manner in which the mortgagee obtains possession or receives the profits being immaterial, in the absence of fraud.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1822-1824; Dec. Dig. § 614.*]

Appeal from Chancery Court, Tate County; I. T. Blunt, Chancellor.

Action by R. H. Ellis and others against B. F. Garrett and others, in which defendants filed a cross-bill. From a decree for plaintiffs, defendants appeal. Reversed, and decree entered on cross-bill.

The appellees filed a bill in chancery to cancel the claim of appellants as a cloud upon their title to the land described in the bill. The appellants answered, setting up a sale in 1883 to B. F. Garrett, under a deed of trust given by the parents of the appellees in 1881, alleging that the trustee's deed has been lost and never recorded, and also setting up the ten-year statute of limitations of adverse possession, and the ten-year statute of mortgagee in possession, receiving the rents from the place, and asking that their answer be made a cross-bill, and praying a cancellation of the claim of the appellees as a cloud upon their title to the land. The record shows that after the death of B. H. Ellis, the father of the appellees, the land was advertised and sold under the deed of trust, and that at the sale said B. F. Garrett became the purchaser, and that from that time on rents were collected by Garrett from the Ellises, and that Garrett took several deeds of trust on the crops and personal property of the Ellis family, and that in the said deeds of trust the land was described as the property of Garrett, and it was also recited in said deeds of trust that they were given to secure the rents due Garrett. These contracts were made with the widow prior to her death, and afterwards with her eldest son, and it seems clear from the record that the neighbors regarded the property as Garrett's, and he continued to pay taxes on it as owner. There is no proof in the record of the payment of any part of the money due on the deed of trust; but the chancellor held that it was barred by the statute of limitations, and declined to permit Garrett to testify as against the interest of the deceased, Mrs. Ellis, who died in 1893, and that, therefore, the statute did not begin to run until that time, and as the suit was brought in 1906, within the 10 years, therefore recovery was not barred. There was a decree for complainants, from which this appeal comes.

J. F. Dean, for appellants. N. A. Taylor, for appellees.

MAYES, C. J. A very careful investigation of this case leads to the irresistible conclusion that B. F. Garrett, as mortgagee after condition broken, entered into the actual possession of the land about which this contest is being waged, and was in actual possession and receiving the profits and rent of the land for a period of more than 20 years before the institution of this suit. We do not deem it necessary to enter into a detailed statement of the facts in this opinion. In reporting the case, the reporter can do that. In addition to being in possession of the land under conditions that were notorious throughout all that neighborhood, renting it out and receiving rents therefor, the parties in possession reciting in their deeds in trust that it was the land of Garrett for years and years, he paid taxes on it and had it assessed to him for over 20 years. All these things corroborate the statement of the witnesses to the effect that Garrett was in possession and receiving the rents, though not conclusive in themselves. This case is absolutely controlled by section 3092 of the Code of 1906, which is as follows, viz.: "When a mortgagee, after condition broken, shall obtain the actual possession or receipts of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him; and in such case a suit may not be brought but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; but such acknowledgment shall be effectual only as against, and to the extent of the interest of the party signing it."

This section contains no saving clause as to minors or other persons whomsoever, and when once it is shown that the mortgagee, after condition broken and without fraud, actually obtains possession of the land, or receipt of the profits or rent of land embraced in his mortgage for the period prescribed by statute, his title is complete. The statute above quoted is explicit and positive, and gives the mortgagee title when he has obtained actual possession, or when he has been in receipt of the rents and profits of the land for more than 10 years. In short, actual possession is not necessary in order to perfect the title; but even if there has been no actual possession, but there has been a receipt of rents and profits for the period of limitation, the title is complete.

It is contended that, even if it is shown that the mother and brother of complainants did surrender the land to the mortgagee, this act of theirs could not prejudice the rights of the other heirs, equally interested in the property, unless acquiesced in by them. We do not think this contention can be sustained under the statute. The statute is purely a statute of limitations, peremptory in its commands, and utterly without indulgence. Such statutes as this, though seemingly harsh at times, yet work out much good in the adjustment of affairs between man and man, and prevent more wrong than they perpetrate. The fact of the possession of the land embraced in the mortgage by the mortgagee after condition broken, or the fact of the receipt by him of profits and rent of the land for a period of 10 years, makes this title complete, no matter how or through whom he obtains his possession, or how he obtains the profits or rents, unless, of course, he obtains it through fraud. It will rarely happen that a mortgagee will be allowed to retain possession of land for 10 years without disturbance from the owner of same, unless there has been some kind of a transfer of the property to the mortgagee.

The decree of the chancellor is reversed, prayer of cross-bill sustained, and decree entered here canceling the claim of complainants in the original bill as a cloud upon the title of B. F. Garrett, and the title to property declared to be in B. F. Garrett.

So ordered.

WILKINSON COUNTY v. JONES.

(No. 14,136.)

(Supreme Court of Mississippi. May 30, 1910.)

REWARDS (§ 8*)—PERFORMANCE OF SERVICE.

Under the express terms of Code 1906, § 1459, to earn a reward for arresting a murderer, the arrest must be made while the murderer is fleeing or attempting to flee.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. § 11; Dec. Dig. § 8*]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by Ralph G. Jones against Wilkinson County. From a judgment of the circuit court, reversing a judgment of the board of supervisors, disallowing plaintiff's claim for the statutory reward of \$100 for arresting a fleeing homicide, defendant appeals. Reversed and rendered.

The claim was first presented to the circuit court on the ex parte petition of appellee Jones, and by that court allowed. The claim was then presented to the board of supervisors, and disallowed. On the trial before the board of supervisors, the testimony was taken down and embodied in a bill of exceptions. From the judgment of the board, Jones appealed to the circuit court, and the circuit court tried the case on the record

made before the board of supervisors, as a court of appeals, and rendered a judgment reversing the judgment of the board and allowing the claim, and awarding a mandamus against the board in the event they should refuse to pay it. The facts in reference to the alleged capture of Amanda Humphreys, who had slain Nick Messenger, were testified to by the appellee, Jones, and the sheriff of the county.

Carl Fox, Asst. Atty. Gen., for appellant. Bramlette & Tucker, for appellee.

ANDERSON, J. (after stating the facts as above). Under the authority of Ex parte Petition of Webb, 49 South. 567, this case is properly before the court. This reward is claimed under section 1459 of the Code of 1906, which provides as follows: "A person who shall arrest any one who has killed another and is fleeing, or attempting to flee, before arrest, and shall deliver him up for trial, shall be entitled to the sum of one hundred dollars out of the treasury of the county in which the homicide occurred, upon the allowance of the circuit court and the board of supervisors of the county in the manner provided by law."

The testimony of the appellee, Jones, is conclusive against his right to recover the reward claimed by him. It neither shows nor tends to show that, at the time he arrested Amanda Humphreys, she was either "fleeing or attempting to flee." His testimony is borne out by that of the sheriff. Giving the statute in question a liberal construction in favor of persons arresting fleeing homicides, as the court held in Ex parte Petition of Webb, supra, should be given, it is clear, from the facts, the appellee is not entitled to the reward.

Reversed, and judgment here for appellant, dismissing the claim.

JAMES et al. v. TALLAHATCHIE DRAINAGE COMMISSION et al. (No. 14,386.)

(Supreme Court of Mississippi. May 16, 1910.)

DRAINS (§ 18*)—ISSUANCE OF BONDS BY COMMISSION—COMPLIANCE WITH STATUTE—NECESSITY.

The statute under which the Tallahatchie Drainage Commission was proceeding to issue bonds was amended so as to provide that no bonds theretofore issued, or attempted to be issued, but undelivered, and no bonds hereafter attempted to be issued and sold, should be valid or binding upon the commission, unless indorsed by the treasurer to the effect that he has duly registered them to the owner, and that before such bonds are entitled to registry and indorsement the proposal to issue them shall be submitted to a vote of the qualified electors residing within the drainage district who own land subject to the tax imposed thereby, and that such bonds shall not be sold, or be a valid obligation of the commission, except by consent of

a majority of the qualified electors. *Held*, that the statute must be complied with before a valid issue of bonds can be made by the drainage commission.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 18.*]

Appeal from Chancery Court, Tunica County; M. E. Denton, Chancery.

Injunction suit by T. G. James and others against the Tallahatchie Drainage Commission and others, begun by bill in chancery filed by the plaintiffs, who are property owners in the Tallahatchie drainage district, seeking to enjoin the sale of certain bonds issued by the members and officers of the Drainage Commission. The defendants demurred and filed a motion to dissolve the temporary injunction, and the chancellor sustained the demurrer and dissolved the injunction, and plaintiff appealed. Reversed and remanded.

J. C. Wilson, F. A. Montgomery, and Percy, Moody & Percy, for appellants. Dinkins & Caldwell and J. W. Cutrer, for appellees.

SMITH, J. Since the decree of the court below was rendered the statute under which the Tallahatchie Drainage Commission was proceeding to issue the bonds in question has been amended, so as to prescribe the conditions upon which bonds may be issued. This act, among other things, provides: "And no such bonds heretofore issued, or attempted to be issued, but not yet delivered, and no such bonds hereafter attempted to be issued and sold, shall be valid or binding on the said drainage commission until the same be endorsed by the treasurer thereof, in writing, that he has duly registered said bonds to the owner thereof, as hereinafter provided. Before any such bonds shall be entitled to registry and indorsement by the treasurer, and before they shall become valid and binding as the obligations of the said drainage commission, or on any property in said drainage district, the proposal to issue of such bonds shall first be submitted to a vote of the qualified electors, actually residing within the limits of said drainage district who own land subject to the tax imposed by the act of which this is an amendment, and such bonds shall not be sold, or be the valid obligation of said commission, except upon the consent of a majority of such qualified electors voting at an election called for that purpose, as hereinafter provided." ¹ Before any bonds can be issued by the commission, this provision of the statute must be complied with. It therefore becomes unnecessary for us to consider the other matters set up in the bill of complaint, and as to which we express no opinion.

The decree of the court below is reversed, the injunction reinstated, and the cause remanded.

GLOBE & RUTGERS FIRE INS. CO. v. FIREMEN'S FUND FIRE INS. CO. et al. (No. 14,185.)

(Supreme Court of Mississippi. May 30, 1910.)

1. PLEADING (§ 214*)—DEMURRER—EFFECT.

A demurrer to the declaration admits every material allegation thereof, and an affidavit filed by another, denying allegations therein, cannot affect the legal effect of the facts alleged, when considered on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 526-534; Dec. Dig. § 214.*]

2. MASTER AND SERVANT (§ 339*)—INTERFERENCE WITH RELATION BY THIRD PERSONS—INDUCING SERVANT TO LEAVE EMPLOYMENT.

While other insurance companies might induce plaintiff's agents to leave its employment and enter their own employment, if the purpose of employing them was to honestly further their own business, they could not conspire to illegally destroy plaintiff's business, by wrongfully and maliciously inducing its agent to leave its employment and enter their own employment, without being liable for resulting damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1283; Dec. Dig. § 339.*]

3. CONSPIRACY (§ 17*)—CIVIL LIABILITY—ACTIONS—PARTIES.

If defendants maliciously conspired together to injure plaintiff's business, all of defendants were properly joined in an action against them for damages; the conspiracy making the wrongful acts the joint wrong of all of them.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 17; Dec. Dig. § 17.*]

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by the Globe & Rutgers Fire Insurance Company against the Firemen's Fund Fire Insurance Company and others. From a judgment dismissing the action on demurrer to the declaration, plaintiff appeals. Reversed and remanded.

T. M. Miller and Joseph Hirsh, for appellant. McLaurin, Armistead & Brien, for appellees.

MAYES, C. J. The Globe & Rutgers Fire Insurance Company began suit in the circuit court of Adams county against numerous insurance companies. We deem it unnecessary to name all the companies made defendants to the declaration. The suit is for an alleged tort, and the amount sued for is \$50,000. The declaration alleges substantially that plaintiff is engaged in the business of writing fire insurance in the state of Mississippi, having complied with all the laws of the state relative thereto, and being duly licensed; that plaintiff conducts its business through numerous local agents in various towns and cities of the state, including the city of Natchez, all local agencies being under the supervision of its general state agents; that plaintiff is, and always has been, in active competition with defendants, all being engaged in the same business and in the same territory; that plaintiff has built up a large and lucra-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ Laws 1910, c. 132.

tive business in fire insurance, and in consequence of its good management, stability, and just dealing has secured the good will of all the communities where its business is carried on; that plaintiff is independent of all combination among insurance companies, and does not seek to increase rates of insurance, or cheapen the services of desirable agents, or otherwise hamper free competition in the fire insurance business, but conforms in all respects to all the laws applicable to the business; that, in order to prosecute its business successfully, plaintiff has found it necessary to employ agents in various places, who are experienced in the business and thoroughly competent, and who also represent other insurance companies; that because of its independence, justice, liberality, and success it has brought itself into strong disfavor with the defendants, who are its rivals in business; that because of these facts the defendants, with others unknown to plaintiff, wickedly and maliciously contriving and intending to harass, vex, oppress, annoy, and injure the plaintiff, and as far as practicable put it out of business in the state, by depriving it of the service of successful and experienced agents employed by it, and in an effort to bring it into discredit and disfavor with the public and compel it to quit business, or employ inexperienced persons as its local agents, did about the 30th of April, 1908, and in the county of Adams, wickedly, maliciously, and unlawfully, and with the intention and purpose aforesaid conspire with each other and with others unknown, and intending to deprive plaintiff of the services of one Trabue Lawrence, its local agent, maliciously and unlawfully, persuade, cajole, and intimidate Trabue Lawrence, the defendant's local agent, threatening to drive him out of his business as insurance agent unless he should yield; that thereupon the said Lawrence was persuaded, forced, and intimidated by the defendants into abandoning and leaving the service of plaintiff, so that from and after the 2d day of May, 1908, plaintiff lost the benefit of the valuable service of the aforesaid Lawrence on account of the wicked, malicious, and unlawful conspiracy of the defendants; that because of this conspiracy plaintiff was compelled either to quit business in Natchez or intrust its affairs to less experienced and less competent local agents, to its damage of at least \$3,000 per annum in net premiums, which it could and would have earned, had it been permitted to retain the services of Lawrence. Wherefore plaintiff claims that by reason of the aforesaid wicked, malicious, unlawful, and oppressive conspiracy it has sustained injury and damage in the sum of \$50,000, for which it sues. To this declaration a demurrer was interposed, setting up numerous grounds; the chief one being that the declaration does not aver any facts which constitute a cause of action. The demurrer was sustained, and the

suit dismissed, from which judgment an appeal is prosecuted.

It may here be stated that there is an affidavit filed by Lawrence in which he denies the allegations of the declaration. But this case must be considered without reference to this affidavit, since it forms no part of the question presented by the record. If the declaration states a good cause of action, the demurrer must be overruled. Plaintiff cannot be precluded in its suit by any denial made by Lawrence. It may be able to prove the facts alleged in the declaration by other witnesses. The demurrer confesses every material allegation of the declaration, and with such allegations confessed it is for us to determine whether a cause of action appears. The affidavit cannot add to or take away from the legal effect of the case.

The declaration states facts which show that defendants are not in the mere exercise of just rights, but that they are wickedly, unlawfully, and maliciously interfering with plaintiff's employé for the sole purpose of harming it. Under the facts alleged in the declaration, it may have been perfectly permissible for the defendants to have employed the agent of plaintiff and to pay him better for his services. They might employ him, or any number of plaintiff's agents similarly in the employ of plaintiff, without violating any principle of lawful right, if the object of the employment was in the honest furtherance of their own business enterprises. But the facts stated in the declaration show a determination to destroy and drive plaintiff out of business, and the declaration alleges a conspiracy for this purpose. Surely no individual or corporation may maliciously and wantonly set about to ruin a competitor. As an incident to the advance of one's own business and for the purpose, he has the right to use all proper methods, and his competitors must be able to cope with his ingenuities. As is said in the case of *Martel v. White*, 185 Mass. 260, 69 N. E. 1087, 64 L. R. A. 263, 102 Am. St. Rep. 346: "Competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly." The fact that a rival in business is vanquished is not of itself sufficient to give rise to a cause of action against his competitor; but the facts must go further, and show that the contest was carried on by methods not allowable in such warfare.

For an association of persons to conspire together for the sole purpose of destroying one's business certainly transcends legitimate and lawful competitive methods. Every person must be free to ply his own calling. If he may be interfered with by having his employé driven from his service by fraud, misrepresentation, intimidation, obstruction, or molestation, and in this way have his business destroyed, the effect upon his business operations and progress is as deadly as if the

law permitted an incendiary to burn or a mob to destroy. If his business is to be destroyed, it can make little difference in result whether it be by the unlawful use of fire or unlawful intimidation or molestation. Legitimate competition he must meet, or surrender; but legitimate competition only means that all may make the best lawful use of their faculties and their means. If in so doing their competitor's business is destroyed as a mere incident of his inability to successfully contend against superior skill or means, that is but the hardship of legitimate warfare. The world is always in search of improved methods and reduction of cost. *Martel v. White*, 135 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341.

In the case of *Employing Printers' Club v. Doctor Blosser Company*, 122 Ga. 509, 50 S. E. 353, 106 Am. St. Rep. 137, there is to be found a lengthy and exhaustive discussion of the question involved in this case. In that case it is held that, wherever there is a malicious interference with one's employés, an action can be maintained against the party so interfering. It is stated on page 516 of 122 Ga., on page 355 of 50 S. E., and on page 142 of 106 Am. St. Rep., that: "At common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damages and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statutes of laborers. The early English cases limited the action to the enticement of menial servants; but the later cases, beginning with *Lumly v. Gye*, 2 El. & B. 216, have extended the doctrine beyond menial servants, and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract. * * * In the case of *Quinn v. Leatham* [1901] L. R. App. Cas. 495, after reviewing many cases, it was stated that: 'A combination of two or more, without justification or excuse, to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable.' The Supreme Court of the United States approvingly cited the English cases of *Lumly v. Gye*, 2 El. & B. 216, and *Bowen v. Hall*, 6 Q. B. Div. 333, and reached the conclusion that, if one maliciously interferes with a contract to the injury of the other, the party injured may maintain an action against the wrongdoer. *Angle v. Chicago Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55."

In the case of *Dolz v. Winfree, Norman & Pearson*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755, it is stated that: "Every one has a right to enjoy the fruits and advantages of

his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." See, also, *Walker v. Cronin*, 107 Mass. 562.

In the case under consideration, as well as the case above cited, it appears from the declaration that the interference with the business of plaintiff was not incidental to the accomplishment of some legitimate purpose of the defendants, but that the interference was wanton and malicious, and for the purpose of driving the plaintiff out of business. The gist of this action is the malicious and unlawful interference with plaintiff's business, to his damage. The action would lie as well against one as against all the defendants; but the charge of the conspiracy is the basis of the right to join all in the same suit as parties defendant. It becomes, by reason of the conspiracy, the joint wrong of all conspirators. *Cooley on Torts*, § 125; *Dolz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. See, also, 11 Am. St. Rep. note on page 474.

As we have already seen from the authorities, the right to recover for malicious interference extends to all kinds of contracts; that is to say, all contracts of service whatever may be their nature. But it is argued on the part of appellees that there was no contract for any definite period of time between plaintiff and Lawrence, and therefore there could be no interference which would justify the action. We do not think, under the authorities, that it makes any difference whether there was a contract between plaintiff and Lawrence for a definite period of time or not. There was a service and a quasi contract, and plaintiff had a right to have this service to continue free of malicious interference. The suit is because of a malicious and wanton interference with plaintiff's rights, and is not for the breach of any contract.

Counsel for appellees cite the cases of *Hunt v. Simonds*, 19 Mo. 533, and *Orr v. Home Mutual Ins. Co.*, 12 La. Ann. 225, 68 Am. Dec. 770, wherein it was held that an action would not lie against the officers of an insurance company, combining and conspiring to willfully and maliciously injure the owner, by refusing, without cause, to take insurance upon his boat, whereby he is deprived of his occupation and compelled to sell the boat. We say of these cases that they are decided, one in 1854 and the other in 1857, and are out of harmony with modern decisions upon this subject. In truth, their holding is ex-

pressly repudiated in *Eddy on Combinations*, vol. 2, p. 513; 16 *Encyc. Law* (2d Ed.) 1111.

There may be some early authorities which conflict with the view of the law announced in this case; but the more modern and more just decisions, according to our view, sustain our conclusions. We were early taught that one of the maxims of the law was that "there is no wrong without its remedy." Wanton and malicious interference with one's business, with the purpose to destroy it, is a wrong that will be admitted by the most indifferent. We hardly think it necessary to pursue the discussion of this case further.

Reversed and remanded.

STOKES v. LEMON & GALE CO. (No. 14,374.)

(Supreme Court of Mississippi. May 30, 1910.)

EXECUTORS AND ADMINISTRATORS (§ 226*)—NOTICE TO CREDITORS—VALIDITY.

An administrator's notice, requiring claims against the estate to be filed within a year, is not void for using the word "file," instead of "register."

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 226*.]

Appeal from Chancery Court, Madison County; G. G. Lyell, Chancellor.

against Walter Stokes, administrator. From a decree for plaintiff, defendant appeals.

Action by the Lemon & Gale Company. Reversed, and bill dismissed.

This is an appeal from a decree of the chancery court in favor of the appellee for an amount alleged to be due by appellant's intestate. It is admitted that the appellee did not register its claim against the estate of the decedent within the one year allowed by law and in accordance with the published notice to creditors made by the administrator; but the chancellor held that such notice was void, and that therefore appellee was not estopped from recovering the amount of its claim.

H. B. Greaves, for appellant. Powell & Powell, for appellee.

WHITFIELD, C. The notice published by the administrator in this case was as follows: "Notice to Creditors. Whereas, I was duly appointed administrator to the estate of Julius Stokes, deceased, by the chancery court of Madison county, Mississippi, on the 21st day of April, 1908, and having qualified as such: Now, therefore, all persons having claims against the estate of said deceased will probate and file the same within a year from date or the same will be barred."

It is insisted that this notice is absolutely null and void; that the word "register" should be used, instead of the word "file"; and that the failure to use that word "register" vitiates the whole notice. This is far

too technical a view. The notice is a substantial compliance with the law. It is conceded that the claim of the appellee was barred, unless this notice was absolutely void, so as to operate as no notice at all.

It follows that the decree of the court below is reversed, and the bill dismissed.

PER CURIAM. The above opinion is adopted as the opinion of the court.

WOODSON v. COLORED GRAND LODGE OF KNIGHTS OF HONOR OF AMERICA et al. (No. 14,254.)

(Supreme Court of Mississippi. May 30, 1910.)
INSURANCE (§ 798*)—BENEFICIARIES—ESTOPPEL.

One who for many years acquiesced in a separation from her husband, and in his remarriage, and who herself remarried, is estopped to claim the benefits of insurance as his widow, as against his second wife.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 798*.]

Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.

Action by Mary Warren Woodson against the Colored Grand Lodge of Knights of Honor of America and another. From the judgment, complainant appeals, and defendant Mary Webster Woodson files cross-appeal. Affirmed on appeal, and reversed and rendered on cross-appeal.

Henry, Fox & Canizaro, for appellant. Anderson & Vollor, for cross-appellant. W. J. Latham, for appellee.

MAYES, C. J. This suit is instituted by Mary Warren Woodson against the Colored Grand Lodge of Knights of Honor and Mary Webster Woodson. The purpose of the suit is to compel the Grand Lodge Knights of Honor to pay complainant the sum of \$500 and interest, which is claimed to be due under a certain life insurance policy taken out in the order by one Tom Woodson. The policy of insurance was taken out by Tom Woodson some time in July, 1907. The fruits of the policy, by the terms of the contract, are made payable "to the widow or heir of the said Tom Woodson," and became payable at the death of the insured, which occurred in November, 1907. This contest is really between Mary Warren Woodson and Mary Webster Woodson; each claiming to be entitled to the proceeds of the policy by virtue of the fact of being the widow of deceased.

The only question in the case is: Which of these two women is entitled to the benefit of this policy? The facts are hardly disputed, and the question is practically one of law. It appears that in 1890 the complainant, Mary Warren Woodson, married the deceased in Vicksburg. After the marriage complainant and deceased lived together for about three

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

years, and separated; Tom Woodson remaining in Vicksburg, as it seems, and Mary Warren Woodson going across the river into Louisiana, but frequently visiting relatives in Vicksburg. Eight years after the marriage of complainant and deceased, and five years after the separation, Tom Woodson married a second time; this time marrying Mary Webster, who became Mary Webster Woodson, second alleged wife, and defendant in this suit. After the second marriage, deceased continued to live with the second wife, recognizing and holding her out as such, from 1888 until his death in November, 1907, and there were born to them eight children during this period of time. In the meantime Mary Warren Woodson, the first wife, some time after the separation, and at a time not clearly shown, but soon after the separation, married one Reason Blew in Louisiana. It will thus be seen that we have three presumably valid marriages—the first marriage between Mary Warren Woodson and Tom Woodson, in 1880; the second being between Tom Woodson and Mary Webster, in 1888; the third being that of Mary Warren Woodson with Reason Blew, at a time after her separation, but not clearly stated. The policy was taken out by Tom Woodson in July, 1907, 24 years after the separation from the first wife and 19 years after his marriage with his second wife, and while he was living with the second wife; and it is certain that the insurance, so far as Tom Woodson's intentions may be gleaned from his acts, was for the benefit of his second wife, Mary Webster Woodson. Throughout this 19 years Tom Woodson lived and cohabited with his second wife, and held her out to the world as such. During this 19 years the complainant was paying visits to the city of Vicksburg, and knew all of this, and knew that children were being born to her first husband and the alleged second wife, but never made complaint or raised her voice in remonstrance, but permitted them to continue the relation. In addition to this, and by her conduct recognizing the lawfulness of their relation, she contracted another marriage. In short, the conduct of the alleged first wife shows that she lived and acted in accordance with the right of all parties to this suit to contract a valid marriage.

The question now is: Will she be permitted to assert that which is at variance with the condition she has accepted, and in accordance with which she has lived, in order to make herself the beneficiary under the insurance policy? It may be here stated that no divorce is shown, and the complainant denies that any was obtained. No question is involved in this case, except as to which one of these women shall have this money. The complainant is not seeking to make lawful a marriage improvidently entered into, in order that offspring may be legitimized; but, if the object of her suit is accomplished, it will bas-

tardize children, and convict her own self of bigamous relations deliberately entered into. She must recover, if at all by proving her own turpitude, out of which she profits by the loss of others. Under these facts is complainant estopped? No question of heirship is involved here; that is, there is no contest between innocent heirs for the purpose of settling which set are legitimate heirs, each set being equally innocent of participation in the wrong, but being the mere victims of other people's wrong. In such case, of course, nothing but the fact of who were the legal heirs could ever settle such controversy. Under the facts of this case we have no hesitancy in saying that the first wife is estopped to introduce testimony proving her own turpitude, and contradicting that condition of affairs which she by her conduct has assented to be the true condition, and in accordance with which she has lived and acted for 19 years.

We do not at all say that, where the question arises in proper shape, the true condition of affairs in regard to marriage may not be shown; but we hold that under the facts of this case the complainant is estopped by her conduct, under every principle of law and equity. We are not aware of any case in our own Reports that is in point here; but the case of *Richardson's Estate*, 6 Pa. Co. Ct. R. 653, is almost identical with the facts of this case. On principle, we do not know of any reason why the rules of estoppel should not be applied as strictly to the facts of this case as any other civil contest. It appears in the record that the Grand Lodge had already paid to the second wife the sum of \$275 on the \$500 policy at the time of the institution of this suit, leaving a balance of only \$225, and the trial court decreed that the Knights of Honor should not be liable for this \$275, but decreed that the complainant should recover a judgment for the balance of \$225. From this judgment there was an appeal and cross-appeal; the complainant appealing from that part of the judgment which denied her the right to recover the whole of the policy, and the second wife appealing from that part of the judgment which decreed that the complainant should recover the \$225, or balance.

This being the case, the case is affirmed on direct appeal, and reversed on cross-appeal, with a decree here in favor of cross-appellant for the sum of \$225.

So ordered.

ROTHENBERG v. PACKARD.
(No. 14,488.)

(Supreme Court of Mississippi. May 2, 1910.)
CONTRACTS (§ 278*)—Breach—Right of Action.

Just before a performance of a theatrical company, of which plaintiff was manager, the actors struck because of plaintiff's failure to

pay their salaries, whereupon defendant, in whose house the play was to be, made an oral contract with plaintiff's traveling agent and the actors by which 70 per cent. of the receipts of the performance were to be withheld and applied on their salary, which was done. Plaintiff's written contract with defendant did not prohibit such an oral contract. *Held*, in an action by plaintiff for the part of the receipts of the performance called for by his written contract with defendant that plaintiff was not entitled to recover; the oral contract not infringing upon plaintiff's rights and being justified by the emergency, in order that the performance might proceed.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 278.*]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action by O. H. Packard against L. Rothenberg. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is a suit brought by the appellee against the appellant, alleging a breach of contract. The defendant pleaded, in addition to the plea on the general issue, the failure of the plaintiff to perform his contract, and set up an entirely new parol contract entered into with plaintiff's traveling agent. The record shows that the appellee was the manager of a theatrical troupe, called the Harry Beresford Company, which was billed for two performances in the city of Meridian on November 29, 1907. Just prior to the matinee performance, the appellant's manager, one Jones, learned that the actors and actresses had declined to perform because of certain arrears in salary. Jones at once, appreciating the situation, entered into an agreement with the traveling agent, one Du Bois, and the other actors and actresses, to hold out 70 per cent. of the receipts for their pay. This agreement was consummated, and the performance given, and the money withheld for the actors, in accordance with this subsequent parol agreement. The appellee, who was plaintiff below, sued for that part of the receipts called for by contract, and as a defense the appellant set up the breach of said contract by the appellee, alleging that but for the subsequent parol contract there would have been no performances, and that the appellee had failed, therefore, to comply with his contract to fill the engagement, and that the parol agreement subsequently entered into was entirely separate and distinct from the original contract alleged to have been broken. Under this state of facts, the court gave a peremptory instruction to find for the plaintiff, and from the judgment thereon this appeal was prosecuted.

Bozeman & Fewell, for appellant. F. V. Brahan, for appellee.

WHITFIELD, C. It is perfectly manifest from the whole record that the contract here involved was not the written contract on which the appellee relies. There is nothing

in that written contract to prohibit making a verbal contract under which the performance in this case was rendered. The situation was that the actors and actresses in the company refused to perform at all because their salaries were in arrears. The appellee had breached his contract with them, and there is nothing in the evidence to hint at ability on the part of the appellee to perform the contract, or any readiness or offer on his part to perform the contract. With this situation wholly unforeseen, the appellant made the contract under which this performance was rendered, a contract wholly independent of the contract on which the appellee relies. There was perfect authority and right on the part of the parties to the verbal contract to make it. No right of the appellee was thereby infringed. It was simply a case of emergency wholly unforeseen, in which emergency this verbal contract was made, in order that the performance might proceed.

It follows, of course, that the giving of the peremptory instruction by the court below was manifest error. It was for the jury to say whether they would believe the witness Jones, the appellant's manager, or not, about what the terms of this verbal contract were. If they did believe him, the appellant was clearly entitled to a verdict. Whether they would believe Jones was a question for them, and not for the court.

The judgment is reversed, and the cause remanded for a new trial.

PER CURIAM. For the reasons set out in the opinion of the Commissioner, the judgment is reversed, and the cause remanded.

BROWN et al. v. McINNIS et al.
(No. 14,291.)

(Supreme Court of Mississippi. May 30, 1910.)

Appeal from Chancery Court, Simpson County: Sam Whitman, Jr., Chancellor.

Action by H. Alonzo Brown and others against Daniel C. McInnis and others. From the judgment, Brown and others appeal. Affirmed.

McWille & Thompson, for appellants. May & Sanders, Hersh. Dent & Landau, and A. W. Dent, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. STOVALL.
(No. 14,489.)

(Supreme Court of Mississippi. May 30, 1910.)

Appeal from Circuit Court, Warren County: J. N. Bush, Judge.

Action by Louis A. Stovall against the Yazoo & Mississippi Valley Railroad Company. Judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment for plaintiff, and defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Henry, Fox & Canizaro, for appellee.

PER CURIAM. Affirmed.

LANG v. BOUSLOG. (No. 14,177.)

(Supreme Court of Mississippi. May 30, 1910.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between Edwin B. Lang and M. P. Bouslog. From the judgment, Lang appeals, and Bouslog files cross-appeal. Affirmed on both.

Dodds & Leathers and V. A. Griffith, for appellant. Ford, White & Ford, for appellee.

PER CURIAM. Affirmed on direct and cross appeal.

ILLINOIS CENT. R. CO. v. MITCHELL. (No. 14,050.)

(Supreme Court of Mississippi. May 31, 1910.)

Appeal from Circuit Court, Choctaw County; G. A. McLean, Judge.

Action by J. Ben Mitchell against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Dismissed.

PER CURIAM. Appeal dismissed.

MOORE v. MISSISSIPPI CENT. RY. CO. (No. 14,151.)

(Supreme Court of Mississippi. May 23, 1910. Suggestion of Error Overruled June 6, 1910.)

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Action by Will Moore against the Mississippi Central Railway Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed and remanded.

This suit was begun by the filing by appellant of a declaration in the circuit court against the appellee for damages for injuries alleged to have been received at the hands of the appellee. The lower court sustained a demurrer to the declaration, and the plaintiff appealed. The case was argued and submitted, and thereafter the court of its own motion remanded the cause to the docket for reargument. Thereupon the appellant's counsel filed a suggestion of error, which the court, after considering, sustained, and set aside its former order remanding the cause to the docket, and entered an order reversing the judgment and remanding the cause to the circuit court. Counsel for appellee then filed a suggestion of error, which the court overruled.

J. W. Cassedy and Potter & Thomson, for appellant. H. Cassedy, for appellee.

MAYES, C. J. The former order of the court remanding this cause to the docket is vacated, the demurrer overruled, and the cause remanded. The declaration is very near a violation of section 729 of the Code of 1906 in its unnecessary and confusing prolixity, but we are satisfied that there are sufficient facts stated to constitute a cause of action, and the cause is reversed and remanded.

MAGRUDER v. YAZOO & M. V. R. CO. (No. 14,368.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Claiborne County; Jno. N. Bush, Judge.

Action between J. M. Magruder and the Yazoo & Mississippi Valley Railroad Company. From the judgment, Magruder appeals. Affirmed.

J. McC. Martin, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

WASHINGTON et al. v. PEACOCK. (No. 14,366.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Chancery Court, Sunflower County; M. E. Denton, Chancellor.

Action between George Washington, Sr., and others and L. P. Peacock. From the judgment, Washington and others appeal. Affirmed.

F. E. Everett and S. F. Davis, for appellants. J. Holmes Baker, for appellee.

PER CURIAM. Affirmed.

MISSISSIPPI EASTERN RY. CO. v. SAMUEL WYNMAND COOPERAGE CO. (No. 14,381.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Clarke County; Jno. L. Buckley, Judge.

Action between the Mississippi Eastern Railway Company and the Samuel Wynmand Cooperage Company. From the judgment, the Railway Company appeals. Affirmed.

See, also, 98 Miss. 78, 46 South. 557.

S. H. Terral, J. A. Anderson and Baskin & Wilbourn, for appellant. Witherspoon & Witherspoon and Neville & Stone, for appellee.

PER CURIAM. Affirmed.

WILSON v. STATE. (No. 14,341.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, De Soto County; W. A. Roane, Judge.

Albert Wilson was convicted of murder, and appeals. Affirmed.

L. J. Farley and Farley & Lauderdale, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

NEW ORLEANS & N. E. R. CO. v. MATTHEWS et al. (No. 14,555.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between the New Orleans & Northeastern Railroad Company and D. M. Matthews and others. From the judgment, the Railroad Company appeals. Affirmed.

A. S. Boseman, for appellant. Williamson & Gilbert, for appellees.

PER CURIAM. Affirmed.

IVY v. SCOTT. (No. 14,322.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Ohancery Court, Lafayette County; I. T. Blount, Chancellor.

Action between James Ivy and Millie Scott. From the judgment, Ivy appeals. Affirmed.

Edgar Webster, for appellant. Kimmons & Kimmons, for appellee.

PER CURIAM. Affirmed.**BREVARD WOODS STAVE CO. v. WESTERN UNION TELEGRAPH CO.**

(No. 13,633.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Chickasaw County; E. O. Sykes, Judge.

Action between the Brevard Woods Stave Company and the Western Union Telegraph Company. From the judgment, the Stave Company appeals. Affirmed.

Geo. Butler, for appellant. E. O. Sykes, Jr., and Harris & Willing, for appellee.

PER CURIAM. Affirmed.**GREENWALD v. LUCE & MANNING.**

(No. 14,554.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between S. Greenwald and Luce & Manning. From the judgment, Greenwald appeals. Affirmed.

G. Q. Hall, Hall & Jacobson, for appellant. Cochran & McCants, for appellees.

PER CURIAM. Affirmed.**STATE ex rel. SIGSBEE et al. v. CITY OF BIRMINGHAM et al.**

(Supreme Court of Alabama. April 19, 1910.)

1. MUNICIPAL CORPORATIONS (§ 957*)—ANNEXATION OF TERRITORY—CONSTITUTIONAL PROVISIONS.

Where territory sought to be joined to B. was not included within the corporate limits of any other city or town. Const. 1901, § 216, providing that no city, town, village, or other municipal corporation, except as provided in the article, should levy or collect a higher rate of taxation in any one year than one-half of 1 per cent., and exempting B. and other cities from such restriction, was not applicable thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 957.*]

2. MUNICIPAL CORPORATIONS (§ 35*)—ANNEXATION OF TERRITORY—EFFECT.

Where by an election the territory of one city is added to that of another, the original corporation containing the added territory ceases to exist, and the added territory becomes a part of the city to which it is added, and subject to its powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 85.*]

3. MUNICIPAL CORPORATIONS (§ 957*)—BOUNDARIES—ALTERATION—ADDITION OF TERRITORY—STATUTES.

Code 1907, §§ 1070-1074, providing for the addition of new territory to cities, is not in conflict with Const. 1901, §§ 215, 216, providing that no county shall levy a greater rate of taxation than one-half of 1 per cent., and that no city, village, or other municipal corporation, other than certain specified cities, shall levy or collect a higher rate than one-half of 1 per cent., in that the statute permits the transfer of territory where the tax rate is so limited to cities which are expressly exempted from the limitation by the Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 957.*]

4. STATUTES (§ 90*)—SPECIAL AND LOCAL LAWS—AMENDMENT OF CITY CHARTER.

A proceeding to annex territory to a city is not an amendment to the city's charter, and is not therefore in conflict with Const. 1901, § 104, subd. 18, providing that the Legislature shall not pass and specially provide a local law amending, confirming, or extending the territory of any municipal corporation, etc.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 90.*]

5. MUNICIPAL CORPORATIONS (§ 33*)—BOUNDARIES—EXTENSION—STATUTORY PROVISIONS.

Code 1907, § 1072, provides that, in every proceeding to extend the corporate limits of any city under the provisions thereof, the council shall declare in each resolution and the judge in each order "that such resolution, order or notice, as the case may be, is passed, given or entered under the provisions of this article." Held, that such requirement is directory only, and that proceedings for the extension of the city limits are not invalidated by a failure of the order declaring the result of the election to contain such quoted provision.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 33.*]

6. MUNICIPAL CORPORATIONS (§ 33*)—BOUNDARIES—EXTENSION—DESCRIPTION—VARIANCE.

Proceedings for the extension of the boundaries of a city were not invalidated because the description in the published notice was not identical with the descriptions in the papers in the case, where both referred to a plat and reached the same point over practically the same route.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 33.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Petition by the State, on relation of J. N. Sigsbee and another, in the nature of quo warranto, against the City of Birmingham. From a judgment for respondents, petitioners appeal. Affirmed.

In addition to the petition set out in a former report of this case (157 Ala. 418, 47 South. 1036), and another report found in 48 South. 843, the following paragraph (No. 5) was added to the petition, as follows:

"Petitioners aver and show your honor's court that the said election was June 30, 1908, and a void election, in this: The said election was held under section 1071 of the Code of Alabama of 1907, which section is in conflict with section 216 of the Constitution of 1901, in this: Said section 1071 authorizes

an annexation of territory not incorporated, and which prohibited levying a greater tax than one-half of 1 per centum on the tax book property for one year, on the property situated therein, and which said section 216 of said Constitution granted to and authorized to the city of Birmingham, to which the said territory has been annexed under said election, the right to levy a tax at the rate of 1 per centum on the taxable property situated in the said city of Birmingham for any one year, which said territory was, on the ratification of said Constitution of 1901, established by its charter, which did not comprise the territory embraced and described in the exhibit hereto attached, and for that reason said section 1071 of the said Code is void, in that it conflicts with said section 216 of the Constitution."

Pinkney Scott, for appellants. Robert H. Thatch, for appellee.

SIMPSON, J. This is a quo warranto proceeding, for the purpose of testing the validity of certain proceedings under which an election was held to annex certain territory to the city of Birmingham. The case has been before this court heretofore. See *State ex rel. Sigsbee v. City of Birmingham*, 48 South. 843; *State ex rel. McKinley v. Martin*, 48 South. 846.

The first insistence of the appellants is that the court erred in sustaining the motion to strike paragraph 5, which has been added to the original petition. The substance of the contention is that the chapter included in sections of Code of 1907 from 1070 to 1074, inclusive, is in conflict with section 216 of the Constitution of 1901. Said section 216 provides "that no city, town, village or other municipal corporation, other than as provided in this article, shall levy or collect a higher rate of taxation in any one year * * * than one-half of one per cent., * * *" and then makes certain provisions not material to this controversy, and exempts Birmingham and other cities from this restriction. The insistence is that, by allowing the city of Birmingham to extend its limits so as to include the territory in question, it will result in subjecting the property in said territory to a higher rate of taxation than could be levied on it at the time of the adoption of the Constitution, and thus deprive it of the protection of said section 216.

It may be remarked, in the first place, that the territory described in the petition "does not embrace any territory within the corporate lines of another city or town," so that section 216 does not apply to it. Section 215 provides that no county shall levy a greater rate of taxation than one-half of 1 per cent. If the argument of the appellants be correct, then no city or town could ever be incorporated or extended; for in either event it would result in placing the territory under

the control of a corporation, which could increase the amount of taxes levied therein. Even if the territory sought to be annexed to Birmingham were incorporated, the result of the annexation would not be a violation of section 216, because it would not allow the original corporation to levy a higher rate than was provided for by law when the corporation was organized. By the election of the people the original corporation ceased to exist, and the territory simply became a part of the city of Birmingham, and, of course, subject to its powers.

Said sections are not violative of section 215 or section 216 of the Constitution; and there was no error in striking section 5 from the petition. This proceeding to annex the territory does not constitute an amendment to the charter of the city of Birmingham, and is not in conflict with section 104, subd. 18, Const. 1901. *State ex rel. Gamble v. Hubbard*, 148 Ala. 391, 41 South. 903.

It is next insisted that the proceedings were invalid, for failure to comply with the requirements of section 1072 of the Code. Said section provides for a second application to extend the city limits, after they have already been once extended, and in the same section goes on to provide that "in every proceeding to extend the corporate limits of any city or town under the provisions hereof the council" shall declare in each and every resolution, and the judge in each order "that such resolution, order or notice, as the case may be, is passed, given or entered under the provisions of this article." It appears from the record that this statement was made in the resolution of the city council, and in the decree ordering the election that fact is recited, and the order is stated to be made under the section of the Code; but in the order declaring the result of the election the section of the Code is not mentioned. It clearly appears from the entire proceeding, which was continuous, the final order referring to the previous proceeding, that it was all done under said statutes, and we hold that the requirement that said recital shall be made in every order is merely directory.

The next insistence is that the description of the territory to be annexed is not identical in the notice published in the *Age-Herald* with the descriptions in the papers in the case. It seems that in the notice in the paper one of the calls is left out, to wit, where the description in the papers in the cause is, "thence in a straight line to the northwest corner of the boundary line of the town of East Lake; thence westwardly in a broken line, along the northern boundary lines of the towns of East Lake, Woodlawn, and Avondale, to the northwest corner of the town of Avondale," the description in the notice is, "thence in a straight line to the northwest corner of the boundary line of Woodlawn and Avondale, to the northwest corner of the town of Avondale." We have not

the plat referred to, but, from the description, both descriptions reach the same point, and it appears to be by practically the same route. However, as the petition refers to the plat, and the court had the plat before it, and the notice also, it must be inferred that the variance in description is immaterial, and the map shows the true boundary lines. The proceedings are not invalid on this account.

The court properly denied the application for a writ of mandamus, and the decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

WASHINGTON et al. v. ARNOLD et al.
(Supreme Court of Alabama. April 5, 1910.)

1. APPEAL AND ERROR (§ 322*)—PARTIES.

While generally appeals should be taken in the name of all the plaintiffs or of all the defendants, only parties affected by the decree are necessary parties to the appeal; and where two of three defendants filed a joint demurrer, the third, not demurring, and a decree was rendered on the demurrer or only one, the third defendant was not a necessary party to an appeal from the overruling of the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795-1797; Dec. Dig. § 322.*]

2. APPEAL AND ERROR (§ 720*)—ASSIGNMENTS OF ERROR—ASSIGNMENTS CONSIDERED—PARTIES NOT APPELLANTS.

Assignments of error of a defendant, not a party to the decree appealed from, nor affected by it, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2983, 2984; Dec. Dig. § 720.*]

3. JUDGMENT (§ 668*) — CONCLUSIVENESS — PERSONS BOUND — PARTIES.

A judgment establishing a lien on a building and lot for materials in an action against the contractor and defendant as owner conclusively established complainant's right to the lien as against defendant, even though another might be entitled to dispute the right to the lien on the ground that defendant did not own the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1181; Dec. Dig. § 668.*]

4. FRAUDULENT CONVEYANCES (§ 66*)—TRANSFERS INVALID — GROUND OF INVALIDITY — TRANSFER PENDING SUIT.

Defendant purchased a lot and was put into possession, and contracted to have a building erected thereon, and complainant thereafter began proceedings against defendant and the contractor to obtain a personal judgment against the contractor for materials furnished, and to establish a lien for such materials, and pending such proceedings, the vendor of the lot conveyed it to defendant's wife; the recited consideration being paid by defendant, and not by his wife. *Held*, that the conveyance of the lot to defendant's wife was a fraud upon complainant's rights.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 169; Dec. Dig. § 66.*]

5. FRAUDULENT CONVEYANCES (§ 239*)—RIGHT OF ACTION TO SET ASIDE—EXISTENCE OF OTHER REMEDY—ADEQUACY OF LEGAL REMEDY.

Complainant has no adequate legal remedy, so that equity will grant relief by setting the conveyance aside.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 681; Dec. Dig. § 239.*]

6. EQUITY (§ 239*) — PLEADING—DEMURRER—EFFECT.

The facts alleged are taken as confessed on demurrer to the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. § 239.*]

7. FRAUDULENT CONVEYANCES (§ 263*)—ACTION TO SET ASIDE—PLEADING—ALLEGATIONS—FRAUD—SUFFICIENCY.

The bill alleged that defendant purchased a certain lot, and was put in possession thereof, and contracted with another to erect a building thereon, and that complainants furnished material for its erection, and thereafter sued defendant and the contractor to obtain a personal judgment against the contractor and to enforce a lien for material on the lot and building, and that pending the suit the seller of the lot deeded it to defendant's wife, but that defendant in fact paid the recited consideration, and further alleged that the conveyance was made to defraud complainants and prevent the enforcement of their lien. *Held*, that the allegations of fraud were sufficient.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 771-774; Dec. Dig. § 263.*]

8. EQUITY (§ 147*) — BILL — MULTIFARIOUSNESS.

The bill was not objectionable as being multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 340; Dec. Dig. § 147.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by J. S. Arnold and others against W. D. Washington and others. From a decree overruling a demurrer by one defendant to the complaint, defendants Washington appeal. Affirmed.

Frank S. White & Sons, for appellants.
John H. Miller and W. M. Davidson, for appellees.

DOWDELL, C. J. The bill is exhibited against W. D. Washington, Janie S. Washington, and the Ensley Land Company, all of whom are made respondents. W. D. and Janie S. Washington filed a joint demurrer. The cause was submitted for decree on this demurrer only as to the respondent W. D. Washington, and a decree overruling the same was rendered. From this decree the present appeal is prosecuted under the statute. Code 1907, § 2838.

The appeal is taken jointly in the names of W. D. Washington and Janie S. Washington, and only in their names. Motion is now made to dismiss the appeal, because not taken in behalf of all of the respondents to the bill. The general rule is that appeals must be taken in the names of all of the plaintiffs or defendants as the case may be, and

summons and severance had in the appellate court for purpose of assignment of errors. The rule, however, finds its limitation, in that only parties to the suit who are affected by the judgment or decree appealed from should be made parties in the appeal. The only case among the decisions of this court that we have been able to find which might be said to indicate a contrary view is the case of *Clark v. Knox*, 65 Ala. 401. It appears from the report of that case that the record never came into the hands of the reporter. The learned judge, in the use of general terms with reference to parties to the appeal, might well have had in mind in that case that all of the parties to the suit were affected by the decree appealed from. So we think, when properly understood, that case is not opposed to the above-stated rule.

In the present case the cause was submitted to the chancellor for decree solely upon the demurrer of the respondent W. D. Washington to the bill. No submission was had or decree rendered on the demurrer of the other respondents. As a matter of fact, the respondent Ensley Company did not demur to the bill. It is difficult to see how the decree on the demurrer of W. D. Washington to the bill could affect the other respondents. It is still open for the respondent Janie S. Washington to invoke a ruling upon her demurrer to the bill. It is true she has joined in the appeal. This, however, was an irregularity; but the appellees' motion does not go to this defect or irregularity in the appeal. The motion to dismiss the appeal must be overruled.

The assignments of error are jointly and severally made by W. D. and Janie S., but only the assignments by the former will be considered, since the latter is not a party to the decree appealed from, nor is she affected by it. The bill shows by its averments that the respondent W. D. Washington purchased of the Ensley Land Company, a corporation, a certain described lot in the city of Ensley, and was put into the possession of the same by the said Ensley Land Company; that the said W. D. Washington contracted with one Gates to erect a building on said lot, and that the said Gates, in pursuance of said contract, did erect the building on the lot; that the complainants furnished the material for the erection of said building; that in October, 1907, the complainants brought suit in the circuit court of Jefferson county, against said Gates and the said W. D. Washington, for the purpose of obtaining a personal judgment against said Gates, and to enforce a lien on the said lot and building for materials furnished by these complainants in the erection of the building; that said suit was prosecuted to judgment in April, 1908, in which judgment a lien was declared on the said building and lot; that pending said suit, and on the 14th of December, 1907, the Ensley

Land Company, for a recited consideration, executed a deed to said lot to the respondent Janie S. Washington, the wife of the said W. D. Washington. The bill charges that the said Janie S. paid none of the recited consideration, but that the same was paid by the said W. D., and that the transaction was had, and the conveyance so made to the said Janie S., for the purpose of defrauding complainants and defeating them in the enforcement of their lien.

The complainants' asserted lien on the building and lot, so far as the respondent W. D. Washington is concerned, was conclusively established against him by the judgment of the circuit court, in which proceeding he was made a party. If the facts charged in the bill are true, and they are to be taken as confessed on demurrer, the conveyance to Janie S. was a fraud upon the rights of the complainants, and passed no title to her that in a court of equity could defeat the just claims of the complainants. It is true the Ensley Company's deed in law conveyed the legal title to Janie S., but not as against the rights of the complainants in a court of equity, when made to defraud as charged in the bill.

The bill is sufficient in averments of fraud, and on the facts stated the complainants are without a complete and adequate remedy at law. The bill, we think, contains equity, and is not open to the objection of multifariousness. Nor do we think it subject to any of the stated grounds of demurrer.

The decree of the chancellor overruling the demurrer will be affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

TUCKER v. STATE.

(Supreme Court of Alabama. April 21, 1910.)

1. SEDUCTION (§ 40*)—EVIDENCE—IMMEDIATE COMPLAINT.

In a prosecution for seduction, evidence that the prosecutrix did or did not make immediate complaint is not admissible.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 72, 79; Dec. Dig. § 40.*]

2. CRIMINAL LAW (§ 799*)—RIGHT OF ACCUSED TO COUNSEL—INVASION—INSTRUCTIONS.

Inasmuch as it is a constitutional right for one charged with crime to be heard by counsel, it is error for the court in a criminal prosecution to instruct the jury to disregard that part of the argument of counsel for accused in which he criticised the evidence of a witness; the criticism not exceeding the bounds of legitimate argument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1944-1946; Dec. Dig. § 799.*]

3. CRIMINAL LAW (§ 758*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

It is an invasion of the province of the jury to instruct that, in weighing the testimony of accused, they must consider his interest in

the case; but an instruction that they may do so is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1786-1789; Dec. Dig. § 758.*]

4. CRIMINAL LAW (§ 1056*)—APPEAL—NECESSITY OF RESERVING EXCEPTIONS—INSTRUCTIONS.

An error in instructing the jury that they must consider the interest of accused in the case in weighing his testimony is unavailing on appeal, where no exception was reserved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2868, 2870; Dec. Dig. § 1056.*]

5. CRIMINAL LAW (§ 741*)—DIRECTING VERDICT—REFUSAL—GROUNDS.

Where there is any evidence on which a conviction might be based, the general affirmative charge for defendant is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705-1728; Dec. Dig. § 741.*]

Appeal from Circuit Court, Shelby County; A. H. Alston, Judge.

S. Berry Tucker was convicted of seduction and appeals. Reversed and remanded.

Samuel Henderson, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. The appellant was indicted and tried for the seduction of one Pauline Gibson, an unmarried woman. On the trial the said Pauline was examined as a witness on behalf of the state. She denied yielding her consent to sexual intercourse with the defendant, and testified that the intercourse was accomplished by force and against her will. The court refused, on the objection of the solicitor, to permit the defendant to ask this witness "if she complained to any one of the defendant's conduct toward her."

In prosecution for rape, the fact that immediate complaint by the person assaulted was or was not made is admissible evidence. Mayfield's Dig. vol. 1, p. 760, § 44 et seq. This rule, however, is not applicable in prosecutions for seduction, where consent to the intercourse constitutes an element of the crime.

In criticising the evidence of the witness Foust, counsel for the defendant did not exceed the bounds of legitimate argument in addressing the jury. Cross v. State, 68 Ala. 478. The court, therefore, in its oral charge, committed error in instructing the jury to disregard that part of counsel's argument. It is a constitutional right for one charged with a criminal offense to be heard by counsel.

It was an invasion of the province of the jury for the court in its oral charge to instruct them that in weighing the testimony of the defendant they "must" consider his interest in the case. It is proper to instruct the jury that they "may" do so, but not that they "must" do so. However, the record fails to show that any exception was re-

served to this part of the oral charge, though insisted on in argument here by counsel for appellant. This error, without exception reserved, is unavailing on appeal.

There was some evidence of arts and flattery employed by the defendant to seduce, and also evidence from which the jury might have inferred the willingness and consent of the prosecutrix, and of her yielding to the flattery, etc., notwithstanding her denial of consent, and consequently the general charge requested by the defendant was properly refused.

For the errors indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, SAYRE, and EVANS, JJ., concur.

ST. JOHN v. RICHTER.

(Supreme Court of Alabama. April 7, 1910.)

1. CERTIORARI (§ 60*)—RETURN.

The return to a writ of certiorari should be made or required, or an adequate reason shown why it is not made, before the court dismisses the petition for certiorari and quashes the writ issued by a judge thereof.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 161; Dec. Dig. § 60.*]

2. CERTIORARI (§ 33*)—PETITIONER—INDIVIDUAL INTEREST.

One who, by being a petitioner for the election, was a party to the proceedings in the probate court, by which a local option election was ordered and held, and by which the result against sale was declared, had such an individual interest in the subject-matter as authorized him to apply for a writ of certiorari to quash a subsequent order of the probate judge setting aside and annulling the former proceedings without any notice to him.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 44; Dec. Dig. § 33.*]

3. CERTIORARI (§ 70*)—REVIEW—REVERSAL—WITHOUT REMAND.

Though, for error of the circuit court in dismissing the certiorari to quash an order of the probate court setting aside a local option election, the result of which was against sale, its judgment will be reversed, yet the state-wide prohibition law being now in force, so that further prosecution of the certiorari is useless, the cause will not be remanded.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 70.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Petition of F. E. St. John for writ of certiorari to quash proceedings of the Probate Judge was dismissed, the writ theretofore issued quashed, and petitioner appeals; Al Richter being the appellee. Reversed.

J. B. Brown, for appellant. George H. Parker, for appellee.

MAYFIELD, J. Appellant was one of a great number of resident citizens of Cullman county who signed and filed with the probate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judge of that county a petition praying that the probate judge call an election, in said county, to determine whether the sale of intoxicating liquors should be prohibited in that county, under the provisions of the local option statute of February 26, 1907, now embraced in sections 492-511 of the Code of Alabama. The election was accordingly ordered by the probate judge, and was held in accordance with such order and the statute authorizing it, and resulted in a majority against the sale of intoxicants. The returns of the election were duly and properly made, and canvassed, and the result was declared and certified as required by the statute. On the 1st of January, 1908, the appellee, who was also a resident citizen of said county, and who owned and operated a saloon in said county, filed with the probate judge a petition praying that the former order of the judge, calling the election, and all subsequent proceedings had thereunder, be set aside and held for naught, on the grounds: (1) That the local option law under which the election was ordered to be held was void; and (2) that it had been repealed by the subsequent statute known as the state-wide prohibition act. The probate judge granted the petition of Richter, and set aside his former orders, declaring the election and all the proceedings held thereunder void and of no effect. This appellant then applied to the judge of the Eighth judicial circuit (which circuit includes Cullman county) for a common-law certiorari to quash the proceedings of the probate judge in setting aside the election as prayed in the petition of Richter. The circuit judge ordered the writ to issue, in accordance with appellant's petition, directing the probate judge to send up to the circuit court, for the consideration of that court, a full and complete record of the proceedings had before such probate judge. The petition for the writ of certiorari recites, among other things: "That said petition (for the election) was signed by your petitioner, who is a qualified voter of said county, and 1,249 or more other qualified voters of said county, as is shown on the face of said order, a copy of which is attached under 'Exhibit A,' and made a part of this petition." Exhibit A, which is the order calling the election, recites the following, among other facts: "On this the 1st day of November, 1907, comes F. E. St. John and files in this court, the following petition, purporting to be signed by 1,930 qualified voters of Cullman county, to wit. * * * After having filed and duly considered said petition, and after the names of the persons who are not qualified voters have been eliminated or stricken from said petition, the court finds that petition is signed by 1,250 qualified voters of this county." The probate judge, though served with the writ of certiorari, made no return thereto. The petitioner (appellant) then made several unsuccessful attempts to have the circuit court compel the probate judge to make his return of the proceedings as direct-

ed by the writ. Before any return was ever made by the probate judge to the writ, the appellee and the probate judge moved the court to dismiss and quash the proceedings for certiorari, assigning many grounds in support of the motion. The circuit court granted the motion and dismissed the petition for certiorari, and quashed the writ theretofore issued by the circuit judge, taxing the appellant with the costs of the proceedings, and from that judgment this appeal is prosecuted.

A return to the writ of certiorari issued should have been made or required, or an adequate reason shown why it was not made, before dismissing the petition or quashing the writ. The proper rule and practice in such cases has been thus stated: "The return is a prerequisite to any review to be undertaken by the court out of which the writ issues; and, until it is made, the court will not render any judgment or make any order except for the purpose of enforcing obedience to the writ and compelling the making of a return." 4 Ency. Pl. & Pr. p. 212, par. 2; *People v. McCraney*, 21 How. Prac. (N. Y.) 149. "Although it is the duty of the officers to whom the writ is directed to prepare their return, and although they may be compelled summarily to make a return, yet it is incumbent upon the prosecutor of the writ, rather than the adverse party to him, to see that the return is made, and to invoke the aid of the court to compel the compliance with the mandate of the writ." 4 Ency. Pl. & Pr. p. 213, par. 4; *Derton v. Boyd*, 21 Ark. 204; *Bannister v. Allen*, 1 Blackf. (Ind.) 414; *State v. Gibbons*, 4 N. J. Law, 45; *State v. Trenton*, 36 N. J. Law, 499; *Dean v. Wade*, 5 N. J. Law, 719. "The return should be made not later than the day on which the writ is returnable, though it may be made at any time during such day, in the absence of statutory provisions to the contrary." 4 Ency. Pl. & Pr. 213, par. 5; *Hill v. Young*, 3 Mo. 337.

The return of the writ to the court is essential to the court's jurisdiction to review. The application for the writ is often made (as in this case) to the judge in vacation, and not to the court, and the writ in such case is issued by the judge, and not by the court, though it is made returnable to the court; and, until a return is made, the court—as distinguished from the judge as such—acquires no jurisdiction of the subject-matter or controversy.

The circuit court quashed the writ and dismissed the proceeding (as shown by this record) upon the ground that the petitioner (appellant) had no such interest in the subject-matter as would entitle him to the writ of certiorari; that he had no such individual interest in the subject which was so affected by the proceedings in the probate court sought to be quashed as would authorize him to apply for the writ of certiorari.

In this the circuit court was likewise in error. It is true that the party applying for a writ of certiorari must show that he has

a personal interest in the subject-matter, and not a mere public interest, in common with the general public. *Harris on Certiorari*, p. 4, § 2. The complete answer to this contention of appellee, and upon which the trial court acted, is that this appellee—the party who applied for the certiorari—was a party to the proceeding in the probate court, by which the election was ordered and held, and by which the result was declared. He was a party to the record and proceedings which the probate judge subsequently set aside and annulled; and he, in consequence of being such a party to the record and proceedings, had such an interest therein as authorized him to apply for a certiorari to quash and vacate the second order made by the probate judge if it was void, as he alleged in his petition for a certiorari.

The second order, setting aside and annulling the former proceedings, was had and made without any notice to him who sought and obtained the first order. He may, in a proper case, obtain a certiorari, to cancel the second order or judgment if it be absolutely void—as in his petition in this case it is alleged to be. *Starkweather v. Seeley*, 45 Barb. (N. Y.) 164.

It has been held that a citizen or qualified voter, who appears in a proceeding only for the purpose of showing cause why a third party should not obtain a license to sell intoxicating liquors, if authorized by law so to appear and contest the right of such third party to so obtain a license, has such interest in the granting of the license that he can maintain certiorari to review the action of the board granting the license. *McCreary v. Rhodes*, 63 Miss. 308.

It has likewise been held by the Supreme Court of New Jersey that citizens of a municipality, who protest against the action of the board of mayor and aldermen in granting a right of way to a street car company, are authorized to obtain a certiorari to review the orders granting the right of way. *State v. Borough of Neptune*, 57 N. J. Law, 362, 30 Atl. 529. This last case followed the case of *Middleton v. Robbins*, 54 N. J. Law, 571, 25 Atl. 471, which was a proceeding, like this, to test the validity of an election, which probably lays down the proper rule, and which determines the right of appellant in the case at bar, to obtain certiorari. The court in that case says: "It has been settled in the Supreme Court that, when a citizen has appeared as a remonstrant against the granting of a license, and notwithstanding such remonstrance the license has been granted, such citizen can test the legality of such license by certiorari. *Dufford v. Nolan*, 46 N. J. Law, 87; *Austin v. Atlantic City*, 48 N. J. Law, 118, 3 Atl. 65. Both these cases were, cited in the opinion delivered in the (Traphagen) case, in support of the doctrine that, to entitle a person to appear as a prosecutor,

he must suffer a special injury. These cases were presented as instances where there existed a special interest in the event, which entitled the remonstrant to a writ. Now, if a remonstrating citizen has an interest which entitles him to the use of the writ to test the legality of a license, I cannot perceive why an objecting citizen has not the same right to test the legality for an order for an election which involves exactly the same matter. The statutes in both instances contain provisions for the appearance and objections of citizens. In both instances the proceedings involve a matter of public policy of kindred nature. And I think it unquestionable that in both instances the citizen who, by direction of the statutes, comes in and interposes his objection, becomes a party to the proceeding and is thereby invested with a peculiar interest which inheres in a party."

It follows that the circuit court erred in dismissing the certiorari, and the judgment is reversed; but as the state-wide prohibition law is now in force, and has been sustained by this court, a further prosecution of this suit would be in vain and useless and of no possible benefit to either the parties or the public, and the cause will not be remanded.

Reversed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

CLEMMONS v. STATE.

(Supreme Court of Alabama. April 5, 1910.)

1. GRAND JURY (§ 8*)—FORMATION.

Objection to the formation of a grand jury may be taken when it is not drawn in the presence of officers designated by law, or when there is some order of the court or action of the judge, appearing of record, relating to the organization of the grand jury, which is contrary to or unauthorized by the statute, notwithstanding Code 1907, § 7572, providing that no objection can be taken to an indictment on any ground going to the formation of a grand jury, except that the jurors were not drawn in the presence of the officers designated by law, and that neither such objection nor any other can be taken to the formation of a special grand jury summoned by direction of the court.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. §§ 16-20; Dec. Dig. § 8.*]

2. GRAND JURY (§ 10*)—FORMATION.

Code 1907, § 7257, requires the judge to draw the grand jurors from the jury box when no grand jury has been drawn, or where from any cause none is returned for service for any term of the court, but Local Acts 1907, p. 206, § 29, creating the Morgan county law and equity court, provides that the judge may order a grand jury summoned and impaneled to consider matters that may come before it, which jury may be summoned immediately and in whatever manner the judge may direct in his minute entry. *Held*, that the judge of such court could order the jury commission to draw a special grand jury where one had not been drawn for a regular term.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. § 27; Dec. Dig. § 10.*]

3. WITNESSES (§ 287*)—EXAMINATION—REBUTTAL—ELICITING WHOLE OF CONVERSATION.

Where accused had, on cross-examination, brought out part of a conversation between a witness and the person who swore out the warrant for accused's arrest as to threats of accused towards such person, and the reason therefor, the state in rebuttal could show the rest of the conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1002; Dec. Dig. § 287.*]

4. CRIMINAL LAW (§ 1111*)—APPEAL—PRESUMPTIONS—CORRECTNESS OF BILL OF EXCEPTIONS.

A recital in the bill of exceptions that accused had brought out part of a conversation, on cross-examination, will be treated as true on appeal so as to support the ruling of the court in permitting the state to show the rest of the conversation in rebuttal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2894; Dec. Dig. § 1111.*]

5. CRIMINAL LAW (§ 338*)—EVIDENCE—RELEVANCY—SIMILARITY OF CONDITIONS.

Testimony of one as to the time within which, after death, blood flowed from two bodies, was incompetent in a murder case, where the conditions of the bodies in the two cases as to which the witness testified, and the manner in which death was inflicted in those cases, were entirely different from the conditions and mode of death in the case at bar.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

6. CRIMINAL LAW (§ 452*)—EVIDENCE—COMPETENCY OF OPINION EVIDENCE.

Such witness, not having been shown to be a practicing physician or surgeon, nor to have any scientific knowledge on the subject, was incompetent to testify as to the time in which the blood in a human body would coagulate and cease to flow after death; the subject being one of expert evidence and not within the common knowledge of the court or jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.*]

7. CRIMINAL LAW (§ 478*)—OPINION EVIDENCE—QUALIFICATIONS OF EXPERT.

To authorize a witness to testify as an expert, it must appear that by study, practice, experience, or observation as to the particular subject he has acquired a knowledge beyond that of ordinary witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1065; Dec. Dig. § 478.*]

8. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—SHIFTING BURDEN OF PROOF.

A charge that the burden was not on accused to prove that some one else committed the crime, but that it was upon him, after the state had shown a prima facie case, to establish his innocence, was erroneous, as shifting the burden of proof to accused, which is always on the state, except as to special defenses provided by statute, such as insanity and former conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1849; Dec. Dig. § 778.*]

9. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge that as matter of law the corpus delicti had been proved, provided the jury believed the evidence, was reversible error as upon the weight of evidence, in violation of Code 1907, § 5362, providing that the court shall not charge upon the effect of the testimony unless

required to do so by one of the parties, and invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. §§ 763, 764.*]

10. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge that alleged confessions of accused were voluntary, provided the jury believed the evidence, and that if they believed the confessions and the other evidence accused was guilty, was erroneous, as upon the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1752; Dec. Dig. §§ 763, 764.*]

11. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS.

The evidence being in conflict as to material ingredients of the offense, and palpably so as to accused being the guilty party, so that if accused's evidence was true he was not guilty, the jury having the right to believe him, the charge that, if the jury believed the alleged confessions of accused and the other evidence in the case, accused was guilty, would have been improper if requested by the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1734; Dec. Dig. §§ 763, 764.*]

12. CRIMINAL LAW (§§ 763, 764*)—TRIAL—AFFIRMATIVE CHARGE OF GUILT.

A charge affirmative of guilt, predicated upon a belief of the testimony by the jury, should not be given where there is any evidence upon which an acquittal could be based, or where the facts pointing to guilt rest in inference only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1734; Dec. Dig. §§ 763, 764.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Bob Clemmons was convicted of murder, and he appeals. Reversed and remanded.

John R. Sample and Callahan & Harris, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The case made by appellant is as follows: The accused was indicted, tried, and convicted for the murder of Nettie Edmonson. The indictment was found at a regular term of the Morgan county law and equity court by a grand jury organized under an order of the court based on the failure of the jury commissioners to draw a grand jury for that term of court. Said order directed the jury commissioners to draw a sufficient number of qualified citizens to compose a grand jury, and the sheriff was therein commanded to summon the grand jury so drawn. The record shows that one Tom Edmonson and his family, consisting of his mother, 72 years of age, his wife, his daughter, Nettie Edmonson, 13 years of age, and an infant son, 2 years of age, resided in Morgan county; that the defendant lived on Edmonson's farm and cultivated his lands on shares, and had done so for several years; that he lived a short distance from Edmonson's house, and the defendant and Edmonson and his family had always been friends.

On the night of November 25, 1908, Tom Edmonson's home was discovered to be on fire, and his neighbors, including the defendant, rushed to the scene. On arriving, the house and barn were discovered to be in flames, and it was impossible for any one to enter or go near to either. Search was immediately made to ascertain the whereabouts of Tom Edmonson and the different members of his family; but none of them could be located. Later in the night, and during the burning of the house, a body was seen lying within one of the rooms on a bed, with face down, and it was taken from the burning building, together with the bedding and bed. The bedding, bedtick, and feathers under the body were saturated with "fresh red blood." This body was identified to be that of Nettie Edmonson. A physician examined the body and found two wounds, one a cut or stab, in the right side of the chest; the other a gash or slight cut on or near the collar bone. The physician testified that these wounds were not fatal. No other bodies were found in the house, but a part of the body of Tom Edmonson's wife or mother, and a foot of his infant son, were found in the barn in the cotton seed room, and also the carcasses of Tom Edmonson's three mules. Near the human bodies found in the seed room was found an open knife, identified as that of Tom Edmonson, the blade of which was corroded and stained. Extensive search failed to discover any trace of Tom Edmonson, his body, or any part thereof. The open knife identified to be that of Tom Edmonson was delivered to the physician, and the blade inserted into the wounds of Nettie Edmonson, and "the wound fit the blade of the knife," and the blade of the knife fitted the hole in the clothing of Nettie Edmonson that correspond to the wound in her chest.

It appears that Tom Edmonson was a simple-minded man and incapable of transacting much business; that during the afternoon preceding the fire he was at his home, and was mad; that, some days or weeks after the fire, blood was found in and about the home of the defendant, and also out near the graveyard, some distance from Tom Edmonson's house and that of defendant. A coroner's jury was held at the home of the defendant the day following the fire, which a great number of people attended. At this investigation no blood was seen, at any of these various places about defendant's, as was found many days or weeks afterwards. The day after the fire, parties were searching in almost every direction from the Edmonson home, and in and around the graveyard. The burial of the remains of Tom Edmonson's family occurred at this graveyard, drawing great crowds of people; but no one discovered the blood in the sedge grass, which was found thereafter, only 10 or 15 feet from the public highway. Numerous witnesses testified that the blood afterwards found was not about the premises the day after the

fire. The first coroner's jury returned the verdict that the family of Tom Edmonson had been killed by Tom Edmonson, and that he was at large, and the second coroner's jury found that the family came to their deaths at the hands of unknown parties.

The record discloses that defendant was alleged to have made a statement to one Gib Luker, his 13 year old nephew, on the morning before the night of the fire, and broached the conversation in this manner: "I will tell you something, if you will promise not to tell it, and I said I would not tell. He made me take 20 cents not to tell it. He then said he had killed Edmonson and his family, and for me to go to school and not tell anybody, and when he handed me the money he said not to look sad that day. I went on to school and stayed at school all day long and did not tell any one. When I left school, I came back to defendant's house the same way I had gone that morning, and when I was passing his house he came out and walked with me down the path a little piece and asked me if I had told any one, and I told him that I had not. He then said that he was going to put them all in the house and burn them up that night. That that morning, when he went up there to feed, the whole family got after him, some with sticks, some with rocks, some with knives, and he had to kill them. He said that Nettie was pretty high strung and like to have gotten away from him; that he ran her up the road to the graveyard and caught her and had a struggle with her, and she like to have gotten away. He said she was lying out in the old field up there, and that he was going to put them all in the house and set it afire and then hallow and then ring the bell. He told me to tell my father and mother when they saw the fire down there that night that they had better not come down there."

It further appears that one Harry Culbreath was at the home of Tom Edmonson at about 10 o'clock in the morning of the day just preceding the fire, and saw Tom Edmonson, his wife, and some of the other members of his family, and talked with them. Other testimony showed that the family was at home late in the afternoon, and a few hours prior to the fire.

The testimony of expert witnesses showed that the blood in the human body would coagulate in 30 minutes after death.

It appears that the defendant was, before the tragedy, a man of good character.

The defendant made motion to quash the indictment. The five grounds of the motion presented, in varying form, but two legal propositions: (1) That the indictment was not found by a grand jury drawn in the presence of the officers designated by law; (2) that the indictment was grounded upon an order of the court for the organization of the grand jury, which order was without any warrant

in the statute or was contrary to its provisions.

After the introduction of the evidence addressed to the various grounds of the motion, the court overruled the same, and the defendant excepted. The defendant also raised the same questions in the form of six pleas in abatement. Pleas 4, 5, and 6 were demurred out, and issue joined on pleas 1, 2, and 3, and the same evidence was introduced in support of the pleas as was introduced to the motion, whereupon the court gave to the jury the general affirmative charge at the request of the state, and the defendant excepted.

The objections to the indictment were grounded upon the following order of the court, made at a regular term thereof, for a grand jury for said term: "Monday morning, February 1, 1909. State of Alabama, Morgan County. Morgan County Law and Equity Court. Be it remembered that at a regular term of the Morgan county law and equity court, begun and held for the county of Morgan, at the courthouse of said county in the city of Decatur, Ala., commencing on Monday, February 1, 1909, present and presiding the Honorable Thos. W. Wert, judge; D. F. Greene, solicitor; J. S. Fowler, clerk; and Thos. R. Shipp, sheriff of said county. The court being duly opened according to law, and the commissioners having failed to draw a grand jury for this term of the court, and the court being of the opinion that a special grand jury should convene to consider any violations of the law and to perform other duties, and the court being of the opinion that the jury commission should draw said special grand jury: It is ordered that said commission draw immediately, as is required by law, a sufficient number of qualified citizens to compose said special grand jury, and the sheriff is hereby ordered to summon same, to be and appear at the courthouse, Morgan county, Ala., at 10 o'clock a. m. February 8, 1909. Dated Feb. 1, 1909."

Sections 6 and 7 of the act creating the Morgan county law and equity court provide that the court shall have two regular terms each year, known as the spring and fall terms of court; the spring term to begin on the first Monday in February and end June 30th, and the fall term to begin the first Monday in September and end December 31st. The sessions of the court to be held during these terms are left to the discretion of the presiding judge, fixed by an order entered of record. Local Acts 1907, p. 193. Section 29 of this act undertakes to provide against any failure of the jury commissioners to perform their duty in this instance, as well as to provide against other contingencies that might arise from other causes. It provides: "That whenever for any cause a jury, grand or petit, shall be quashed by the court or shall fail to have been drawn or summoned, or if drawn and summoned, shall fail to attend, the court may forthwith order the sheriff to summon from the qualified

citizens of Morgan county, a jury or juries, to serve for any time specified or ordered by the court." (*Italics supplied.*)

It is well recognized in this court that objection to the formation of a grand jury may be allowed in two classes of cases: (1) When not drawn in the presence of the officers designated by law; (2) when there is some order of the court or action of the judge appearing of record, relating to the organization of the grand jury, which is contrary to or unauthorized by the statute, notwithstanding section 7572 of the Code. *Nordan v. State*, 143 Ala. 22, 39 South. 406; *Fryer v. State*, 146 Ala. 7, 41 South. 172; *Billingslea v. State*, 68 Ala. 490; *Cross v. State*, 63 Ala. 40; *Scott v. State*, 63 Ala. 59; *O'Byrnes v. State*, 51 Ala. 27-29; *Berry v. State*, 63 Ala. 126, 127; *Tucker v. State*, 152 Ala. 1, 44 South. 587, 588.

Section 39 of the local act above referred to, as last amended, among other things provides as follows: "That at any time during the vacation or during any regular term of said court if, in the opinion of the judge of this court, a session of the court shall be held, the judge of this court, upon making a minute entry therefor, is hereby empowered and authorized, to declare this court in session for such purpose or purposes, that he may deem proper, and the judge of said court be and he is hereby authorized to order a grand jury summoned and impaneled to consider matters that may come before it, and which said grand jury may be summoned immediately and in whatsoever manner the judge may direct in said minute entry. * * * See section 39, Gen. Acts 1907, p. 633, amending the local statute above referred to.

The indictment was found at a regular term of the court, and not at a special or adjourned term; and, consequently, sections 7280 and 7261, nor 3249, Code 1907, do not apply. It has been held by this court that there is a field of operation for each of these statutes (*Holland's Case*, 50 South. 215); but this case is not within the scope of any one of the three; it falls within the scope of section 7257 of the Code, which requires the judge to draw the grand jurors from the jury box when no grand jury has been drawn or, from any other cause, none is returned for service for any term of the court. The law requiring the judge to draw the jury, he would have no authority in this case to order the commissioners to draw it. But the local statute under which this grand jury was organized authorizes the judge "to order a grand jury summoned and impaneled * * * in whatever manner he may direct in the minute entry." This, of course, authorized the proceedings by which the grand jury was drawn, summoned, and organized.

Section 7572 of the Code is as follows: "No objection can be taken to an indictment, by plea in abatement, or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand

jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court."

It therefore clearly appears that the grand jury in this case was drawn by the jury commissioners of Morgan county, who were the persons designated by law to perform this duty, and that the order of the judge or court relating to the organization of the grand jury was authorized by the local statute—the only two grounds available to quash the indictment. It therefore follows that the indictment was good, and unsailable by motion to quash or by pleas in abatement on the grounds alleged. It was the evident purpose of the local statute above to authorize the judge or court to direct, by minute entry, how the grand jury should be drawn, summoned, and organized. To this extent it is different from the general law.

During the rebuttal examination of one of the state's witnesses, the solicitor propounded to the witness the following question: "Detail what Rufe Luker said to you when he came to you to swear out the warrant for the arrest of the defendant." The defendant objected to the question, assigning proper grounds; but the court overruled his objection and allowed the witness to answer. He answered as follows: "Rufe said: 'Come out here! I've, or you've, got to arrest Bob Clemmons, and do it now.' He said that Bob had threatened to kill him and his boy Gib, and I asked him why, and he said that the defendant had told him and his boy that he had killed Tom Edmonson and his whole family and had put them in the house and barn and burned them up." The defendant then moved to exclude the answer, upon the same grounds assigned to the question; but the court overruled his motion, to which actions of the court as to the question and the answer the defendant duly excepted. This would clearly be reversible error, but for the recital in the bill of exceptions that the defendant had brought out a part of this conversation on cross-examination. If this was true (and we must so treat it, to support the ruling of the court), it was not error, but was proper.

The defendant, in order to rebut or disprove the testimony of the witness Luker and his son, who testified as to confessions made by the defendant on the morning of the day preceding the night of the fire—when the dead bodies, in which at that time the blood was warm, were found in the burning houses—offered physicians and surgeons as experts to prove that blood would coagulate and cease to flow in the human body from one-half to an hour after

death. To rebut this evidence of the experts, the state introduced a witness, one W. E. Tucker, who was shown not to be a practicing physician or surgeon, and to have no scientific knowledge on the subject, but who was shown to have had some experience as to the flow of blood from two dead bodies; and he was allowed by the court, over defendant's objections and exceptions, to relate his experience as to the time within which, after death, blood flowed from those two bodies, and to give his opinion that blood in the human body would not coagulate in one-half to an hour after death. This was clearly error. The first question sought to introduce a species of comparisons or experiment, as to the flow of blood from dead bodies, which was unwarranted by the law or rules of evidence. The conditions of the bodies in the two cases as to which the witness testified, and the manner in which death was inflicted in those cases, were so entirely different from the conditions and mode of death in the case at bar that it would be dangerous to allow such comparisons. Mayfield's Dig. vol. 5, p. 404, subd. 50; volume 1, p. 340. The matter being inquired about, viz., the time in which the blood would coagulate and cease to flow in dead bodies, was certainly the subject of expert evidence, and not within the common knowledge of the court or the jury. The witness was not shown to be qualified to give his opinion as an expert on this subject. The mere fact that he had seen blood flow from two dead bodies, on prior occasions, did not render him competent as an expert on this subject. To authorize a witness to give an opinion as an expert, it must appear that, by study, practice, experience, or observation as to the particular subject, he has acquired a knowledge beyond that of ordinary witnesses; otherwise, he would not be an expert and his knowledge, skill, or experience is not considered sufficient to inform the court or to guide the jury in reaching a correct conclusion upon the subject of inquiry. Wigmore on Ev. § 556; Mobile Co. v. Walker, 58 Ala. 290; Commonwealth v. Farrell, 187 Pa. 408, 41 Atl. 382; Kilbourne et al. v. Jennings et al., 38 Iowa, 533; Burgess' Case, 119 Ala. 669, 24 South. 727. Evidence like this was condemned by this court in the case of Rash v. State, 61 Ala. 89, in which case it was held that one who had been in the late war, and had observed the range of balls, in many gunshot wounds, but who was not a physician, a surgeon, or an expert, was not qualified to testify as to the range of the balls in some of the wounds which he had so observed, but that a physician or surgeon with experience as to such wounds was an expert, and could give his opinion as to how the wounds were inflicted upon deceased, in a homicide trial.

As a part of the oral charge of the court, the jury were instructed as follows: "It is not on the defendant to prove that some one else committed the crime; but it is upon him, after the state has shown a *prima facie* case, to establish his innocence." To this part of the charge the defendant excepted. This much was error. It is not upon the accused to establish his innocence, when the state has shown a *prima facie* case of guilt. The vice of the instruction is that it improperly places, and shifts, the burden of proof in criminal cases. It would be correct in a civil suit, but not in a criminal trial.

This court has ruled as follows upon these questions: The burden of proof is always upon the state, and is never shifted upon the defendant, except as to special defenses provided by statute, such as insanity, former conviction, etc. *Wharton v. State*, 73 Ala. 366; *Whitten v. State*, 115 Ala. 72, 22 South. 483; *Martin's Case*, 119 Ala. 1, 25 South. 255. Under an indictment for an assault with intent to murder, the burden of proving the alleged intent, as well as the other facts which constitute the felony, is on the state; and a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, "the law presumes that the act was malicious," and that the defendant "intended to kill," is erroneous, because it shifts the burden of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof. Nor is the error cured by further instructing them, in a subsequent portion of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence; "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertained a reasonable doubt, they should acquit the defendant." *Ogletree v. State*, 28 Ala. 693. Strictly speaking, the burden of proof is never on the defendant to establish his innocence, or to disprove the facts necessary to establish the crime for which he is charged. In all criminal cases, if the evidence, any or all of it, raises in the mind of the jury a reasonable doubt as to his guilt, he should be acquitted. *Henson's Case*, 112 Ala. 41, 21 South. 79; *Whitten's Case*, 115 Ala. 72, 22 South. 483. See *Howard's Case*, 110 Ala. 92, 20 South. 365. The rule at one time prevailed in this state that the burden of proof was on the defendant to satisfy the jury that he was incapable of forming specific intent (*Fonville's Case*, 91 Ala. 39, 8 South. 638); but the present rule is that, if from all the evidence the jury have a reasonable doubt of the defendant's guilt, he is entitled to an acquittal. *Whitten v. State*, 115 Ala. 72, 22 South. 483. It is error to in-

struct the jury, in a criminal case, that, if the proof left the question of the defendant's guilt or innocence in equipoise, they could not, on that account alone, acquit. *Winter & Scisson v. State*, 20 Ala. 89.

The court, among other things, and as a part of the oral charge, also instructed the jury as follows: "I charge you as a matter of law that the *corpus delicti* has been proven in this case, provided you believe the evidence." This was also error to reverse. It was certainly a charge upon the effect of the evidence, and in violation of section 5352 of the Code. It was likewise an invasion of the province of the jury. While there was sufficient evidence in the case as to the proof of the *corpus delicti*, if the jury so found, to support a conviction, and to authorize the admission of evidence as to confessions by the defendant, yet the sufficiency thereof was a question for the jury, and not for the court. This court, in *Winslow's Case*, 76 Ala. 47, spoke on this subject as follows: "We cannot assent to the proposition insisted on that the sufficiency of the proof of the *corpus delicti* is a question for the court, and not for the jury. Greenleaf * * * observes: 'The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and by none other—in other words, proof of the *corpus delicti*, and of the *identity of the prisoner*.' The ascertainment that an offense has been committed is as essential to conviction as that the defendant is the guilty agent. Both of these essential propositions are for the determination of the jury, and both must be proved beyond a reasonable doubt. To hold that the court must decide ultimately either of these propositions would be tantamount to a denial of the constitutional right of trial by jury."

The court, also as a part of its oral charge, instructed the jury that the alleged confession of the accused was voluntary, provided they believed the evidence. This was likewise a charge upon the effect of the evidence and an invasion of the province of the jury. Immediately following this expression as to the confession's being voluntary, the trial court instructed the jury as follows: "And if you believe these confessions of the defendant, and the other evidence in the case, the defendant is guilty." This was error, for the same reasons assigned to the other parts of the oral charge, and for the further reason that it would have been improper if requested by the state. The evidence was in conflict as to material ingredients of the offense, and palpably so, as to the accused's being the guilty party. If the evidence of the defendant was true, he was not guilty, and the jury had the right to believe him.

The evidence being thus in conflict, and much of it resting in inference, the affirmative charge could not be given, even with the usual hypothesis—"if requested." Upon

this question this court has spoken as follows: "In the absence of conflicting testimony to the fact of guilt, a charge affirmative of guilt predicated upon a belief of the testimony by the jury may be given, though this court has reiterated that such a charge is of doubtful propriety against a defendant in a criminal case, and should never be given where there is any evidence upon which a verdict of acquittal could be based, or where the facts in evidence pointing to guilt rest in inference only." *Taylor v. State*, 121 Ala. 25, 25 South. 689.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

BANK OF COFFEE SPRINGS v. W. A. MCGILVRAY & CO.

(Supreme Court of Alabama. April 21, 1910.)

1. BANKS AND BANKING (§ 189*)—CHECKS—ACTIONS—DEFENSES—FRAUD.

In an action against a bank on a cashier's check assigned to plaintiffs, pleas that plaintiffs, or one of them, procured the check to be issued by false representations as to the security given or to be given to the bank to secure a loan by the bank to the payees of the check, which the check represented, and that, as a part of the scheme to defraud the bank, plaintiffs, or one of them, had the check indorsed and assigned to him, stated a complete defense.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 189.*]

2. BANKS AND BANKING (§ 226*)—CHECKS—ACTIONS—DEFENSES—FRAUD.

Where, in an action against a bank on a cashier's check transferred to plaintiff, the bank pleaded plaintiff's fraud in procuring the check, replications not denying the fraud, nor confessing and avoiding the effect thereof, but alleging that after the check had been transferred to plaintiff he had, in consideration thereof, released the payees from their indebtedness to him and delivered up a note and mortgage securing the indebtedness, and that defendant's cashier procured from the payees of the check a note and mortgage to a partnership of which the cashier was a member to secure the loan made by the bank evidenced by the check, and that the bank was therefore estopped from setting up such fraud, or that, after discovering it, defendant had ratified the transaction, were insufficient and demurrable.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 226.*]

3. BANKS AND BANKING (§ 189*)—ACTS OF CASHIER—TAKING SECURITY—ESTOPPEL.

Where a bank claimed that a cashier's check, representing a loan, had been procured from it by plaintiff's fraud and then transferred to plaintiff, the act of the bank's cashier in taking a mortgage from the payees of the check to secure a loan, which the check represented, did not estop the bank from setting up plaintiff's fraud as a defense to the check.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 189.*]

4. BANKS AND BANKING (§ 114*)—FRAUDULENT LOAN—ACTS OF CASHIER—RATIFICATION.

Where defendant's cashier declined to make a loan until proper security should be given, and during his absence plaintiff applied to the acting cashier, and by fraudulently representing that the cashier had agreed to make the loan for the bank obtained a cashier's check to the borrower, which the borrower transferred to plaintiff, and as soon as the cashier returned he attempted to repudiate the transaction, and took steps to protect the bank and himself by taking the mortgage from the payees, such attempt did not constitute a ratification of the transaction by the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 277-280; Dec. Dig. § 114.*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by W. A. McGilvray & Co. against the Bank of Coffee Springs. Judgement for plaintiffs, and defendant appeals. Reversed and remanded.

C. D. Carmichael, for appellant. W. O. Mulkey, for appellees.

MAYFIELD, J. Appellees sued appellant bank upon its own check, which was signed by one Helms as its cashier. The check was payable to J. J. & M. J. M. Lewis, and assigned and indorsed to plaintiffs. To the complaint the bank pleaded the fraud of the plaintiffs in procuring the check to be issued and assigned. This defense was attempted to be set up in a number of special pleas, numbered 9, 10, and 11. The fraud, in short, was that plaintiffs, or one of them, procured the check to be issued by false representations as to the security given or to be given to the bank to secure the loan made by the bank to the payees of the check, and, as part of the scheme to defraud the bank, had the check indorsed and assigned to him. If the matters set forth in these pleas are true, and on demurrer they must be so treated, the plaintiff ought not to recover. They are perfect and complete answers to the complaint, and demurrer thereto could not properly be sustained.

To pleas 9, 10, and 11, plaintiff replied that, after the check was transferred and assigned to him, in consideration of which he had released the payees of the check from their indebtedness to him and delivered up a note and mortgage which secured said indebtedness, one Byrd, the cashier of the defendant bank, procured the Lewises, the payees and transferrors of the check, to execute a note and mortgage to a partnership of which he was a member, to secure the loan made by the bank to the Lewises, evidenced by this check sued upon, and that the bank was therefore estopped from setting up such fraud, or that, after discovering it, defendant had ratified the transaction. The replications were all insufficient, and subject to the demurrers interposed. None of them de-

nied the fraud set up in any one of the pleas, nor did any one of them confess it, and avoid the effect thereof.

There was no attempt to state facts to show that plaintiff was a bona fide purchaser of the check. Certainly Byrd, if he was acting as cashier for the defendant bank, in taking a mortgage from the Lewises to secure the loan, could not thereby estop the bank from setting up the fraud of plaintiff in procuring the loan originally and in having the check transferred to him. It would, indeed, be strange if a party who is thus defrauded should be estopped from setting up the fraud as against the very party who perpetrated it, because his agent tried to indemnify the principal against loss on account of the fraud.

Under some conditions the bank might be liable to the Lewises, though it was not liable to plaintiff, and if the Lewises were willing to secure the bank, directly or indirectly, for the loan, it was of no concern to the plaintiff, who, if the pleas were true, had attempted to defraud the bank by making false and fraudulent statements to its acting cashier, Helms, in the absence of its regular cashier, Byrd. If the pleas are true, Byrd knew the facts, and declined to make the loan until the proper security could be given, and during his absence the plaintiff applied to Helms, and fraudulently and falsely represented to Helms that Byrd had agreed to make the loan for the bank, and Helms, relying on this statement, made the loan, and plaintiff, as a part of his fraudulent scheme, had the check assigned to him or to the firm of which he was a member. As soon as Byrd returned, he attempted to repudiate the transaction, and took steps to secure the bank or himself, or both, against loss on account of plaintiff's fraud. Surely this cannot be a ratification of the transaction by the bank, or an estoppel against its setting up plaintiff's fraud, in an action by the latter to reap the fruits of his wrongful act.

It follows that the court was in error in overruling the demurrers to these replications, and the judgment must be reversed and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McOLELLAN, JJ., concur.

(126 La.)

No. 17,981.

SAINT v. MARTEL.

(Supreme Court of Louisiana. April 25, 1910.
Rehearing Denied May 24, 1910.)

(Syllabus by the Court.)

ABATEMENT AND REVIVAL (§ 4*)—ANOTHER ACTION PENDING.

An exception of his pendens has no legal basis to rest on, when predicated upon the

pendency of a suit in the same court as that in which it is pleaded. The prohibition is against the bringing of the same cause "before two separate courts" of "concurrent jurisdiction." Code Prac. arts. 94, 335.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-38; Dec. Dig. § 4.*]

Appeal from Twenty-Third Judicial District Court, Parish of Saint Mary; Charles L. Wise, Judge ad hoc.

Action by Percy Saint against J. Sully Martel. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

See, also, 123 La. 815, 49 South. 582.

Foster, Milling, Brian, & Saal and Hall & Monroe, for appellant. Edward N. Pugh, Borah & Himel, Farrar Jonas, and Goldsborough & Goldberg, for appellee.

Statement of the Case.

MONROE, J. Plaintiff has appealed from a judgment maintaining defendant's exception of his pendens. It appears that in April, 1907, he brought a suit in the same court against the same defendant, in which he alleged that he had purchased from one Brown, who had acquired from defendant, an undivided one-tenth interest in defendant's one-half of one-fifth interest in the Jennings oil field, but that defendant remained in possession and refused to deliver to him the interest so acquired; that the interest so held by defendant in part of said field, to wit, the Arnaudet tract, had produced, and was producing, great quantities of oil, and that defendant had received as his share of the proceeds thereof \$152,600, of which petitioner was entitled to one-tenth, less \$3,000 paid by defendant to Brown; that the interest so held by defendant also included a certificate for 10,000 shares of stock of the Houssiere-Latreille Oil Company, and 6,666 $\frac{2}{3}$ shares of the same stock, subsequently acquired. And he prayed for judgment for \$15,260, with interest (less a credit of \$3,000), decreeing him to be the owner of one-tenth of all the interest of the defendant in the Jennings oil field and putting him in possession thereof, and ordering defendant to issue to him 6,666 $\frac{2}{3}$ shares of the stock of the Houssiere-Latreille Oil Company. To the suit so filed various exceptions and defenses were pleaded, and, among others, that plaintiff had acquired a litigious right, which, having been sustained, plaintiff appealed to this court, where in June, 1908, the judgment appealed from was reversed, and the case remanded to be further proceeded with. Saint v. Martel, 122 La. 93, 47 South. 413. Thereafter, on March 22, 1909, the case having been called "for the purpose of having the same fixed for trial," defendant moved that it be dismissed, on the ground that it had been compromised, which motion on April 5th was referred to the merits, where it was subsequently considered as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the defense, the result being a judgment in favor of plaintiff, decreeing him to be the owner of one-tenth of all the interest of defendant in the Jennings oil field ("being 1/10 of whatever interest the said Martel has in sections 47, 46, 41, 38 & 52, in the said field, in the parish of Acadia") condemning defendant to pay him \$15,715.42 (less \$3,000 paid Brown September 4, 1906), with interest, reserving to defendant the right to deduct in the next settlement any credits to which he may be entitled, and rejecting plaintiff's demand for the stock of the Houssiere-Latreille Company. The judgment thus referred to was rendered on September 4, 1909, and, defendant having appealed, the transcript was lodged in this court on October 30, 1909. In the meanwhile, on October 4, 1909, plaintiff instituted the present suit, in which, after restating the title upon which he sues, and some other matters, he further alleges that after the rendition of a certain judgment by this court in the suit entitled *J. Sully Martel et al. v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 South. 253, the other parties in interest recognized the right of the Messrs. Caffery and Martel to an undivided one-fifth interest in the land constituting the Jennings oil field and in the oil produced, and to be produced, therefrom, and that since then the said oil field "has been operated in co-ownership, four-fifths represented by the Jennings-Heywood Oil Syndicate, or its assigns, and one-fifth by J. Sully Martel and D. Caffery, Jr., they representing the co-owners of said one-fifth and receiving the fruits thereof"; that, as the owner, he is entitled to one-tenth of one-half of said fruits (after deduction of expenses) and of all the machinery, pumps, tanks, and apparatus placed on the property by said syndicate; that Caffery & Martel have received all the oil and the proceeds of all the oil due to the owners of said one-fifth interest, amounting in value to at least \$1,557,319.62; that they have in their possession personal and real property belonging to said owners to the value of at least \$100,000; that there was a partial division of the profits between them (he was informed) whereby Martel received \$157,154.20; that on April 23, 1907, he sued Martel for (his share of) the amount which he had received up to that time, and for recognition of his interest in the property and appurtenances thereto attached, and obtained judgment for \$15,715.42 (less \$3,000) with interest; that since the filing of the last-amended petition in that suit Caffery & Martel have continued to operate and administer said one-fifth interest and have received all the profits therefrom, and that Martel has received in partial settlement \$370,000; that, in addition to the amount which defendant has collected from the firm of Caffery & Martel, one-tenth of which is due to petitioner, Martel is further indebted for "the difference between the sums so collected and the one-tenth of the one-half of the \$1,557,319.62, the proceeds, of

the results of the operation of the oil field by the said Caffery & Martel," less expenses; and "that petitioner has a one-twentieth interest in the bills and notes receivable, cash on one hand, and on the other property held by the said Caffery & Martel"; that petitioner is entitled to a full and complete account from the defendant, and for a judgment for the amount shown to be due him on such accounting, "less the amount for which judgment has already been rendered, as aforesaid"; that he is not willing that defendant should continue to receive from Caffery & Martel the oil, or the proceeds of the oil, which should be coming to him, and that defendant should be enjoined from receiving the same or any other property to which petitioner is entitled, etc. He prays for judgment ordering defendant to account for all oil, money, or other things of value which he has received from Caffery & Martel, or from any other source, in which he, petitioner, owns a one-tenth interest; that he be ordered to account for the one-twentieth of all oil, money, or other things of value which are now in the hands of Caffery & Martel, the one-twentieth of which belongs to petitioner; that he have judgment for whatever amount be found to be due him on such accounting, which is at least \$37,000, etc.

Opinion.

As the law upon which defendant must rely for the support of his plea is to be found in the Code of Practice, we think it advisable to consult that authority. Under the title "Where Actions May Be Brought and in What Manner," and the subtitle, "Judges: Their Jurisdiction; How Their Competency Is Regulated," we find the following:

"Art. 4. The same cause can not be brought before two separate courts, though they be possessed of concurrent jurisdiction, except by discontinuing the suit first brought, before the answer is filed. Hence, if the same suit be brought before two separate courts, having concurrent jurisdiction, the judge before whom the action was brought first, shall sustain his jurisdiction; and the defendant shall be entitled to have the cause dismissed by the other court, and to recover costs."

Under the title, "Of Exceptions and Defense," and the subtitle, "Of Declinatory Exceptions," we find:

"Art. 334. Declinatory exceptions do not tend to defeat the demand, but only to decline the jurisdiction of the Judge before whom it was brought. In such cases, defendant contends that he is not bound to plead before the court in which the action is brought.

"Art. 335. There are two kinds of declinatory exceptions.

"(1) When the exception is taken to the competency of the judge. * * *

"(2) When it arises from the fact of another suit being pending between the same parties, for the same object, and growing out of the same cause of action, before another court of concurrent jurisdiction."

From which it appears that, in the contemplation of the lawmakers, the bringing of a

multiplicity of suits against the same person upon the same cause of action and for the same object is objectionable only when the suits are brought in different courts of concurrent jurisdiction.

If it had been the intention to legislate against the bringing of such suits in the same court, it is not to be supposed that language would have been used which, *ex vi termini*, limits the prohibition to the bringing of them in "separate courts," and which declares that one may except to the jurisdiction of a court when he has already been sued by the same plaintiff for the same thing on the same cause of action in "another court of concurrent jurisdiction," but does not declare that he may plead such exception when so sued in the same court in which the first suit was brought. The distinction is obvious and the reason for it is not less so; for, if a multiplicity of suits by and against the same person arising from the same cause of action, and for the same thing, could be brought in as many different courts, the defendant would be unnecessarily harassed, and there would result a multiplicity of judgments, which might either conflict with each other, or, each being for the same thing, lead to confusion, and, perhaps, injustice in their execution; whereas, such suits brought in the same court may be cumulated, but, even if that be not done, it is not likely that the same judge will make rulings which conflict with each other, or that he will twice condemn a litigant for the same thing. Counsel for defendant cites the following from 2 Hennen's Digest, p. 1166, No. 1, to wit:

"When another action is pending, before the same tribunal, or one of concurrent jurisdiction, between the same parties, for the same object and the same cause of action, the cause will be dismissed on the exception of *lis pendens*. But the exception is declinatory and must be pleaded in *limine litis*. Code Prac. art. 335, § 2; 9 Mart. (O. S.) 493; 5 La. 116; 9 La. 386; 17 La. 498; 3 Rob. 92, 108; 1 La. Ann. 46; 2 La. Ann. 839; 4 La. Ann. 520; 5 La. Ann. 494."

We have already quoted Code Prac. art. 335, § 2, and have seen that it refers in explicit terms to a case where there is a suit already pending and another is brought "before another court of concurrent jurisdiction." It is therefore in direct conflict with the text of the digest in support of which it is cited. As to the other authorities included in the citation, we have carefully examined them, and have found that the particular question here at issue was not raised or considered in either of them. It is true that in *Dick et al. v. Gilmer*, Adm'r, 4 La. Ann. 520, the syllabus reads:

"When another action is pending before the same tribunal, between the same parties, for the same object, and growing out of the same cause of action, the case must be dismissed, if the exception *litis pendens* be pleaded. Civ. Code, art. 335."

But there is absolutely nothing in the opinion (which is very short) from which it would

be possible to say whether the suit upon which the exception was based and that in which it was pleaded were pending in the same court or in different courts, and our impression is that the justices did not in those days prepare the syllabi of their opinions, but left that work to the reporter. On the other hand, in *Bischoff v. Theurer*, 8 La. Ann. 16, the court said:

"The defendant, being sued upon the three promissory notes made by him, payable to his own order, pleaded, in *limine litis*, as an exception, the pendency of another suit, between the same parties and for the same cause of action, in a court of concurrent jurisdiction, which plea was overruled by the court."

And, after considering the facts, the ruling complained of was reversed and the exception maintained, on the ground that a judgment in the suit relied on as the basis of the exception would constitute the thing adjudged in the case before the court, the case of *Dick et al. v. Gilmer*, Adm'r., 4 La. Ann. 520, *supra*, being cited as authority for that view. It was not, however, intimated that defendant committed any error in pleading that the suit first instituted was pending in a court of concurrent jurisdiction, or that the fact that it was pending in such court was unnecessary to the maintenance of the plea. In *Bogart v. Rills*, 8 La. Ann. 55, it appeared that one Blanks brought a petitory action against *Marionneaux* and others; that, the suit as to *Marionneaux* being still pending, the litigants sold their interests to *Bogart & Rills*, respectively, and that *Bogart* brought suit, in the same court, against *Rills*, enjoining him from committing waste upon the land in controversy during the pendency of said suit, and sequestering certain timber which the defendant had cut down, whereupon *Rills* pleaded the exception of *lis pendens*, which the court disposed of as follows:

"It will simplify the case to consider it as one between the original contestants, *Blanks* and *Marionneaux*, and in so doing (which is most favorable to the defendant) we are of the opinion that during the pendency of the suit plaintiff had a right to the conservatory remedies asked for; indeed, from the nature of the sequestration, it could only arise during the pendency of the suit. It is not, strictly speaking, a new action, rather a branch of the old, and ought to have been cumulated with it. The class of exception which prohibits two suits being brought before different tribunals, for the same cause of action, the parties being the same (see Code Prac. art. 335, § 2), was obviously framed to shield defendants from the harassing effects of a multiplicity of suits, before different tribunals, for the same cause of action, by the same plaintiffs. But we cannot understand it to mean that a party is precluded from filing an additional or supplemental petition, necessary, as in this case, for the preservation of what he may deem his rights, during the pendency of the original action, and to which he is forced by the act of the defendant himself. The petition in the present case, to be sure, does not pray that it may be cumulated with the prior suit, but that we consider does not impair the right of the plaintiff to have the conservatory order granted and damages allowed. Upon due proof the court might *ex officio* have ordered the two to be cumulated without prej-

udice to the interests of the parties litigant, and we shall leave that to its discretion."

And so it might have been said in the instant case, but that the appeal in the suit first instituted by plaintiff was allowed on September 8, 1909, and this suit was not instituted until October 4th following, so that the cumulation was impracticable. It does not follow, however, that, where one asserts particular rights and obtains a judgment from which an appeal is taken, he is thereby precluded from the assertion of any other right thereafter arising from the same cause of action, because, by reason of such appeal, he is unable to cumulate the subsequent demand with that upon which the judgment was obtained; for, if that were so, a litigant in a petitory action with a judgment in his favor, suspended by appeal, might be cut off by the prescription of one year from recovering damages in the event of the defendant's denuding the land in controversy of its timber.

If the prohibition in the Code of Practice is not to be confined in its application to the bringing of suits in different courts "of concurrent jurisdiction," there is no reason why a litigant who has sued in one state should not be precluded from bringing a similar suit in another state.

It is, however, well settled that suits between the same parties arising from the same cause of action and for the same object may be prosecuted in different states at the same time. *Godfrey v. Hall*, 4 La. 158; *Stone et al. v. Vincent*, 6 Mart. (N. S.) 517. And the same rule has been applied to suits in the federal and state courts. In *Hampton's Heirs v. Barrett*, 9 La. 336, plaintiffs sought to recover two annual installments of interest on the price of a sugar plantation, and were met by the exception of *lis pendens*, predicated upon the fact that a previous suit had been brought and was then pending in the United States Court for prior installments, and that the defendant had there put at issue the validity of the sale and had asked that it be rescinded, on the ground that the vendor (plaintiff's ancestor) was without title to the thing sold. It was, however, held that the plea was not good, and the ruling of the lower court whereby it was maintained was reversed. In a later case, between the same parties (*Hampton's Heirs v. Barrett*, 12 La. 159), plaintiffs sued for another installment of interest, and were met with the same exception, which was again maintained by the trial court. But *Martin, J.*, as the organ of this court, said:

"We are ignorant of any law which prevents a vendor in a sale, the price of which is paid in installments, from instituting a suit for each installment, as it becomes due. Our learned Brother doubts the correctness of a decision of the Supreme Court of the United States in which the federal and state courts are considered foreign to each other, and makes a distinction

between the federal court which sits in the same state. He does not consider such a court as foreign to the courts of the same state. We consider ourselves bound by the decision of the Supreme Court of the United States, and are not ready to admit any distinction between the federal courts."

And the ruling of the trial court maintaining the exception of *lis pendens* was again reversed.

In *Succession of Townsend*, 37 La. Ann. 405, it appears that a rule had been taken to remove the executor, and that subsequently a suit had been instituted for the same purpose, and that the defendant had excepted to the rule, but had not pleaded *lis pendens*, and that he undertook to make that plea in this court. *Bermudez, C. J.*, in passing upon the matter, said (page 409):

"The rule was taken on January 31, 1884, and the suit was brought on February 9th. The defendant in rule excepted on February 18th, but did not plead *lis pendens*. How can he do so here? The defense is a matter of plea; not one that can be raised in a brief. Even, then, how could *lis pendens* be pleaded in the first proceeding? How could it be set up against a proceeding in the same court? It rests on a proceeding previously instituted in a different court of concurrent jurisdiction. Even then the law provides that, when the plea is not made, the judgment first rendered is valid and executory against the party cast, and the proceedings in the other case shall be stayed and the suit dismissed. Code Prac. arts. 94, 335."

We therefore conclude that the exception of *lis pendens*, as pleaded in this case, has no legal basis to rest on, and was improperly maintained. And it is accordingly ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the case be remanded to the district court, to be there proceeded with according to law and to the views expressed in the foregoing opinion, the costs of the appeal to be paid by the appellee, and those of the district court to await the final judgment.

(126 La.)

No. 18,073.

W. K. HENDERSON IRON WORKS & SUPPLY CO., Limited, v. CITY OF SHREVEPORT et al.

(Supreme Court of Louisiana. May 9, 1910.)

(Syllabus by Editorial Staff.)

1. MUNICIPAL CORPORATIONS (§ 987*)—MUNICIPAL AID TO RAILROAD—VIOLATION OF CONDITIONS—RIGHT OF TAXPAYER.

Where a railroad company, to which a city voted a special tax on condition that it should within a specified time build a railroad and establish shops in the city, failed to comply with the conditions within the time specified, the special tax could be annulled at the suit of a taxpayer, suing for his joint interest and all others similarly situated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 987.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MUNICIPAL CORPORATIONS (§ 977*)—MUNICIPAL AID TO RAILROAD—VIOLATION OF CONDITIONS—EFFECT.

Where a railroad company, to which a special tax had been voted by a city on specified conditions, had forfeited all right to the tax, it could not contest the right of a taxpayer to demand of the city reimbursement of the portion of the tax already paid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 977.*]

Appeal from First District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the W. K. Henderson Iron Works & Supply Company, Limited, against the City of Shreveport and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hall & Jack, for appellants. Blanchard, Barret & Smith, for appellee.

PROVOSTY, J. This suit is brought by a taxpayer of the city of Shreveport to annul a special tax heretofore voted by the city in aid of the defendant railroad company. The ground of the suit is that the defendant railroad company has not complied with the conditions upon which the tax was voted, and that the time has now gone by for doing so. The conditions were that:

"(1) The Shreveport Northeastern Railway, or assigns, is to build a standard-gauge railway from Shreveport in a northeasterly direction to Homer, La., a distance of about 50 miles; etc."

"That the principal shops necessary for the purposes of said railway company should be built and established in the city of Shreveport, and that actual work upon the said railroad shall be commenced at Shreveport within 6 months after the said tax was voted (which said election was held July 31, 1906), and that the said railroad to Homer, La., should be completed within 30 months after the voting of said tax, but no portion of said special tax of seven-eighths of one mill on the dollar should be paid to the said railway company until 20 miles of said railroad should be completed from Shreveport, and that, should the said railroad not be built beyond 20 miles and on to Homer, La., within 30 months, then no further tax to be assessed, collected, or paid to said railroad; that such portion of said tax as had been collected should be paid to the said railway company upon the completion of the said 20 miles of railroad from Shreveport in a northeasterly direction on to Homer, La., a distance of about 50 miles, and that the remaining portion of said tax to be paid each year as collected and as conditioned above; that no portion of said moneys so raised should be paid to any one whatever until the said railway company had built the said 20 miles of railroad in a northeasterly direction from Shreveport on to Homer, La., and the necessary shops constructed, domiciled, and established in the city of Shreveport.

"That no portion of said moneys so raised shall be paid to any one whatever until the said railway company had built 20 miles of the railway in a northeasterly direction from Shreveport, and the necessary shops and domicile constructed and established in Shreveport."

The ordinance ordering the election was passed on April 17, 1906. The election was

held on July 31, 1906. The result was promulgated on August 1, 1906. This suit was filed in May, 1909, and was tried in June, 1909.

From the evidence, the conditions on which the tax was voted have not been complied with, and the time has passed for complying with them. So clear is this, that the trial judge evidently had little patience, except of the forced kind, with the defense to the suit; and we must confess to pretty much the same mental disposition.

The 3 years were nearly out at the time of the trial, and defendant had not yet begun work, or, in fact, done anything at all towards constructing the 20 miles out of Shreveport, except that it had acquired a right of way across five tracts of land in the parish of Bossier, constituting but an insignificant part of the route across that parish, and had made certain surveys. But even the little which it thus had done it had, as it were, undone, by making a transfer of these rights of way and surveys to another and independent road, which was being constructed in the direction of Shreveport. This transfer would seem to be a pretty strong indication of abandonment on the part of defendant of all idea of carrying out the project in aid of which the tax was voted (indeed, it would seem to have been accepted as such by defendant's own secretary); but "out of this nettle, danger," the learned counsel for defendant would seek to "pluck this flower, safety," by arguing that the construction of this other and independent road (which would have been constructed just the same, if the defendant company had never been organized) is a compliance on its part with the condition to construct the 20 miles out of Shreveport. We can hardly believe the learned counsel for defendant is serious in that contention.

Defendant had also bought a tract of land in the city of Shreveport for the location of its shops; but it had paid only \$2,000 on the purchase price of \$12,000, and at the time of the trial the vendor's lien for the \$10,000, unpaid part of the purchase price, was being foreclosed.

Only \$700 of the \$2,000,000 capital stock of the defendant company has been subscribed or paid in.

We do not agree with defendant that the tax should be annulled only in so far as it affects the plaintiff firm, leaving it in all other respects in full force and effect. The suit must be considered to be for the joint interest of plaintiff and all others similarly situated. If this were not so, this court would not have jurisdiction of the appeal.

As defendant has forfeited all right to the tax, and has no further connection with it, it has no standing to contest the right of plaintiff to demand of the city of Shreveport

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reimbursement of that portion of the tax already paid.

Judgment affirmed.

(126 La.)

No. 17,942.

QUEALY v. WALDRON.

(Supreme Court of Louisiana. May 9, 1910.)

(*Syllabus by the Court.*)

MARRIAGE (§§ 58, 60*) — ANNULMENT — PROCUREMENT BY THREATS—EVIDENCE.

Marriage, as a civil contract, is not valid where the parties have not freely consented, and consent is not free where it is extorted by violence or threats. A marriage is properly annulled where the consent of the complainant was procured by violence or threats of such a nature as to inspire a just fear of great bodily harm in a mind of ordinary firmness. Whether the violence or threats employed in a particular case was or were of such a nature is a question of fact left to the appreciation of the judge or jury.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 123, 133; Dec. Dig. §§ 58, 60.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Joseph L. Quealy against Imelda Waldron. Judgment for plaintiff, and defendant appeals. Affirmed.

Cage, Baldwin & Crabites, for appellant. Merrick & Lewis, for appellee.

LAND, J. This is a suit to annul a marriage celebrated on the 24th day of February, 1908, between the plaintiff and the defendant, by a Catholic priest, in the city of New Orleans. The alleged ground of nullity is that plaintiff's consent to the celebration was produced by violence and threats used by certain male relatives of the defendant.

The defendant filed an exception of no cause of action, which was overruled, and then pleaded the general issue.

There was judgment in favor of the plaintiff annulling the marriage, and the defendant has appealed.

Early in the morning of February 24, 1908, the plaintiff was assaulted in his office by two armed relatives of the defendant, and was induced by violence and threats to consent to the celebration of a hasty marriage between himself and the defendant. Plaintiff, a young man 24 years old, was escorted by the two armed men to the house of the priest, thence to procure a marriage license and a wedding ring, thence to the church, and the escorts were present during the performance of the marriage ceremony. Then the parties separated; the plaintiff going to the house of his father. A month later the present suit was instituted.

The evidence raises not the slightest suspicion of any improper relations between the plaintiff and the defendant, and only an in-

ference that there may have been a promise of marriage between the parties. The legal exclusion of the testimony of the husband and wife, and the failure of the two assailants to testify, leave gaps in the story, commencing with the assault on the plaintiff and terminating with the separation of the parties after the performance of the ceremony.

The contention of the defendant is that, the plaintiff having acquiesced to the marriage ceremony, the marriage was valid, although violence and threats were employed in the beginning to coerce consent. This argument assumes that, after the assault on the plaintiff in his place of business, he reluctantly, but of his own free will, consented to wed the defendant. That the plaintiff seemingly acquiesced in the marriage ceremony is shown by the evidence. On the other hand, the plaintiff contends, and the judge below so held, that this apparent consent was produced by the antecedent threats and violence employed to coerce the will of the plaintiff. This is a fair inference, as the two armed men constantly attended on the plaintiff until after the performance of the marriage ceremony. Plaintiff was separated from his friends, and was surrounded by the relatives of the defendant. The creators of the fear having been present throughout the transaction, it may be assumed that the fear continued and produced the apparent acquiescence of the plaintiff in the marriage ceremony. The immediate separation thereafter of the contracting parties fortifies this conclusion.

The case of *Collins v. Ryan*, 49 La. Ann. 1710, 22 South. 920, 43 L. R. A. 814, cited by counsel for the defendant, differs widely in its facts from the case at bar. In that case, there was no open threat of violence or hostile demonstration, and, if the language used by the single relative contained an implied threat, it was not of such a nature as to coerce the will of a man of ordinary firmness. Moreover, in *Collins v. Ryan*, the defendant had been seduced by the plaintiff, who, on being told that he had to marry her, promised to do what was honorable, if given a little time. The court in that case properly held, we think, that the consent, while reluctant and passive, was not forced by threats or violence, but was rather the result of moral pressure. "It is not every degree of violence or every kind of threat that will invalidate a contract; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune." Civ. Code, art. 1851. It is also textual law that "a contract, produced by violence or threats, is void, although the party, in whose favor the contract is made, did not exercise the violence or make the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

threats," and was "ignorant of them." *Id.* art. 1832.

The law considers marriage in no other view than a civil contract. Civ. Code, art. 86. No marriage is valid to which the parties have not fully consented, and "consent is not free" "when it is extorted by violence." *Id.* art. 91. Violence may be physical or moral; that is to say, it may consist of the coercion of the person continuing down to the moment of the celebration of the marriage, or of the coercion of the will by antecedent threats of bodily harm. In the latter case, the person is forced to elect between consenting to marry and exposure to the threatened evils. Such a forced consent does not bind the person who has been constrained to choose the alternative of marriage. *Baudry-Lacantinerie, Droit Civil*, vol. 2, Nos. 1714, 1715.

The question whether the violence employed in a particular case is sufficient to annul the marriage is in its nature one of fact left entirely to the appreciation of the judge. *Carpentier-Du Saint, Repertoire*, etc., vol. 27, p. 328, No. 132.

We agree with the judge a quo that the violence employed in the instant case was sufficient to constrain the will of the plaintiff and to vitiate his consent to the marriage.

Judgment affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 18,184.

STATE v. MALONEY.

(Supreme Court of Louisiana. May 28, 1910.)

Application by the State for the disbarment of Robert J. Maloney. Disbarment ordered.

Walter Guion, Atty. Gen., J. W. Carroll, and George H. Terriberry, for the State.

PER CURIAM. This case having this day been submitted to the court upon the evidence adduced, and the law and the evidence being in favor of the plaintiff and against defendant, and for the reasons assigned:

It is hereby ordered, adjudged, and decreed that the judgment by default herein rendered on the 29th day of April, A. D. 1910, be and it is hereby confirmed and made final, and accordingly there is judgment herein forever disbarring the defendant, Robert J. Maloney, from practicing in this state as an attorney and counselor at law, and that his license as such, issued to

him by this Court on December 8, A. D. 1892, be and it is hereby revoked, annulled, and avoided.

It is further ordered that the costs of this case be paid by said defendant.

(126 La.)

No. 18,186.

STATE v. GOWLAND.

(Supreme Court of Louisiana. May 28, 1910.)

Proceedings to disbar Joseph Q. Gowland. Judgment of disbarment.

Walter Guion, Atty. Gen., and Charles Rosen, for the State.

PER CURIAM. This case having this day been submitted to the court upon the evidence adduced, and the law and the evidence being in favor of the plaintiff and against defendant, and for the reasons assigned:

It is hereby ordered, adjudged, and decreed that the judgment by default herein rendered on the 29th day of April, A. D. 1910, be and it is hereby confirmed and made final, and accordingly there is judgment herein forever disbarring the defendant, Joseph Q. Gowland, from practicing in this state as an attorney and counselor at law, and that his license as such, issued to him by this court on December 19, A. D. 1898, be and it is hereby revoked, annulled, and avoided.

It is further ordered that the costs of this case be paid by said defendant.

(126 La.)

No. 18,185.

STATE v. SPITZFADEN.

(Supreme Court of Louisiana. May 28, 1910.)

Application by the State for the disbarment of Theodore G. Spitzfaden. Disbarment ordered.

Walter Guion, Atty. Gen., and Edwin T. Merick, for the State.

PER CURIAM. This case having this day been submitted to the court upon the evidence adduced, and the law and the evidence being in favor of the plaintiff and against defendant, and for the reasons assigned:

It is hereby ordered, adjudged, and decreed that the judgment by default herein rendered on the 29th day of April, A. D. 1910, be and it is hereby confirmed and made final, and accordingly there is judgment herein forever disbarring the defendant, Theodore G. Spitzfaden, from practicing in this state as an attorney and counselor at law, and that his license as such, issued to him by this court on May 21, A. D. 1894, be and it is hereby revoked, annulled, and avoided.

It is further ordered that the costs of this case be paid by said defendant.

KORNOSKY v. HOYLE (No. 14,651.)

(Supreme Court of Mississippi. June 6, 1910.)

MARITIME LIENS (§ 11*)—STATUTORY PROVISIONS—EXCLUSIVENESS.

The lien and remedy given by Code 1906, §§ 3085-3087, on water craft, for work done or materials supplied in building, repairing, and furnishing the same, does not abrogate the common-law right of lien for services in the repair of a boat while it remains in the possession of the repairer, carrying with it the right to hold the boat till the charges are paid.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 15; Dec. Dig. § 11.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action by Harry Hoyle against Charlie Kornosky. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is a replevin suit, in the circuit court of Harrison county, for a gasoline launch, by the appellee, Hoyle, against the appellant, Kornosky. There was a verdict and judgment in the court below in favor of the appellee, from which this appeal is prosecuted. The appellee owned a boat, and employed the appellant, who was a boatwright, to remodel and repair his boat and install a gasoline engine therein, agreeing to pay therefor what was reasonable. The appellant did the work, furnishing some of the materials. While the work was in progress the appellee made payments. When it was finished, the balance due appellant was \$142.91. On trial, the appellee introduced no testimony, except an agreement of counsel that the legal title to the boat was in the appellee. The appellant and one Wright testified as to the labor performed, material furnished, and the balance due, and that payment was demanded of appellee, which was refused. The appellee sued out a writ of replevin for the boat, and gave a forthcoming bond therefor, and removed it to the state of Louisiana. The appellant refused to give up the boat until the amount due him for labor and materials performed and furnished in the repair of the boat had been paid, claiming a lien therefor. There was no conflict in the testimony, only a question of law being involved. The court instructed the jury to find a verdict for the appellee. The appellant requested a peremptory instruction, which was refused.

Barrett & Taylor, for appellant. W. G. Evans and T. A. Hardy, for appellee.

ANDERSON, J. (after stating the facts as above). The court below held that chapter 85, Code of 1906, which gives a lien, and a remedy therefor, on watercraft for work done or materials supplied in building, repairing, and furnishing the same, was appellant's only remedy for the collection of the amount due him by appellee. In so holding the court erred. At common law the appellant had a possessory lien for work done and materials furnished in repairing the boat,

carrying with it the right to hold the same against the owner until his charges were paid. "It is a principle of the common law that every man who has lawful possession of a chattel upon which he had expended his money, labor, or skill at the request of its owner, thereby enhancing its value, may retain it as security for his debt. This right extends to all such manufacturers, tradesmen, and laborers as receive chattels for the purpose of repairing or otherwise improving their condition." 19 A. & E. Encyc. Law (2d Ed.) 8. "There is a lien at common law for the building of a ship, if the shipwright has not parted with the possession thereof, and the owner's assignee in bankruptcy cannot take the ship without paying all that is due for her construction." 19 A. & E. Encyc. Law (2d Ed.) 1090.

Chapter 85, Code 1906, does not abrogate the common-law right. On the other hand, its purpose is to enlarge the same, and give a better remedy, though not exclusive. The court below should have given the peremptory instruction requested on behalf of the appellant. Under the facts in this record, the appellant is entitled to judgment against the appellee and his bondsman for the return of the boat, or, in lieu thereof, for the amount of his indebtedness, with 6 per cent. interest thereon, from the time it was due, with costs.

Reversed and remanded.

PEOPLE'S WAREHOUSE CO. v. YAZOO CITY. (No. 14,665.)

(Supreme Court of Mississippi. June 6, 1910.)

TAXATION (§ 45*)—CORPORATIONS—STATUTES.

Const. § 181, providing that the property of corporations shall be taxed in the same way as that of individuals, must be construed in connection with section 112, authorizing the Legislature to provide for a special mode of assessment for corporations, and, when so construed, Code 1906, § 4267, providing that corporations shall be assessed at the market value of their stock paid in, less real estate owned, to be separately assessed as other real estate, is not invalid; and where the aggregate market value of the stock of a corporation exceeds the value of the real and personal property, a tax on the difference is a tax on the value of the franchise of the corporation, and is proper.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 100-103; Dec. Dig. § 45.*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Proceedings by the People's Warehouse Company against Yazoo City to review an assessment for municipal taxes. From a judgment affirming the assessment, petitioner appeals. Affirmed.

This is an appeal to the circuit court by the People's Warehouse Company from an order of the municipal authorities of Yazoo City

assessing the property of the warehouse company for municipal taxes. There was a trial before the judge, a jury being waived, and a judgment rendered affirming the order of the mayor and board of aldermen, from which judgment this appeal is prosecuted. The trial was had on agreed facts as follows: "The People's Warehouse is a corporation, organized and existing under the laws of the state of Mississippi, domiciled at Yazoo City, Miss., the paid-up capital stock being \$160,000, divided into 16,000 shares, of the par value of \$10 each; that the shares of said stock are worth on the market in Yazoo City on October 1, 1908, \$11 a share, or \$176,000; that on the 1st day of October, 1908, the date of assessing property under the ordinances of Yazoo City, Miss., *said corporation owned and possessed personal and real property of the market value of \$140,000, all situated in Yazoo City, Miss., and owned no other property, except its charter under the general laws of the state of Mississippi, unless its earning power, good will, and established business shall be considered by the court as property subject and liable to assessment and taxation.* It is further agreed that the assessment of said corporation by Yazoo City was regular under the ordinances of Yazoo City and the laws of the state of Mississippi; that the board assessed the real and personal property at the sum of \$140,000, and assessed the market value of the capital stock paid in at \$160,000 less said \$140,000, the real and personal assessment; but the said corporation does not admit the validity or constitutionality of said assessment. It is further agreed that said corporation has paid under protest to the tax collector of Yazoo City the taxes levied in said assessment of \$160,000 for the year 1908, and if the court shall determine that said assessment is invalid, in whole or in part, said city will refund to said corporation the taxes on the excess as fixed by the court. The court herein means circuit court of Yazoo county, if the judgment of said circuit court shall not be appealed from to the Supreme Court, in which event the said court shall mean Supreme Court. It is further agreed that the charter of said corporation shall be and is hereby made a part of this agreement, and may be read on the hearing of this cause, but need not be copied in the transcript of the record on appeal to the Supreme Court. It is further agreed that the ordinances of Yazoo City providing for the assessment of corporations is the same as section 4267 of the Mississippi Code of 1906, except that the date of assessment is October 1st, instead of February 1st, and that the same was regularly passed, and that the said corporation made a full statement of all its assets to said board, although no demand therefor was made under the law; the representative of said corporation admitting in said meeting that the market value of the capital stock

paid in was eleven dollars per share or \$176,000."

Williams & George, for appellant. Holmes & Holmes, for appellee.

ANDERSON, J. (after stating the facts as above). It is insisted that section 4267 of the Code of 1906 is violative of section 181 of the Constitution, because it provides for the taxation of the property of private corporations for pecuniary gain in a different way and to a greater extent than the property of individuals. That section and section 112 of the Constitution are to be construed together in determining the question involved. Section 181 provides that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals," and section 112 that taxation shall be uniform and in proportion to true value, that property shall be assessed for taxes by general laws and uniform rules, according to true value, "but the Legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property." Section 4267 of the Code provides that corporations organized under the laws of this state, shall be assessed for taxation at the market value of their shares of stock paid in, less real estate owned, to be separately assessed as other real estate. Section 178 of the Constitution provides for the taxation of corporate franchises.

The cases of Panola County v. Carrier & Son, 89 Miss. 277, 42 South. 347, and State v. Simmons, 70 Miss. 485, 12 South. 477, are decisive of the constitutionality of section 4267. The requirement of section 181 that the "property of private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of private individuals" must be construed in connection with the power given the Legislature in section 112 to "provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property." By section 4267 of the Code the Legislature has undertaken to carry out the grant of power conferred by section 112 by providing a special mode of valuation and assessment of private corporations for a pecuniary gain. Where the aggregate market value of the shares exceeds the value of the real and personal property, as it does in the instant case, it is contended that a tax on this difference is a tax on thrift and earning capacity, which is violative of section 181 of the Constitution, because no such tax is levied against individuals. Such contention is unsound. This difference represents the value of the right of the corporation to exist, which is a franchise incident to all corporations, and of value, and constitutes part of its property; and this is true, notwithstanding the corporation is chartered under general laws at small expense.

Touching the value of this franchise, we quote with approval the following by the Supreme Court of Massachusetts in the case of *Commonwealth v. Cary Improvement Co.*, 98 Mass. 19: "The defendants contend, further, that the franchise of a mere land company cannot be said to possess any value beyond that belonging to the property of the corporation; that in these cases the market value of the shares was fictitious and speculative only, and greatly in excess of all property and rights belonging to the corporation, and therefore that, even as a franchise tax, this, as imposed upon these defendants, is an unreasonable tax, in a sense obnoxious to the limitation of the Constitution. We cannot accede to the premises upon which this argument is founded. The franchise of a mere land company has a value beyond that belonging to the property itself. The combination of capital, the capacity to hold and manage large amounts of real estate under one direction, free from competition among those interested, from change by death and disturbance by the chances of individual life, whereby the ultimate development and gradual sale may be secured in the most advantageous manner possible, and many other considerations which readily suggest themselves, make the privilege of a corporate organization in such cases one of great value and importance. The very magnitude of the entire estate, when held in individual hands, will depress its gross value in the market; while under corporate ownership and management, the separate shares, which give to the holder the assurance of participation in the future development and appreciation of the property, will command a much higher proportionate price. The convenience with which the interests of the several shareholders are held, and the facility of the transfer of the shares, are elements of great influence in giving value to the capital stock. And we are not prepared to say that even a merely speculative value, conferred upon stock by the advantages of its corporate character and the privileges thereto pertaining, may not afford a proper basis for the imposition of a tax like this."

And from *Adams Express Company v. Ohio*, 164 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965: "It is a cardinal rule, which should never be forgotten, that whatever property is worth for the purpose of income and sale it is also worth for the purpose of taxation. Suppose an express company is incorporated to transact business within the limits of the state and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousand of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the

state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purpose of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. * * * The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its own power to produce income or for purpose of sale."

Applying these principles to the case in hand, and the \$20,000 the difference between the aggregate value of the shares, and the value of the real and personal property, is the value fixed by law of the franchise of this corporation.

Affirmed.

TERRY v. STATE. (No. 14,516.)

(Supreme Court of Mississippi. June 6, 1910.)

1. SEDUCTION (§ 37*)—INDICTMENT—TIME.

An indictment for seduction of a female under 18 years of age, alleging that she was of previous chaste character, was not defective for failure to use the words "then and there" before the expression "of previous chaste character," since that term was referable only to the time immediately preceding the offense.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 63-66; Dec. Dig. § 37.*]

2. SEDUCTION (§ 46*)—EVIDENCE—CORROBORATION OF PROSECUTRIX.

In a prosecution for seduction of a female under 18 of previous chaste character, the testimony of prosecutrix must be corroborated, in order to sustain a conviction.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Chester Terry was convicted of seduction, and he appeals. Affirmed.

Ford, White & Ford and J. H. Mize, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. The appellant was indicted, convicted, and sentenced in the Harrison county circuit court to the penitentiary for three years for seduction. The indictment was drawn under section 1081 of the Code of 1906, and it charges, leaving out the formal parts, that appellant "did then and there unlawfully and feloniously seduce and have illicit intercourse with one Hilda Ryan, a female child under the age of 18 years old and

of previous chaste character." There are but two of the many assignments of error that we will consider.

First. Appellant assigns as fatal error that the indictment fails to use the words "then and there" just before the expression "of previous chaste character." He seems to contend that without these words the indictment does not definitely charge at what period in the life of the prosecutrix she was chaste. The term "of previous chaste character" refers to the time immediately previous to the offense. Any other construction would be too strained and unreasonable, too captious and technical.

It is further contended that the prosecutrix is not corroborated in her statement. Our statutes provide that she must not only be of previous chaste character, but that the testimony of the female seduced alone shall not be sufficient to convict. This is a wise and wholesome provision of the law. It guards against, or rather minimizes, the chances of an innocent party being accused and convicted. Has the prosecutrix met these requirements of the law? Without going into the details of the testimony on this point, we think she is abundantly corroborated by many facts and circumstances testified to in this case by witnesses other than the prosecutrix. The jury was fully warranted in finding defendant guilty.

This case is affirmed.

PER CURIAM. The above opinion is adopted by the court. Affirmed.

DEVELLING v. STATE. (No. 14,501.)

(Supreme Court of Mississippi. June 6, 1910.)

CRIMINAL LAW (§ 260*)—TRIAL—DEFAULT—VACATION.

Accused, having been sentenced to pay a fine and serve six months for illegally selling cocaine, appealed to the circuit court; and, failing to respond when his case was reached on the preliminary call of the docket, his appeal was dismissed. His counsel, who was a member of the Legislature then in session, had appeared and requested that his case be passed, and on hearing of the dismissal he immediately went to the court, arriving there before the preliminary call of the docket had been concluded, and before any case had been taken up for trial. He filed a motion to set aside the dismissal of his appeal, which was denied. His counsel attempted to get the case set for a day certain, because of his legislative engagements, but was unable to make any agreement with the district attorney, and had no opportunity to present the matter to the court until the case was called. He advised his client that it would be impossible for him to remain in waiting for the case to be tried, but that he would get the case continued or set for a day certain. *Held*, that defendant was entitled to a vacation of his default and a hearing.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

Appeal from Circuit Court, Madison County; W. H. Potter, Judge.

J. M. Develling was convicted of selling cocaine, and he appeals. The conviction was affirmed, without a written opinion, May 16, 1910, and afterwards reopened on the filing of a suggestion of error by appellant's counsel. Suggestion sustained, and judgment reversed and vacated.

E. B. Harrell and H. B. Greaves, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. The appellant was convicted in a court of a justice of the peace for selling cocaine, and sentenced to pay a fine of \$500 and to serve a term of six months in the county jail, from which an appeal was taken to the circuit court. On the preliminary call of the docket he failed to respond when his case was reached, and thereupon, on motion of the district attorney, his appeal was dismissed, with a writ of procedendo. His counsel, who had appeared for him and requested that his case be passed, thereupon notified him by telephone of the action which had been taken in the matter, and he immediately went to the courthouse, arriving there as early as possible after receiving the notice, and before the preliminary call of the docket had been concluded, and before any case had been taken up for trial. He thereupon filed a motion requesting the court to set aside the dismissal of his appeal, and to reinstate the cause on the docket, which motion was overruled; hence this appeal.

It appears that appellant's counsel was a member of the state Senate, which was then in session at Jackson; that, several days prior to the one on which the criminal docket was called, his counsel advised him that it would be impossible for him (counsel) to remain in Canton, waiting for this case to be tried, as he would have to be in attendance upon the Senate; that he would get the case continued or set for a day certain, and in the last-named event would notify him what day the case would be tried. This his counsel failed to do, resulting in his being absent at the call of the docket. Counsel stated that he had been unable to make any agreement with the district attorney, and that he had no opportunity of presenting the matter to the court until the case was called, having been absent most of the time at Jackson. In so advising his client, counsel seems to have acted upon an impression which he had that indulgences of this character were always extended by the court to members of the state Legislature while that body was in session.

Appellant ought to have been in attendance upon the court; but he seems to have acted in perfect good faith, believing that his counsel, by reason of being a member of the state Senate, which was then in session, had the right to have his cases set for a day certain. This being true, and as he arrived in the

courtroom before the preliminary call of the docket had been completed, and before any case had been taken up for trial, his motion to reinstate the cause ought to have been sustained. The case is not free from difficulty, for ordinarily, when a defendant in a criminal cause fails to respond when called in court, the proper course to pursue is either to take a forfeiture upon his bond, or, if his case is on appeal, to dismiss same with a writ of procedendo; and a forfeiture or procedendo, when taken, ought not to be set aside, unless it is clear that the defendant was not in fault.

The suggestion of error is sustained, the judgment heretofore entered is vacated, the judgment of the court below reversed, and the cause remanded.

ROUX v. CITY OF GULFPORT.

(No. 14,647.)

(Supreme Court of Mississippi. June 6, 1910.)

CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for assault, it is not error to refuse an instruction that the burden is on the city to prove defendant guilty beyond every reasonable doubt, and if from the consideration of all the evidence there arises two reasonable theories, one that the defendant is guilty as charged, and one that the defendant is innocent, then it is the duty of the jury to acquit, even though the theory that he is guilty is supported by more probable evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Joseph Roux was convicted of assault and battery, and appeals. Affirmed.

J. H. Mize, for appellant. Jno. L. Heiss (Jas. R. McDowell, Asst. Atty. Gen., of counsel), for appellee.

McLAIN, C. Appellant was convicted before the police justice of the city of Gulfport upon affidavit charging him with assault and battery. He appealed the case to the circuit court of Harrison county, and was convicted and sentenced, from which judgment he prosecutes this appeal.

The only assignment of error that appellant makes in this case is that the trial court erred in refusing the following instruction: "The court instructs the jury, for the defendant, that the burden of proof is on the city to prove the defendant guilty beyond every reasonable doubt before they can convict him, and if, after consideration of all the evidence in this case, there arises from the evidence in the case two reasonable theories, one theory that the defendant is guilty as charged, and one theory that the defendant is innocent, then it is the duty of the jury to adopt the theory that the defend-

ant is innocent, and acquit him, even though the theory that defendant is guilty is more probably supported by the stronger evidence." This instruction, in substance, is the same charge that was condemned by this court in the case of Runnels v. State, 50 South. 490.

The case is affirmed.

PER CURIAM. The above opinion is adopted by the court.

Affirmed.

BRAHAN v. MERIDIAN HOME TELEPHONE CO. (No. 14,398.)

(Supreme Court of Mississippi. June 6, 1910.)

1. MUNICIPAL CORPORATIONS (§ 663*)—STREETS—TREES—OWNERSHIP.

Adjacent property owners own the trees in front of their lots and between the sidewalks and the streets, so that a telephone company which cut such trees without the consent of the adjacent owner would be liable under Code 1906, § 4977, requiring one destroying any tree, etc., without the consent of the owner, to pay the statutory penalty.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 663.*]

2. MUNICIPAL CORPORATIONS (§ 682*)—STREETS—GRANT OF RIGHT TO USE—CUTTING TREES—GRANT TO TELEPHONE COMPANY.

A city cannot authorize a telephone company or other person to damage or destroy trees between the street and sidewalk belonging to adjacent property owners, without making compensation to such owner, though it may itself remove such trees, if they destroy the free use of the street, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 682.*]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by F. V. Brahan against the Meridian Home Telephone Company. From a judgment for defendant upon a directed verdict, plaintiff appeals. Reversed and remanded.

F. V. Brahan, pro se. Ethridge & Ethridge, for appellee.

MAYES, C. J. Since the case of Telephone Co. v. Cassidy, 78 Miss. 666, 29 South. 762, it has been settled in this state that adjacent property owners also own the trees growing in front of their lot, and between the sidewalk and the street. Mr. Brahan is such property owner, as appears from the facts of this case, and the trees cut and trimmed were between the street and sidewalk. The above case is also authority for another proposition, and that is that no city can authorize any public service corporation, or other individual, to damage or destroy trees, so as to exempt from liability. The trees are the property of the adjacent owner as absolutely as if they grew in a forest, subject to certain rights which the municipality has in its governmental capacity, which we shall state; but the city cannot transfer any of its rights to any person or corporation to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the detriment of the owner. The ownership of trees between the sidewalk and the street is as sacred as any other property right. Of course, the paramount purpose of the sidewalks and the streets is for a public use as such, and when trees obstruct the free use of the street the city undoubtedly has the power to carry out the paramount purpose, and trim or destroy the trees, if such action be necessary to complete its use to the public; but this power belongs alone to the city, and can be exercised only when it seeks to make the street or sidewalk useful for its legitimate purposes.

It is difficult for us to understand why section 4977 of the Code of 1906 does not apply in this case. It provides that, if any person shall cut down, deaden, destroy any tree, etc., without the consent of the owner, etc., he shall pay the statutory penalty, etc. This telephone company did those things, knowing that it did not own the trees, and never asked consent of the owner at any time. It claimed to be acting under authority of the city of Meridian; but the city of Meridian had no power to give any such authority. If the statute did not apply, under the facts of this case, it would be of little force or effect. The telephone company could have used its eminent domain powers; but it did not see fit so to do, and is therefore liable.

There should not have been a peremptory instruction for defendant, and because there was the cause is reversed and remanded.

PRICE v. CITY OF GULFPORT. (No. 14,520.)

(Supreme Court of Mississippi. June 6, 1910.)

1. INTOXICATING LIQUORS (§ 233*)—UNLAWFUL KEEPING FOR SALE—PROSECUTION—ADMISSIBILITY OF EVIDENCE.

In a prosecution for having in possession intoxicants with intent unlawfully to sell them, evidence that accused was receiving liquor by freight from without the state, and that bottles, empty and filled, were found in his dwelling, was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297; Dec. Dig. § 233.*]

2. INTOXICATING LIQUORS (§ 236*)—UNLAWFUL KEEPING FOR SALE—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for having in possession intoxicants with intent unlawfully to sell them, under Laws 1908, c. 114, § 1797, making it unlawful for one to have in his possession intoxicants for the purpose of selling them in violation of law, evidence held sufficient to sustain a conviction in view of Laws 1908, c. 115, § 1747, providing that, if any one shall be found in possession of appliances adapted to retailing intoxicants, it shall be presumptive evidence that the person owning or controlling such appliances is engaged in selling intoxicants contrary to law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

George C. Price was convicted of unlawfully keeping intoxicants for sale, and he appeals. Affirmed, on opinion of Commissioner.

J. H. Mize, for appellant. Jno. L. Heiss and Jas. R. McDowell, Asst. Atty. Gen., for appellee.

McLAIN, C. Appellant was convicted by the police justice of the city of Gulfport upon affidavit charging him with unlawfully keeping for sale intoxicating liquors. He appealed the case to the circuit court of Harrison county, and was convicted and sentenced, and from that judgment he prosecutes this appeal.

Appellant's chief assignment of error is that the evidence upon which he was convicted was not competent testimony to submit to the jury, and that the evidence upon the whole was not sufficient to sustain the verdict. On November 23, 1909, appellant was running a poolroom in the city of Gulfport, and a few blocks away he lived upstairs in a building owned by one Streiffer, from whom he rented. Streiffer occupied the lower part of the building as a store, dealing mostly with sailors—supplying sailors and vessels with supplies. On November 23, 1909, the police officers of the town searched his dwelling for intoxicating liquors. Eight bottles of beer were found in the refrigerator, and 42 pints of whisky were found between a folding lounge or bed. In the room in which this whisky was found, a trapdoor was discovered, cut in the floor of the room, thereby forming a kind of closet between the floor and the ceiling of the lower room. Some bottles were found in this place, but were empty. At the same time, the officers found at the Louisville & Nashville freight depot, 4 cases of whisky in bottles, making 12 gallons. The cases were marked and consigned to appellant, and he had paid the freight on same, and had receipted the railroad agent for the whisky.

The railroad agent on the trial of the case, testified, and produced the official duplicate freight bills covering a period of 23 days prior to the arrest of the defendant. This showed shipments to appellant on November 10th, 13th, and 20th of 17 cases of whisky, three gallons to the case, making 51 gallons. Appellant signed for all of this whisky and paid the freight; his signature appearing to each of the duplicate freight bills. The defendant offered no proof whatever to explain any of these matters, except one Casper Vahle testified that he had, a short time before the finding of the whisky, rented this room from appellant in which some of the whisky was found, and that the whisky found there was his whisky. Upon an inspection of all the testimony in the case,

many facts and circumstances appear strongly suggesting and indicating that Casper Vahle was a mere tool or agent of appellant.

We think all this testimony was admissible as against the objection that it was irrelevant and immaterial. While it was not a violation of law to purchase whisky outside of the state and ship it into the state, yet, where the defendant is charged with having in his possession intoxicating liquors with the intention or for the purpose of selling the same in violation of law, evidence that he was receiving whisky was a relevant fact in connection with the charge. *Bonner v. State*, 2 Ga. App. 711, 58 S. E. 1123. Section 1747, c. 115, p. 117, Acts 1908, provides, among other things, that if any one shall be found in possession of appliances adapted to retailing such liquors it shall be presumptive evidence that the person owning or controlling such appliances is engaged in selling or bartering intoxicating liquors contrary to the law. *Gillespie v. State*, 51 South. 811.

This conviction is had upon a record containing no direct and positive proof that appellant did unlawfully sell intoxicating liquors, yet it does show that he had in his possession many gallons of intoxicating liquors from time to time, under circumstances, wholly unexplained, as to warrant the jury in finding him guilty, when these facts and circumstances are considered in the light of all the evidence, along with section 1797, c. 114, and section 1747, c. 115, Acts 1908, bearing upon the question.

The case is affirmed.

PER CURIAM. The above opinion is adopted by the court.
Affirmed.

HAND v. CITY OF GULFPORT. (No. 14,646.)

(Supreme Court of Mississippi. June 6, 1910.)

Appeal from Circuit Court, Harrison County; T. H. Barnett, Judge.

Emma Hand was convicted of unlawfully keeping intoxicants for sale, and she appeals. Affirmed, on opinion of Commissioner.

J. H. Mize, for appellant. Jno. L. Heiss (Jas. R. McDowell, Asst. Atty. Gen., of counsel), for appellee.

McLAIN, C. Appellant was convicted before the police justice of the city of Gulfport upon affidavit charging her with unlawfully keeping for sale intoxicating liquors. She appealed the case to the circuit court of Harrison county, and was there convicted and sentenced, and from that judgment she prosecutes this appeal.

This case is controlled by the case of *Gillespie v. State*, 51 South. 811, and by the case of *George C. Price v. City of Gulfport* (decided at this term of court) 52 South. 486.

This case is affirmed.

PER CURIAM. The above opinion is adopted by the court.
Affirmed.

(126 La.)

No. 17,773.

LOWER TERREBONNE REFINING & MFG. CO. v. BARROW.

(Supreme Court of Louisiana. March 28, 1910.
Rehearing Denied May 24, 1910.)

(Syllabus by the Court.)

1. CONTRACTS (§ 143*)—CONSTRUCTION AS A WHOLE—LANGUAGE.

A contract should not be so interpreted as to defeat the main purpose, indicated by its provisions, taken as a whole, or to impute to the parties the use of language without meaning or effect.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 723; Dec. Dig. § 143.*]

2. EVIDENCE (§ 586*)—WEIGHT OF EVIDENCE.

Affirmative testimony, supported by corroborating circumstances, is more convincing than the negative testimony of one who does not remember.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; W. P. Martin, Judge.

Action by the Lower Terrebonne Refining & Manufacturing Company against R. R. Barrow. Judgment for defendant, and plaintiff appeals. Affirmed.

Suthon & Wurzlów, for appellant. H. S. Gagné, for appellee.

Statement of the Case.

MONROE, J. This case has been thoroughly considered and correctly determined by the learned judge of the district court, and we cannot do better than adopt his opinion (save in one particular, which will be noted) and affirm his decree. The particular to which we refer is this: Under the contract sued on, plaintiff agreed to dig, or dredge out, a certain extension of a canal, belonging to defendant, at an estimated cost of \$3,500, in consideration whereof defendant accorded plaintiff the privilege of carrying its freight and the freight of Ashland Plantation (belonging to another concern, but of which one of the parties interested in the plaintiff company was part owner) through the canal, at certain special rates of toll, and agreed that the tolls debited to plaintiff should go in reimbursement of the \$3,500 to be expended by it, until the accounts should balance each other, provided that plaintiff should make shipments enough to accomplish that result within three years; otherwise plaintiff's obligation to reimburse the \$3,500 to be considered canceled. There was no stipulation in the contract that the tolls due upon the shipments of Ashland Plantation should be thus dealt with, and, though our learned Brother of the district court says, at one place in his opinion, "Under the terms of the contract, the plaintiff had the right to receive credit for tolls on its own freight

and that of Ashland Plantation," he reached a different conclusion before entering his judgment, and, in effect, decided that plaintiff did not have that right. His opinion reads as follows:

Opinion rendered in this case by Hon. W. P. Martin, judge of the district court:

"The plaintiff institutes this suit to recover of the defendant the sum of \$3,096.21, on a written contract, under the terms of which the plaintiff alleges that it was agreed that the plaintiff should do a certain amount of dredging, in the canal of defendant, with its dredgeboat, and that no charge should be made for the use of the dredge, but that the defendant should pay, or refund, to the plaintiff, the expense of operating the dredge, including the necessary repairs, provided that the dredging done did not exceed the sum of \$3,500.

"That this amount was to be paid, or refunded, by permitting the plaintiff to ship its freight and that of Ashland Plantation through the canal at the rates set forth in said contract; it being stipulated that plaintiff was to keep an exact account of the expenditures for cutting the canal, and the defendant was to keep an account of the amount of freight shipped through the said canal, which was to be credited to the amount due the plaintiff for work and dredging done in the said canal.

"That it was further stipulated in the said contract that the plaintiff was to have three years, from notice that the said canal was open for business, in which to ship a sufficient amount of freight to cover \$3,500 expended in dredging.

"Plaintiff then avers that it fulfilled its portion of the contract by cutting the said canal, and, in so doing, expended \$3,949.43, a detailed statement of which was rendered the defendant. That the said defendant, thereupon, paid plaintiff, on January 6, 1906, the excess over \$3,500 expended by it in the digging of the said canal; that is to say, \$449.43.

"That having, on November 29, 1905, received notice from the defendant that his canal was open and ready for business, it proceeded to ship its sugar and molasses through the said canal and to receive freight from New Orleans in the same manner, and that, within the three years, it shipped and received an amount of freight, which, under the tolls stipulated in the contract, was more than sufficient to cover the \$3,500 due for work done by its dredgeboat in defendant's canal. That the said defendant paid plaintiff \$403.79 for freight on 11,537 barrels of sugar, shipped through the said canal, at the rate of 3½ cents per barrel, leaving, however, a balance of \$3,096.21 still due and unpaid, which plaintiff prays to recover.

"The defendant, Barrow, first pleaded the general issue, admitting, however, the contract sued on.

"The defendant sets forth a history of the Barataria & Lafourche Canal, dwelling upon the magnitude of the work which its opening to navigation involved, and also sets forth the causes and inducements which led him to enter into the contract sued on, as well as certain negotiations and agreements had with the plaintiff previous to the signing of the said contract, all of which, being irrelevant to the issue involved, makes it unnecessary to here consider those unnecessary averments.

"The defendant then avers that the contract sued on contemplated the building of barges by the plaintiff, for the purpose of shipping and receiving its freight in the manner and for the tolls set forth in the contract.

"That, after the said contract was completed, in November, 1905, the defendant, finding that the plaintiff was not shipping its freight through the said canal as per agreement, went to Mr. H. G. Bush, the then secretary and treasurer of the plaintiff corporation, and inquired

of him the reason why his freight was not being shipped through the said canal. Mr. Bush having stated that he found it impossible to build barges in time to market the crop of 1905 and 1906, he, therefore (in order to encourage Capt. Bradford, who was operating a boat in the said canal), agreed with Mr. Bush that, if he would ship the crop of 1905 by the boat of Capt. Bradford, he (defendant) would allow the plaintiff, on all freight so shipped, for that season, the same refund of tolls as was provided in the written contract. That, notwithstanding this inducement, the plaintiff shipped but a small portion of its crop of 1905 through the said canal, by Capt. Bradford, and, since then, it has not shipped any freight at all through the canal.

"That, according to his agreement, the defendant refunded to the plaintiff the tolls collected upon freights shipped by Capt. Bradford during the season of 1905. That the said agreement was only for the season of 1905, and that, although the crops of 1906-1907-1908 have, since, been marketed by plaintiff, it failed to transport its freight through the defendant's canal in the manner contemplated by the contract, but has shipped the same by rail.

"After making certain averments in regard to certain agreements between plaintiff and the railroad company, in regard to freight, which averments were stricken from defendant's answer, previous to trial, the defendant, finally, avers that the plaintiff, having failed to ship its freight through his canal, as contemplated in the contract, and the time having elapsed in which the plaintiff enjoyed the right to ship its freight under the terms and inducements set forth in its contract, so much of the money as was expended by plaintiff in tolls has, ipso facto, been forfeited by defendant.

"Reserving his right to sue the plaintiff for the violation of its contract, the defendant finally prays to be dismissed, with costs.

"Opinion.

"The solution of the issues involved in this case depends upon the interpretation of the contract sued on. The contract is divided into four sections, the first of which presents no difficulties; it being admitted that plaintiff carried out its obligation, and that the statement rendered, showing the amount expended by plaintiff in digging the canal, is correct.

"This statement shows that the plaintiff expended \$3,949.43 in doing this work, and, in order to reduce the indebtedness to the amount set forth in the contract, to wit, \$3,500, the defendant remitted to plaintiff his check for \$449.43.

"The second section relates to special rates of toll allowed the plaintiff, in connection with the work performed by it in dredging the said canal, and the manner in which the shipments of freight should be made and the tolls ascertained. This section of the contract reads as follows:

"That, in consideration of doing this work, the party of the second part is to enjoy the right to have its freights, and the freights of Ashland Plantation, of Caillouet and Maginnis, pass through the said canal its entire length, from Bayou Terrebonne to the Mississippi river, at the following rates of toll: When barges of less than 1,000 barrels of sugar capacity are locked, at one time, in one or more barges, the rate is to be 4 cents per barrel, based on the capacity of the barges; when 1,000 or more barrels of sugar are locked at one time, in one or more barges, the rate is to be 3½ cents per barrel, based on the capacity of the barges. All barges of the party of the second part shall be rated at their carrying capacity in barrels of sugar. The rate on all freight, including coal and oil, going back from New Orleans, is to be at 20 cents per ton, of 2,000 pounds, and the party of the second part

agrees to furnish exact weights on all back freights from the river end of said canal. Empty barges from New Orleans to be locked free. Empty barges to New Orleans to be locked free, provided, it is intended that freight shall be returned by these same barges, and, in that case, the toll, on the barges returned, shall not be at 20 cents per ton, of 2,000 pounds, but at the carrying capacity of the barges in barrels of sugar and at the rate, as agreed, on sugar coming to New Orleans.

"Before discussing the evidence in this case, it would be well to thoroughly understand this section of the contract, as the correct interpretation of its provisions solves, to a great extent, the questions and issues involved.

"In granting to the plaintiff the right to ship its freight and that of Ashland Plantation through the defendant's canal, provision is made for the rates of toll and the manner of ascertaining the same. It provides that 'when barges of less than 1,000 barrels of sugar capacity are locked at one time, in one or more barges, the rate is to be 4 cents per barrel, based on the capacity of the barges; when 1,000, or more, barrels of sugar are locked at one time, in one or more barges, the rate is to be 3½ cents per barrel, based on the capacity of the barges.' The very evident meaning of this provision is that the toll charged is not based on the number of barrels of sugar actually contained in the barges locked through the canal, but on the capacity of the barges used in shipping the sugar or other products.

"The capacity of the barges is determined by ascertaining the number of barrels of sugar that the barges will carry. In other words, a barrel of sugar is used as a measurement to ascertain the carrying capacity of the barges, and the rate of toll is charged on the capacity of the barge, and not on the actual freight contained in the barge, whether it be sugar or other product.

"For instance, if the carrying capacity of a barge is less than a thousand barrels, say, 500 barrels, of sugar, the toll would be 4 cents for every barrel of sugar it was capable of carrying; that is to say \$20, and this would be the charge irrespective of whether the barge actually contained one barrel of sugar or 500 barrels. If the capacity of the barge exceeded 1,000 barrels of sugar, say, 1,100 barrels, then the toll would be 3½ cents for every barrel of sugar it was capable of carrying; that is to say, \$38.50.

"This provision in the contract for ascertaining the tolls to be charged is made clearer by the provision, immediately following, to the effect that: 'All barges of the party of the second part shall be rated at their carrying capacity in barrels of sugar.'

"The very evident purpose of providing for the rating of the carrying capacity of the barges was to ascertain the toll to be charged, and this would be unnecessary if the toll was to be collected on every barrel of sugar contained in the barge. The reason of thus fixing the tolls is self-evident.

"It is as much trouble and as expensive to lock a barge, through a canal, that contains one barrel of sugar, as it is to lock one through containing 500 barrels, and if the toll was fixed on what the barges contained, and not on the capacity, a barge with 500-barrel capacity could be locked through the canal for 4 cents.

"A careful reading of this section of the contract satisfies the court that it was the intent of the parties to the contract that the plaintiff, designated as the party of the second part, should operate its own barges; that is to say, should ship its freight, both to and from its refinery in barges constructed, leased, hired, or employed for the particular purposes of transporting either its freight or that of Ashland Plantation.

"Were it otherwise, why the provision that the toll should be charged on the carrying capacity of the barges used in the transportation of

the freight of the plaintiff? And, why the provision that 'all barges of the party of the second part (plaintiff) shall be rated at their carrying capacity'?"

"This section of the contract also provides for the toll on freight coming from New Orleans and fixes such toll at 20 cents per ton, and provides, further, that empty barges, to New Orleans, shall go free, provided that it is intended that freight shall be returned by such barges; but, in the latter case, the toll is not 20 cents per ton, but is fixed at the carrying capacity of the barges.

"It is manifest that such a provision as this was not meant to apply to common carriers by whom the plaintiff might have shipped some freight, but was meant to apply to barges used exclusively in carrying plaintiff's freight or that of the Ashland Plantation, and which the contract provides shall be estimated at their carrying capacity, in barrels of sugar.

"Section 3 of the contract makes it even more clear that the contract contemplated the shipping of plaintiff's freight in its own barges or in barges operated for that purpose. This section provides the manner in which the plaintiff shall be credited with its tolls. Neither the payment of any cash nor the refunding of tolls is contemplated by the contract. It is provided that the defendant shall keep an exact account of the tolls charged against the freight of the plaintiff and credit the same against the \$3,500 due the plaintiff for its work in the canal, until the same has been liquidated, and the plaintiff is given three years in which to ship a sufficient quantity of freight, the tolls of which would be equal to the indebtedness of the defendant.

"The contract, therefore, did not contemplate the refunding of any tolls, and yet, if the plaintiff were permitted to ship by a common carrier, and pay such carrier its regular charge, it could recover in no other way save that of refunding.

"But the plaintiff contends that the defendant, Barrow, having refunded the amount of freight charges paid by it to a common carrier for the season of 1905, has thereby admitted and shown that he placed the same construction on the contract as did defendant; that is to say, it was in contemplation of the parties that the freight, as paid, be refunded.

"This refunding was done by check, which must be considered in connection with the letter which accompanied the check.

"In this letter, of May 2d, 1906, the defendant, Barrow, in explaining the remittance, states that it is made by virtue of a personal agreement with plaintiff, to the effect that he would refund the toll paid Bradford, a common carrier, for the season of 1905, and that he made that agreement in order to encourage Bradford to go into the business. And, in this same letter, defendant makes some reference to the building of barges by the plaintiff, thereby showing that it was not his understanding that the plaintiff had been released from the contractual obligations to operate its own barges, save and except for the season of 1905. In replying to the letter of Barrow, of May 2, 1906, the defendant does not deny the personal agreement referred to in Barrow's letter, but calls his attention to the fact that the amount of the check does not correspond to the tolls of the contract.

"On May 6th, Barrow, in remitting an additional check of \$57.68, says: 'Yours of the fourth to hand. In figuring up tolls to be refunded you, I did not have the memo of agreement with me and thought it was three cents, when it should have been three and one-half cents.'

"The plaintiff earnestly contends that this sentence in Barrow's letter is an additional admission on his part that he intended and understood the contract to mean that plaintiff was to get a refund on all freight, it mattered not how shipped.

"This is not the impression conveyed to my

mind. This reference in Barrow's letter seems to be made, not to the contract, but to the 'personal agreement' referred to in his first letter to plaintiff.

"Mr. Barrow positively so swears, and what immediately follows this reference in his letter convinces me that he was referring to the personal agreement and not to the contract. The letter goes on to say: 'You will remember that, after I had induced Mr. Bradford, last season, to enter this Terrebonne trade, in order to get you to patronize him by giving your sugar, I said to you. I would be willing to return your tolls on sugar you gave him, at three and one-half cents per barrel, for the season, and back freight would not be considered,' etc.

"From this it will be seen that Barrow, after referring to the 'memo of agreement,' went on to state what the agreement was, stating that the tolls to be refunded for that season were to be at the rate of $3\frac{1}{2}$ cents a barrel; whereas, the written contract stipulated that they should be $3\frac{1}{2}$ cents and 4 cents, according to the capacity of the barges.

"True it is that Mr. H. G. Bush, with whom this personal agreement was made, testified that he had no recollection of any such agreement. This agreement was supposed to have been made in November or December, 1905, and, while Mr. Bush had no recollection of such an agreement, on the trial of this case, and the court here states that it believes that Mr. Bush testified to the best of his recollection, yet his memory seems to have been better on May 4, 1906, because, at that time, in writing to Mr. Barrow, he says: 'We seem to have different ideas in regard to toll on our sugar, and, if the writer remembers correctly, he had a conversation with you last winter in which you stated that our tolls would be allowed no matter who owned the boat or the barges hauling our freight.'

"It would seem, therefore, that Mr. Barrow and Mr. Bush did have some conversation, during the winter of 1905, in reference to the hauling of freight by other means than on barges furnished by the plaintiff; and the plaintiff would seem to admit, in the letter, that, under the contract, it was obliged to furnish barges, otherwise, why should it refer to a subsequent agreement by which it is claimed that he was given the right to ship by any boat or barge?

"Taking into consideration this reference, in Mr. Bush's letter, to a conversation with Mr. Barrow relative to the tolls that would be allowed the plaintiff when shipping by common carrier, and the fact that Mr. Barrow's recollection of this agreement is clear and positive, both on the day of the trial and on May 2, 1906, when he stated the agreement in his letter, and considering, further, that, in his correspondence at that time, the plaintiff, at no time, denied this agreement, further than to take the position that it was not part of the contract that it should own its boats or barges, I am of the opinion that the personal agreement referred to in Mr. Barrow's letter of May 2, 1906, has been proved by a fair preponderance of evidence.

"But, even though it be admitted that Mr. Barrow, in his letter of May 2, 1906, referred to the written contract, and not the personal agreement, would the plaintiff be in a better position?

"The contract, itself, is clear and explicit, and, by its terms, the plaintiff bound itself to ship its sugar and freight in a certain manner, and it certainly cannot now be held that the contract has changed because the defendant sent a check to the plaintiff, which, without the personal agreement, it was not entitled to.

"To my mind, the conclusion is irresistible that the intent of the parties to the contract was that the plaintiff was to operate its own barges, whether it did so by building, chartering, supplying barges, or otherwise, and that the contract contemplated no refunding of tolls when shipped by a common carrier. The fact that de-

fendant did refund certain tolls during the season of 1905 is shown to have been done by virtue of a subsequent, oral agreement, which did not, in any way, affect or modify the original contract.

"By this subsequent agreement, relative to the season of 1905, the plaintiff was the gainer rather than the loser, as, by it, the plaintiff received tolls not contemplated by the contract and which would, otherwise, have been lost, as it was unprepared, in 1905, to ship its sugar in the manner set forth in the contract.

"The plaintiff had three years in which to make preparations to ship its crop as was contemplated, and the terms of the contract were specifically called to its attention in May, 1906, by Mr. Barrow's letter, so that it had two years and a half in which to make preparations to reimburse itself in tolls for the outlay in operating its dredge in defendant's canal.

"Having failed to ship its sugar and to receive its freight from New Orleans, as set forth in, and contemplated by, the contract, and having permitted the three years' limit to expire, within which it had the right to have liquidated the defendant's indebtedness to it by shipping its sugar in barges operated for that purpose, the plaintiff cannot now force the defendant to pay it, in cash, the unearned portion of the amount still unpaid on its work in the said canal.

"To give the plaintiff a judgment as prayed for would not only be contrary to the letter and spirit of its contract with defendant, but it would be doing a great injury to the defendant.

"It was, and could, not, possibly, be contemplated that the defendant should ascertain from every common carrier whose boats were locked through this canal, whether the defendant had any freight on its boats, and the nature and extent of the same, and yet, if the plaintiff's contention be true, that is what the defendant had to do.

"True, the defendant ascertained the amount of sugar shipped by plaintiff for the season of 1905; but this seems to have been done under some arrangement with Capt. Bradford, and plaintiff had due and timely notice that this arrangement would only hold good for that particular season.

"And, again, of what profit or advantage would it be to the defendant to have a common carrier operating in its canal, if the toll collected on the boats or barges of the carrier had to be remitted to the plaintiff? That would be the equivalent of taking money out of one pocket and placing it in another.

"For the foregoing reasons, it follows that the demand of the plaintiff for the refunding of the tolls paid by it to a common carrier, who was receiving and delivering plaintiff's freight along with that of other persons, must, under the terms of the contract, be rejected.

"This brings us to the consideration of the molasses shipments made by plaintiffs. Those shipments appear to have been made in barges, but it is not shown whether or not they were handled by a common carrier along with other freights. If made in separate barges, capable of being estimated or rated in accordance with the terms of the contract, and the same can be reduced to its equivalent in barrels of sugar, then the plaintiff is entitled to refund on this molasses, because the same was shipped in accordance with the spirit of the contract, and any tolls collected thereon may be recovered. The evidence adduced on this phase of the case is too meager and unsatisfactory to base a judgment on, and, as before stated, such shipments may have been made, along with other freights, on a common carrier.

"The same may be said of the freight of the Ashland Plantation. Under the terms of the contract, the plaintiff had the right to receive credit for the tolls on its own freight and that of the Ashland Plantation of Caillouet & Maginnis, and, if the shipments were made in the

manner contemplated in the contract, then the plaintiff is entitled to recover."

In entering the decree, the learned judge nonsuited the plaintiff on its claim for reimbursement of freights paid on molasses, and, finally, rejected its demand in all other respects, including, necessarily, that relating to the freights from Ashland Plantation.

A careful consideration of the contract sued on and of the evidence adduced has satisfied us of the correctness of the conclusions reached and of the reasons upon which they are based.

The judgment appealed from is accordingly affirmed.

(128 La.)

No. 17,876.

RADY v. FIRE INS. PATROL OF NEW ORLEANS.

(Supreme Court of Louisiana. May 9, 1910.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 122*)—PRESCRIPTION—INTERRUPTION—SERVICE OF CITATION.

Prescription is not interrupted by the service of citation on a day of public rest other than Sunday.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 122.*]

2. TIME (§ 9*)—EXCLUDING FIRST OR LAST DAY—LIMITATION OF ACTIONS.

An action for damages for the death of a person is prescribed by one year from the day of the death. In the computation of time, the day a quo is excluded, and the day ad quem must have elapsed. Thus, where death occurred on June 25, 1905, citation served on June 25, 1906, before midnight, will interrupt prescription.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

3. CHARITIES (§ 45*)—FIRE INSURANCE PATROL—NEGLIGENCE—"PUBLIC CHARITABLE ASSOCIATION."

The Fire Insurance Patrol of the City of New Orleans is not a public charitable association, and is responsible in damages for injuries occasioned by the negligence of its servants in driving its wagon into a truck of the city fire department. Conceding that such patrol and the fire department have the same rights of way in the streets, it does not follow that the former is not responsible for injuries inflicted through the negligence of its servants.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 103; Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 2, p. 1082.]

Appeal from Civil District Court, Parish of Orleans; Thos. C. W. Ellis, Judge.

Action by Mary Rady against the Fire Insurance Patrol of New Orleans. Judgment for plaintiff, and defendant appeals. Affirmed.

McCloskey & Benedict, for appellant. George W. Flynn, for appellee.

LAND, J. Plaintiff sued for damages for the death of her son, James Rady, who died

on June 25th from the effects of wounds received on June 23, 1905, in a collision at a street crossing between truck No. 4 of the New Orleans Fire Department and a patrol wagon of the defendant. Rady was the driver of truck No. 4 at the time of the collision.

The petition in this suit was filed on June 23, 1906, and on the same day at 2:45 p. m. copies of the citation and petition were served on the defendant. This service was made on a Saturday, and in the citation the plaintiff was styled "Rody," instead of "Rady." On June 25, 1906, another citation in due form issued and was served at 10:15 a. m. of the same day.

Defendant's plea of the prescription of one year was overruled, and defendant then answered that the collision could not have been avoided by any human foresight, and that every care, circumspection, and prudence were used by the respondent at the time.

The case was tried, and there was judgment in favor of the plaintiff for damages in the sum of \$5,000. Defendant has appealed, and the plaintiff has, by answer, joined in the appeal and prayed for an increase of the award to \$10,000.

Prescription.

The contention of the defendant is that the service of the citation on the Saturday half holiday was a nullity and did not interrupt prescription.

Article 207 of the Code of Practice of 1870 provides that "no citation can issue" on Sundays, Fourth of July, first or eighth of January, twenty-fifth of December, twenty-second of February, or on Good Friday. Section 1114 of the Revised Statutes of 1870 provided that the same days "shall be considered as days of public rest in this state," and for cases where bills of exchange and promissory notes become due and payable on such holidays. By Act No. 9, p. 16, of 1880, said section was amended and re-enacted so as to include Mardi Gras, and the fourth of March in New Orleans, among the days of public rest. There was other legislation on the subject-matter, which culminated in Act No. 3, p. 5, of 1904, amending and re-enacting the same section so as to read:

"The following shall be considered as days of public rest and legal holidays and half holidays in this state, and no others, namely: Sundays, * * * Good Friday, * * * twenty-fifth of December, * * * Thanksgiving Day, * * * and in cities and towns where the population shall exceed fifteen thousand, every Saturday, from twelve o'clock noon, until twelve o'clock midnight, to be known as a half holiday."

By Act No. 6, p. 9, of 1904, the same Legislature provided for the continuance of trial of any case begun but not concluded at the time of the intervention of any legal holiday or half holiday, Sunday and Christmas Day excepted.

It is very plain that Act No. 3 of 1904 places Saturday half holidays on the same footing as Sunday and other legal holidays and days of public rest, and that Act No. 6 of 1904 treats such half holiday as a dies non juridicus. In fact neither the Code of Practice nor the statutes of this state make any distinction quoad judicial proceedings between Sunday and other legal holidays; all being days of public rest, except in the matter of the trial of cases already begun.

We therefore are of opinion that the service of the citation on the half holiday, being prohibited by law, produced no legal effect.

But the service on June 25, 1906, was good. It is true that this service was made more than one year after the date of the accident; but it was within one year from the date of the death; that is to say, the last day of the year had not elapsed when the citation was served. Civ. Code, art. 3467. The day a quo is excluded in the computation. See *De Armas v. De Armas*, 3 La. Ann. 528, 529, citing a number of French commentators. In *Chestnut v. Hughes*, 22 La. Ann. 616, the court said:

"Prescription had not accrued when the citation was served on the 4th of April, 1868, the injury having occurred on the 4th of April, 1867. The year must be computed from the day on which the injury was caused; the day a quo is not included. Civ. Code, art. 3467 (3430); [*De Armas v. De Armas*] 3 Ann. 528."

The damages on account of the death were not sustained until June 25, 1905, and prescription quoad such damages commenced to run from the date of the death. *Jones v. Texas & Pacific Ry. Co.*, 125 La. 542, 51 South. 582.

On the Merits.

This case is on all fours with that of *Coleman v. same defendant*, reported in 122 La. 626, 48 South. 130, 21 L. R. A. (N. S.) 810. *Coleman* was on the same truck and was injured in the same collision. The district court awarded damages in favor of *Coleman*, and the judgment was affirmed on appeal. Both courts found that the collision was occasioned by the negligence of the servants of the defendant. In the case at bar, another district judge, after considering the same state of facts, says:

"The evidence as a whole convinces me that the negligence of the defendant's employes was the direct cause of the collision, in which the plaintiff's son lost his life. * * * In this position the slightest attention would have manifested the near approach of the fire department truck, for its gong was sounding, and its horses going at a moderate gallop. * * * I find the facts of this case in substance as they are found by the Supreme Court, in the (*Coleman*) case referred to, hereinbefore."

After a reconsideration of the evidence, we see no good reasons for changing our opinion on the question of negligence.

This conclusion renders it unnecessary to discuss at any great length the questions of law that were considered in the *Coleman* Case. We adhere to the view that the defendant is not a public charitable corporation and is liable for the negligence of its servants. We are impressed with the very able argument of counsel for defendant as to the proper construction of the provisions of the statute giving to the men, teams, and apparatus of the fire insurance patrol the same right of way, whilst going to a fire, as the fire department of the city. Section 18 Act No. 83, p. 111, of 1894, provides that the officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way to any fire and in any highway, street, or avenue over any and all vehicles of any kind except those carrying the United States mail, and also a penalty against persons owning or driving vehicles and refusing right of way, etc. The act of 1902 (Acts 1902, No. 115) gives to the defendant the same right of way, and it is argued, therefore, equal rights of way. Conceding the premises, the defendant's servants are not dispensed from the use of ordinary care in the exercise of such right of way. The greater the danger, the greater should be the care to avoid collisions with the heavier and more unwieldy apparatus of the fire department.

We are not prepared to say that the quantum of damages awarded for the death of the son is manifestly insufficient.

Judgment affirmed.

PROVOSTY, J. (concurring). While I have not changed the views upon which was based my dissent in the *Coleman* Case, 122 La. 626, 48 South. 130, 21 L. R. A. (N. S.) 810, I consider that case to be a precedent binding on me.

(126 La.)

No. 17,801.

BOUTTERIE v. DEMAREST.

(Supreme Court of Louisiana. April 25, 1910.
Rehearing Denied May 24, 1910.)

(Syllabus by the Court.)

1. MARRIAGE (§ 37*)—DURESS—RATIFICATION. While plaintiff may have consented to marry defendant because of fear of bodily harm, he afterwards had ample opportunity to protest against the consummation of the marriage and failed to do so, and so he will be held to have consented.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 108; Dec. Dig. § 37.*]

2. MARRIAGE (§ 37*)—ANNULMENT—THREATS. A marriage cannot be invalidated on an allegation of violence, or threats, if it has been approved. The violence is condoned if the married person has freely and without constraint cohabited with the defendant after

recovering his liberty. He ratified the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 108; Dec. Dig. § 37.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Neill, Judge.

Action by A. S. Boutterie against Florence Demarest. Judgment for defendant, and plaintiff appeals. Suit dismissed.

Foster, Milling, Brian & Saal, for appellant. Emmet Alpha, for appellee.

BREAUX, C. J. This is a suit for a judgment to have a marriage decreed null. This marriage was entered into between plaintiff and defendant before a justice of the peace in the very early morning of the 29th day of September, 1908.

The ground on which plaintiff bases his suit is that he was forced to marry the defendant.

Brief Statement of the Pleading.

The complaint is that he was forced by the father of defendant and by two of his male relatives and a friend.

Plaintiff's complaint further is that at 2 o'clock in the morning a license was obtained from the clerk of court, and immediately a justice of the peace was sent for and the marriage ceremony performed.

He alleged in his petition that he resisted the demand made of him to marry the defendant until he began to see danger to himself if he continued in refusing to marry the defendant; that, while apprehending that he would be murdered if he did not accede to the marriage, he went through the ceremony of marrying the defendant.

He avers, in substance, that he had never paid attention to defendant as a suitor to her hand, never asked her in marriage, never was engaged to her, and was under no moral obligation to become defendant's husband.

That after the marriage ceremony, still under fear of those who forced him to repair to Franklin and who accompanied him, and under fear of others who remained away, he went to the home of defendant.

That on recovering his liberty he repudiated the marriage and refused to live with the defendant and never ratified or confirmed the marriage.

The defendant avers, in effect, that it is not true that plaintiff was placed in fear and forced to marry her.

In the alternative, her position is, as a defendant, that, if the court should find that plaintiff was treated as he alleged, he had ratified and confirmed the marriage after he had recovered his liberty and voluntarily lived with her.

Statement of the Case.

Both plaintiff and defendant were residents of the town of Patterson on the Teche.

The plaintiff had made remarks about the defendant and connected therewith the name of a young man who resided in Morgan City. This young man, hearing of these remarks, went to Patterson and informed the father of the defendant of these remarks.

He became one of the party bent on compelling the plaintiff to marry the defendant. During the quarrel in the early morning, which resulted in a fight, this informant from Morgan City was heard to say several times:

"He must marry her."

This young man, who is referred to in the testimony as a professional baseball player, and plaintiff quarreled and fell to fighting with their fists.

This was on the street in the early evening, the evening preceding the morning of the marriage, to which we have above referred. How the fight ended the evidence does not state.

A moment afterwards, plaintiff went into the store of one of the merchants, and while in the store he met the angry father of the defendant.

They began to fight. The owner of the store seriously objected to such a disturbance of the peace in his place of business. He put a stop to it and said to these disturbers of the peace, that, if they wished to talk over the matter, they might go to an adjoining room, to which he pointed.

This suggestion was accepted by plaintiff and the defendant's father, and the two walked into the room and talked over the matter some little time. No one heard what was said between them.

They all were armed; that is, the plaintiff and the relatives and friend of the defendant in the vernacular were "heeled."

When the two, the plaintiff and the father of defendant, walked into the adjoining room, two of defendant's party took down buggy whips that were hanging on one of the walls of the store.

Plaintiff, on leaving the room and returning into the store, said that he would marry the defendant.

Immediately there were preparations made to go to Franklin in order to obtain the required license and to have the marriage ceremony performed.

Plaintiff's clothes were damaged in the scuffle. His hat could not be found. There was nothing strange in its disappearance, for in an affray, we fancy, that the most active may well lose his hat. Plaintiff refused to go further without his hat.

He must have found a hat, and he was given an opportunity to put on other clothing.

Two of defendant's party accompanied plaintiff to his room, where he changed his clothing, and shortly thereafter all left for the parish seat.

After the struggle referred to above, there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

must have been some talk among the parties about the marriage.

Opinion and Judgment.

Up to date improvements lend themselves to hurried marriages.

The father of the defendant telephoned 18 miles away, late in the night—it must have been near 12 o'clock—and asked the clerk of court whether he would issue a license to plaintiff to marry his daughter.

The clerk's reply was that the hour to issue the license was unusual. Nevertheless, he issued a license. At first the clerk positively refused to issue the license.

The father asked the clerk to grant him an interview on his arrival in Franklin, a request that could scarcely be denied, as every one has a right to be heard.

The request was acceded to by the clerk with the result that after the parties arrived it was finally concluded that it was advisable to let them be married. There was apparent good humor among the party; everything appeared smooth to the clerk.

The defendant and her group were artful enough (if it was done designedly) not to let it be known that there had been a slight affray. The little allusion made to it was in a playful mood, and the plaintiff's conduct or utterances were not such as to give rise to a suspicion in that regard. The plaintiff urged not the least objection. On the contrary, he openly expressed willingness to go through the ceremony and was married by the officiating justice of the peace, and, as the latter testified, also the clerk, without the plaintiff making the least impression of unwillingness on his part.

We reiterate, during all this time there was good humor among all of the parties, including the plaintiff. Not once did plaintiff give out the most remote intimation that he had been the victim of threats or violence. The clerk and the justice of the peace testified and stated that they were entirely satisfied from the appearance of the parties and the talk with them, including the plaintiff, that there were no threats brought to bear.

After the marriage, at the depot, awaiting the cars to return to Patterson, the plaintiff, doubtless, tired after the day's activity, leaned on defendant's shoulder and went to sleep apparently.

After the return to Patterson of plaintiff and defendant and those who went with them plaintiff and defendant went to the house of defendant's father. Nothing unusual happened. The father of defendant and her brother went early to their work in the sawmill shops near by.

The plaintiff and defendant lived together as man and wife and all that those words imply from the morning of their return from Franklin until the next day.

The evidence does not show that plaintiff was shadowed after his return and while at the house.

When the night came—the first night after the marriage—the father of the defendant returned to his home. Plaintiff asked him to go with him to the town. The father declined and said that his son would go with him. He did go.

One witness testified that while thus going with plaintiff he appeared to shadow him. He had his hand on his rear pocket.

From the testimony it does not appear that plaintiff in the least protested against the action of the son.

We do not infer that the plaintiff is a weakling. He certainly—if anything of the kind was done—could at least have remonstrated. But this is not the only time that some remonstrance would have been in place. On coming from the room into the store on the night in question, instead of complaining, he was heard to say that he would marry the defendant.

He went to his room at the hotel, dressed himself for the wedding, and never raised the least objection.

Others, who were not in sympathy with the defendant and her party, saw him. It does not appear that he uttered the least protest. He left from the home of defendant; he returned to it after the marriage without complaining.

On the morning of the second day he said to defendant that he was going to Morgan City. Not a word of objection was raised by defendant or any of the family. He left as one enjoying full liberty.

But before leaving he kissed defendant and her female relatives present, including defendant's mother. He parted apparently on good terms with them all. When asked as to his return, his answer was that he had another trouble before him in Morgan City.

He was at the time engaged to be married to a young lady in Morgan City. This, we take it, was the trouble he expected to meet.

In two or three days he returned to his newspaper office in Patterson.

Called upon by defendant at his office, she, without much talk, shot him with a pistol owned by her cousin, who was one of the party who followed plaintiff and defendant to Franklin. This was outrageously wrong, but it presents a different issue. It cannot be taken as obliterating that which had been done.

We cannot give the least sanction to the conduct of those who, on the part of the defendant, brought on the difficulty in the early part of the night in Patterson.

To say the least, it was anything but right to treat him as he was treated.

They showed him not the least consideration. That is not the way to build up family ties.

If the case had ended with the trouble at the store in the early part of the night, the result would be different. We cannot give our sanction to any such conduct. But it did not end there.

But the plaintiff made no attempt to stand upon his rights. He married without objection, in so far as the evidence discloses.

Violence may be condoned if the married person has freely and without constraint cohabited together after recovering his liberty. Civ. Code, art. 111.

He began to express his willingness to marry the defendant in a loud and audible voice, which was heard by witnesses who are not discredited in any way. Never for a moment did he attempt to recall this consent. He satisfied the clerk and the justice of the peace of his willingness to marry the defendant.

The plaintiff is intelligent, active, and amply able to take care of himself. Why this dilatoriness in expressing his intention to repudiate the marriage after what had taken place? There were no threats proven, and it was not under impending threat that the plaintiff and defendant lived at the home of defendant's father. We take it, he was free to leave, as he left in the morning and repaired to Morgan City.

If plaintiff was under the power of the father and others, there is no evidence that that power was held over him after the marriage.

As relates to contract, to which we refer because the rule has been held as applying to the contract of marriage, it cannot be invalidated on an allegation of violence or threats if it has been approved. Civ. Code, art. 1855.

There is here every evidence of complete approval.

The testimony shows that defendant's life was not what it should have been.

If the evidence be true, she was sadly unfortunate in her conduct. It was deplorable and a shame in a community in which social order prevails.

Conceding for a moment all that the evidence shows in this respect, she, none the less, had certain rights. Ratification in so far as she was concerned was possible.

There was ratification, as we think the evidence shows. She had the right not to be imposed upon in the name of marriage.

It devolved upon the plaintiff if he was compelled to marry her, when it came to the consummation of the marriage, to declare that under no circumstances he would go to the end with the matter. He was married, 'tis true; the proper ceremony had been followed; the evidence does not prove that he was forced to go one step further.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed.

It is further ordered, adjudged, and decreed that plaintiff's suit be dismissed, and the demand rejected at costs of plaintiff in both courts.

(128 La.)

No. 17,958.

CROCHET v. DUGAS.

(Supreme Court of Louisiana. April 25, 1910.
Rehearing Denied May 24, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 249*)—COMMUNITY PROPERTY—SEPARATION FROM BED AND BOARD—EFFECT.

A decree of separation from bed and board carries with it a separation of goods and effects, and the community thus dissolved cannot be re-established by the subsequent reconciliation of the parties. *Ford v. Kittredge*, 26 La. Ann. 190, reaffirmed. Article 1451 of the Code Napoleon, permitting, in such a case, the re-establishment of the community by formal notarial agreement between the parties, has never been incorporated in the Louisiana Civil Codes.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-712; Dec. Dig. § 249.*]

2. HUSBAND AND WIFE (§ 298½*)—SEPARATE PROPERTY OF WIFE—LIABILITY OF HUSBAND FOR INCOME.

Where there is no community, the husband is not responsible for the income of the separate property of the wife not administered by her alone, collected and used by him. Civ. Code, arts. 2386, 2396.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 298½.*]

3. HUSBAND AND WIFE (§ 151*)—EXPENSES—DUTY OF WIFE TO CONTRIBUTE.

Where the wife has not reserved to herself the administration of her separate estate, she is not bound to contribute to the expenses of the marriage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595; Dec. Dig. § 151.*]

4. DIVORCE (§ 301*)—SEPARATION FROM BED AND BOARD—CUSTODY OF CHILDREN.

In cases of separation from bed and board the children should be placed under the care of the party obtaining the separation, but the judge may, for the greater advantage of the children, and with the advice of the family meeting, order that some or all of them shall be intrusted to the care of the other party. There is no such discretion in cases of divorce. Civ. Code, art. 157.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 790; Dec. Dig. § 301.*]

Appeal from Twenty-First Judicial District Court, Parish of Iberville; C. K. Schwing, Judge.

Action by Leontine Crochet against Enos Dugas. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Albert L. Grace, for appellant. P. G. Borron, for appellee.

LAND, J. This is the third suit instituted by the plaintiff against the defendant for a separation from bed and board. The first suit filed in August, 1907, was discontinued.

The second suit resulted in a judgment of date February 15, 1908, in favor of the plaintiff, granting her a separation from bed and board and the custody of her minor children, and decreeing a separation

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the goods and effects belonging to the community, and referring the parties to a notary for the purpose of partitioning the same.

A settlement and partition was had, the wife receiving \$4,700 in cash for her interest in all the community property. A part of the sum so received the wife invested in real estate.

In June, 1908, the wife and husband became reconciled, and she conveyed to him, for the purported consideration of \$1,000, three tracts of land which she had acquired from one Nathan Becker. The husband subsequently sold one of these tracts.

In March, 1909, the present suit for a separation from bed and board was instituted, based on allegations of cruel treatment and habitual intoxication on the part of the husband. Plaintiff also prayed for a dissolution and settlement of the community; and alleged that the defendant had \$2,600 of community funds at the date of the former partition, which he had concealed and clandestinely converted to his own use; that the defendant had also received \$225, the proceeds of the sale of a portion of her separate property, and \$210 in rents collected from her tenants; that the community, beginning at the time of the reconciliation between the parties, had accumulated assets amounting to \$1,200, which the defendant had used in paying his own debts, and for one-half of which he was accountable.

Plaintiff prayed for an inventory of the property of the second community; for alimony for herself and minor children at the rate of \$50 per month; for a judgment of separation from bed and board, and for the custody of her minor children; for a dissolution of the community, and for a settlement and partition thereof according to law.

The defense was a general and special denial of all the allegations of misconduct set forth in the petition, and the defendant reconvened for a divorce on the ground of adultery in the year 1897.

For further answer the respondent averred that the partition of the community property had in 1908 was full, fair, and complete; and specially denied that any community had existed between them since the judgment of separation of date February 15, 1908.

The court fixed the alimony prayed for at \$25 per month by judgment of date April 22, 1909.

The cause was tried on the merits, and there was judgment of date July 7, 1909, in favor of the plaintiff granting her a separation from bed and board; ordering a dissolution and settlement and partition of the community; condemning the defendant to return to the community the sum of \$975, and in the event of his default, that the plaintiff have and recover of him the sum of \$487.50, with legal in-

terest thereon from date of judgment, and ordering that the plaintiff recover of the defendant the further sum of \$225, with legal interest thereon from May 22, 1908. It was further ordered that a family meeting be convoked to advise as to the permanent care and custody of the minor children in accordance with the provisions of article 157 of the Civil Code.

The defendant appealed from this judgment as a whole, and the plaintiff appealed from that portion ordering the convocation of a family meeting to advise as to the permanent custody of the minors.

The evidence is amply sufficient to sustain the judgment of separation from bed and board rendered in favor of the plaintiff.

The reconventional demand of the defendant for divorce is without merit.

The money claims of the plaintiff not allowed in the judgment below need not be considered, as she has not appealed from the judgment except as to the custody of the children.

The theory of the plaintiff's petition is that there were *two* communities, one of which was dissolved and partitioned in April, 1908, and the other sprang into being when the parties were reconciled in June, 1908. The judgment appealed from charges the defendant with the rents of the real estate which he acquired in the partition of 1908, and with the rents of real estate which the plaintiff acquired with the money received by her in the same partition. If the first community was not dissolved, it is obvious that the plaintiff is accountable to the community for \$4,700, the amount received by her in the partition of 1908, and that her purchases of real estate with such funds ensured to the benefit of the community.

If the first community was dissolved, it is equally obvious that the property received by the husband and wife respectively in the partition became paraphernal.

In *Ford v. Kittredge*, 28 La. Ann. 190, it was held that the community once dissolved by a judgment of separation of bed and board cannot be re-established by the reconciliation of the parties. In that case the court pointed out that article 1451 of the Code Napoleon provided in express terms for the re-establishment of a dissolved community by consent of the parties evidenced by an act passed before a notary public, and said: "Here there is no such law, and we do not think that we can make one."

The Civil Code provides that separation from bed and board carries with it separation of goods and effects. Article 155. We assume that the framers of the Civil Code advisedly omitted the provisions of the Code Napoleon relative to the re-establishment of the community by the formal consent of the parties in interest.

Under Code Napoleon, art. 1451, the re-establishment of the community is a matter

of formal agreement between the parties, and this conventional re-establishment relates back to the date of the marriage. Hence, even under the Code Napoleon, there can be only one community between the same spouses.

It follows that the defendant was improperly charged with the sum of \$826, representing the revenues of his separate property. Defendant is however, chargeable with the sum of \$225 representing the proceeds of the sale of his wife's property. Defendant is not chargeable with rents of his wife's property collected and used by him. Civ. Code, arts. 2386, 2396. The demand of the husband against the wife for contribution to the expenses of the marriage is untenable, as it does not appear that she reserved to herself the administration of all her paraphernal property. Civ. Code, art. 2389. On the contrary, it is shown that the wife conveyed all her real estate to her husband, and it does not appear what separate income she derived from other sources.

The complaint of the plaintiff as to that portion of the judgment relative to the custody of the children is unfounded, since the judge acted within the discretion vested in him by the provisions of article 157 of the Civil Code.

The defendant did not appeal from the judgment fixing the amount of alimony pendente lite.

It is therefore ordered that the judgment appealed from be amended by striking out and rejecting that portion of the decree recognizing the existence of the community, and ordering the defendant to return to the community the sum of \$975, or pay one-half of the said amount to the plaintiff; and it is further ordered that, as thus amended, said judgment be affirmed, and that the plaintiff pay the costs of appeal.

(126 La.)

No. 17,796.

Succession of BOURDETTE et al.

(Supreme Court of Louisiana April 11, 1910.
Rehearing Denied May 9, 1910.)

(Syllabus by the Court.)

1. DISMISSAL OF ACTION.

Plaintiff's suit was dismissed by the sustaining by the court of defendant's exception to its want of jurisdiction. That judgment on appeal is affirmed.

2. VENUE (§ 6*)—ACTION AGAINST HEIR—RECOVERY OF DEBTS DUE BY DECEASED.

The only issue left to be disposed of after the decision in *Bourdette v. Burke*, 119 La. 478, 44 South. 270, was the amount (if any) of money due by the defendant William Burke to the widow in community of J. P. Bourdette. The trial court properly held that that issue

should be disposed of by the court of the defendant's residence.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 6.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

In the matter of the succession of Jean P. Bourdette and Peter Burke. Action by Jean P. Bourdette against William Burke. Judgment for defendant, and plaintiff appeals. Affirmed.

Albert Voorhies, for appellant. Pierson, Walton & Pierson, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff, the widow of J. P. Bourdette, alleged that in the year 1873 she married Jean Pierre Bourdette, who died in this city June 11, 1898, leaving as his sole heir their infant grandchild, Peter Burke. Neither his succession nor the community of acquets and gains has ever been liquidated or settled, either judicially or otherwise. The said infant heir died August 1, 1906, nor has his succession been ever liquidated and settled. The sole heir of said Peter Burke is his father, William Burke, of this city, lately removed to the parish of Jefferson.

He has been recognized as the sole heir of both said deceased, but has never been put in possession of the properties of said estate, nor has he ever attempted to ask petitioner who, as widow in community and as acting tutrix aforesaid, has had full, continuous, and uninterrupted possession, and has in the meantime paid the following debts due by both the said deceased, to wit:

(1) All the state and municipal taxes assessed on square within Short, Fern, Colopisa, and Washington streets, in this city, since the death of J. P. Bourdette June 11, 1898, up to the present time, \$320.

(2) All the insurance premiums during that time in the name of the deceased, \$250.

(3) Burial expenses of J. P. Bourdette, paid C. Betz, \$64.

(4) Physician's bill during last illness of her husband, Dr. Mercier, \$20.

(5) Grave digger, M. Dunn, \$5.

(6) Funeral and services of J. P. Bourdette, deceased, \$55.

(7) Nurse's bill, Eugenie Crozat, from April 1, to June 11, 1898, \$225.

(8) Funeral of Peter Burke, \$35.

(9) Nurse's bill for Peter Burke, \$60.

(10) Education and expenses of clothing, board, etc., of Peter Burke during aforesaid eight years, \$320.

Making an aggregate of \$1,354 of privileged debts due by the succession of Jean P. Bourdette and Peter Burke, and also by the community heretofore existing between petitioner and said J. P. Bourdette, and what she is entitled to recover by legal subrogation from said successions and community as privileged

claims of said square of property against said succession of community.

Furthermore, should said square of property be held to be the separate estate of said J. P. Bourdette, then the community is the creditor of said estate for the construction, buildings, and improvements put thereon during marriage upon said property, which was a marsh when the spouse took possession to build up a home, reclaimed and highly improved the same, so that the enhanced value at the date of his death was in excess of \$5,000, for one-half of which the community is the creditor of his estate.

In this connection the sum of \$300 inherited by petitioner from her parents were turned over to him to assist in reclaiming and improving said property, for which amount she is a creditor of her husband's estate. The aforesaid debts, liabilities, and obligations form an integral part of the aforesaid succession and also of said community which it is time now to liquidate and settle in due course.

In view of the premises, petitioner prayed that William Burke be cited, and that petitioner do have a judgment against him in his capacity of sole heir of Jean P. Bourdette and Peter Burke; that their succession be duly inventoried and settled, including the said community which is an integral part thereof, and which petitioner has accepted; that the amount of the community be fixed in due course and petitioner recognized as entitled to one-half of net amount thereof; that she be recognized as a creditor of said estates for the aforesaid aggregate sum of \$1,354, plus the sum of \$300. But, should the aforesaid amount be denied her, then, as she would be left in destitute circumstances, that she be allowed the widow's portion of \$1,000, and that her demands be recognized as privileged claims on the whole estates of said Jean P. Bourdette and Peter Burke, and community prayed for general relief and in duty bound, etc.

Defendant excepted to the jurisdiction of the court *ratione personæ*. Under reservation of this exception, he further excepted:

First. That this proceeding is incorrectly styled and titled "Succession of Jean P. Bourdette and Peter Burke," and is a direct suit by the plaintiff widow, Jean P. Bourdette, against exceptor as defendant, and that the succession of Jean P. Bourdette and of Peter Burke have been opened and closed under No. 80,100 of the docket of the civil district court for this parish.

Second. That plaintiff's petition is vague and indefinite and fails to give the dates on which the alleged claims or charges were paid, and fails to itemize and detail the said alleged claims and expenses, and that exceptor cannot safely plead or answer until the dates of payment of the alleged claims and expenses are given, and until the said claims are itemized and detailed.

Third. That all of plaintiff's alleged claims

and charges are prescribed by the prescription of one, three, five, and ten years.

Fourth. That plaintiff's suit discloses no cause or right of action.

Fifth. That, in so far as plaintiff's suit seeks to have the real property described in her petition declared part of the community existing between herself and her late deceased husband, exceptor pleads as *res judicata* the final judgment in the case of Widow Jean P. Bourdette v. William Burke, No. 83,323 of the docket of the civil district court for the parish of Orleans.

In view of the premises, exceptor prayed that these exceptions be maintained, and that plaintiff's suit be dismissed at plaintiff's costs.

Plaintiff moved for, and was granted, permission to amend her original petition, but the amendment does not appear in the record. On June 15, 1909, judgment was rendered maintaining the exception of want of jurisdiction and dismissing plaintiff's suit.

On the trial of the exceptions, plaintiff in the present suit offered and introduced in evidence the petition of William Burke in suit No. 80,100 in the civil district court, parish of Orleans, Succession of J. P. Bourdette v. Burke, and particularly the declaration therein that he was of the parish of Orleans at the time of the institution of the suit.

It was admitted that William Burke, defendant in the present suit, sold an undivided half of a certain square of ground situated in the Seventh district of this city, being square No. 457, bounded by Fern, Fig. Short, and Colopissa streets, the said sale having been made by act passed before Fred. Deibel, notary public, on the 18th of August, 1906, to William Mitchell, and that he sold the other half of said square by act before the same notary on September 7, 1906, to William Mitchell, and that in both of the aforesaid acts he is represented as being a resident of the city of New Orleans.

Counsel for William Burke filed in evidence record of suit in civil district court for the parish of Orleans, No. 80,100 entitled "Succession of Jean P. Bourdette and Peter Burke" and specially the judgments therein, the first one having been rendered on the 15th of August, 1906, and the other having been rendered August 31, 1906, recognizing and sending into possession the defendant William Burke as the sole heir of the deceased child, Peter Burke, which judgment specially described the square of ground involved in this litigation.

Opinion.

The district court having sustained defendant's exception to its jurisdiction and dismissed plaintiff's demand, the only question submitted to us for decision is whether that exception was properly sustained or not. The only matter passed upon in the district court is in regard to its authority to act at all on plaintiff's demand. It has refused to do

so. We are of opinion that at the time of the institution of this suit the defendant was a resident of the parish of Jefferson. It does not necessarily result from that fact that plaintiff's suit should be dismissed. We must presume that a community of acquêts and gains existed between J. P. Bourdette and his wife—existed independently of the question whether particular property standing in his name on the conveyance records belonged to him individually and separately, or whether it belonged to the community of acquêts and gains which existed between himself and his wife.

If such community existed, the widow became on his death under the law of 1884 usufructuary of his share of the community property.

The plaintiff in this suit sets up the existence of such a community, and asserts that it has never been settled or liquidated, and that she has a legal interest in having this done. She urges that the defendant is the proper person contradictorily with whom she should proceed to liquidate and settle it, and that the civil district court is the proper tribunal before which this settlement and liquidation should be made. The real estate referred to is not specifically alleged in the petition as belonging to the community or to the husband separately. She evidently desires to raise an issue as to that fact. In dealing with the petition in this case, we must consider that feature of it which looks to a settlement and a liquidation of the community in connection with it as being simply a demand personally for sums of money. If the demand is to be held as an ordinary personal suit against defendant for sums of money, the judgment appealed from is correct.

The evidence taken on trial of the exception to the jurisdiction shows that J. P. Bourdette died about 1898, shows that the only issue of the marriage between J. P. Bourdette and the plaintiff was a daughter named Amelia Bourdette, who married the defendant, William Burke, on the 12th of June, 1890. That Amelia Bourdette, wife of William Burke, died leaving as her sole heir a child Peter Burke, who died on August 1, 1906, at the age of 15 years, leaving his father, the defendant, Wm. Burke, as his sole heir.

On August 13, 1906, the defendant filed a petition in the civil district court (in the matter bearing the number 80,100 on its docket), in which, after reciting the above facts, he alleged that he was desirous of being sent into possession of his said son's estate inherited by his said son from his grandfather, J. P. Bourdette; that he desired to be recognized as the sole heir of his said son purely, simply, and unconditionally; that the said succession owed no debts and no administration was necessary; that the property of this estate consisting solely of an undivided half of 24 lots (which he described) worth but the sum of \$3,000, and said property had always borne its just proportion of the in-

heritance therein, and therefore was not subject to the inheritance laws of Louisiana. He prayed that he be recognized as the only heir of said son Peter Burke, and as such sent into possession of the said property. Judgment was rendered according to the prayer of this petition on August 15, 1906.

On August 29, 1906, he filed a supplemental and amended petition, in which he again recited the same facts as those recited in his original petition, and prayed for judgment placing him in possession of the other half of said described property as heir of his said son.

Judgment was rendered in his favor as prayed for.

The defendant subsequently sold the whole of the said property to one William Mitchell in the year 1906. Both of the petitions of the defendant asking to be recognized as heir of his son and to be placed in possession of his estate were acted upon ex parte. The widow of J. P. Bourdette was ignored in the proceedings as having any interest in the premises.

The case was submitted to the court for decision without argument. In the brief filed in this court on behalf of the appellee, counsel call our attention to the decision rendered by this court in 119 La. 478, 44 South. 270, in the matter bearing the title Bourdette v. Burke, in which the same plaintiff's demand was dismissed as of nonsuit. Counsel cull from that decision the following extract:

"The second supplemental petition disclosed that the square of ground was the separate property of the husband. It follows that the only specific relief prayed for—that is, the recognition of plaintiff's alleged rights as part owner and usufructuary in the property—must be denied. * * *

"We think that the exception of inconsistent and contradictory demands should have been sustained, and also the exception of no cause of action quoad the demand to be recognized as owner and usufructuary. * * * If the plaintiff had any cause of action, * * * it was one in personam against the defendant as heir of the heir of her husband." Bourdette v. Burke (No. 16,585, Supreme Court Docket) 119 La. 478-482, 44 South. 270.

The petition in this case appears to contain the same allegations that the original petition in the case cited contained, but omits the supplemental petition. A rehearing was applied for in the former case and refused on June 28, 1907. The present suit was filed July 5, 1907.

In a delayed brief filed on behalf of the appellant, it is contended: That the object of the present suit is to have the succession of J. P. Bourdette and the community between him and his widow and also the succession of the grandchild Peter Burke liquidated and settled. That neither have as yet been settled and liquidated. That William Burke had caused himself several years after the death of the parties by strictly ex parte proceedings to be recognized as sole heir of

his deceased child, but he had never in fact been put in possession. That in the meantime, and for consecutive years, the widow remained in possession of the whole estates of her deceased husband and grandchild, and had administered the same, paying debts, taxes, and insurance, and taking care of the grandchild, who had been abandoned by his father, until his (the boy's) death. That she had had him educated and had paid heavy expenses of funeral, doctor's bills, nurse's expenses, etc., as she had previously done for the estate of her husband. That, when this suit for settlement and liquidation of the two estates was made and before, one Peter Hecker, a transferee of the property referred to by two acts of sale had brought suit for possession claiming title to the real estate, and had had that property sequestered. That the widow had bonded the sequestration, whereupon Hecker claimed a right to bond by preference, because the widow had lost her right to bond by exercising her right to do so too tardily, and had succeeded in bonding the property on appeal to the Supreme Court. *Hecker v. Bourdette*, 121 La. 467, 46 South. 575. So that the two estates were still remaining in gremio legis, the possession of the widow and grandmother having given way through the sequestration bond to await the final action of the court in the matter of *Hecker v. Widow J. P. Bourdette*. That in the meantime and at present William Burke had never taken possession, and was simply figuring as the recognized heir of his son waiting developments in the issues between Hecker and the widow. That he had presently to meet the issues in the civil district court involving the settlement and liquidation of the two successions and the community and the fixing of the respective rights of the husband, the widow, and the grandchild in these two successions. Referring to the exception of *res judicata* advanced by Wm. Burke, appellant urges that *res judicata* cannot be pretended when the judgment invoked as such was one of nonsuit.

We are of the opinion that the judgment appealed from is correct, and that the district court for the parish of Jefferson is the proper tribunal to which the widow must have recourse. The judgment appealed from is hereby affirmed.

(126 La.)

No. 18,149.

STATE v. TREADAWAY et al.
(Supreme Court of Louisiana. April 25, 1910.)

(Syllabus by Editorial Staff.)

1. WORDS AND PHRASES—"NEGRO."

A "negro" is defined as a "black man, especially one of the race who inhabit tropical Africa, and who are distinguished by crisped or curly hair, flat noses and protruding lips,"

and the word also includes their descendants in America and elsewhere, but the word is also loosely applied to other dark and black-skinned races and to mixed breeds. The word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood, notably those whose admixture is so slight that even an expert cannot be positive.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4772-4773.]

2. WORDS AND PHRASES—"COLORED."

The word "colored" by a consensus of opinion means of some other color than white, having a dark or black color of the skin, specifically in the United States belonging wholly or partly to the African race, having or partaking of the color of the negro. Throughout the United States, except on the Pacific Slope, the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1274.]

3. WORDS AND PHRASES—"GRIFF."

The word "griff" in the state of Louisiana has a definite meaning, indicating the issue of a negro and a mulatto. A person too black to be a mulatto and too pale in color to be a negro is a "griff."

4. WORDS AND PHRASES—"MULATTO."

A person too dark to be white and too bright to be a griff is a "mulatto."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4616.]

5. WORDS AND PHRASES—"QUADROON."

The "quadroon" is distinctly whiter than the mulatto.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5873.]

6. MISCEGENATION (§ 1*)—CONSTRUCTION OF STATUTE—"PERSON OF THE NEGRO OR BLACK RACE."

An octoroon is not a "person of the negro or black race" within Act No. 87 of 1908, § 1, making concubinage between a person of the Caucasian or white race and a person of the negro or black race a felony.

[Ed. Note.—For other cases, see Miscegenation, Dec. Dig. § 1.*]

Land and Nicholls, JJ., dissenting.

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chretien, Judge.

Octave Treadaway and another were indicted for miscegenation, in violation of Act No. 87 of 1908, § 1, and from a judgment of acquittal the State appeals. Affirmed.

St. Clair Adams, Dist. Atty., Warren Doyle, Asst. Dist. Atty., and James Wilkinson, for the State. Loys Charbonnet, for appellees.

PROVOSTY, J. The indictment in this case charges that one of the defendants is a person of Caucasian or white race, and the other "a person of the negro or black race, to wit, an octoroon," and that they "did cohabit together and live in concubinage," in violation of section 1 of Act No. 87 of 1908, which reads as follows:

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that concubinage between a person of the Caucasian or white race and a person of the negro or black race is hereby made a felony, and whoever shall be convicted thereof in any court of competent jurisdiction shall for each offense be sentenced to imprisonment at the discretion of the court for a term of not less than one month nor more than one year with or without hard labor."

The sole question is whether an octoroon is "a person of the negro or black race" within the meaning of this statute.

Scientifically, or ethnologically, a person is Caucasian or negro in the same proportion in which the two strains of blood are mixed in his veins; and therefore scientifically, or ethnologically, a person with seven-eighths white blood in his veins and one-eighth negro blood is seven-eighths white and one-eighth negro. But the words of a statute are not to be understood in their technical, but in their popular, sense, and the prosecution contends that the popular meaning of the word "negro" includes an octoroon.

The dictionaries are the exponents of the popular meaning of the words of the language. If we consult them, we find that the word "negro" does not include an octoroon within its meaning.

Webster's International Dictionary, definition of word "negro":

"Negro. A black man, especially, one of a race of black or very dark persons who inhabit the greater part of tropical Africa, and are distinguished by crisped or curly hair, flat noses, and thick protruding lips; also, any black person of unmixed African blood, wherever found."

Id., definition of word "colored":

"Colored. (Ethnologically) Of some other color than white; specifically applied to negroes or persons having negro blood; as, a 'colored man'; the 'colored' people."

Century Dictionary, p. 3960, definition of word "negro":

"A black man; specifically, one of a race of men characterized by a black skin and hair of a woolly or crisp nature. Negroes are distinguished from the other races by various other peculiarities—such as the projection of the visage of the forehead; the prolongation of the upper and lower jaws; the small facial angle; the flatness of the forehead and of the hinder part of the head; the short, broad, and flat nose; and the thick projecting lips. The negro race is generally regarded as comprehending the native inhabitants of Sudan, Senegambia, and the region southward to the vicinity of the equator and the great lakes, and their descendants in America and elsewhere; in a wider sense it is used to comprise also many other tribes further south, as the Zulus and Kafirs. The word 'negro' is often loosely applied to other dark or black-skinned races, and to mixed breeds."

Id., definition of the word "colored," p. 1111:

"Having a dark or black color of the skin; black or mulatto; specifically, in the United States, belonging wholly or partly to the African race; having or partaking of the color of the negro."

29 Cyc. p. 661, definition of word "negro":

"A black man descended from the black race of South Africa."

Id., definition of word "colored":

"Not a phrase of art, but often applied to black people, Africans, or their descendants, mixed or unmixed; persons of African descent or negro blood; persons of the negro race; persons who have any perceptible admixture of African blood."

A. & E. E. of Law, p. 213, definition of "colored people":

"'Colored' or black people, African or their descendants, mixed or unmixed."

In Zell's Encyclopædia, "negro" is defined as follows:

"A name properly applied to a race or variety of the human species, inhabiting the central portion of Africa, principally between the latitudes 10 degrees north and 20 degrees south, on account of some of their striking characteristics—their black color. They do not include Egyptians, Nubians, Abyssinians, etc., of the North, or Hottentots of the South African. Their characteristics are: Skin black, hair woolly, lips thick, nose depressed, jaws protruding, forehead retiring, proportions of the extremities abnormal."

7 Encyclopædia Britannica, p. 316, and also 7 Americanized Encyclopædia Britannica, p. 4416, defines the word "negro" as follows:

"Distinctly dark, as opposed to the fair, yellow, and brown varieties of mankind. The negro dominion originally comprised all Africa south of the Sahara; negro, members of the dark race whose original home is in the inter-tropical and subtropical regions of the Eastern hemisphere."

Webster's Dictionary (Thompson & Thompson Ed. 1907) p. 747, describes "negro" as follows:

"A native or descendant of the black race of men in Africa. The name is never employed to the tawny or olive-colored natives of the northern coast of Africa, but to the most southern race of man, who is quite black."

Standard Dictionary, definition of word "colored":

"Of a dark-skinned or non-Caucasian race; specifically, in the United States, of African descent, wholly or in part. Originally the epithet was applied only to those of mixed blood, making three classes of inhabitants—white, black, and colored."

Id., definition of word "negro":

"One belonging to the Ulotrichi or woolly-haired type of mankind; a black man, especially of African blood, and particularly one belonging to the stock of Senegambia, Upper Guinea, and the Sudan. In North Carolina a person who has in his veins one-sixteenth or more of African blood."

For what it here says is the case in North Carolina the Standard gives as its authority the decision of the Supreme Court of that state in the case of State v. Chavers, 50 N.

C. 11; but a perusal of that decision reveals that in it the court has not undertaken to declare what was the popular meaning of the word "negro" in that state, but has simply applied or enforced the following statute:

"All free persons descended from negro ancestors to the fourth generation inclusive, though one ancestor in each generation may have been a white person, shall be deemed free negroes and persons of mixed blood."

This was not to hold that in North Carolina the word "negro," as popularly understood, includes within its meaning a person having $\frac{15}{16}$ of white blood and only $\frac{1}{16}$ of negro blood in his veins, but that such a person was a negro according to said statute. Of course, where a statute has defined the meaning of a word, the definition is authoritative. If the statute we are dealing with, or any other statute of this state, had defined the word "negro" as including a person of mixed blood, there would be an end of all question. But the contention of the prosecution is that the word does not need to be defined in a statute; that popularly it has a definite, well-known meaning; and that in this popular acceptation it includes all persons having in their veins a perceptible admixture of negro blood. In support of that contention, opposed as it is to the dictionaries of the language, universally accepted as the reliable exponents of the meaning of the words of the language, there is adduced absolutely nothing. The learned district attorney appeals to some knowledge of the popular meaning of the word "negro" which the judges of this court are supposed to be possessed of, derived outside of the dictionaries of the language. Apart from the dictionaries, the only source from which can be derived information as to the meaning of words is the literature of the language, including in that literature the evanescent newspaper writings of the day. Now no literature, whether of the permanent or evanescent kind, has been called to the attention of the court in which the word "negro" or the term "a person of the negro race" has been given a meaning which would include an octoroon; and, still less, a person of $\frac{15}{16}$ white and $\frac{1}{16}$ negro blood, or $\frac{31}{32}$ white blood to $\frac{1}{32}$ negro blood. If this court were to declare that the popular meaning of the word "negro" embraces octoroons, the decision would furnish the one solitary instance in legal or any other literature where the word had been given that meaning. The judges of this court do not know that the word has that meaning. The learned trial judge did not think it had; and we are informed that his colleague on the criminal district court bench, Judge Baker, than whom no man in this state, we dare say, has had a wider experience in the trial of criminal cases, was of the same opinion.

There is a word in the English language which does express the meaning of a person

of mixed negro and other blood, which has been coined for the very purpose of expressing that meaning, and because the word "negro" was known not to express it, and the need of a word to express it made itself imperatively felt. That word is the word "colored." The word "colored," when used to designate the race of a person, is unmistakable, at least in the United States. It means a person of negro blood pure or mixed; and the term applies no matter what may be the proportions of the admixture, so long as the negro blood is traceable. *Lee v. New Orleans Great Northern Railway Co.*, 125 La. 238, 51 South. 182. In our Constitution and laws, when it has become necessary to use a word comprehending within its meaning both negroes, properly so-called, and persons of mixed negro blood, the term "colored" has invariably been used. Thus the Civil Code of 1838 (articles 95 and 2261) made null all marriages between whites and "free people of color." The same language was used in Act No. 308 of 1855. In article 284 of our present Constitution, the expression is: "There shall be free public schools for the white and colored races." And so in our numerous public schools statutes. The "Jim Crow" railroad law (Act No. 111 of 1890, p. 152) requires the railroads to provide equal but separate accommodations for the "white and colored races." The "Jim Crow" street railways law (Act No. 64 of 1902, p. 89) requires that the street railways shall provide equal but separate accommodations "for the white and colored races." The miscegenation law (Act No. 54 of 1894, p. 63) provides that "marriage between white persons and persons of color is prohibited." The act of June 7, 1806 (1 *Lislet's Dig.* p. 498), entitled, "An act to prevent the introduction of free persons of color," etc., uses the expression "persons of color" throughout. The act of April 14, 1807 (1 *Lislet's Dig.* p. 499), entitled "An act to prevent the immigration of free negroes and mulattoes," etc., uses the expressions "negroes and mulattoes" and "free persons of color" throughout. The act of March 31, 1808 (1 *Lislet's Dig.* p. 499), requires notaries passing acts in which "free persons of color may be concerned" to add "after the name and surname of such free persons of color," these words: "free man or free woman of color." The act of March 16, 1830 (Laws 1830, p. 90), entitled "An act to prevent free persons of color from entering the state," etc., uses the expression "negroes, mulattoes or other free persons of color" throughout, repeating that expression several times in 12 of its 17 sections. The act of March 25, 1831 (Laws 1831, p. 78), uses the same expression "free negroes, mulattoes or other persons of color." The title of *Bulard & Curry's Digest*, relating to negroes, griffs, mulattoes, etc., is not "of negroes," but is "of colored persons." Act June 7, 1806 (1 *Martin's Dig.* p. 608), relating to slaves, is entitled "An act prescribing the

rules," etc., with respect to "negroes and other slaves." (N. B. Other slaves here could only mean descendants of negroes, because there was no other kind of slaves.) In its section 40 this act uses the expression "free persons of color." The act of same date relative to the crimes of slaves, "free negro, mulatto or mustee" (Act March 20, 1809 [1 Martin's Dig. p. 664]) uses expression "negroes and other slaves." So likewise the act supplementary thereto of March 23, 1810 (1 Martin's Dig. p. 668). Act of this latter date "concerning the introduction of certain slaves," etc., uses the expression "that a slave, whether negro, mulatto or person of color." The act of March 19, 1816 (1 Martin's Dig. p. 686), is relative to "negroes and other slaves," and speaks of the capture of runaway negroes or slaves, and of any free person of color." The act of February 16, 1818 (Laws 1818, p. 18), uses the expression "negroes and other slaves." Act March 16, 1830 (Laws 1830, p. 90), uses the expression "free persons of color." The Revised Statutes of 1852 (pages 284-290) contains the title "free persons of color." It embodies the entire existing legislation at that time in force relative to said title. Some of the acts already hereinabove referred to are reproduced, and, in addition, Acts 1825, p. 132, Acts 1830, p. 90, Acts 1831, p. 98, Acts 1842, p. 308, Acts 1843, p. 45, Acts 1846, p. 163, and Acts 1850, p. 179. A perusal will show that throughout, both in the text and in the marginal notes, the expressions used are "persons of color" or "negroes, mulattoes, or other free persons of color." See same book, title "Slaves" (pages 522-557), where the term "person of color" is constantly used to designated persons of mixed negro blood, and never the unqualified word "negro." What is here said of the Revised Statutes of 1852 is equally true of the Revised Statutes of 1856. Therefore, if the word "negro" as used in the act now in question and in the Gay-Shattuck act, so called (Act No. 176, p. 236, 1908), of the same Legislature of 1908, was intended to have a meaning synonymous with "colored," this use of the word must be looked upon as a clean and clear departure from the customary mode of designating persons of mixed negro blood.

And, if we refer to the legislation of our sister states, we find the same uniformity in the use of the word "colored," and not "negro," where the intention is to designate not exclusively the negro, or black man, but also the mulatto and others of mixed negro blood. And we find that, except in those states where a definition of the word "negro" is given once for all in the Code or General Statutes (as, for instance, Pol. Code Ala. 1907, § 2; Gen. St. Fla. 1906, p. 165, § 1), the word is not used as convertible with "colored," unless there is added at once some word enlarging its ordinary meaning. Thus:

In Maryland the word "colored" is used throughout in Code Pub. Gen. Laws 1904,

book 1, pp. 892, 893, on subject of railroads; page 939, on the subject of house of reformation; book 2, pp. 1745-49, on the subject of schools; and the word "negro" is used, but with a definition added, in book 1, p. 877, on the subject of marriage. See, also, 1 Pub. Gen. Laws Md. p. 200, where the expression "negro or of negro descent" is used.

In South Carolina the Constitution of 1895 (article 3, § 33) reads:

"The marriage of a white person with a negro, or mulatto, or person who shall have one-eighth or more negro blood," etc.

And 1 Civ. Code, art. 5, §§ 1298-1299 (Agricultural Schools), uses the word "colored" throughout, and section 2964, volume 1, on the subject of marriage, uses the words "negro or mulatto." And the public school acts use the words "colored" or "colored races."

In Tennessee, the Code of 1884, on the subject of schools (section 1208, art. 9), hospitals (section 2071, art. 6), deaf and dumb institutes (section 2098, art. 6), railroads (section 2364), uses the word "colored" throughout—and on the subject of marriages (section 3291) uses the words "negroes, mulattoes, or persons of mixed blood, descended," etc. Same in the Constitution of 1870.

In Florida, Gen. St. 1906, §§ 3529-3533, on the subject of miscegenation, uses the words "negro or mulatto." Section 1, p. 165, declares that "the term 'negro' shall include every person having one-eighth or more of negro blood." The Constitution on the subject of schools (article 12, § 12) uses the word "colored." On the subject of marriage (article 16, § 24) it uses the expression "negro or negro descent."

In Georgia, 2 Civ. Code 1895, art. 3, § 1820, provides that:

"All negroes, mulattoes and their descendants having one-eighth negro or African blood in their veins shall be known in this state as persons of color."

Const. art. 8, § 5906, on the subject of schools, uses the term "colored."

In Mississippi, Code 1906, § 3244, on the subject of marriage, uses the expression "negro or mulatto, or persons who shall have one-eighth or more negro blood. Sections 4059, 4060, on the subject of railroads, uses the term "colored" throughout; and so does the Constitution of 1890 on the subject of schools (section 207).

In West Virginia the Code of 1906 uses the word "colored" throughout. Thus section 1763 et seq., on the subject of colored institutes; section 1589 et seq., on the subject of schools; sections 4359, 4360, on the subject of miscegenation. And so does Const. art. 12, § 8, on the subject of schools; sections 2889 and 2909, on the subject of marriage.

In Alabama, the Constitution, forbidding marriages, uses the expression "negro or descendant of a negro." Const. 1901, § 102. The Political Code, as already stated, defines the word "negro." In the legislation of the

state generally the word "colored" is used thus. Const. § 256, on the subject of schools; Code, § 5487, on the subject of railroads, etc.

In North Carolina, the Code (section 1084, p. 437) provides that "all marriages between a white person and a person of negro descent to the third generation are void." The legislation of the state in other connections uses the word "colored."

In Virginia, the word "colored" is used throughout, except that, in prohibiting marriages, Code 1873 (Code 1887 not in library) p. 1208, c. 192, § 8, uses the word "negro." There is a statute in Virginia providing that "every person having one-fourth or more of negro blood shall be deemed a colored person." In *McPherson v. Commonwealth*, 28 Grat. 939, the Supreme Court of Virginia held that a person having less than one-fourth of negro blood was not a negro. To the same effect *Jones v. Commonwealth*, 80 Va. 538-542. The court was interpreting the first of the above-quoted statutes in connection with the second; and assumed that the word "negro" was convertible with "colored." We are not prepared to say that the second of the said statutes does not have the effect of making the two terms completely synonymous in Virginia.

In Kentucky, the statute with reference to marriage (Rev. St. 1894, §§ 2097, 2098) uses the expression "negro or mulatto," and adds that:

"Those shall be deemed negroes and mulattoes who are of pure negro blood, and those descended from a negro to the third generation inclusive."

See Laws Ky. 1865-66, c. 556, § 3. Const. 1891, § 187, on the subject of schools, and Rev. St., on same subject, pp. 1448-1452, use the word "colored" throughout.

In Missouri, Laws 1864, p. 67, there is a statute defining the term "negro" and "mulatto."

Also in Arkansas, Kirby's Dig. 1904, § 6632, p. 1378, provides a statutory definition.

The laws of Oklahoma are not in the state library.

Nothing is to be found on the subject in the laws of Kansas or the District of Columbia.

In Texas, the word "colored" is used generally, except in the law forbidding marriages, where the expression "African and persons of African descent" is used. And the word is defined by statute. Rev. St. 1895, art. 3908. And in the separate car law the word "negro" is used.

Passing to the other states, we find that in New York the words "colored" and "of African descent" are used. 1 Rev. St. (Birds-eye 2d Ed.) tit. "Schools," p. 572, art. 11; *Id.* (Insurance) p. 1692, No. 819.

So in Massachusetts, Rev. Laws (Schools) p. 478; (Kidnapping) p. 1746; "negro, mulatto, or other persons of color."

In Indiana, Rev. St. p. 2638, par. 2641, marriage is prohibited between "white persons and persons having one-eighth or more negro

blood." Elsewhere, the expressions are "negro or mulatto" (Const. art. 1, § 82; 2 Burns' Ann. St. 1906, p. 237) and "colored" (2 Burns' Ann. St. 1906, pp. 361, 1175).

In Ohio, the terms used are "colored," "wholly or partially of African descent," "persons of color." 2 Rev. St. § 1, par. 3631; section 2, par. 3631.

In Arizona, Rev. St. p. 809, art. 3092, forbids marriage between white and "negro or descendant of negro."

In Nebraska, Rev. St. § 4275, forbids marriage between white and persons "possessed of one-fourth or more of negro blood."

In Nevada, Comp. Laws, § 4853, subsec. 3, p. 944, forbids illicit cohabitation between white and "any black person, mulatto, Indian or Chinese."

In Illinois, the word "colored" is used throughout. Const. art. 8 (Schools); Act March 24, 1874 (Rev. St. 1874, c. 122, § 100).

In Montana, Laws 1909, c. 49, p. 57, prohibiting marriages, uses the expression "negroes and persons of negro blood."

In Michigan, How. Ann. St. 1882, par. 6214, p. 1619, on subject of marriages, uses expression "wholly or in part of African descent." The Constitution (Schools) uses word "colored."

The foregoing review of the laws of the other states is, we realize, very imperfect and superficial; but it suffices to show that the word "negro," very far from having been generally recognized and accepted as including within its meaning persons of mixed negro blood, has, on the contrary, never been so used, unless coupled with defining words, or with a definition statutorily elsewhere adopted, except perhaps in Virginia. We say "perhaps," because there is in Virginia a statute which may be said to impart that meaning to the word.

If we pass from statutory literature and come to judicial literature, we find the same approximate uniformity in the use of the word "colored" whenever the idea is to refer to persons in general having negro blood; and the use of the word "negro" unqualified only when the reference is to the negro properly so called, or blacks. Thus in the first of our volume of reports (1 Mart. [O. S.] 184, the case of *Adelle v. Beauregard*), the syllabus reads:

"Persons of color are presumed free—negroes otherwise."

A sharp distinction is here drawn between persons of color and negroes proper or blacks. In the following cases the word "colored" is used throughout to designate negroes proper and persons of mixed negro blood: *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639 (a railroad case); *Decuir v. Benson*, 27 La. Ann. 1 (a steamboat case); Same case on appeal to Supreme Court of U. S. (*Hall v. De Cuir*) 95 U. S. 485, 24 L. Ed. 547; *State ex rel. v. Judge*, 44 La. Ann. 770, 11 South. 74 (a railroad case); *State v. Pearson*, 110 La. 387, 34 South. 575 (a street car case);

Lange v. Richoux, 6 La. 560; Robinett v. Verdun's Vendees, 14 La. 542; Compton v. Prescott, 12 Rob. 56; Badillo v. Tio, 6 La. Ann. 129; Succession of Hebert, 33 La. Ann. 1099; Succession of Vance, 110 La. 760, 34 South. 767; Cazanave v. Bingaman, 21 La. Ann. 435; Succession of Colwell, 34 La. Ann. 285; Jung v. Dorlocourt, 4 La. 175; Holmes v. Holmes, 6 La. 470, 26 Am. Dec. 482; Succession of Pearce, 30 La. Ann. 1169; The Sue (D. C.) 22 Fed. 843; Louisville, N. O. & T. R. Co. v. Mississippi, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599; Logwood v. Memphis, etc., Co. (C. C.) 23 Fed. 318; Murphy v. Western, etc., R. R. (C. C.) 23 Fed. 637; State ex rel. Garnea v. McCann, 21 Ohio St. 198; People ex rel. v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; Roberts v. City of Boston, 5 Cush. (Mass.) 198.

In C. O. & S. R. R. Co. v. Wells, 85 Tenn. 613, 4 S. W. 5, a railroad passenger case, the plaintiff was a mulatto, and the court used the word "mulatto" throughout, except when referring to the "colored" porter.

In Lee v. Hill, 83 Ky. 49, the word "negro" was used; but whether for the purpose of designating the negro proper, or also the person of mixed negro blood, cannot be ascertained from the decision.

In Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738, the term "negro" was used, but the plaintiff and his children were negroes of the full blood; hence the word "negro" was the appropriate term to use in the case. Where, however, the schools act is referred to and the school children, the word "colored" is used.

In State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 8 Am. Rep. 713, the word "negro" occurs both in the syllabus and in the decision; but the court was dealing with a statute which read: "Negroes, Mongolians and Indians shall not be admitted into the public schools."

In Westchester, etc., R. R. v. Miles, 55 Pa. 209, 93 Am. Dec. 744, the court seems to have used the words "negroes" and "black" convertibly with "colored." The case, however, in no way involved the meaning of these terms; but dealt exclusively with the right to provide separate accommodation for the races on the cars of the plaintiff company.

In Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405, the words of the statute were "of African descent" and "colored." Nowhere "negro" unqualified.

The cases in the following long list involved slaves, rights to slaves, rights claimed by slaves, suits for freedom, incapacity to inherit resulting from the impossibility of whites and persons of color to marry, etc. In not one of these cases is the word "negro" used as including mulattoes, and still less quadroons, etc. Where the word "negro" is used it is with the meaning of a black person. Not necessarily a pure blooded African; but a black person. The word "colored" is used with the same freedom as if its mean-

ing, as expressing a person having negro blood in his veins, were no more uncertain than is the meaning of the word "horse" or "man." Merry v. Chexnaider, 8 Mart. (N. S.) 699; Gomez v. Bonneval, 6 Mart. (O. S.) 656; Cuffy v. Castillon, 5 Mart. (O. S.) 496; Metayer v. Metayer, 6 Mart. (O. S.) 16; Metayer v. Noret, 5 Mart. (O. S.) 566; Forsyth v. Nash, 4 Mart. (O. S.) 385; Brown v. Compton, 10 Mart. (O. S.) 425; Simmins v. Parker, 4 Mart. (N. S.) 203; Hawkins v. Vanwinckle, 6 Mart. (N. S.) 420; Girod v. Lewis, 6 Mart. (O. S.) 559; Livaudais' Heirs v. Fon, 8 Mart. (O. S.) 161; Allain v. Young, 9 Mart. (O. S.) 221; Delery v. Mornet, 11 Mart. (O. S.) 10; Morgan's Syndics v. Fiveash, 8 Mart. (N. S.) 590; Labranche v. Watkins, 4 Mart. (O. S.) 391; Palfrey v. Rivas, 7 Mart. (O. S.) 371; Morgan v. Mitchell, 3 Mart. (N. S.) 576; Catin v. D'Orgensy's Heirs, 8 Mart. (O. S.) 219; Moosa v. Allain, 4 Mart. (N. S.) 102; Louis v. Cabarrus, 7 La. 172; Prudence v. Bermodi, 1 La. 241; Poulard v. Delamare, 12 La. 267; Smith v. Smith, 13 La. 446; Poydras v. Taylor, 18 La. 12; Mary v. Morris, 7 La. 139; Marie Louise v. Marot, 8 La. 479; Phillis v. Gentin, 9 La. 211; Grounux v. Abat's Ex's, 7 La. 81; Poydras v. Mourain, 9 La. 505; Markham v. Close, 2 La. 584; Moffat v. Vion, 5 La. 347; Hart v. St. Rome, 7 La. 589; Guerrier v. Lembeth, 9 La. 341; Hurst v. Wallace, 5 La. 99; Strawbridge v. Turner, 9 La. 215; Rice v. Cade, 10 La. 295; Goldenbow v. Wright, 13 La. 373; Buel v. New York Steamer, 17 La. 546; Valsain v. Cloutier, 3 La. 176, 22 Am. Dec. 179; Phillis v. Gentin, 9 La. 210; State v. Moore, 8 Rob. 521; McCargo v. N. O. Ins. Co., 10 Rob. 202, 43 Am. Dec. 180; Maria v. Edwards, 1 Rob. 359; Nolé v. De St. Rome, 3 Rob. 484; Mathews v. Boland, 5 Rob. 200; Fanchonette v. Grange, 5 Rob. 510; Verdun v. Splane, 6 Rob. 530; Jackson v. Bridges' Heirs, 1 Rob. 172; Francois v. Loblano, 10 Rob. 450; Winston v. Foster, 5 Rob. 113; Feltus v. Anders, 5 Rob. 7; Cotton v. Brien, 6 Rob. 115; Frierson v. Irwin, 5 La. Ann. 525; Baldree v. Davenport, 7 La. Ann. 589; State v. Dick, 4 La. Ann. 183; Conant v. Guesnard, 5 La. Ann. 697; Eulalie v. Long, 9 La. Ann. 9; Liza v. Puissant, 7 La. Ann. 80; Haynes v. Forno, 8 La. Ann. 35; Brown v. Smith, 8 La. Ann. 59; Barclay v. Sewell, 12 La. Ann. 262; Pauline v. Hubert, 14 La. Ann. 161; Gaudet v. Gourdain, 3 La. Ann. 136; Angelina v. Whitehead, 3 La. Ann. 556; Mary v. Brown, 5 La. Ann. 269; Trahan's Heirs v. Trahan, 8 La. Ann. 455; Virginia v. Himel, 10 La. Ann. 185; Price v. Ray, 14 La. Ann. 697; Hardesty v. Wormley, 10 La. Ann. 239; Delphine v. Guillet, 11 La. Ann. 424; Henriette v. Barnes' Heirs, 11 La. Ann. 454; Jamison v. Bridge, 14 La. Ann. 31; Jones v. State, 13 La. Ann. 406; Thompson v. Touriac, 13 La. Ann. 605; Deshotel's v. Solleau, 14 La. Ann. 745; George v. Demouy, 14 La. Ann. 145; Carmouche v. Carmouche, 12 La. Ann. 721;

Eugenie v. Preval, 2 La. Ann. 180; Arsene v. Pigneguy, 2 La. Ann. 621; Sophie v. Duplessis, 2 La. Ann. 724; Matilda v. Autrey, 10 La. Ann. 555; Maranthe v. Hunter, 11 La. Ann. 734; Vall v. Bird, 6 La. Ann. 223; Baker v. Tabor, 7 La. Ann. 556; McDowell v. Couch, 6 La. Ann. 366; State v. Whetstone, 13 La. Ann. 376; Collingsworth v. Covington, 2 La. Ann. 406; Hynson v. Meullon, 2 La. Ann. 798; Arnoult v. Deschapelles, 4 La. Ann. 41; Bibb v. Hebert, 3 La. Ann. 132; Blanchard v. Dixon, 4 La. Ann. 57; McCutcheon v. Angelo, 14 La. Ann. 34; Arnandez v. Lawes, 5 La. Ann. 127; Carmouche v. Bouls, 6 La. Ann. 96, 54 Ann. Dec. 558; Benjamin v. Davis, 6 La. Ann. 472; Kemp v. Hutchinson, 10 La. Ann. 494; Griffing v. Routh, 11 La. Ann. 135; Gardiner v. Thibodeau, 14 La. Ann. 732; Willamson v. Norton, 7 La. Ann. 393; Spalding v. Taylor, 1 La. Ann. 195; Botts v. Cochrane, 4 La. Ann. 35; Dowty v. Templeton, 9 La. Ann. 549; Farwell v. Harris, 12 La. Ann. 50; Barry v. Kimball, 12 La. Ann. 372; Daret v. Gray, 12 La. Ann. 394; Buddy v. The Vanleer, 6 La. Ann. 34; Marciacq v. Wright, 13 La. Ann. 27; Vinot v. Bertrand, 6 La. Ann. 474; Oates v. Caffin, 3 La. Ann. 339; Leigh v. Meurice, 6 La. Ann. 476; Landry v. Klopman, 13 La. Ann. 345; Gaudet v. Gourdain, 3 La. Ann. 136; Carmelite v. Lacaze, 7 La. Ann. 629; Henderson's Heirs v. Rost, 11 La. Ann. 541; Marshall v. Watrigant, 13 La. Ann. 619; State v. Solomon, 15 La. Ann. 463; Bateman v. Frisby, 15 La. Ann. 58; Rost v. Doyal's Heirs, 15 La. Ann. 265; Foster v. Mish, 15 La. Ann. 199; Howes v. The Red Chief, 15 La. Ann. 321; Maille v. Blas, 15 La. Ann. 100; Beverley v. Str. Empire, 15 La. Ann. 432; Pelham v. The Messenger, 16 La. Ann. 99.

The foregoing is not given as being an exhaustive review of the decisions wherein the courts of this country might have had occasion to make use of a term to designate persons of the mixed negro blood; but merely as a review of a certain number of cases taken at random, without choice, except that we have sought to include all those of our own reports.

The precise question of whether the word "negro" in its ordinary acceptation includes within its meaning mulattoes, quadroons, etc., has never been considered by the courts, so far as we have been able to ascertain. The decisions coming nearest to it are the following:

In *People v. Hall*, 4 Cal. 399, the court, interpreting the following statute: "No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man"—held, that the statute disqualified all races other than the Caucasian, and that, therefore, a Chinaman could not testify. In the course of the opinion the court said: "The word 'black' may include all negroes, but the term 'negroes' does not include all black persons." It will be observed, also,

that the Legislature of California did not consider that the words "black person" included "mulattoes," for it deemed it necessary to add "or mulattoes" in order to make the statute include mulattoes, meaning, no doubt, by "mulattoes" all persons of mixed negro blood.

In *Thurman v. State*, 18 Ala. 278, the court, interpreting clause 5 of section 2 of the Code of Alabama, which contains a provision defining the term "negro" and "mulatto," and makes the latter to mean "a person of mixed blood, descended on the part of the father or mother from negro ancestors to the third generation inclusive, though one ancestor of each generation may have been white," said:

"The contention of appellant that she could not be convicted of the felonious grade of the offense charged if it appeared that her paramour was a mulatto, the indictment charging cohabitation with a negro, proceeded, doubtless, on the meaning of those terms, unaffected by the statute to which we have referred; that is, that a negro, generically considered, is a descendant of the whole blood from the black, woolly-headed race of Southern Africa, and that a mulatto is of the half blood, a person who is the offspring of a negress by a white man, or of a white woman by a negro."

In *Felix v. State*, 18 Ala. 720, on an allegation that a person was a negro, and proof that he was a mulatto, and the question being as to whether the proof sustained the allegation, the court said:

"The word 'negro,' meaning a black man descended from the black race of Southern Africa, is not understood in common parlance to mean a mulatto, and our statutes seem to make the distinction between them."

See, also, *Linton v. State*, 88 Ala. 216, 7 South. 261.

This, so far as we know, is the only extant judicial expression of opinion (barring that of the two judges of the criminal district court for the parish of Orleans in the instant case) regarding the popular meaning of the word "negro" when used without any qualification, and in the absence of any statute enlarging the ordinary meaning of the word.

In *State v. Davis*, and *Same v. Hanna*, 2 Bailey (S. C.) 558, the court, interpreting a statute which disqualified negroes and mulattoes as witnesses, held that:

Every person of "a distinct and visible admixture of negro blood is to be denominated a mulatto, or person of color. * * * The distinctions which have obtained in the French and Spanish American colonies, and in our sister state of Louisiana, in relation to persons of mixed European and negro blood, have not been admitted in this state. There the descendant of a mulatto—that is, a person of an equal mixture of European and negro blood and a white—is called a 'quadroon.' This term has not been adopted in our state, and I have no doubt that according to the popular acceptation of the term among us such a person would be called a mulatto, or person of color."

Let it be noted, first, that the court does not say that the descendant of a mulatto and a white would be known in Louisiana as a

"negro," but as a "quadroon"; and that "according to popular acceptation such a person would be called [in South Carolina, not a negro, but] a mulatto, or person of color."

In *State v. Chavers*, 50 N. O. 11, the court interpreted the following statutory provision: "That all free persons descended from negro ancestors to the fourth generation, inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood"—and held that: "A person must have in his veins less than one-sixteenth part of negro blood, before he will cease to be a free negro, no matter how far back you had to go to find a pure negro ancestor."

Here the court was simply interpreting a statute and using the language of the statute.

In Ohio a person is white or colored accordingly as the white or the colored blood predominates. *Monroe v. Collins*, 17 Ohio St. 665; *Williams v. School Dist.*, Wright (Ohio) 579; *Lane v. Baker*, 12 Ohio, 237, 248; *Gray v. State*, 4 Ohio, 353, 354; *Anderson v. Millikin*, 9 Ohio St. 568.

In Michigan a person of less than one-fourth negro blood has been held to be a white person within the meaning of the constitutional provision limiting the elective franchise to "white male citizens." *People v. Dean*, 14 Mich. 406, 414.

In *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131, under a statute forbidding marriage between "a white person and a negro or a person of mixed blood descended from negro ancestry to the third generation"—an indictment charged that the defendant, a white man, married a negro woman—it was held that it was insufficient to show that the woman was of the mixed blood.

The decision of this court in the case of *Lee v. N. O. & Great Western R. R. Co.*, 125 La. 236, 51 South. 182, is extensively quoted from in the brief of the prosecution, as conclusive of the question now at issue; but we do not see that it has any bearing. The question there was not, as here, whether the word "negro," unqualified, embraces within its meaning persons of mixed negro blood, but as to what proportion of negro blood a person must be possessed of in order to be a colored person within the meaning of the separate railroad coach statute. The court was in no way, shape, or form, directly or indirectly, called upon in that case to interpret the word "negro" as including or not within its meaning, when unqualified and in absence of a defining statute, persons of mixed negro blood.

The other cases cited in the same connection in the brief filed in behalf of the prosecution are *Clark v. Board of School Directors*, 24 Iowa, 275; *Johnson v. Town of Norwich*, 29 Conn. 406; *Pierce v. School Trustees*, 46 N. J. Law, 79; *Van Camp v. Board of Education of Logan*, 9 Ohio St. 412.

In *Clark v. Board of School Directors*, *supra*, the question was whether under the Constitution and the statutes, which made no distinction between the white and the colored youths of the state, the school board could maintain separate schools for the white and the colored. There was absolutely no question in the case about the meaning of the word "negro." In fact, that word does not occur in the decision. While arguing that, if the school board could exclude African children from the schools, they could exclude Irish, French, German, English, etc., the court said:

"The term 'colored race' is but another designation, and in this country but a synonym, for 'African.'"

This is the nearest the court came to mentioning the word "negro."

In *Johnson v. Town of Norwich*, 29 Conn. 406, the question was whether a person having "one-fourth African negro blood" was "a person of color." The court said:

"According to the common, general, and, indeed, universal, acceptation of the phrase, 'persons of color' in this community, it embraces not only all persons descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors, and have a distinct, visible admixture of African blood."

There was no question in the case of the meaning of the word "negro," nor is there anything in the case that can in the most distant manner throw any light upon the meaning of that term.

In *Pierce v. School Trustees*, 46 N. J. Law, 79, the statute forbade the exclusion of a child from any school "on account of his or her religion, nationality or color." The excluded child was admittedly a mulatto. There was no pretense to its being white. The court said:

"Counsel further urges that since, under the rule of the trustees, an Italian (for example) as dark as the relator's children would have been admitted, the exclusion was therefore owing, not to 'color,' but to race, which the statute does not prohibit. But I think the term 'color,' as applied to persons in this country, has had too distinct a history to leave possible such an interpretation of the law. Both in the statute and in the regulations of the respondents persons of color are persons of the negro race."

Here the court was dealing with the meaning of the term "persons of color," not with the meaning of the word "negro race," as including or not persons of mixed blood.

In *Van Camp v. Board of Education of Logan*, 9 Ohio St. 412, the court said:

"The only question presented is whether children of five-eighths white and three-eighths African blood, who are distinctly colored and generally treated and regarded as colored children by the community where they reside, are of right entitled to admission in white schools."

The contention, as shown by the dissenting opinion, was as to whether the term "colored children," made use of in different parts

of the statute, had the same meaning as the term "black or mulatto," as used in other parts of the statute. The court held that the object of the statute was to divide the school children of the state into two categories—the "white" and the "colored"—and proceeded, as follows:

"To which of these classes do the children of the plaintiff in error belong—'white' or 'colored'? They are in the ordinary, if they are not in the legal, sense, white. The demurrer admits that they are, in fact, if not in law, 'colored' children. Our standard philologist, Webster, defines 'colored people' to be 'black people,' 'Africans, or their descendants, mixed or unmixed.' Such is the common understanding of the term. A person who has any perceptible admixture of African blood is generally called a 'colored' person."

There was no denial that the children were colored persons, and there was no contention that they were "blacks or mulattoes." The whole case turned upon whether the term "colored persons" made use of in the statute was intended to be restricted to "blacks or mulattoes," or was intended to be extended to "colored persons" generally. The court was not called upon to interpret the term "negro." It never occurred to the learned counsel in the case or to the court that the words "black or mulattoes" could be intended to include persons of five-eighths white blood. In the instant case, the argument is that the term "negro race" includes persons of seven-eighths white blood.

These decisions are authority that a negro is necessarily a person of color; but not that a person of color is necessarily a negro. There are no negroes who are not persons of color; but there are persons of color who are not negroes. The term "colored," as applied to race, was given the meaning of the word "negro" for the very purpose of having in the language a term including within its meaning both negroes and descendants of negroes; but the converse is not true. The word "negro" was never adopted into the language for the purpose of designating persons of mixed blood. On the contrary, it was for the purpose, and the sole purpose, of expressing the meaning of persons of the negro race proper; and it can have now a different, or more enlarged, meaning only by enlarging its original meaning, as was done with the word "colored," and imparting to it a meaning different from that which it originally bore in the language. The Legislature might do this, but the statute by which it did it would have authority only in Louisiana, and the word "negro" would still continue to mean, the world over, outside of Louisiana, except where its meaning had been in like manner statutorily enlarged, a person of the African race, or possessing the black color and other characteristics of the African.

We do not think there could be any serious denial of the fact that in Louisiana the words "mulatto," "quadroon," and "octoroon"

are of as definite meaning as the word "man" or "child," and that, among educated people at least, they are as well and widely known. There is also the less widely known word "griff," which, in this state, has a definite meaning, indicating the issue of a negro and a mulatto. The person too black to be a mulatto and too pale in color to be a negro is a griff. The person too dark to be a white, and too bright to be a griff, is a mulatto. The quadroon is distinctly whiter than the mulatto. Between these different shades, we do not believe there is much, if any, difficulty in distinguishing. Nor can there be, we think, any serious denial of the fact that in Louisiana, and, indeed, throughout the United States (except on the Pacific slope), the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. We think, also, that any candid mind must admit that the word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood; notably those whose admixture is so slight that in their case even an expert cannot be positive. That much has to be admitted, else why should the Legislatures of all the Southern states (to say nothing of the Northern), save and except, perhaps, in the one case of the Virginia statute hereinabove referred to and commented on, have uniformly abstained from using the word without qualifying it and have deemed it necessary to enlarge the ordinary, or dictionary, meaning of the word by a special statutory definition whenever they have desired to use it as including persons of mere mixed negro blood; else, why should the word "colored" have received such universal adoption as meaning persons of negro blood pure or mixed, if there was already in the language a word expressing that meaning, and no special word was needed to express it? Well, then, if there are well-known words in the language by which persons of negro blood whether pure or mixed may be unmistakably referred to or designated, and, in fact, since that meaning could be unmistakably conveyed by the use of a phrase instead of by a single word, and since the word "negro" of itself and unqualified has to be admitted to be to say the least of equivocal meaning as including persons not having the appearance of negroes, though having in their veins some admixture of negro blood, can any one say why the Legislature should have said "negro," plain "negro," or "negro race," unqualified, if its intention was to include these persons of such slight admixture of blood? The Legislature must be supposed to know the words of the language and to use them according to their ordinary signification. When, therefore, it used the word "negro," plain "negro," or "negro race," and not these other words or forms of speech including within their meaning persons who, though apparently white, yet had in their

veins a perceptible admixture of negro blood, the inevitable inference is that it did so because it meant negro, plain negro, or persons black as negroes and having the characteristics of the negro, and not these other persons not coming within that description.

It might be different if there were something in the context to enlarge the ordinary meaning of the word; but there is nothing. The word stands isolated, and has to speak for itself.

A consideration of the object sought to be attained by a statute oftentimes throws light upon its meaning, and the argument is made that such is the case in the present instance, that the purpose was to prevent a mixing of bloods, and that that object would not be accomplished if only the blacks and not also the mulattoes and quadroons and octoroons and others of lesser mixture were included within the prohibition; that, in fact, the statute would then be practically a dead letter, since concubinage of the whites with the blacks is practically unknown.

That argument would have great weight if it did not, in the first place, lead to a disregard of the plain meaning of words in advocacy of an attempt to reach the supposed spirit of the statute; and if it did not, in the second place, lose sight of facts of no less importance than the history of the negro race in Louisiana, and the whole past legislation of the state on the subject of the sexual relations of the two races. That history teaches that from birth of the state up to the last session of the Legislature concubinage with even the pure-blooded negro was not forbidden, and that to this day cohabitation with even the pure-blooded negro is not forbidden except in concubinage; and that from 1870 up to 1894 marriage with the pure-blooded negro was not only not forbidden, but was legal. And the abstention from legislating on the subject cannot be ascribed to a difference in conditions or to lack of interest in the subject; for, during all this time, conditions have been the same, and of all fit subjects for legislation this one of the relations of the two races has been one of the most prominent in public thought, demanding the closest and highest attention of the statesmen of the day. It is the growth and progress of ideas that has induced this legislation. Up to the session of 1894 the Legislature had evidently not deemed the time ripe for prohibiting marriage. Up to the session of 1908, it had not deemed the time ripe for prohibiting concubinage even with the pure-blooded negro. It has not deemed the time ripe for prohibiting cohabitation even with the pure-blooded negro, except in concubinage. Whether it deemed the time ripe in 1908 for prohibiting concubinage with the person of slight admixture of negro blood, no matter how slight the admixture, and has done so by this statute, is the question. If it has done so, it has certainly chosen to do it in most questionable form, when it could

just as easily have done it in a form free from ambiguity by using the terms made familiar by the Constitution and by our other past legislation on the subject of the races. That our Legislature, which in the whole history of the state has not deemed it expedient to impose the slightest inhibition or penalty upon concubinage even with the pure-blooded negro, and which continues to deem it inexpedient to impose the slightest restriction upon free illicit cohabitation with the pure-blooded negro except in concubinage, should all of a sudden (conditions being unchanged) have awakened to the necessity of making concubinage even with persons barely exhibiting a trace of negro blood not only an offense and a crime, but a felony, is not a conclusion necessarily to be adopted. Legislation upon important and prominent subjects does not usually go by fits and starts, but by gradual progression. At all events, if the intention was thus to go at one clean sweep from one extreme to the other, terms expressive of that intention should have been used, and not terms which, in the light of the ordinary meaning of words, and in the light of the past legislation of the state, and of the legislation of the other states, and of the judicial literature of the country, are not expressive of that intention, or, at best, express it ambiguously.

The connection also in which a word is used often operates as a limitation, or as an enlargement, of its meaning. Thus, this same word "negro," if used in connection with the social relations of the whites and negroes and persons of mixed negro blood, would certainly convey the precise and exact meaning of the word "colored" when used in the same connection, because it is known that socially persons of mixed colored blood are known to be classed with negroes. A notice posted at the entrance of a ballroom that negroes are not admitted would certainly mean that colored persons—i. e., persons of mixed negro blood as well as negroes proper—were not admitted; and a similar notice at the entrance of a hotel or theater would approximately with the same certainty have the same meaning. In all states where separate car laws have been in operation for some time a like notice at the entrance of a railroad coach or street car would have the same meaning, though with diminishing certainty. But, while this is true of the word "negro" when used in connection with the social relations, it is not equally true of the word when used generally. For instance, a notice that all negroes were to be driven out of New Orleans would no doubt set everybody inquiring at what point the color line was to be drawn. Few in all likelihood would understand that the many people who have the appearance, education, and culture of whites were intended to be included in such an order. The contention of the prosecution is that the word "negro" is synonymous with "colored"—no matter in what connection it

is used. This is not so. Had it been so, the law forbidding marriages would have used the word "negro," and not the word "colored"; for "negro" would then have been the natural and obvious word to use.

It was suggested at the bar that the Legislature would hardly permit whites and octoroons to live in concubinage when forbidding them to ride together in railroad coaches and street cars. But the best answer to that suggestion is that—to use a homely illustration—"the proof of the pudding is in the eating thereof"; that the Legislature has as a matter of fact done that very thing; that from the time of the passage of the separate car bills, years ago, until this last session of the Legislature, not only octoroons, but jet black negroes, were allowed to live in concubinage with whites, although forbidden to ride in the same railroad coaches and street cars with them. The question which the court has to deal with in this case is not what the Legislature should have done, but what it has done. The only thing the courts can do (if they wish to keep within the legitimate scope of their functions) is to enforce the laws as they are written, interpreting them in accordance with the recognized and accepted canons of construction.

If conjectures are admissible, however, as to what considerations may have prompted the Legislature to enact separate car statutes, while leaving the concubinage and illicit commerce of the races untrammelled, one consideration which readily suggests itself is that without separate car statutes the whites would be brought in contact with the colored no matter how objectionable the proximity might be to them, whilst their concubinage or illicit commerce with them could only be voluntary. The laws on the subject have heretofore been for the protection of the individual; whereas now the time has ripened for the protection of the race. To what length has the Legislature gone in the latter direction is the question.

A consideration which fortifies the conclusion to which we have arrived is that penal statutes are construed strictly. They are not "enlarged, or extended to cases not obviously within their words and purport." *Johnson v. Southern Pacific*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. They are construed in *favorem libertatis*. Cases not clearly embraced within them cannot be brought in by a doubtful construction. Nothing is a crime which the Legislature does not clearly and unmistakably make a crime. This is strikingly illustrated by the cases of *State v. Smith*, 30 La. Ann. 848, and *State v. Depass*, 31 La. Ann. 487, where incest went scot free because the statute making it a crime did not define what constitutes incest; and this, although incest is defined in every dictionary in the language.

For whatever it may be worth we will mention that, as framed by its author and

presented to the Legislature, the act we are dealing with contained the following clause:

"That a person who is as much as one thirty-second part negro shall be, for the purpose of this act, a person of the negro race."

Thus we find that the author of the act had not considered that the word "negro" of itself and unqualified, or in its ordinary acceptance, would include within its meaning mulattoes, quadroons, etc. Following the example of all those who had had occasion to frame similar laws in the past, where the word "negro" was used instead of the term "persons of color," he added a clause enlarging the ordinary, dictionary meaning of the word "negro." As he drafted and presented it, the act would most unquestionably have applied to all persons of color, and the question arises: Why did the Legislature strike out the clause which unquestionably gave this act that application? If the act was intended to have that application, certainly the clause could do no harm. The negro blood is barely traceable beyond the $\frac{1}{16}$, and certainly not beyond the $\frac{1}{32}$. The reason for striking out this clause could not, then, have been for the purpose of extending its application to persons having less than $\frac{1}{32}$ part of negro blood. And, if the object of striking out that clause was not to extend the application of the act, what could it have been, if not to restrict its application? The suggestion that the clause was stricken out because the word "negro" of itself and unqualified includes mulattoes, quadroons, octoroons, etc., and no additional clause was therefore necessary to give it that meaning, cannot explain the action of the Legislature in striking out this clause. If the act was intended to apply to mulattoes, quadroons, etc., the clause could do no harm, and there was absolutely no reason to strike it out. It could only tend to make the act more definite. The author of the act who doubtless had drafted it only after having read the legislation of the other states on the same, or kindred subjects, deemed such a definition necessary. Those who had occasion to frame the kindred legislation in other states deemed it necessary to add such a definition of the word.

To say that the definition was wholly useless would be to lose sight of the fact that until the decision of this court in the case of *Lee v. N. O. & Great Northern Railroad Co.*, 125 La. 236, 51 South. 182, no one in this state—not the Governor, not any judge of any of the courts of the state—could have undertaken to say with any degree of authoritativeness what proportion of blood a person had to have in his veins in order to be classed as a person of color. The question had to come to this court, and a definition was adopted by this court only after study of the general jurisprudence upon the subject, and even then the definition first adopted was changed in consultation. To say, under

these circumstances, that the reason why the definition which for the purpose of enlarging the ordinary dictionary meaning of the word "negro" the author of this bill had added to it was stricken out was that the definition was useless, mere surplusage, dead matter in the bill, is, in our opinion, to go dead against the plain truth of the matter. Had the definition not been stricken out, but remained in the bill, it would have saved this court much labor in the case of *Lee v. N. O. & G. N. R. Co.*, supra. We can come to no other conclusion than that the Legislature struck the definition out because the statute with the definition in it included mulattoes, quadroons, etc., whereas, shorn of the definition, it did not include them.

Judgment affirmed.

His honor, the CHIEF JUSTICE, concurs, and hands down a separate opinion.

His honor, Mr. JUSTICE LAND, dissents, and hands down a dissenting opinion, in which dissenting opinion Mr. Justice NICHOLLS concurs.

BREAUX, C. J. (concurring). The statute does not include persons in whose veins courses only an infinitesimal degree of blood of the African race.

The General Assembly did not include (although at first proposed) all persons with $\frac{1}{32}$ part of African blood, or over.

The lawmaking power declined to insert the fraction mentioned above. Would the courts be warranted in adopting a construction that would include those persons as forming part of the negro race?

I am unable to agree with a view that would lead to that conclusion.

On the other hand, there is an extreme view that would place the Legislature in the attitude of having enacted a statute that includes within its meaning only persons of the pure African type. The statute goes further evidently and includes a "griff." (Popular meaning includes griff among negroes.)

It includes all persons of color in which the negro blood predominates.

The statutory definition of other states in which the word "negro" is defined, the weight of judicial interpretation, and popular meaning define as "negroes" all quarter-blooded persons.

They in my opinion, as generally understood, are negroes and fall within the meaning of the statute.

They are easily susceptible of identification as of the class in question. "Appreciable" in a recent decision is the word used to denote those who should be considered negroes.

In Century Dictionary the definition of "colored" includes as "negroes" persons of mixed blood to the degree before mentioned—i. e., quarteroons—but does not include "octo-color," to which I shall refer in a moment.

"Negro" is defined (to quote from the dictionary) "colored"; "having dark or black color of the skin, black or mulatto specifically

in the United States; belonging wholly or partly to the African race—of or pertaining to the negroes, or to persons partly of negro origin."

Now, as to the octo-rooms (persons referred to in the indictment), they are not negroes. They are not classed as negroes. They are not white, as relates to blood. It does not follow that they are negroes.

I therefore concur in the decree.

LAND, J. I am constrained to dissent from the conclusion reached by the majority of the court that the words "a person of the negro race" as used in Act No. 87 of 1908, p. 105, designate, or were intended to designate, only negroes of pure or unmixed African blood.

In 1894 the Legislature by Act No. 54, p. 63, prohibited marriages between white persons and persons of color. It is conceded that the term "persons of color" include all people of mixed or unmixed negro blood. That was an anti-miscegenation statute. Act No. 87 of 1908 has the same purpose, and was intended as an additional legal barrier against the intermixing of the blood of the two races. As the purpose of the statute is to prevent miscegenation, the evil sought to be remedied should be considered in construing the words used by the lawmaker. To hold that the term "negro race" includes only persons of unmixed African blood would defeat the plain purpose of the lawmaker. Under such a rigid construction, a person of African descent with any admixture whatever of white or nonnegro blood would be immune from the operation of the anti-miscegenation statute of 1908, and would render its prohibition practically nugatory.

Without entering into any extended discussion of the question, I will state that I am clearly of the opinion that the word "negro" as used in the statute has the same meaning as "colored," a term used in popular language to designate persons of African descent, mixed or unmixed.

The same Legislature at the same session enacted a law prohibiting the sale of intoxicating liquors to "whites and negroes" on the same premises. Section 6, Act No. 176, p. 239, of 1908. If the term "negroes" as thus used includes only the pure blacks, then the griff or mulatto may freely call for his drinks in any barroom or drinking saloon patronized by white people.

The legislative history of the state of Louisiana shows that the terms "negro," "colored," or "of color" have always been used as synonyms. Under the Civil Code of 1825, and statutes prior to 1845, all free persons of African descent, whether black, yellow, or of a whiter hue, were styled "free people of color" or "free colored persons." Civ. Code 1838, arts. 95, 2261; Act No. 806 of 1855. In the legislation since 1870, we find Act No. 111, p. 152 of 1890, requiring railway com-

panies to provide equal, but separate, accommodations for the "white and colored races." Article 248 of the Constitution of 1898 provides that "there shall be free public schools for the white and colored races." The term "colored" as applied to a race of men is a misnomer from a scientific standpoint, but has become a well-known popular term signifying "negro" or "African," mixed or unmixed.

In the recent case of *Lee et al. v. New Orleans Great Northern R. Co.*, 125 La. 236, 51 South. 182, this court, speaking through the writer as its organ, said:

"The lawmaker never applied the term 'colored' to slaves, but since emancipation that term has been used as synonymous with negro."

I see no good reasons to change these views founded on life-long experience and association with the white and black people of the South. It may be stated in this connection that educated persons of color of all shades call themselves "negroes."

I am convinced that the General Assembly of 1908 used the term "negro" in the anti-concubinage act, and in the Gay-Shattuck liquor law as synonymous with "colored." Any other construction, I may say with due respect to my associates, would render the prohibitory provisions of those statutes practically nugatory, and would place the Legislature in the attitude of condoning concubinage between white persons and colored persons of mixed blood.

Mr. Hunsicker, who introduced the original bill, used the term "negro race" as including colored persons who may have only $\frac{1}{32}$ part of negro blood in their veins. The fact that this definition was stricken out does not necessarily imply the legislative intent to confine the term "negro race" to persons of unmixed African descent. The more reasonable inference is that the lawmaker was unwilling to class persons with only $\frac{1}{32}$ part of African blood as "negroes." The statutes of other states cited in the majority opinion demonstrate that no Legislature in the enactment of anti-miscegenation statutes has ever defined the term "negro" as applicable only to persons of unmixed African descent. In the South the prevailing legislative opinion is that a person of color having $\frac{1}{16}$ part of African blood in his veins is a negro.

The anti-miscegenation act of 1908 has since its passage been uniformly construed and enforced as including negroes of mixed blood, and a number of persons have been convicted, sentenced, and punished on that theory of the law. The case at bar is the first and only one in which this construction has been controverted. Fortunately the General Assembly will convene next month, and will have an opportunity of expressing the legislative intent in no uncertain terms.

I therefore respectfully dissent from the majority opinion and decree in this case.

NICHOLLS, J. I concur in the above.

HERNDON et ux. v. BONNER. (No. 14,401.)
(Supreme Court of Mississippi. June 13, 1910.)

HABEAS CORPUS (§ 93*)—CUSTODY OF MINOR CHILDREN—RIGHTS OF GUARDIAN.

Under Code 1906, § 2409, providing that the guardian of a minor who has no parent shall be entitled to the custody of the minor, or one person may be appointed the guardian of the person and another of the estate of the minor, where a decree expressly provided that a person was to be the guardian of the person and estates of his wards, it fixed the right to the custody of the wards in the guardian, until vacated on a proper proceeding for that purpose, and they being wards of the chancery court it alone has the power to determine who shall have the custody of their person and estates, and the right to custody will not be determined on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 93.*]

Appeal from Circuit Court, Jones County;
R. L. Bullard, Judge.

Habeas corpus by T. B. Bonner, guardian of Inel Bonner and Eugene Bonner, against J. R. Herndon and wife, to recover the custody of his wards. Judgment for plaintiff, and defendants appeal. Affirmed.

This is a habeas corpus proceeding by the appellee, T. B. Bonner, guardian for Inel Bonner, a girl 12 years of age, and Eugene Bonner, a boy 10 years of age, their uncle, against the grandfather and grandmother of said minors, J. R. Herndon and his wife, appellants, for their custody. The writ was made returnable before the circuit judge, who rendered judgment awarding their custody to the guardian, T. B. Bonner, from which this appeal is prosecuted by the grandparents.

The petition for the writ alleges that the petitioner, T. B. Bonner, had been legally appointed guardian by the chancery court of Jones county of the persons and estates of these minors, with the right to the custody of both; that their mother and father were dead, and he permitted them to spend the summer of 1909 with their grandparents at their home in Sandersville, Jones county (Bonner's home being at Laurel, and in said county); that, when the time approached for their return to his home to enter school, Mr. and Mrs. Herndon refused to give them up, detaining them with force, violence, and threats. In their answer the Herndons admit the substantial allegations of the petition, and to justify their detention of the children charge that Bonner is unfit to have their custody, care, and education, and that they are setting out the reasons therefor. On the trial the only testimony admitted by the judge was the decrees of the chancery court of Jones county appointing Bonner guardian for the minors, in which it is recited he is to be guardian of their persons and estates. Respondents offered to introduce testimony to sustain their answer, which the court declined to permit.

Hall & Street, for appellants. Deavours & Shands, for appellee.

ANDERSON, J. (after stating the facts as above). The right to the custody of minors having a guardian is fixed by statute in this state (section 2409, Code 1906), which provides that "the guardian of a minor who has no parent shall be entitled to the custody of the minor as well as of his estate, or the court or the chancellor may appoint one person to be the guardian of the person, and another to be the guardian of the estate of the minor." The decree of the chancery court appointing Bonner expressly provides that he is to be guardian of the person and estates of his wards. The circuit judge had no power to override the statute and decree of the court. This decree under the statute fixed the right to the custody of the wards in the guardian, until vacated by the court making it on a proper proceeding for that purpose, which is amply provided for by law. They are the wards of the chancery court, which alone has the power to determine who shall have the custody of their persons and estates.

It is insisted that Foster v. Alston, 6 How. 406, is authority to the contrary. We hold that it is not. The question there was whether the testamentary guardian in Tennessee (the uncle) was entitled to the custody of his wards, as against their mother in Mississippi, with whom they were living, and thoroughly capable of having their custody, care, and education. The court refused to recognize the legal right of the Tennessee guardian, under the laws of that state, as against the right of the mother and the best interest of the wards in this state; Judge Sharkey dissenting, in able opinion. The question here is whether the court in a habeas corpus proceeding will overturn a statute of this state by awarding the custody of these minors to one person when the law says another shall have it, which we answer in the negative.

Affirmed.

ADAMS COUNTY v. AIKMAN. (No. 14,490.)
(Supreme Court of Mississippi. June 13, 1910.)

1. HEALTH (§ 7*)—OFFICERS—SALARY—WHEN FIXED—STATUTE REGULATING.

Though, under Code 1906, § 2509, it is the duty of the board of supervisors to fix the salary of a county health officer in advance of his appointment, in case of failure to do so the board may fix his salary at a later date.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 7.*]

2. HEALTH (§ 7*) — OFFICERS — SALARY — SUIT FOR — REMEDY.

Where a health officer's salary had been \$50 per month, and after his reappointment it was reduced to \$25 per month by the board of supervisors, in a suit for three months' salary he could only recover the salary fixed by the board; his remedy, if dissatisfied with the al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lowance, being an appeal from the order fixing the salary.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 7.*]

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by W. H. Alkman against Adams County. Plaintiff had judgment in a justice of the peace court, and on appeal to the circuit court judgment was again for plaintiff, and defendant appeals to the Supreme Court. Reversed and remanded.

Ernest E. Brown, for appellant. Martin & Bowman, for appellee.

SMITH, J. At the time of the institution of the suit in the court below, appellee had been for several years health officer for Adams county. In July, 1907, the board, by order on its minutes, fixed his salary for the 12 months next thereafter at \$50 per month. No further order was entered with reference to his salary, but he continued to receive as such the sum of \$50 per month until the expiration of his term, on April 30, 1909. On May 15, 1909, appellee was reappointed as such health officer. At its June, 1909, meeting, the board of supervisors, by order duly entered upon its minutes, over objection of appellee, fixed his salary at \$300 per annum. At the August meeting of the board appellee filed his claim for an allowance of \$50 per month, which claim was rejected by the board, and a warrant directed to be issued to him for the sum of \$75, \$25 per month, which warrant was by appellee declined. Shortly after he instituted suit in the court of a justice of the peace to recover from appellant "the sum of \$150 as health officer of Adams county, Miss., for the months of May, June, and July, at \$50 per month." From a judgment against it in said court, appellant appealed to the circuit court, and, judgment being rendered against it in that court, also appeals to this court.

Under section 2509 of the Code of 1906 it is the duty of the board of supervisors to fix the salary of a county health officer in advance of his appointment; but, in the event it fails to do so, it may fix his salary at a later date. To hold otherwise would result in depriving such officer of any compensation for services which he might have rendered after his appointment and before his salary was fixed, for the reason that, as held in *Yandell v. Madison County*, 81 Miss. 291, 32 South. 918, he can receive no compensation except a salary fixed by the board. The case of *De Soto County v. Westbrook*, 64 Miss. 312, 1 South. 352, is not in conflict herewith. That case simply holds that, where a salary of a health officer has been fixed by order of the board, it cannot be subsequently reduced to such an amount as to virtually abolish the office. In such event the order of the board reducing same is void. Appellee was

only entitled to recover from the county the sum of \$25 per month, the salary fixed by the board. If dissatisfied with this allowance, he should have appealed from the order of the board fixing the same.

Reversed and remanded.

BRADFORD et al. v. CHIAPELLA.

(No. 14,648.)

(Supreme Court of Mississippi. June 13 1910.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between J. C. Bradford and others and Mrs. A. Chiapella. From the judgment, Bradford and others appeal. Dismissed.

E. M. Barber, for appellants. L. H. Doty and J. H. Mize, for appellee.

PER CURIAM. Appeal dismissed.

MOBILE & O. R. CO. v. PAXTON.

(No. 14,302.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Monroe County; Jno. H. Mitchell, Judge.

Action by E. Paxton against the Mobile & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Boone and D. W. Houston, for appellant. Paine & Paine, for appellee.

PER CURIAM. Affirmed.

HARTMAN et al. v. STRUBLER COMPUTING SCALE CO. (No. 14,443.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Action between F. H. Hartman and another and the Strubler Computing Scale Company. From the judgment, Hartman and another appeal. Affirmed.

Jones & Tyler, for appellants. A. C. & J. W. McNair, for appellee.

PER CURIAM. Affirmed.

BABERS v. BRAMLETTE et al.

(No. 14,432.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Chancery Court, Wilkinson County; J. S. Hicks, Chancellor.

Action between J. N. Babers and D. C. Bramlette and others. From the judgment, Babers appeals. Affirmed.

Ackland H. Jones and E. G. Shannon, for appellant. Jones & Ventress and McWillie & Thompson, for appellees.

PER CURIAM. Affirmed.

SIMPSON v. PERKINS et al. (No. 14,553.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action between W. C. Simpson and W. L. Perkins and others. From the judgment Simpson appeals. Affirmed.

McBeath & Miller and Flowers, Fletcher & Whitfield, for appellant. Amis & Dunn, for appellees.

PER CURIAM. Affirmed.

CITY OF JACKSON v. HARRIS.

(No. 14,464.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between the City of Jackson and N. J. Harris. From the judgment, the city appeals. Affirmed.

Wm. Hemingway for appellant. Wells & Wells, for appellee.

PER CURIAM. Affirmed.

BINGHAM v. MOORMAN et al (No. 14,567.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Calhoun County; G. A. McLean, Judge.

Action by L. B. Bingham against R. T. Moorman and A. J. Ruth. From the judgment, Bingham appeals. Affirmed.

Dunn & Patterson and Gould & McKeigney, for appellant. J. L. Bates, for appellees.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. ALEXANDER

LUMBER CO. (No. 14,326.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Chancery Court, Coahoma County; M. E. Denton, Chancellor.

Action between the Yazoo & Mississippi Valley Railroad Company and the Alexander Lumber Company. From the judgment, the Railroad Company appeals. Dismissed.

PER CURIAM. Appeal dismissed.

HEISS v. O'NEAL. (No. 14,172.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Action between John L. Heiss and W. E. O'Neal, Sr. From the judgment, Heiss appeals. Affirmed.

E. M. Barber, for appellant. Money & Graham, for appellee.

PER CURIAM. Affirmed.

HEISS v. FIRST NAT. BANK OF COMMERCE. (No. 14,656.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Forest County; W. H. Cook, Judge.

Action between John L. Heiss and the First National Bank of Commerce. From the judgment, Heiss appeals. Dismissed.

E. M. Barber, for appellant. N. C. & C. E. Hill, for appellee.

PER CURIAM. Appeal dismissed.

MALONEY v. MALONEY et al. (No. 14,230.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Action between Harry H. Maloney and Alice Maloney and others. From the judgment, Harry H. Maloney appeals. Affirmed.

Ford, White & Ford, for appellant. Dodds & Leathers, for appellees.

PER CURIAM. Affirmed.

WALTON v. STATE. (No. 14,126.)

(Supreme Court of Mississippi. June 13, 1910.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

J. C. Walton was convicted of crime, and appeals. Affirmed.

Witherspoon & Witherspoon, for appellant. Ethridge & Ethridge and Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

LUCY v. DEAS et al.

(Supreme Court of Florida, Division A. May 9, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 485*)—VOID JUDGMENT—COLLATERAL ATTACK.

A void judgment is a nullity, and may be attacked collaterally; but a judgment is not void if the court as organized legally existed and had jurisdiction of the subject-matter and of the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.*]

2. JUDGMENT (§ 511*)—VOID JUDGMENT—FRAUD IN LITIGATION—COLLATERAL ATTACK.

Where by fraud practiced in litigation the court apparently had jurisdiction of the cause and of the parties, but in reality the court had no jurisdiction of the subject-matter, or had no jurisdiction of the adverse party, because he was not duly served with notice or otherwise, or did not have a hearing, or an opportunity to be heard, on account of fraud practiced on him, the trial is not one of adversary rights in a proper subject-matter, and the judgment is null and void in toto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 954; Dec. Dig. § 511.*]

3. JUDGMENT (§ 501*)—VOID JUDGMENT—JURISDICTION—COLLATERAL ATTACK.

Where the court is legally organized, and has jurisdiction of the subject-matter, and the adversary parties are given an opportunity to be heard by the actual or constructive service on them of notice of the litigation as required by law, any errors or irregularities, or even wrongdoing, in the proceedings, short of an illegal deprivation of an opportunity to be heard, will not render the judgment void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. § 501.*]

4. JUDGMENT (§ 490*)—JUDGMENT IN REM—VALIDITY—COLLATERAL ATTACK.

Property in this state is subject to the laws thereof, and judgments rendered by the courts in proceedings in rem upon such property are not null and void, because the owner was out of the state and had no personal notice of the suit, where the property is within the jurisdiction of the court and the constructive notice required by law was given.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 928; Dec. Dig. § 490.*]

5. JUDGMENT (§ 512*)—COLLATERAL ATTACK—FALSE TESTIMONY.

The giving of incompetent or false testimony at the hearing, and the injustice of the claim asserted against the property, do not render the judgment null and void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 955; Dec. Dig. § 512.*]

Appeal from Circuit Court, Hillsborough County; J. B. Wall, Judge.

Bill by Frank C. B. Lucy against A. W. Deas and others. Decree for defendants, and complainant appeals. Affirmed.

M. G. Gibbons and Herbert S. Phillips, for appellant. Wall & McKay, for appellees.

WHITFIELD, C. J. The bill of complaint alleges that Frank C. B. Lucy, the complainant, is a citizen of Hillsborough county, Fla.; that since January 10, 1900, he has been the owner of certain described land in said county; that in January, 1904, the complainant, being desirous of leaving the state for a time, placed the lands in the hands of two different real estate agents for the purpose of selling the same; that he gave to his friend W. M. Chapman a power of attorney to make deeds of conveyance of the land, should a sale be made by either of the real estate agents during the temporary absence of the complainant from the state, the net proceeds of the sale to be deposited; that he left with said Chapman his address, and from time to time exchanged letters with him till the death of Chapman; that he had no knowledge of the death of Chapman till his arrival in Tampa in October, 1908; that A. W. Deas is the administrator of the estate of said W. M. Chapman; that said Deas and Weir, one of the real estate agents combining and confederating together for the purpose of defrauding the complainant, caused attachment proceedings against complainant to be instituted by said Deas, as administrator, and levied upon said land of complainant, for an alleged indebtedness of the complainant to the said W. M. Chapman; that the affidavit in attachment was made by an attorney who had no knowledge of indebtedness of complainant to Chapman, deceased, unless it was received from said Weir, and, if so received, it was false; that service was obtained on complainant by publication, and that he had no personal knowledge of said suit until after his arrival in Tampa in October, 1908; that judgment was rendered against complainant upon the testimony of

said Weir, and that the same was false and untrue, in that the said Weir could not and did not have any knowledge of any indebtedness of complainant to Chapman, deceased, and that such testimony was given only to defraud complainant; that at the institution of the attachment proceedings complainant was not indebted to said Chapman, deceased, in any sum whatsoever; that prior to January, 1904, complainant had been indebted to said Chapman, now deceased, but that prior to said date he had paid said indebtedness, and had a receipt in full for same, which the complainant is ready to produce; that to defraud complainant an execution was issued on the judgment, and the land sold and conveyed to said Weir; that said conveyance was made to defraud complainant. The prayer is for relief against the judgment and the deed of conveyance, and for general relief. A demurrer to the bill of complaint was sustained, and the bill dismissed. Complainant appealed, and contends that the dismissal of the bill was error.

The relief sought is not from the acts of a fiduciary, but from a judgment obtained by a creditor in an attachment proceeding. The deed of conveyance depends upon the validity of the judgment upon which it is based. There is no allegation that the complainant is in possession of the land, and it does not appear that, if the complainant is entitled to relief, it cannot be adequately afforded by an appropriate action at law.

A void judgment is a nullity, and may be attacked collaterally; but a judgment is not void if the court as organized legally existed and had jurisdiction of the subject-matter and of the parties. Where by fraud practiced in litigation the court apparently had jurisdiction of the cause and of the parties, but in reality the court had no jurisdiction of the subject-matter, or had no jurisdiction of the adverse party, because he was not duly served with notice or otherwise, or did not have a hearing or an opportunity to be heard on account of fraud practiced on him, the trial is not one of adversary rights in a proper subject-matter, and the judgment is null and void in toto. But where the court is legally organized, and has jurisdiction of the subject-matter, and the adversary parties are given an opportunity to be heard by the actual or constructive service on them of notice of the litigation as required by law, any errors or irregularities, or even wrongdoing, in the proceedings, short of an illegal deprivation of an opportunity to be heard, will not render the judgment void.

The statutes of this state provide for constructive service by publication in proceedings begun by attachment. Such actions are in the nature of proceedings in rem, and constructive service lawfully made is sufficient to bind the property proceeded against. The bill of complaint does not allege that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

service required by the statute was not made, but it is alleged that service by publication was made. The alleged fact that complainant had no personal knowledge of the attachment proceedings does not render the judgment void, since the constructive notice required by law was given. Property in this state is subject to the laws thereof, and judgment rendered by the courts in proceedings in rem upon such property are not null and void because the owner was out of the state and had no personal notice of the suit, where the property is within the jurisdiction of the court and the constructive notice required by law was given. See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. The giving of incompetent or false testimony at the hearing, and the injustice of the claim asserted against the property do not render the judgment null and void. 23 Cyc. 1000, 1100; *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230, and notes.

It is not alleged that the complainant was fraudulently kept from appearing, or that the service was not sufficient for the proceeding complained of.

Whatever may be the hardships in this case, the judgment complained of is not wholly null and void, and cannot be relieved against collaterally in this proceeding.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

SULLIVAN v. ORANGE COUNTY COM'RS.
(Supreme Court of Florida, Division A. May 9, 1910.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 35*)—LOCAL OPTION ELECTION—CANVASSING BOARD.

In local option elections, under the Constitution and laws of this state, the board of county commissioners constitutes the "county canvassing board," authorized to canvass the returns from the election districts and declare the result of the election.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 35.*]

2. INTOXICATING LIQUORS (§ 35*)—LOCAL OPTION ELECTION—CUSTODY OF BALLOTS.

The clerk of the circuit court is clerk of the board of county commissioners, and he is a proper custodian of ballots that were used at a local option election and were received by such clerk from the county commissioners when acting as a county canvassing board.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 35.*]

3. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—EVIDENCE.

While the power of the county canvassing board may be expressly limited by law in the

matter of ascertaining and declaring the result of the election as shown by the returns from the several election districts, the power of the court to consider any legal evidence offered upon an issue of the legality of the election is not limited by statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 37.*]

4. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST.

Where a proper basis is laid for it, the court may examine the original ballots and any other matters directly affecting the election in determining its validity; and the power and duty of the court are not affected by any irregularity or illegality in the action of the county canvassing board or other election officers.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 37.*]

5. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST.

It is competent for the court to determine, from the original ballots and the returns, and from other papers and evidence relating to the conduct of the election, whether a legal election was held.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 37.*]

6. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—COMPETENCY OF VOTER.

Where the nonpayment of a poll tax is the ground upon which it is alleged that an illegal vote was cast, it should be affirmatively shown that the unpaid tax was legally assessable against the voter. The statute exempts certain classes of persons from the payment of poll taxes, and it should be clearly shown that the voter did not belong to any of the exempted classes.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 37.*]

7. EVIDENCE (§ 83*)—PRESUMPTIONS—REGULABILITY OF OFFICIAL ACTS.

The inspectors at an election are presumed to have allowed only legally qualified electors to vote, until the contrary is clearly made to appear.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.*]

Appeal from Circuit Court, Orange County; M. S. Jones, Judge.

Bill by T. M. Sullivan against the County Commissioners of Orange County. Decree for defendants, and complainant appeals. Affirmed.

J. E. Hartridge and J. H. Jones, for appellant. J. D. Beggs and L. G. Starbuck, for appellees.

WHITFIELD, C. J. A bill in equity was presented in the circuit court for Orange county, under section 1216 of the General Statutes of 1906, to test the legality of a local option election held October 8, 1907, in Orange county, pursuant to section 1209 et seq. of the General Statutes of 1906, "to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited therein." The declared result of the election was 589 for selling, and 592 against selling. Upon final hearing on the pleadings and evidence, the court dismissed the bill of complaint, thereby in effect decreeing that the alleged il-

legality of the election had not been shown by proofs. On appeal the complainant assigns and argues a number of points on the procedure below; but it is deemed necessary to discuss here only those questions that affect the real merits of the controversy.

At the hearing alleged defective ballots, asserted to have been voted in the election, were offered in evidence, and were objected to as illegal and irrelevant, upon grounds that the court could not go behind the returns, and that the ballots were not received from the proper custody. The ballots were received in evidence.

In local option elections, under the Constitution and laws of this state, the board of county commissioners constitutes the "county canvassing board," authorized to canvass the returns from the election districts and declare the result of the election. See *Barton v. State*, 43 Fla. 477, 31 South. 361. Under section 15, art. 5, of the Constitution, the clerk of the circuit court is also clerk of the board of county commissioners. The clerk of the circuit court for Orange county testified that he "acted as clerk of the board of county commissioners" when the canvass of the returns was made, that he received the ballots offered in evidence from the county commissioners, and that they had been in his custody ever since. It thus appears that the ballots offered in evidence were received from the proper custody.

While the power of the county canvassing board may be expressly limited by law in the matter of ascertaining and declaring the result of the election as shown by the returns from the several election districts, the power of the court to consider any legal evidence offered upon an issue of the legality of the election is not limited by the statute. Where a proper basis is laid for it, the court may examine the original ballots and any other matters directly affecting the election in determining its validity; and the power and duty of the court are not affected by any irregularity or illegality in the action of the county canvassing board or other election officers. It was competent for the court to determine, from the original ballots and the returns, and from other papers and evidence relating to the conduct of the election, whether a legal election was held. The statutory remedy by bill in equity is exclusive; therefore the contention that the ballots could not be examined by the court in this proceeding, but mandamus should have been asked to compel the canvassing board to reassemble and count the ballots, is untenable. *State ex rel. H. W. Metcalf Co. v. Martin*, 55 Fla. 538, 46 South. 424.

The allegation that three designated persons were allowed to vote, though they had not paid their poll tax and were not qualified voters, is not fully sustained by the evidence.

Where the nonpayment of a poll tax is the ground upon which it is alleged that an illegal vote was cast, it should be affirmatively shown that the unpaid tax was legally assessable against the voter. The statute exempts certain classes of persons from the payment of poll taxes, and it should be clearly shown that the voter did not belong to any of the exempted classes.

It appears that the three designated persons were registered voters, but that two of them had not paid a poll tax for 1906, and one of them had not paid a poll tax for 1905. There is no showing when this latter voter became a resident of the county, and it may be that a poll tax for 1905 was not due from him; and it does not appear that the others were not residents of another county of the state during the entire year 1906, and returned to Orange to reside in time to be qualified to vote there October 8, 1907. See *H. W. Metcalf Co. v. Orange County*, 56 Fla. 829, text 838, 47 South. 363. The inspectors are presumed to have allowed only legally qualified electors to vote, until the contrary is clearly made to appear.

This disposition of the points here discussed renders a consideration of other assignments unnecessary.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

CLARK v. STATE.

(Supreme Court of Florida, Division A. May 4, 1910. On Rehearing, June 9, 1910.)

(Syllabus by the Court.)

1. LARCENY (§ 40*) — INDICTMENT — DESCRIPTION OF STOLEN PROPERTY — ISSUES AND PROOF.

Where an allegation in an indictment for larceny that a better description of the property is unknown is material, the point becomes an issue.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 102, 103; Dec. Dig. § 40.*]

2. LARCENY (§ 30*) — INDICTMENT — DESCRIPTION OF PROPERTY.

In a prosecution for larceny, the indictment, for the purpose of giving individuality to the act charged, should with reasonable certainty state the species or names and the number of the articles or things alleged to have been stolen, so as to show that the things or articles are personal property and the subjects of larceny and that the proofs are of the same property, and to prevent embarrassment to the accused in making his defense and to protect him against a second prosecution for the same offense.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 64-75; Dec. Dig. § 30.*]

3. LARCENY (§ 30*)—INDICTMENT—DESCRIPTION OF PROPERTY.

In an indictment for larceny, the description of the property required is only such as, in connection with other allegations, will, if sustained by proof, affirmatively show the defendant to be guilty, and will reasonably inform him of the facts charged and enable him to make defense. The limit in requiring certainty of description is that it need not be so minute or expanded as to impose unreasonable burdens upon the prosecution or otherwise defeat justice.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 64-75; Dec. Dig. § 30.*]

4. INDICTMENT AND INFORMATION (§§ 120, 196*)—DESCRIPTION OF PROPERTY—SURPLUSAGE—WAIVER OF DEFECTS.

Where an indictment for larceny contains a sufficient description of the stolen property, an allegation that a better description is unknown is immaterial. Where the description is not sufficient to enable the defendant to make his defense, he should make proper application for a better description.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 315, 628-635; Dec. Dig. §§ 120, 196.*]

5. INDICTMENT AND INFORMATION (§ 167*)—ISSUES AND PROOF—UNNECESSARY ALLEGATIONS—DESCRIPTION OF PROPERTY.

In a prosecution for larceny, where the indictment contains an apparently sufficient description of the stolen property, and also an allegation that a better description is unknown, it is not error to exclude testimony as to whether the grand jurors in fact knew a better description of the property.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 531; Dec. Dig. § 167.*]

6. CRIMINAL LAW (§ 696*)—TRIAL—MOTION TO STRIKE TESTIMONY—SUFFICIENCY.

Where some of the testimony of a witness is admissible, a motion to strike the whole of such testimony is too broad and properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1643; Dec. Dig. § 696.*]

7. CRIMINAL LAW (§ 1088*)—WRIT OF ERROR—RESERVATION OF GROUNDS OF REVIEW.

An assignment of error based upon the refusal of the court to give a requested charge cannot be considered by the appellate court where the transcript does not show except by the motion for a new trial that such a charge was requested, as the motion is not self-supporting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2790; Dec. Dig. § 1088.*]

8. CRIMINAL LAW (§§ 841, 1000*)—WRIT OF ERROR—RESERVATION OF GROUNDS OF REVIEW—REFUSAL OF REQUEST—EXCEPTIONS.

Where a requested charge is refused, it must be set out in the bill of exceptions with the refusal to give it and the exception taken thereto. The refusal to give a requested charge should be excepted to at the refusal, and cannot be excepted to in a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 2022; Dec. Dig. §§ 841, 1000.*]

9. CRIMINAL LAW (§ 1177*)—HARMLESS ERROR—PUNISHMENT.

Where the fine imposed is less than the maximum for either grand or petit larceny, the defendant cannot complain that the value of

the property did not justify the verdict and judgment; some value being shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3183-3189; Dec. Dig. § 1177.*]

10. LARCENY (§ 64*)—UNEXPLAINED POSSESSION OF STOLEN GOODS—PRESUMPTION.

A presumption of guilt as a matter of law does not follow or flow from the unexplained possession of personal property recently stolen, but guilt in such a case may be inferred as a matter of fact if warranted by other circumstances.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.*]

11. CRIMINAL LAW (§ 1182*)—WRIT OF ERROR—VERDICT.

Where there is evidence to support the verdict, and it does not appear that the jury were not governed by the evidence in their finding, or that reversible errors were committed at the trial, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3205; Dec. Dig. § 1182.*]

(Additional Syllabus by Editorial Staff.)

On Rehearing.

12. LARCENY (§ 40*)—PLEADING AND PROOF.

In a prosecution for larceny, where the articles alleged to have been stolen are separate in kind and numbers and their value is given only in the aggregate, proof of the ownership as alleged of some of the articles, and that such articles are of sufficient value to warrant the verdict, is sufficient.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126; Dec. Dig. § 40.*]

Error to Circuit Court, Columbia County; B. H. Palmer, Judge.

James Clark was convicted of larceny, and brings error. Affirmed.

A. J. Henry and R. H. Chapman, for plaintiff in error. Park Trammell, Atty. Gen., for the State.

WHITFIELD, C. J. The plaintiff in error was convicted in the circuit court for Columbia county for the larceny of "one feather bed, 8 bed quilts, 6 pillows, 6 pillow shams, 6 vases, one lamp, one collar case and two collars, 10 table dishes, two pair window curtains, one rug, 3 pictures, two ladies' hats, one sugar dish and one cake plate, a better description and all of said property is to the grand jury unknown, and of the total value of one hundred and twenty-five dollars (\$125) and of the goods and property of S. Dobson and Mattie Dobson."

At the trial S. Dobson testified that he found certain of the goods in the defendant's house, and described the vases as being "light colored and silver, some glass and some tinged with gold. One was of solid silver tinge all over it and one was of glass, green, about that high, I suppose. One had a round oval glass with flowers in there." The dishes were described as "glass dishes." The pillows were described by the witness Mattie Dobson as "feather pillows."

After the state had put in its testimony, the defense recalled the witness S. Dobson,

and asked him if he testified before the grand jury that the pillows were feather pillows, and whether he gave to the grand jury the description of the vases and table dishes that he gave in this trial. The state objected to the questions as being immaterial. The objection was sustained and an exception noted. While the purpose of the questions was not stated, it may have been apparent that the purpose was to show to be untrue the allegation in the indictment that "a better description of all of said property is to the grand jury unknown."

Where an allegation in an indictment for larceny that a better description of the property is unknown is material, the point becomes an issue. See *Enson v. State*, 58 Fla. 37, 50 South. 948. But, where a sufficient description is given, an allegation that a better description is unknown is immaterial and may be regarded as surplusage. *Carden v. State*, 89 Ala. 130, 7 South. 801.

In a prosecution for larceny, the indictment, for the purpose of giving individuality to the act charged, should, with reasonable certainty, state the species or names and the number of the articles or things alleged to have been stolen, so as to show that the things or articles are personal property and the subjects of larceny and that the proofs are of the same property, and to prevent embarrassment to the accused in making his defense, and to protect him against a second prosecution for the same offense. The description required is only such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, is sustained by proof, and will reasonably inform him of the facts charged and enable him to make defense. The limit in requiring certainty of description is that it need not be so minute or expanded as to impose unreasonable burdens upon the prosecution or otherwise defeat justice. *Bishop's New Crim. Proc.* pars. 526, 699, 702, et seq.; 12 *Ency. Pl. & Pr.* 980. The names by which the articles are commonly known and the number of each being given in the indictment the property could be readily identified, and it does not appear that a more particular description than was given could have been reasonably required to protect the rights of the defendant. See *Glover v. State*, 22 Fla. 493; *Mizell v. State*, 38 Fla. 20, 20 South. 769; *Porter v. State*, 26 Fla. 56, 7 South. 145; 2 *Bishop's New Crim. Proc.* par. 700; *State v. Curtis*, 44 La. Ann. 320, 10 South. 784; *State v. Parker*, 47 Vt. 19; *Williams v. State*, 25 Ind. 150; *Powell v. State*, 88 Ga. 32, 13 S. E. 829; *State v. Johnson*, 30 La. Ann. 904; *State v. Martin*, 82 N. C. 672.

If the defendant deemed the description of the articles not sufficient to protect his rights, he may have taken appropriate action before testimony for the state was in, by an application for a bill of particulars, or, if the indictment is fatally defective, by motion to

quash. The laws of this state require only that the indictment shall be so framed as to so plainly and fairly inform the defendant and the jury of the nature and cause of the accusation against him, and as not to be "so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense." Section 11, Bill of Rights; sections 3961, 3962, Gen. St. 1906.

If the description given is sufficient, the allegation that a better description was unknown is immaterial. But, if the description is not sufficient to enable the defendant to make his defense, he should have made a proper application to the court for a more detailed description. Under the circumstances of this case, there was no error in excluding the testimony as to whether the grand jurors in fact knew a better description than was given of the property alleged to have been stolen.

A witness for the state testified that on a visit to the defendant's home the wife and children of the defendant gave to the wife and children of the witness some of the property alleged to have been stolen, and further testified as to what his wife and children had told him about the matter. The defendant moved to strike all the testimony of this witness, but the court struck only that part relating to what had been told witness by his wife and children. At least some of the testimony of the witness was not irrelevant or immaterial, and the order of the court striking the part that was inadmissible was not error.

The assignment based upon the refusal of the court to give a requested charge cannot be considered, as the transcript does not show, except by the motion for a new trial, that such a charge was requested, and the motion is not self-supporting. *White v. State*, 26 Fla. 602, 607, 7 South. 857; *Oliver v. State*, 54 Fla. 93, 44 South. 712. Where a requested charge is refused, it must be set out in the bill of exceptions with the refusal to give it and the exception taken thereto. The refusal to give a requested charge should be excepted to at the refusal, and cannot be excepted to in a motion for a new trial. *Lester v. State*, 37 Fla. 382, 20 South. 232; *Thomas v. State*, 49 Fla. 123, 38 South. 516.

The value of the goods found at the defendant's house and shown to belong to S. Dobson and Mattie Dobson was shown to exceed \$20, and the sentence being a fine of \$250, and less than the maximum fine for either grand or petit larceny, the defendant cannot complain that the value of the property did not justify the verdict and judgment.

It is contended that the presumption of guilt arising from the possession of the goods was overcome by evidence and the defendant should have been acquitted. A presumption of guilt as a matter of law does not follow

or flow from the unexplained possession of personal property recently stolen, but guilt in such a case may be inferred as a matter of fact if warranted by other circumstances. *McDonald v. State*, 56 Fla. 74, 47 South. 485. In a case like this there is no presumption of guilt to be overcome by evidence, but the allegations of the indictment are to be proven by direct evidence or by indirect or circumstantial evidence.

There is evidence to support the verdict, and, as it does not appear that the jury were not governed by the evidence in their finding or that reversible errors occurred at the trial, the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, P. J., and HOCKER and PARKHILL, JJ., concur in the opinion.

On Rehearing.

WHITFIELD, C. J. In an application it is stated that the court overlooked the contention that, as the indictment "only states the collective or aggregate value of different articles to have been stolen, that a conviction is possible only where it is shown by the evidence that the defendant is guilty of the larceny of all the articles," and that, as some of the stolen articles were shown to be the property of a third person, there was a fatal variance between the allegations and the proofs. These matters were not overlooked by the court. The disposition of the case necessarily showed that the contentions were not tenable.

In a prosecution for larceny, where the articles alleged to have been stolen are separate in kind and numbers, and their value is given only in the aggregate, proof of the ownership as alleged of some of the articles, and that such articles are of sufficient value to warrant the verdict and judgment, is sufficient. See *Raines v. State*, 42 Fla. 141, text 143, 28 South. 57; 1 Bishop's New Crim. Proc. par. 488; 25 Cyc. 102-3; *Bone v. State*, 121 Ga. 147, 48 S. E. 986; *State v. Evans*, 23 S. C. 209.

Rehearing denied

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

LEACH et al. v. ROSEBROOK.

(Supreme Court of Alabama. May 12, 1910.)

MORTGAGES (§ 544*)—FORECLOSURE—WRIT OF ASSISTANCE—RIGHT TO POSSESSION—DETERMINATION.

After the purchaser on foreclosure had been put in possession, he was ousted in favor of

R., under a judgment in forcible entry and detainer. *Held* that, since R. held possession under a judgment of a court of competent jurisdiction rendered subsequent to the purchaser's possession, the purchaser's right to possession could not be determined on a writ of assistance.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1573; Dec. Dig. § 544.*]

Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor.

Action between Noel C. Leach and others and Fred Rosebrook. From an order quashing a writ of possession on appeal to the chancellor, and ordering that possession be restored to Rosebrook, Leach and others appeal. Affirmed.

Howard & Hunt, for appellants. Wilkerson & Wilkerson, for appellee.

SAYRE, J. In May, 1908, appellants had a decree in the chancery court of De Kalb foreclosing against appellee a mortgage on an 80-acre tract of land. At the sale which followed Baker became the purchaser. June 28, 1906, the sheriff returned a writ of habere facias possessionem as executed by placing Baker in possession. Meantime Rosebrook had commenced an action of forcible entry and detainer against Baker and one Neal, who had acquired possession in a way which is not made to appear. This action was removed to the circuit court, where, on February 18, 1909, Rosebrook recovered judgment for the land in controversy. March 5, 1909, a writ of possession from the circuit court was executed by dispossessing Baker and putting Rosebrook into possession. On the same day Rosebrook was again ousted and Baker restored to possession under an alias writ issued by the register in chancery. The register entertained a motion to quash the last writ, overruling the motion. On appeal the chancellor quashed the writ, and ordered that possession be restored to Rosebrook. From the chancellor's order this appeal is taken.

It is not important to consider what went before the decree quashing the writ from the chancery court, for in the exercise of its power to prevent abuse of its process, as well as to enforce its decrees, the court was authorized to make the order or decree, and we are concerned only to know whether it was rightly made in view of the status then existing. The statute authorizing the removal of forcible entry and detainer cases to the circuit court provides that on the trial of causes so removed the plaintiff must recover on the strength of his legal title as in ejectment, unless he can prove that the defendant entered under some contract or agreement with plaintiff. It results from this frame of the statute that it may not be known whether plaintiff recovered in the circuit court on the strength of his legal title or on a mere right to possession. That, however,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may not be of consequence here, for it was determined in the circuit court, and that subsequent to the decree of sale in the chancery court and the writ issued thereunder, that Rosebrook was entitled to possession. Possession was accordingly delivered to him. In *Hooper v. Yonge*, 69 Ala. 484, it was said that the remedy afforded by the writ of assistance, or possession, being summary in its character, the writ should be refused when the purchaser has been guilty of such delay as to leave it doubtful whether or not he has given to the person in possession the right to remain. The rule, in other words, is to refuse the writ, except in clear cases. In the case at bar it does not appear that complainants, or the purchaser under their decree, have been guilty of any laches.

But another obstacle stands in the way. Rosebrook holds possession under the judgment of a court of competent jurisdiction, rendered subsequent to the possession or right of possession acquired by his adversary under the sale decreed by the chancery court. It is evident that the possession of this land is not to be banded back and forth between the parties as here shown. Equally clear it is that their ultimate rights are not to be determined on an application for a summary writ. The chancellor, by quashing the writ which had issued from the chancery court, properly left the parties in the position to which they had been assigned by the judgment of the circuit court postdating the chancery decree. If there are reasons of judicial cognizance why that status does not coincide with the legal or equitable rights of the parties as they now are, that consideration must be given effect in a suit at law or in equity, to be set on foot by due process. *Ex parte Forman*, 130 Ala. 278, 30 South. 480.

The order of the chancery court will be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

NASHVILLE, C. & ST. L. RY. v. RAGAN.
(Supreme Court of Alabama. May 12, 1910.)

1. RAILROADS (§ 303*)—HIGHWAY CROSSINGS—OBLIGATION OF RAILROAD.

A railroad constructing its road across a public highway, must put and keep the approaches and crossing in proper repair for the use of the traveling public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. § 303.*]

2. RAILROADS (§ 326*)—HIGHWAY CROSSINGS—RIGHTS OF TRAVELING PUBLIC—CONTRIBUTORY NEGLIGENCE.

The traveling public may assume that a railroad, constructing its road across a public highway, has discharged its duty of putting and keeping the approaches and crossing in proper repair; and a traveler is not guilty of

contributory negligence in crossing the track without first stopping and examining the condition of the crossing, though he must keep an ordinary lookout, but is negligent where he attempts to cross after discovery of defects in the crossing, or where such defects are open and glaring.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1038; Dec. Dig. § 326.*]

3. RAILROADS (§ 350*)—HIGHWAY CROSSINGS—RIGHTS OF TRAVELING PUBLIC.

Whether a traveler on a public highway was guilty of negligence in attempting to cross a defective railroad crossing with a well-drilling outfit, or in the manner of driving the outfit over the crossing, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1168; Dec. Dig. § 350.*]

4. RAILROADS (§ 351*)—HIGHWAY CROSSINGS—INJURIES TO TRAVELERS—INSTRUCTIONS.

In an action against a railroad for damages to a well-drilling outfit, caused by a defective railroad crossing, an instruction that, if the use of the crossing at the time by such an outfit was an extraordinary use of the crossing, plaintiff could not presume that the crossing was in a safe condition, but he must first ascertain whether it was safe, and if he failed to do so the verdict must be for defendant, was properly refused, as requiring too high a degree of care on the part of plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1207; Dec. Dig. § 351.*]

5. RAILROADS (§ 347*)—DEFECTIVE CROSSINGS—DAMAGES—ACTIONS—EVIDENCE.

In an action against a railroad for damages resulting from a defective railroad crossing, evidence that the crossing had been repaired by the railroad two or three days after the accident was inadmissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1128; Dec. Dig. § 347.*]

6. RAILROADS (§ 345*)—DEFECTIVE CROSSINGS—PLEADING AND PROOF—CONTRIBUTORY NEGLIGENCE.

Where, in an action against a railroad for damages resulting from a defective crossing, none of the pleas charged that plaintiff had been warned of the danger before attempting to cross, evidence that a guide had not warned him of any danger was inadmissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1115; Dec. Dig. § 345.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by G. L. Ragan against the Nashville, Chattanooga & St. Louis Railway. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The allegation of the complaint is that the crossing was unsafe, and that plaintiff was in charge of a well-drilling outfit attached to a traction engine, and that in making the crossing the outfit was damaged, and that plaintiff was injured by being jammed by the same, and that it was all caused by a projecting rail. The following charge was requested by the defendant, and refused: "(5) If the crossing on defendant's track at this time by such vehicles as that driven by plaintiff was not one of the ordinary uses to which said crossing was put, but if such was an extraordinary use of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said crossing, then plaintiff had no right to presume that said crossing was being kept in a condition safe for the crossing of such a vehicle; but the duty rested upon him first to ascertain whether or not such crossing was safe for such purpose, and if he failed to do so then your verdict should be for the defendant."

Walker & Spragins, for appellant. E. O. McCord, J. A. Bilbro, and John A. Inzer, for appellee.

ANDERSON, J. If a railroad constructs its road across a public road or highway, the duty devolves upon it to put and keep the approaches and crossing in proper repair for the use of the traveling public. *So. R. R. Co. v. Morris*, 143 Ala. 628, 42 South. 17; *So. R. R. v. Posey*, 124 Ala. 486, 26 South. 914; *Patterson v. S. & N. A. R. R.*, 89 Ala. 318, 7 South. 437. And the traveling public have the right to assume that it will discharge this duty, and cannot be said to be guilty of contributory negligence in crossing the track, without first stopping and examining the condition of said crossing. Of course, they should keep an ordinary lookout, such as prudence would suggest to any traveler, and would be guilty of contributory negligence if attempting to cross after discovery of the defect in the crossing, or might be for a failure to discover said defect, should it be open and glaring. It was a question for the jury, however, in the case at bar, as to whether or not the plaintiff discovered the defect, or should have discovered it, before attempting to cross. The proof shows that the rail on the approaching side was but little, if any, higher than the ties or earth, but that the rail on the opposite side was several inches above the roadbed, and it was a question for the jury to determine whether or not the defect was or could have been discovered before the plaintiff reached the crossing. It was also a question for the jury to determine whether or not the plaintiff was guilty of negligence in failing to stop, after the engine passed over and received a jar from crossing the last rail, and place something against the rail, so as to prevent a jar to the wagon or rear vehicle, or whether or not he could have stopped before the wagon struck the last rail. The trial court did not, therefore, err in refusing the general charge, requested by the defendant, upon the idea that its special pleas of contributory negligence had been proven beyond dispute, or upon any other theory.

There was no error in refusing charge 5, requested by the defendant. If not otherwise bad, it required too high a degree of care on the part of the plaintiff, and may have misled the jury to believing that the plaintiff was required to stop, get out, and

inspect the crossing before attempting to cross.

The trial court erred in permitting the witness Jackson to testify that the crossing was repaired two or three days after the accident. True, he did not state who made the repairs; but the jury would have naturally inferred that they were made by the defendant. While there has been some little conflict in the authorities as to whether or not evidence of repairs or improvements subsequent to the accident is admissible, the weight of authority, as well as sound reasoning, is against the admissibility of said evidence. *Ala. Co. v. Heald*, 154 Ala. 505, 45 South. 686; *Going v. Ala. Co.*, 141 Ala. 537, 37 South. 384; *Terre Haute R. R. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303, and note; *Morse v. Minneapolis R. R.*, 30 Minn. 465, 16 N. W. 358.

The question to the plaintiff, whether or not the guide had warned him of any danger, should not have been permitted, and the defendant's objection thereto should have been sustained. The answer was but an attempt to exculpate the plaintiff of contributory negligence, not charged in any of the pleas. None of the pleas charge that plaintiff was warned of danger before attempting to cross. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

MINONA PORTLAND CEMENT CO. et al. v. REESE et al.

(Supreme Court of Alabama. May 10, 1910.)

1. CORPORATIONS (§ 320*)—STOCKHOLDERS' SUITS.

Before individual stockholders can sue to remedy corporate wrongs, they must first apply to the directors for redress, unless facts are shown which would render an application to the directors useless.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1429, 1430; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 614*)—BILL TO DISSOLVE.

Stockholders of a nongrowing corporation, which has failed of the objects for which it was formed, and which owes no debts, may sue for dissolution of the corporation and the distribution of its assets to those entitled thereto, without first applying to the directors; the latter having no authority to dissolve the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2435; Dec. Dig. § 614.*]

3. CORPORATIONS (§ 612*)—DISSOLUTION—JURISDICTION.

A court of equity is the proper place to have decreed the dissolution of a nongrowing corporation and the distribution of its assets among those entitled thereto.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 612.*]

4. CORPORATIONS (§ 614*)—DISSOLUTION.

Allegations of a bill by stockholders to dissolve a corporation that it was a failure, and setting up facts which, if true, show conclusively that it was a failure, and that the business for which it was formed could never be inaugurated or carried on, gave the court jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2439; Dec. Dig. § 614.*]

5. EQUITY (§ 39*)—COMPLETE RELIEF.

Where the court takes jurisdiction for the purpose of dissolving a nongoing corporation and distributing its assets in accordance with a bill filed by stockholders, it will settle all the equities arising out of the subject-matter of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Bill by J. E. Reese and others against the Minona Portland Cement Company and others. From a decree overruling a demurrer to the bill as amended, defendants appeal. Affirmed.

A. L. McLeod, W. M. Vaughan, and E. C. Jones, for appellants. W. T. Harris and W. F. Hogue, for appellees.

EVANS, J. One of the appellants, Minona Portland Cement Company, is a private domestic corporation organized under the laws of the state of Alabama. The bill in this case was filed in the city court of Selma by certain persons who own preferred stock in said corporation against those owning the common stock therein, together with the officers of said corporation and the said corporation itself. The purpose of the bill is to dissolve the corporation and cancel certain stock issued, which is alleged to have been fictitiously paid up, to distribute the assets of the corporation among the stockholders, as may be decreed, to those entitled thereto, and for general relief. According to the allegations of the bill, the said corporation has no creditors, and no one is interested in its affairs, save the stockholders themselves. The bill further alleges that the corporation has wholly failed of the purposes for which it was organized, and sets forth matters as facts which, if true, show that the objects held in view by the promoters and organizers of the corporation have become impossible of accomplishment, and that it is impossible to proceed further with the work or business proposed. The bill was twice amended in the court below, and from a decree overruling the demurrer to it as last amended this appeal was taken.

The contention of appellants is that, before individual stockholders in a corporation can bring a suit to remedy corporate wrongs, they must first apply to the directors for redress, unless facts are alleged and proved which would render an application to the directors futile and vain. This contention is correct as to corporate wrongs, but has no application to a case like the one we are now

considering, so far as the general equity of this bill is concerned. It is not to redress the wrongs of directors or officers of the corporation that is the primary object of this bill, but simply to have a nongoing corporation, one that has utterly failed of the object and purposes for which it was formed, and which owes no debts, dissolved, and the assets distributed, according to law, to those entitled. In such a case there is no necessity to apply to the directors for redress, for the directors, as such, have no authority to dissolve a corporation; their business being usually to see that the corporation is properly conducted to work out the purposes for which it was formed. A court of equity is the proper place to have such dissolution decreed and the assets properly distributed. *Ross v. American Banana Company*, 150 Ala. 270, 43 South. 817; *Central Land Co. et al. v. Sullivan*, 152 Ala. 361, 44 South. 644; *Noble et al. v. Gadsden Land & Improvement Co. et al.*, 133 Ala. 251, 31 South. 856, 91 Am. St. Rep. 27.

The allegations of the original bill that the corporation was a failure, and setting up facts which, if true, show conclusively that it is a failure, and that the business for which it was formed can never be inaugurated or carried on, gave the court jurisdiction, and was not subject to demurrer; and, the court having taken jurisdiction for the purpose of dissolving the corporation, it will settle all the equities arising out of the subject-matter of the bill.

There is no question of laches appearing upon the face of the bill that could defeat any of the rights of complainants. The corporation was not formed until November 14, 1906, and the bill in this case was filed June 12, 1908. The bill charges that the 1,250 shares of common stock, estimated as of the par value of \$100 each, were paid for by respondents with lands worth \$15,400. In other words, \$125,000 worth of common stock was paid for with \$15,400 worth of land. This was in plain violation of section 26 of an act approved October 2, 1903. See Gen. Acts Ala. 1903, p. 327, which provides how subscriptions to capital stock of corporations may be discharged, and one of the ways is by a transfer of property at its reasonable value. If the allegations of the bill are true (and we must take them to be true for the purposes of the demurrer) then the larger part—the difference between \$15,400, the value of the land, and \$125,000, the face value of the common stock—was a fiction, and complainants would be entitled to relief against this, unless they have lost this right by laches, acquiescence, or participation in the unlawful and fictitious issue of stock, or for some other sufficient cause. As none of these appear from the allegations of the bill, the question could not be raised by demurrer. Hence the ground of demurrer attempting to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

raise this question was properly overruled.

We have discussed and decided all questions presented and urged in the brief of appellants' counsel, and find them all against appellants. The decree of the judge of the city court, overruling the demurrer, is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

BRYANT v. WHISENANT et al.

(Supreme Court of Alabama. May 12, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 159*)—PUBLIC SCHOOLS—FEES FOR ATTENDANCE—RIGHT TO EXACT.

Code 1907, §§ 1678-1903, relating to the public school system, contemplates free tuition to all minor residents more than seven years old; but, in the absence of statutory provision for a fund for heating and lighting schoolrooms, the county boards of education may prescribe a reasonable method for raising such fund, e. g., by imposing a reasonable incidental fee upon pupils, and delegate its authority to the district boards and teachers to enforce the method adopted.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 330; Dec. Dig. § 159.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 159*)—PUBLIC SCHOOLS—FEES FOR ATTENDANCE—REASONABLENESS.

A rule requiring public school pupils, excepting children of indigent parents, to pay an incidental fee of not less than 25 cents, nor more than \$1, to provide a fund for heating and lighting the schoolrooms, is reasonable, and a pupil who fails to comply with it may be excluded from attendance.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 330; Dec. Dig. § 159.*]

Mayfield, J., dissenting in part.

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by Bessie Bryant, pro am, against M. A. Whisenant and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The suit was for damages alleged to have been done plaintiff on account of declining to permit her to attend a public school taught in district No. 23, in Calhoun county, of which the defendants were the district trustees. It is alleged that the defendants instructed the teacher not to receive or teach her, and that they made the rules excluding her from school. The pleas are as follows: "(2) That in, to wit, the month of October, 1908, the county board of education of Calhoun county adopted rules and regulations for public schools of Calhoun county, and amongst other rules it was provided 'that they [the district trustees of public schools] are authorized to assess and collect an in-

cidental fee from each pupil of not less than 25 cents nor more than \$1; provided that children of indigent parents may be excused from paying this fee.' And said rule of said county board of education was in force and effect on, to wit, the 15th day of February, 1909, and subsequent and prior thereto, and at the time and matters complained of in said complaint. That acting under and by authority of said rule the said defendants as such district trustees assessed an incidental fee of, to wit, 35 cents against each of the pupils attending said public school in district No. 23, in Calhoun county, and the said plaintiff was one of the pupils in said school; and on the 15th day of February, 1909, as a condition precedent to the instruction of said plaintiff, it was required by said defendants that said incidental fee be paid to the said teacher, Miss Whiteside, and the said plaintiff and her father, her next friend, failed and refused to pay such incidental fee, and thereupon, in order to enforce such rule and regulation, these trustees, defendants herein, instructed the said teacher not to hear the lessons of the plaintiff until said incidental fee was paid, and the nonpayment of the said incidental fee was the sole cause of said instruction to said teacher. These defendants say that said incidental fee of 35 cents from each pupil attending said school was strictly necessary for the purpose of providing wood and water, in order that said school might be conducted, that the children there attending might be comfortable while attending said school, and that the instruction might be properly given them; and these defendants further aver that there was no other source of obtaining said necessities than assessing said incidental fee." (4) Practically same as 2.

O. M. Alexander and Tate & Walker, for appellant. Blackwell & Agee, for appellees.

ANDERSON, J. It is manifest that chapter 41 of the Code of 1907, which relates to the public school system of the state, contemplates that tuition shall be absolutely free to all minors of the state over the age of seven. We think, however, there is a well-defined distinction between tuition and a reasonable incidental fee for heating and lighting the schoolroom. State ex rel. Priest v. University of Wisconsin, 54 Wis. 159, 11 N. W. 472. And when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collection of this fund, and to delegate the authority to the district boards and teachers to enforce said rules. We also think that the requirement of a reasonable incidental fee for this purpose, as a condition precedent to attendance, is contemplated by the statute, in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

absence of any special provision for same, and that the rule set up in special pleas 2 and 4 was a reasonable one, and a good defense to the plaintiff's action. The trial court properly overruled the demurrers to these pleas, and the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, McCLELLAN, and SAYRE, JJ., concur in the opinion and the conclusion. **MAYFIELD, J.,** concurs in the conclusion, but does not think that the law contemplates free tuition.

KNOX v. STATE.

(Supreme Court of Alabama. May 19, 1910.)

1. CRIMINAL LAW (§ 1166*)—HARMLESS ERROR—EFFECT OF UNLAWFUL ARREST.

Where the record shows a regular affidavit and warrant in due form, and a subsequent arraignment, plea of not guilty, trial, and conviction, an improper arrest before the issuance of the warrant does not affect the merits of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3100; Dec. Dig. § 1166.*]

2. INDICTMENT AND INFORMATION (§ 139*)—MOTION TO QUASH PROCEEDINGS—TIME FOR MAKING.

A motion to quash criminal proceedings on the ground that defendant was arrested without a warrant, made after defendant had pleaded to the charge, and been tried and convicted, was too late.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.*]

3. CRIMINAL LAW (§ 240*)—HOLDING ACCUSED FOR TRIAL—AUTHORITY—CONSTITUTIONAL PROVISION.

Under Const. 1901, § 157, making all judges in the state conservators of the peace, they have a right to hold a party for trial, irrespective of the validity of the warrant of arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 495-500; Dec. Dig. § 240.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Will Knox was convicted of selling spirituous liquors, and appeals. **Affirmed.**

Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant in this case was convicted of the offense of selling spirituous liquors contrary to law. The defendant made a motion to quash the proceedings because, first, "the offense of which defendant was charged was not committed in the presence of the officers making the arrest, except the testimony of B. G. Chew, and that said arrest was made without a warrant;" second, that the commitment was made without affidavit and warrant, and the warrant

not procured until after the commitment to prison.

The record shows a regular affidavit and warrant, in due form, on June 29, 1909, an arraignment on September 20, 1909, and a plea of not guilty, trial, and conviction. If the defendant was improperly arrested before that time, it could not affect the merits of this case. The record also shows that on the 9th of October, 1909, the day when this motion purports to have been filed, the defendant had already pleaded to the charge, been tried, and convicted. It was too late then to move to quash the proceedings on the ground that he was arrested without a warrant. No evidence seems to have been introduced in support of the motion.

In addition to what has been said, all the judges in this state are conservators of the peace (Const. 1901, § 157), and have a right to hold a party for trial, irrespective of the validity of the warrant of arrest. Ex parte Thomas, 100 Ala. 101, 13 South. 517; *Fruitt v. State*, 130 Ala. 147, 30 South. 451; 9 Ency. Pl. & Pr. pp. 1066, 1067; Ex parte Hamilton et al., 65 Miss. 98, 139, 3 South. 68.

There was no error in overruling the motion.

The demurrers, not appearing in the record proper, cannot be considered.

The judgment of the court is affirmed. **Affirmed.**

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

SCHULTE v. WILKE.

(Supreme Court of Alabama. May 12, 1910.)

1. JUSTICES OF THE PEACE (§ 2*)—APPOINTMENT—STATUTES.

Acts 1884-85, p. 402, providing for the election of justices of the peace in the late city of Mobile, dividing it into eight precincts, and providing for a justice for each, is a local law fixing the number of precincts and the justices of the peace thereof, and is not repealed by the subsequent Codes, and the number of precincts and the boundaries can only be changed by the Legislature, notwithstanding Code 1907, §§ 339, 340, 1106, 1107, 4637, empowering county commissioners to establish election precincts, and providing for justices in each precinct, and authorizing the governing board of a city to create new wards and divide the same into voting precincts.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 2.*]

2. JUSTICES OF THE PEACE (§ 6*)—VOID JUDGMENT—REMEDY.

Where there could be under the law no office of justice of the peace in and for a ward of a city, a justice purporting to act as such for such ward was not a de facto justice, and all judgments rendered by him were void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 9; Dec. Dig. § 6.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. JUSTICES OF THE PEACE (§ 192*)—VOID JUDGMENT—WANT OF JURISDICTION.

Certiorari is the proper remedy to review and quash void judgments, rendered by one purporting to act as a justice of the peace, where he was not even a *de facto* justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 759; Dec. Dig. § 192.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Certiorari by Henry Schulte against Thomas Wilke to quash the judgment. From a judgment denying relief, petitioner appeals. Reversed and rendered.

G. H. Kruempel, for appellant.

ANDERSON, J. The act of 1885 (Acts 1884-85, p. 402) provides for the election and regulation of justices of the peace in such territory in Mobile county as was formerly embraced within the boundaries of the late city of Mobile. It divides said territory into eight precincts, and provides a justice of the peace for each one. This, being a local law, was not repealed by any of the subsequent Codes, and so far as we are advised has not, as to the number of justices of the peace precincts, been repealed by any local law. This law, providing for only eight precincts and a justice of the peace for each one, does not contemplate a tenth precinct and a justice of the peace for same. The Legislature having fixed the number of precincts and the justices of the peace for same, the boundaries or divisions, in so far as they relate to the office of justice of the peace, could only be changed by the Legislature.

It is true the county commissioners are authorized by general law (sections 339 and 340 of the Code of 1907) to change or establish election precincts, and section 4637 provides for two justices of the peace in each election precinct; but this applies only to those justices and precincts not heretofore covered by a local law. It may also be true, that Municipal Code, §§ 1106, 1107, authorizes the governing board of a city to create new wards and to divide said wards into voting precincts; but it was not intended that an increase of wards or voting precincts could operate to change the number of justices of the peace or the territorial boundary of their jurisdiction, in the absence of a repeal of the existing local law on the subject.

It therefore results that there could be no office of justice of the peace in and for Ward 10 of the city of Mobile, and Van der Meulen was not even a *de facto* justice of the peace, and all judgments rendered by him were void, and could not support an appeal, and the proper remedy to review and quash same was by common-law certiorari. Tallasse v. Jones, 128 Ala. 424, 29 South. 448;

Stewart v. Cox, 130 Ala. 676, 30 South. 939; Beach v. Lavender, 138 Ala. 406, 35 South. 352.

The judgment rendered by Van der Meulen against the petitioner being void, the action of the judge of the city court in failing to quash same was error, and a judgment is here rendered vacating said judgment.

Reversed and rendered.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

OWEN et al. v. MOXOM.

(Supreme Court of Alabama. May 12, 1910.)

1. EJECTMENT (§ 16*)—RECOVERY ON PRIOR POSSESSION—GENERAL RULE—EXCEPTION.

The general rule that in ejectment the plaintiff may recover upon prior possession as against a defendant who has a mere subsequent possession, and plaintiff's recovery cannot be defeated by showing that there is or may be an outstanding title in another, does not prevail against a defendant who acquires possession peaceably and in good faith under color of title, since in that case the defendant can defeat the plaintiff's right to recover, upon a previous possession, by showing an outstanding title in another, and without connecting himself therewith.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*]

2. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE—RECORD—STATUTE REQUIRING—TO WHOM APPLICABLE.

Code 1907, § 2830, requiring one claiming by adverse possession to record the deed or other color of title in the office of the judge of probate in the county where the land lies for 10 years before he can get title, applies only to one in possession as a trespasser or mere squatter, and not to one who claims under a bona fide claim of purchase.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 82.*]

3. EVIDENCE (§ 273*)—DECLARATIONS—SOURCE OF TITLE—OWNERSHIP—ADMISSIBILITY.

Though declarations made by claimants to land as to the source of title, whether in possession or not, are not admissible in evidence against another, a party in possession of land may make declarations explanatory of his possession, either in claim or disclaim of ownership, which will be admissible on the issue of disputed ownership, no matter who may be parties, since possession is the principal fact, and the declarations are part of the *res gestæ* of the possession and are admissible, whether actually on the land or not at the time of the making of the declarations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

4. ADVERSE POSSESSION (§§ 43, 71*)—DEEDS—COLOR OF TITLE.

In ejectment, the fact that plaintiff's deed from W. antedated the deed from W.'s grantor, A., was not fatal to the use of the deeds as color of title, nor did it deprive plaintiff of tacking the possession of A. to W., and of W.

to his own; it appearing that W. had been let into possession under A.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. §§ 43, 71.*]

5. EVIDENCE (§ 324*)—TITLE—PROOF—REPUTATION—GENERAL UNDERSTANDING.

It is not competent to show, by reputation or general understanding in the neighborhood, that plaintiff in ejectment owned or had title to the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1220; Dec. Dig. § 324.*]

6. ADVERSE POSSESSION (§ 33*)—PROOF OF REPUTATION—WHEN ADMISSIBLE.

While the existence of a fact cannot be proved by notoriety or reputation, yet in ejectment, where the fact of plaintiff's adverse possession is otherwise established, its notoriety for the purpose of showing notice is admissible; notoriety being an element of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 134, 135; Dec. Dig. § 33.*]

7. TRIAL (§ 86*)—EVIDENCE RELEVANT FOR CERTAIN PURPOSES—OBJECTIONS—EFFECT.

The trial court cannot be put in error for admitting evidence relevant for certain purposes, where the objection attempted to keep it out entirely.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 226; Dec. Dig. § 86.*]

8. EVIDENCE (§ 121*)—DECLARATIONS—PARTIES IN POSSESSION—ADMISSIBILITY.

In ejectment, it was not error to permit a witness to testify that the person through whom the plaintiff derived title had been trying to sell witness' father the land three years before, where there was evidence that he was in possession, as this was part of the *res gestæ*, and it was for the jury whether it applied to the particular parcel of land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338; Dec. Dig. § 121.*]

9. ADVERSE POSSESSION (§ 85*)—EVIDENCE—CLAIM OF TITLE—ADMISSIBILITY.

In ejectment, it was not error to permit the son of the person through whom plaintiff derived title to testify that his father said that he felt he had the right to sell the land; it being a circumstance tending to show that the father was asserting ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 656; Dec. Dig. § 85.*]

10. TRIAL (§ 54*)—EVIDENCE.

In ejectment, it was not error to limit the deeds offered by defendant to color of title, instead of muniment of title, where the title claimed was derived under a tax sale, and what purported to be the assessment failed to show that the land in question formed a part of the assessment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 126; Dec. Dig. § 54.*]

11. TRIAL (§ 199*)—APPEAL AND ERROR (§ 928*)—INSTRUCTIONS—PRESUMPTIONS.

In ejectment, an oral charge that it was for the jury to say what constitutes adverse possession under the facts, and whether it existed under the facts, was not erroneous, as submitting a question of law to the jury, since it simply left it to the jury to determine whether the facts established plaintiff's title by adverse possession, and the court on appeal must assume that the court charged as to the constituents of adverse possession, and that the part of the charge excepted to was merely to call upon the jury to determine whether the evidence

constituted adverse possession, under the rule of law as laid down by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 467; Dec. Dig. § 199.* Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

12. APPEAL AND ERROR (§ 928*)—INSTRUCTIONS—PRESUMPTIONS.

Nor was this presumption as to the oral charge overcome by a recital in the bill of exceptions that "there was no other part of the oral charge which changed the foregoing statement of law," since the charge did not attempt to define adverse possession, or to instruct the jury to do so, but merely instructed them to determine whether adverse possession existed under the facts, not what constituted in law adverse possession.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 928.*]

13. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS.

It was not error to charge that if A. was in adverse possession of the land sued for for more than 10 years prior to 1893, claiming ownership, and remained in possession until W. bought from him, and W. remained in possession until delivery of possession by him to plaintiff, and that plaintiff was in possession, through his tenants, until ousted by defendant in 1903, then the verdict must be for plaintiff, since it only hypothesized adverse possession, and did not attempt to define or set out the ingredients.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

14. EJECTMENT (§ 106*)—DECLARATION OF ADVERSE CLAIM—FILING—QUESTION FOR JURY.

Whether plaintiff in ejectment should or should not have filed a declaration under Acts 1893, p. 478, as to an adverse claim was a question of fact for the jury.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 106.*]

15. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS.

In ejectment, if plaintiff's predecessor held under a bona fide purchase, plaintiff did not have to file a declaration under Acts 1893, p. 478, and, if he did not so hold, his holding after the act could not constitute adverse possession; hence it was not error to charge that, if the jury believed that plaintiff had such an adverse possession as the land was susceptible of for 10 years prior to the time defendant entered into possession, the verdict must be for plaintiff, since in the abstract it was correct, and hypothesized a recovery upon an adverse possession of 10 years, and if the holding was not adverse after the act of 1893 the charge in no way infringed the rule resulting on a failure to register the claim.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

16. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In ejectment, a charge that, to constitute an ouster or adverse possession of wild land, it is not necessary that the one claiming possession should remain on the land, or that he should have any improvements thereon, and if he exercises acts of ownership, and has such possession as the land is susceptible of, such as cutting timber, keeping off intruders, paying taxes, offering to sell it, cutting trees off the land, selling trees off the land, cutting board timber off of it, and giving persons permission to get wood and light wood off the land, then such acts may constitute an actual adverse possession, did not instruct that the facts hypothesized amounted to adverse possession, but that they might do so, whether the party was in

possession under a paper title, or color of title, or not; and, though the charge was not commendable, it was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

17. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS.

In ejectment, it was not error to refuse a charge that, unless the jury was reasonably satisfied that plaintiff's predecessor was in adverse possession claiming ownership for not less than 10 years prior to February 11, 1893, plaintiff could not recover by reason of any title in his predecessor, unless his predecessor was in possession under a bona fide claim of purchase, claiming adversely for 10 years, since it was calculated to mislead the jury to the conclusion that plaintiff could not recover unless the possession of his predecessor was coupled with a bona fide claim of purchase for 10 years prior to the statute of 1893.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

Appeal from Circuit Court, Cleburne County; John Pelham, Judge.

Action by Phillip S. Moxom against W. T. Owen and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The oral charge of the court, excepted to, is as follows: "It is for you to say what does constitute adverse possession under the facts in this case, and whether it existed under the facts."

The following charges were given at plaintiff's request: "(1) Gentlemen of the jury, I charge you that if Mr. Armstrong was in the adverse possession of the land sued for, for more than 10 years prior to 1893, claiming to own the same as his own, or as a partner in the firm of Johnston & Co., and remained in possession until the time that Wallace bought from him, and that after Wallace's purchase he, the said Wallace, remained in possession until the delivery of the possession to Moxom by him under his deed, and the said Moxom, acting through his tenants, remained in possession of the same until Owen ousted him in the fall of 1908, then your verdict must be for the plaintiff. (2) Gentlemen of the jury, if you are reasonably satisfied from the evidence that the plaintiff and those under whom he claims had such an adverse possession of the land as, from its wild nature, it was susceptible of, for 10 years prior to the time that Owen entered into possession, then your verdict must be for the plaintiff. (3) Gentlemen of the jury, to constitute an ouster or adverse possession of wild or unimproved land, it is not necessary that the person claiming the possession should remain on the land, or that he should have any improvements thereon. If such person, claiming the possession, exercises acts of ownership over the land, and has such possession of the land as, from its wild character, it is susceptible of, like cutting timber therefrom, keeping off intruders, paying taxes, offering to sell it, cutting trees off the land, selling

trees off the land, cutting board timber off of it, and giving persons permission to get wood and light wood off the land, then such acts may constitute an actual adverse possession of such wild or unimproved land."

The following charge was refused to the defendant: "(5) The court charges the jury that, unless they are reasonably satisfied from the evidence that Armstrong was in the adverse possession of the land sued for, claiming to own the same, for not less than 10 years before the 11th day of February, 1893, plaintiff would not be entitled to recover by reason of any title in Armstrong, unless the jury should further believe that Armstrong was in possession under a bona fide claim of purchase, claiming the said land adversely for a period of 10 years."

Knox, Acker & Blackmon, for appellants. Blackwell & Agee, for appellee.

ANDERSON, J. The general rule is that in an action of ejectment the plaintiff may recover upon prior possession as against a defendant who has a mere subsequent possession, and such defendant cannot defeat the plaintiff's recovery by showing that there is or may be an outstanding title in another. 10 Am. & Eng. Ency. of Law, 487; Green v. Jordan, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; Roe v. Doe, 48 South. 49; Dodge v. Irvington Land Co., 158 Ala. 91, 48 South. 383, 22 L. R. A. (N. S.) 1100. This rule does not prevail, however, against a defendant who acquires the possession peaceably and in good faith under color of title; for, if such is the case, the defendant can defeat the plaintiff's right to recover, upon a previous possession, by showing an outstanding title in another and without connecting himself therewith. McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 South. 822.

In the case at bar the plaintiff proved a prior possession, but the defendant proved a possession under a purchase and color of title, and also proved an outstanding title in Henderson, the patentee; and the plaintiff was then put to proof of title by establishing one superior to Henderson's, and which was attempted by showing adverse possession by himself and those under whom he holds for a sufficient length of time for it to ripen into title, and which question was properly submitted to the jury, as there were many possessory acts shown by Armstrong and those holding under him. Indeed, almost every possessory act to which the character of the land was susceptible was proven.

Neither was the defendant entitled to the general charge, upon the theory that there was no declaration or claim filed, in the probate office, of an adverse claim, or because Armstrong was holding for the Johnston Company and there had been no sufficient repudiation of their title by him. The stat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute (section 2830, Code 1907) requiring registration applies only to one in possession as a trespasser or mere squatter, and not to one who claims under a bona fide claim of purchase. *Roe v. Doe*, 159 Ala. 614, 48 South. 1063; *Holt v. Adams*, 121 Ala. 664, 25 South. 716; *Sledge v. Singley*, 139 Ala. 346, 37 South. 98. There was evidence from which the jury could infer that Armstrong was in possession under a bona fide claim of purchase, and the trial court did not err in not assuming, as matter of law, that Armstrong could not hold adversely after the act of 1893 (Acts 1892-93, p. 478), unless he had filed a written declaration in the probate office. It is true that the proof tended to show that Johnston Company, and not Armstrong, had purchased or entered the land; but it also showed that Armstrong owned an interest in same, and that he was holding under the claim of said Johnston Company. Whether Armstrong held adversely to Johnston Company or not, or his possession could not be tacked onto those holding under him, as to all of the land, did not entitle the defendant to the general charge, as there was proof that Armstrong claimed an interest in the land, and the plaintiff was entitled to his undivided interest, and the general charge, or those questioning Armstrong's right to claim adversely to the Johnston Company, did not except the interest of Armstrong in the land, whether he was holding the other interests for Johnston Company or not.

It is true that declarations made by claimants to land as to the source of title, whether in possession or not, are not admissible in evidence as against another. *Doe v. Clayton*, 81 Ala. 391, 2 South. 24; *Daffron v. Crump*, 69 Ala. 77. But a party in possession of land may make declarations explanatory of his possession, and either claim or disclaim ownership of the property, and such declarations may be given in evidence, in an issue of disputed ownership, no matter who may be parties to the suit. Possession being the principal fact, such declarations are admissible as part of the *res gestæ* of the possession itself, and are admissible when made by a party while on the land, or in possession thereof, whether actually on the land or not at the time of making same. *Payne v. Crawford*, 102 Ala. 398, 14 South. 854, and authorities there cited. There was proof tending to show that Armstrong was in the possession of the land when he wrote the letter to Wallace, which was a mere claim of ownership of the land, and did not relate to the source of his title, and the trial court did not err in admitting the letter in evidence.

There was no error in refusing to exclude the conversation between Wallace and Armstrong, as there was evidence that Armstrong was in possession of the land, and was actually on it when the conversation was had. It is true that some of the declarations of Armstrong related to the source of his claim or title; but some of them showed that he

was claiming to be the owner of the land, and the motion to exclude did not separate the good from the bad. Nor was the question asked calling for the conversation subject to the objection made to same.

The fact that the deed from Wallace to Moxom may have antedated the one from Armstrong to Wallace was not fatal to the use of the deeds as color of title; nor did it deprive this plaintiff of tacking the possession of Armstrong to Wallace, and that of Wallace to his own. The proof shows that Wallace had been let into possession under Armstrong.

It is not competent to show, by reputation or general understanding in the neighborhood, that a plaintiff in an action of ejectment owned or had title to the land. *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443. But, while the existence of a fact cannot be proved by notoriety or reputation, yet, where the fact is otherwise established, its notoriety, for the purpose of showing notice, and which said notoriety is an element of adverse possession, may be shown. *Tenn. Co. v. Linn*, 123 Ala. 138, 26 South. 245, 82 Am. St. Rep. 108; *Woods v. Montevallo Co.*, 84 Ala. 564, 8 South. 475, 5 Am. St. Rep. 393; *Humes v. O'Bryan*, 74 Ala. 81. There was evidence, independent of the fact that the land was known as the Armstrong land, showing that Armstrong was in possession, and the fact that the land was so known was a circumstance to show that his possession was notorious. If it tended to show ownership, or facts other than the notoriety of the possession, the appellant should have requested a limitation to this effect, but cannot put the trial court in error for letting it in, as it was relevant for certain purposes, and the objection attempted to keep it out entirely.

There was no error in permitting the witness Phillips to testify that Armstrong was trying to sell his father the land three years after the surrender. There was evidence that he was in possession, and this was part of the *res gestæ*, and it was a question for the jury as to whether or not it applied to this particular parcel of land, as it was in section 30, north of his old home.

The motion to exclude the evidence of Henry W. Armstrong that his father said that he felt he had a right to sell the land was not subject to the grounds of the motion. Whether properly expressed or not, it was a circumstance tending to show that he was asserting ownership thereto, and was competent, relevant, and material.

The trial court did not err in limiting the deeds offered by the defendant to color of title, instead of muniment of title. The title claimed under the deed was derived under and by virtue of a tax sale, and which must have complied with the statute in order to vest the purchaser at the sale with a title. It is sufficient to say that what purports to be the assessment on agreed page 42 of the

record, fails to show that the land in question formed a part of the assessment.

The trial court will not be put in error for so much of the oral charge as was excepted to by the appellant. This charge did not submit a question of law to the jury. It simply left it to them to determine whether or not the facts in the case established the plaintiff's title by adverse possession. It did not leave it to the jury to determine the legal definition or meaning of adverse possession, but to determine whether the facts as given in evidence constituted adverse possession, doubtless under the rule of what was adverse possession, as probably laid down by the court. We must assume that the court instructed the jury as to the constituents of adverse possession, and that so much of the charge as was excepted to was merely to call upon the jury to determine whether or not the evidence constituted adverse possession under the rule of law as laid down by the court. This presumption as to the oral charge is not overcome by the recital in the bill of exceptions that "there was no other part of the oral charge which changed the foregoing statement of the law." The oral charge did not attempt to define adverse possession, or to instruct the jury to do so, but merely instructed them to determine whether or not adverse possession existed under the facts in the case—not what constituted, in law, adverse possession, but whether or not it existed under the facts.

There was no error in giving charge 1 at the request of the plaintiff. It hypothesized adverse possession in the concrete, did not attempt to define or set out the ingredients, and whether the court would or would not have been justified in refusing it, for failing to set out the constituents of adverse possession, we need not decide; but it is sufficient to say there was no error in giving same.

There was no error in giving charge 2 at the request of the plaintiff. Whether the plaintiff should or should not have filed a declaration, under the act of 1893, as to an adverse claim, was a question of fact for the jury. If Armstrong held under a bona fide purchase, he did not have to file the declaration. On the other hand, if he did not hold under a bona fide claim of purchase, his holding after the act of 1893 could not constitute an adverse possession after that period. The result is the charge is in the abstract correct, and hypothesizes a recovery upon an adverse possession for 10 years. If the holding was not adverse after the act of 1893, the charge in no way impinged the rule resulting from a failure to file the claim in case Armstrong was not claiming under a bona fide claim of purchase.

Charge 3, given at plaintiff's request, did not instruct that the facts hypothesized amounted to adverse possession, but that they may do so; and we think they might,

whether the party was in possession under a paper title, or color of title, or not. The charge hypothesizes many more possessory acts than those intimated to be insufficient in the case of *Alexander v. Savage*, 90 Ala. 383, 8 South. 93. We do not commend this charge, but do not think it was reversible error to give same.

The trial court did not err in refusing charge 5, requested by the defendant. It was calculated to mislead the jury to the conclusion that the plaintiff could not recover unless the possession of Armstrong was coupled with a bona fide claim of purchase for a period of 10 years prior to the statute of 1893.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

(126 La.)

No. 17,526.

CAGE v. QUAKER REALTY CO., Limited.
(Supreme Court of Louisiana. April 25, 1910.
Rehearing Denied May 24, 1910.)

(Syllabus by the Court.)

TAXATION (§ 730*)—SALE FOR TAXES—ADJUDICATION TO STATE—EFFECT.

Plaintiff being in possession of certain property enjoined the placing of the defendant in possession of the same under a writ of possession, which was granted to him as holder of an auditor's deed dated in October, 1902, executed to him under Act No. 80 of 1888. The property had been adjudicated to the state in 1883 at a tax sale for delinquent state taxes. It was reoffered for sale by the state under Act 80 of 1888 and adjudicated to it. At that time plaintiff was in possession of the property, but without title, and had been for many years, but not sufficiently long for him to have acquired ownership by prescription. The state did not take possession under the adjudication to it. At the time defendant sought to take possession under the auditor's deed, plaintiff had been in possession long enough to have acquired by prescription. The district court rendered judgment adverse to the plaintiff, and he appealed. Held that, through the second adjudication to the state its title became good and perfect (section 1, Act No. 80 of 1888), and plaintiff's right to invoke prescription was cut off.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 730.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Calhoun Cage against the Quaker Realty Company, Limited. From the judgment, plaintiff appeals. Affirmed.

Geo. H. Terriberry and Meyer S. Dreifus, for appellant. William Winans Wall, for appellee.

NICHOLLS, J. Plaintiff alleged that he was the owner of the following described real estate, situated in the city of New Orleans:

"A certain triangular square of ground in the First municipal district, bounded by Roman, Prieur, Melpomene and Thalia streets, measuring as follows: Fifty-eight (58) feet nine (9) inches and three lines (3) front on Roman street, one hundred and thirty (130) feet, one (1) inch and four (4) lines in front on Prieur street by a depth of three hundred and two (302) feet, eight (8) inches and six (6) lines in front on Melpomene street and three hundred eleven (311) feet one (1) line on a line running from Roman street to Prieur street, being the dividing line between the Annunciation and Nuns Faubourg, the whole American measure."

That petitioner had acquired the ownership of said real estate by the prescription of 30 years, having had actual physical and uninterrupted possession of said real estate since the year A. D. 1869.

That the Quaker Realty Company, Limited, had caused to be issued by this honorable court, in the matter styled, "In re Quaker Realty Co. Ltd., Praying for Possession, No. 85,355," two writs of possession, one directed to petitioner, and one directed to Adam Wilson, and that civil sheriff would deliver unto the Quaker Realty Company, Limited, possession of said property unless restrained by this honorable court.

That Adam Wilson was occupying said property with petitioner and by permission of petitioner, who was the sole owner thereof; that said Quaker Realty Company, Limited, claimed title to said property by virtue of an alleged and pretended tax sale made to its author, the Aztec Land Company, in accordance with section 3 of Act 80 of 1888; that said tax sale as well as the taxes and assessments whereon it was based were null, void, and of no effect, for the reason that so much of said square of ground as this petitioner claimed the ownership of was not included in said assessment, and for the further reason that said assessment was in the name of a person who had no title to said property, and it was therefore null, void, and without effect, and should be annulled, avoided, and canceled; said sale was void for the further reason that no notice thereof was given as required by law, and for the further reason that all the proceedings culminating in said sale were illegal; that the Quaker Realty Company, Limited, was utterly without title to such land in said square of ground as was herein described, and the causing of the aforesaid ex parte writs to be issued was simply and solely one of the steps in a fraudulent plan to dispossess petitioner of real estate, the ownership and full and sole title to which petitioner had acquired by the prescription of 30 years, and petitioner specifically charged fraud.

That a writ of injunction should issue restraining said Quaker Realty Company, Limited, and H. B. McMurray, civil sheriff, for the parish of Orleans, state of Louisiana, from proceeding further with the execution of the writs of possession as heretofore referred to; that the value of the property herein referred to was about the sum of \$2,100.

In view of the premises he prayed that a writ of injunction issue herein enjoining and restraining said Quaker Realty Company, Limited, and H. B. McMurray, civil sheriff of the parish of Orleans, from proceeding any further with the execution of the writs of possession obtained in the suit styled "In re Quaker Realty Company Ltd., Praying for Possession, No. 85,355," of the docket of this court; that said Quaker Realty Company, Limited, through its proper officer, be cited to appear and answer hereto, and that after legal proceedings had there be judgment against said Quaker Realty Company, Limited, and that this injunction be maintained, and that petitioner be recognized as the owner of so much of said square of ground as was described herein; that said pretended tax sale, in so far as it might purport to convey title to said property owned by petitioner and hereinabove fully described, be annulled, avoided, and canceled. He further prayed for costs, and for such other and further orders as the nature of the cause might require, and law and equity permit.

The injunction prayed for was ordered to be issued and was issued. Defendant filed an exception that plaintiff's petition disclosed no cause of action.

It afterwards answered, pleading, first, a general denial. Further answering, it averred: That it purchased from the Aztec Land Company, Limited, on the 13th day of March, 1905, the following described property, to wit, a certain triangular square of ground, situated in the city of New Orleans, La., in the Fourth municipal district of said city, and bounded by Roman, Prieur, Melpomene, and Thalia streets; that the Aztec Land Company, Limited, purchased said property from the auditor of public accounts, acting by virtue of section 3 of Act No. 80 of 1888, and Act 126 of 1896, with the right to be sent into possession in accordance with the provisions of section 3 of Act 80 of 1888; that said property was bid in for and adjudicated to the state of Louisiana for the delinquent state taxes of the year 1883, assessed in the name of John Hanley or John Holley, by Joseph Desposito, the duly appointed and authorized deputy of James D. Houston, state tax collector of the First or Upper district of the city of New Orleans, La., at an offering thereof under Act No. 96 of 1882, on December 13, 1884, at the principal front door of the building in which the civil district court in and for the parish of Orleans was held, and that on February 4, 1885, said Joseph Desposito, deputy aforesaid, in his official capacity executed an act of sale of said property in notarial form to the state of Louisiana before Joseph Hall Spearling, then a notary public of this city, which act of sale was registered in the conveyance office in Book 122, folio 275.

That said property was forfeited to the state of Louisiana for the delinquent state taxes of the years 1871 to 1877, inclusive, un-

der the Revenue Laws of 1871 (Act No. 42, of 1871) and 1877 (Act No. 96, of 1877), respectively, there having been a separate forfeiture for each of said years, 1871 to 1877, inclusive, as would appear more fully from the lists of delinquent state tax papers for said years, on file in the office of the auditor of public accounts, register of conveyances, and the recorder of mortgages, and that said taxes for said years or any of them were not paid by any former owner prior to said forfeitures, nor has said property ever been redeemed from any of them.

That respondent's said tax titles to said property had been quieted and confirmed by the prescription of three years as embodied in article 223 of the state Constitution of 1898, which prescription respondent pleaded in support of its title and in bar of plaintiff's demand.

That said plaintiff, Calhoun Cage was never the owner of said property, and at the date of the issuance of said writ of injunction herein was absolutely without any right to the possession of the same; that the writ of injunction sued out herein was willfully, wrongfully, and wantonly obtained from this court by false allegations, and had damaged respondent in the full sum of \$50, in that it had been forced thereby to employ an attorney at law to protect its rights, and had agreed to pay said attorney at law \$50 as a fee for his services which compensation was entirely reasonable and proper.

It prayed that the injunction issued herein might be dissolved and set aside, and plaintiff's suit dismissed at his costs, and that there be judgment in favor of respondent over and against plaintiff, recognizing respondent as the sole owner of said hereinbefore described property, and as such to be entitled to the possession thereof, and for \$50 damages as aforesaid, with interest thereon at the rate of 5 per cent. per annum from the date of rendition of judgment herein until paid. Further it prayed that Edward C. Killian, the surety on the injunction bond, be condemned in solido with said plaintiff for said damages and costs; and for general and equitable relief.

The district court rendered judgment in favor of plaintiff and against defendant, ordering and decreeing that the injunction issued herein in so far as to prohibit any further proceeding under the writ of possession issued in suit No. 85,355 beyond placing defendant, the Quaker Realty Company, Limited, in possession of the following described property, to wit: Lot No. 1 in the square bounded by Roman, Prieur, Melpomene and Thalia streets, measuring 44 feet, 9 inches on Prieur street, and 147 feet, 10 inches and 4 lines in depth on the other side line; said lot being No. 1, forming the corner of Prieur and Melpomene streets and being triangular in shape. It is further ordered that there be judgment in reconvention in favor of the said defendant, the Quaker Realty Com-

pany, Limited, and against the plaintiff, Calhoun Cage, recognizing the said defendant as the owner of the above-described property.

It is further ordered that in all other respects the reconventional demand of the defendant be dismissed, as in case of nonsuit, and that said defendant pay all costs.

Judgment read and signed in open court February 1, 1909. Judgment signed in open court February 5, 1909.

Plaintiff has appealed.

Defendant has not answered the appeal.

The defendant in support of his title introduced in evidence a copy of a notarial act before Joseph H. Spearing, in which appeared Joseph Desposito, representing himself as the duly appointed and authorized deputy of James D. Houston, state tax collector of the First or Upper district of the city, in which he declared that on the 13th of December, 1884, acting under Act No. 96 of 1882, he offered for sale in enforcement of taxes due on the same a certain triangular square of ground situated in the Fourth district of the city, bounded by Roman, Prieur, Melpomene, and Thalia streets, designated as triangular square No. 430, which property was duly and legally assessed for 1883, and advertised in the name of John Hanley, Jr.; that, at said offering, no one having offered to pay the taxes thereon or to bid at all on said property or any portion thereof, he had adjudicated the same to the state of Louisiana. In the said act he recited the different formalities which had been taken in the matter of said sale, and declared that he had in making said sale complied with all the requirements of the law in respect thereto.

After making such recitals he said that in view of the premises, and in pursuance of the adjudication, and by virtue of the promises of Act No. 96 of 1882, he granted, bargained, sold, assigned, transferred, set over, and delivered the said described property with all the improvements thereon and rights, ways, privileges, and appurtenances thereunto belonging or appertaining, with the right to be put into actual possession thereof by order of any court of competent jurisdiction, the said property being redeemable at any time within the space of one year, beginning on the date the act then passed was filed in the conveyance office, by paying the price of adjudication, with 20 per cent. and costs added in each instance.

This act was recorded in the conveyance office in the city of New Orleans on May 2, 1885. On the 27th of October, 1902, W. S. Frazee, State Auditor, executed in presence of two witnesses a writing in which he declared that, in pursuance of section 3 of Act No. 80 of 1888 and Act 126 of 1896, he, by said instrument, sold, assigned, and delivered to the Aztec Land Company, Limited, a certain triangular square of ground, bounded by Roman, Prieur, Melpomene, and Thalia streets, designated as triangular square No. 430; that said described property was adju-

licated to the state of Louisiana on the 13th day of December, 1884, as the property of John Hanley, Jr., by the state tax collector of the Fourth district of the city of New Orleans for unpaid taxes due the state of Louisiana for the year 1883, and had been once advertised for sale by the state tax collector in accordance with the provisions of Act No. 80 of 1888, and failed to sell; that he had received bids for said described property as would appear by an application and bid of the Aztec Land Company, Limited, on the 16th October, 1902, and that the sale to said company was made for cash in current money, the price being \$21.56, the receipt of which he acknowledged. This act was recorded in the conveyance office of the city of New Orleans on January 19, 1903.

On the 13th March, 1905, the Aztec Land Company, Limited, by act under private signature, sold to the Quaker Realty Company certain property described in that act which was recorded on March 13, 1905.

The plaintiff alleged, as has been stated, that the Quaker Realty Company, Limited, had caused to be issued by the civil district court, in the matter entitled "In re Quaker Realty Company, Limited, Praying for Possession No. 85,355," two writs of possession, one directed to him and one directed to Adam Wilson, and that the sheriff would deliver said property to the Quaker Realty Company unless restrained by the court; that Adam Wilson by petitioner's permission was occupying with petitioner part of the property which belonged to petitioner as stated in his petition. The plaintiff obtained in this proceeding an injunction against the execution of the two writs of possession which was in the hands of the sheriff. Those writs have not been produced or shown by either plaintiff or defendant—indeed no part of the record in suit No. 85,355 is before the court.

Plaintiff urges that so much of the square of ground as he claims the ownership of was not included in the assessment; that it was assessed in the name of a person who did not own it; that no notice was given as required by law; and that all the proceedings culminating in said sale were null and void.

The present action is an injunction proceeding brought by Calhoun Cage, alleging himself to be the owner and in possession of certain described property in the First district of New Orleans. He alleges that he has acquired ownership of said property by prescription. He obtained an injunction directed towards the Quaker Realty Company, enjoining it from carrying into effect a writ of injunction which it had obtained from the civil district court for the parish of Orleans, ordering the sheriff to take into his possession as belonging to that company. The company claims that said property was by tax sale adjudicated to the state, and had thereafter been sold by the state through deed

from the State Auditor to the Aztec Realty Company; that defendant had acquired that property from the Aztec Realty Company. Defendant does not pretend that the state, the Aztec Realty Company, or itself had ever had possession of that property. So far from that the proceedings of the defendant have for their object the obtaining of possession for it and the ousting of Cage from the same. Cage, in taking out the injunction, is defending his possession and his ownership, and the Quaker Realty Company is claiming ownership and the right to possession thereunder.

The plaintiff, Cage, is an old colored man, who has established beyond doubt that he has been in possession of the property which he now occupies continuously since 1869 or 1870, without opposition from any quarter. The property was a swamp when he went upon it. It was in reality unfit for habitation—no one attached value to it, nor thought of making use of it until within the last few years, when, by reason of conditions which no one anticipated would arise in a life time, it has suddenly attracted (as all the property of that character in the rear of New Orleans) the attention of parties speculating in tax titles, as affording extraordinary possibilities for future gain.

Cage while occupying the premises, built a hut upon it in which he had continuously lived and he also built additionally several small buildings. He ditched the place, inclosed it by a fence, and by carrying to it from day to day baskets of earth which he dumped into the swamp, made the place habitable. The defendant charges the plaintiff with being a squatter upon the property, a trespasser who has no rights, and is entitled to no consideration whatever. That may have been his status originally, but one which worked no injury to the actual owner of the property. By and through actual possession he had long since lost the character of a trespasser, and has acquired rights as a possessor, which he is entitled to protect through the judiciary.

He has in our opinion obtained ownership of the property which he is now occupying by the prescription of 30 years unless the running of prescription in his favor was interrupted before it was acquired. Defendant contends that prescription was interrupted by the ownership of the property by the state before prescription was acquired. It urges that no prescription could run in plaintiff's favor during the ownership of that property by the state, as it is universally recognized that no prescription can be pleaded against it. The plaintiff claims that if the state, through the tax proceedings which defendant sets up, obtained absolute ownership of the property, carrying with it the constructive possession which flows from ownership, it might be conceded that the state's ownership of the property could not

be divested through the prescription by adverse possession thereof. It is urged, however, that if the proceedings did not carry with them absolute ownership, but required something to be done thereafter, or possession to be taken after the tax sale in order to convey and complete ownership, then, until such subsequent proceedings should have been resorted to, or such subsequent possession obtained, prescription continued to run in favor of the actual possessor, and he could invoke prescription in aid of his occupancy.

That if the situation was such that the state had to eke out its claim to ownership by invoking the aid of an exemption from the effect of prescription defendant in possession had the right to resist that plea by all legal objections; that the rule that prescription does not run against the state does not mean that a claim to prescription cannot be set up by way of resistance to claims of ownership when advanced by the state; that the Quaker Realty Company, as a plaintiff out of possession, invoked herein in aid of its claim the state's exemption from the operation of prescription; that it could not urge estoppel under such circumstances. The question arises in this case whether the proceedings on which defendant relies and bases its right carried with them as result the interruption of prescription running in favor of the plaintiff arising from actual possession. We must say at the threshold that the forfeitures to the state to which defendant company refers do not enter in our opinion as factors in determining the result. The state abandoned any claim under those forfeitures, when she advanced her claims as a creditor against the alleged owner, and proceeded to a tax adjudication as against him. The state's rights must be made to rest upon the tax proceedings.

At the time of the proceedings taken by the state against the property adjudicated to it in 1883, in enforcement of delinquent state taxes and at the time of that adjudication, the plaintiff, Calhoun Cage, was not the owner of the same. He does not claim that he was then the owner. He had not then paid a dollar of taxes upon it, nor has he since done so. The actual owners of the property at that time, whoever they may have been, also paid no taxes upon it, evidently attaching no value to it. They abandoned it, leaving it to be itself responsible for its just proportion of taxes due to the state. The plaintiff does not deny the fact that after the adjudication to the state the property was by it offered for sale under Act 80 of 1888, a second time, and that it was a second time adjudicated to the state; that second adjudication had the effect of cutting off the rights of all persons who had been interested in the property, and placed the title of the state thereafter beyond future attack.

It became thereafter good and perfect against all parties. Section 1 of Act 80 of 1888.

Under that view of the situation, the judgment appealed from is correct, and it is hereby affirmed.

(126 La.)

No. 18,067.

MADERE et al. v. ALEXANDRE.

(Supreme Court of Louisiana. Feb. 14, 1910.

On the Merits, May 23, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 224*)—SUPREME COURT—JURISDICTIONAL AMOUNT.

A joint demand by plaintiffs for \$5,000 damages for public defamation, consisting of accusations of arson made falsely and maliciously, cannot be considered as fictitious or inflated, for the purpose of vesting jurisdiction in the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 617; Dec. Dig. § 224.*]

2. APPEAL AND ERROR (§ 337*)—DISMISSAL—TIME OF TAKING.

That the judgment appealed from was prematurely signed, and that the appeal was taken the day before the judgment should have been signed, present no grounds for the dismissal of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. § 337.*]

3. JUDGMENT (§ 282*)—RENDITION—ENTRY.

In the country parishes, a judgment rendered orally and noted on the minutes may be read and signed at any time within three days, or later.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 555; Dec. Dig. § 282.*]

(Additional Syllabus by Editorial Staff.)

4. LIBEL AND SLANDER (§ 77*)—JOINDER OF ACTIONS—SLANDER.

Two persons, jointly charged with the crime of arson, may join in a suit based on the slander.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 182; Dec. Dig. § 77.*]

Appeal from Twenty-Eighth Judicial District Court, Parish of St. John the Baptist; Prentice E. Edrington, Judge.

Action by Joseph Madere and Louis S. Vilemont against Charles Alexandre. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

James Wilkinson, for appellants. James Legendre, for appellee.

On Motion to Dismiss.

LAND, J. This is a suit to recover \$5,000 damages for public defamation.

The petition alleges that the plaintiffs are partners in a mercantile business carried on near Laplace, in the parish of St. John the Baptist; that defendant and his partners conducted a similar business in the immediate vicinity; that in August, 1909, defendant's storehouse was destroyed by fire; that

on sundry occasions the defendant publicly, falsely, and maliciously declared that the plaintiffs had set fire to his said storehouse; and that such unfounded accusations had damaged the plaintiffs jointly in their reputation and credit in the sum of \$5,000.

Defendant filed an exception of misjoinder of parties plaintiff, on the ground that each of them should have instituted a separate action. This exception was maintained, and the suit was dismissed. Plaintiffs appealed.

Defendant has moved to dismiss the appeal on several grounds which may be stated as follows:

(1) That the damages claimed were inflated and magnified in order to give the Supreme Court jurisdiction of the case, or, in other words, that it appears from the allegations of the petition that the damages alleged to have been suffered were less than \$2,000.

The entire sum claimed is the matter in dispute. *Armstrong v. Railroad Company*, 46 La. Ann. 1448, 16 South. 468. A charge of the crime of arson is well calculated to damage the reputation and credit of any person, and the quantum of damages in such cases is left to the sound discretion of the jury or of the court. Hence, there being no standard or measure of damages in such a case, we are not prepared to say that the demand of the plaintiffs is fictitious, or was inflated for the purpose of giving this court jurisdiction.

(2) That the judgment is illegal, because rendered and signed on the same day, in contravention of article 117 of the Constitution of 1898.

As we read the minutes, the judgment was rendered on December 20, 1909, and was read and signed on December 30, 1909. In the country parishes, judgments are often rendered orally and briefly noted on the minutes, and afterwards drafted and read and signed in open court.

We are not prepared to say that a judgment rendered, read, and signed in open court on the same day is an absolute nullity. Article 117 of the Constitution of 1898 was provisional, and it has since been provided by law that judgments rendered by district courts "shall be signed within three days from the date of the rendition of such judgments." Act 40 of 1904, p. 76. The purpose of the lawmaker was to expedite the signing of judgments.

It has been held that the premature signing of a judgment is not assignable as error. *Opothlarholer v. Gardiner*, 15 La. 515, citing *Weathersby v. Hughes*, 7 Mart. (N. S.) 233. A judgment signed prematurely, pending a motion for a new trial, is to be considered as suspended. *Succession of Gilmore*, 12 La. Ann. 563.

It has been held in a number of cases that an appeal taken after rendition, but before signature, of judgment, is not premature, where the judgment is signed at the same term. *McGregor v. Barker*, 12 La. Ann.

289; *Vicksburg, S. & T. R. Co. v. Hamilton*, 15 La. Ann. 521; *Green v. Huey*, 23 La. Ann. 705; *Mouton v. Broussard*, 25 La. Ann. 497; *State v. Balize*, 38 La. Ann. 543.

Hence, if the judgment in question was prematurely signed, its effect was suspended until the next day, and the appeal was not premature because taken one day before the judgment became effective.

Irregularities of this kind are cured by article 898 of the Code of Practice.

It is therefore ordered that the motion to dismiss be overruled.

On the Merits.

PROVOSTY, J. This suit was dismissed in the lower court on exception of misjoinder of parties plaintiff.

The action is for slander. The two plaintiffs demand \$5,000 damages, which they say is due jointly, \$2,500 to each. They allege that they and the commercial firm of which the defendant is a member had rival stores, five acres from each other, at Laplace, La.; that the store of defendant's firm caught fire and burnt down; that during the fire the defendant said in a loud voice in the presence of bystanders, while pointing with his hand to the store of the petitioners, that the store was set on fire by storekeepers, white men, two or three (meaning the petitioners); that on the next day, in the presence of several persons, defendant repeated this statement, and said he knew that something would happen the moment they started a rival wagon; that at another time the defendant, in the presence of several persons, said that he believed the petitioners had set his store on fire.

The question is whether two persons thus joined in one slander may join in a suit based on the slander. We think they can. A case directly in point is that of *Armstrong v. Vicksburg R. R. Co.*, 46 La. Ann. 1448, 16 South. 468, where several persons, who had been jointly prosecuted and acquitted, were allowed to join in a suit in damages for malicious prosecution. Another case directly in point is that of *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 South. 851, 50 L. R. A. 816, 78 Am. St. Rep. 390, where two persons, falsely charged with having jointly committed larceny, were allowed to join in one suit for damages for the tort. Also *La Groue v. City of New Orleans*, 114 La. 253, 38 South. 160, where wife and husband were allowed to join; she demanding damages for personal injury, and he demanding reimbursement of the expenses incurred by him in her medical treatment for the injury.

It is inconceivable how the defendant could be benefited by having to litigate in two suits, instead of in one, the matter set forth in the petition. No awkward complication, no confusion, no increased expense, no inconvenience, can possibly result from the joinder.

Judgment set aside, exception of misjoin-

der overruled, and case remanded to be proceeded with according to law. Defendant to pay costs of appeal.

(126 La.)

No. 18,068.

MADERE et al. v. ALEXANDRE.

(Supreme Court of Louisiana. Feb. 14, 1910.

On the Merits, May 23, 1910.)

Appeal from Twenty-Eighth Judicial District Court, Parish of St. John the Baptist; Prentice E. Edrington, Judge.

Action by Joseph Madere and Louis S. Vilemont against Edmond Alexandre. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

James Wilkinson, for appellants. James Legendre, for appellee.

LAND, J. For the reasons assigned in the opinion in the case of the same plaintiffs v. Charles Alexandre (No. 18,067, this day handed down) 52 South. 535, it is ordered that the motion to dismiss be overruled.

On the Merits.

PROVOSTY, J. For the reasons assigned in the opinion in the case of the same plaintiffs against Charles Alexandre (No. 18,067, this day handed down) 52 South. 535:

Judgment set aside, exceptions overruled, and case remanded to be proceeded with according to law. The defendant and appellee to pay costs of appeal.

(126 La.)

No. 17,800.

ALBERT HANSON LUMBER CO., Limited, v. BALDWIN LUMBER CO., Limited.

(Supreme Court of Louisiana. April 25, 1910. Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. EJECTMENT (§ 16*)—POSSESSORY ACTION—NATURE OF POSSESSION—"REAL AND ACTUAL POSSESSION."

Under the plain text of article 49 of the Code of Practice a plaintiff cannot maintain a possessory action unless he should have had the real and actual possession of the property at the instant the disturbance occurred, and mere civil or legal possession is not sufficient. There can be no "real and actual possession" of property, unless there be, in the commencement at least, a corporeal detention and use of the thing according to its nature and destination. As timbered swamp lands may be actually possessed by the construction of roads or canals, or by deadening, felling, or removing the trees, they are no exception to the general rule. In such a case, mere payment of taxes, tracing of boundary lines, marking of trees, and watching for trespassers do not constitute real and actual possession of the land and timber thereon.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 1, pp. 165-167; vol. 8, p. 7565.]

(Additional Syllabus by Editorial Staff.)

2. EJECTMENT (§ 16*)—"NATURAL POSSESSION."

"Natural possession" is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a

movable possession. Civ. Code, art. 3428. Such a possession in its nature must be visible, open, and public.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 5, p. 4670.]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles L. Wise, Judge ad hoc.

Action by the Albert Hanson Lumber Company, Limited, against the Baldwin Lumber Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Emmett Alpha and Hall, Monroe & Lemann, for appellant. Borah & Himel and Paul Kramer, for appellee.

LAND, J. This is a possessory action, coupled with an injunction, instituted against the defendant, admittedly in actual possession of the 80 acres of timber land in controversy.

Plaintiff alleges that it had been continuously in the real and actual possession as owner of the tract in dispute for more than a year last preceding the institution of the suit, and that the defendant without color of right had disturbed plaintiff's possession by entering on said tract and deadening timber thereon for the purpose of removing the same.

The petition alleges that said tract is cypress swamp land, not susceptible of actual occupancy for residence, nor susceptible of cultivation. The specific acts of possession alleged in the petition are as follows:

That plaintiff purchased said tract of land in 1899, and took actual possession thereof by having the same surveyed, and the timber all counted and estimated, and the lines plainly marked around said tract, "which is contiguous to and forms a part of the contiguous and compact tract of land, known as 'Garden City,' on which is situated petitioner's sawmill, and residences occupied by the managers and employees of petitioner's sawmill business," and that petitioner had promptly paid all taxes upon said land, and the same has been notoriously possessed by petitioner as its owner since the aforesaid date of petitioner's purchase thereof from the estate of Robert Gibbs, deceased.

The defendant avers actual possession as owner of all the timber rights on said tract of land under deed of purchase duly recorded in July, 1907, and that his authors claimed under a chain of title originating in a sale made by Robert Gibbs, the common author, during his lifetime.

Defendant further avers that said tract formed a part of the Bertha plantation, and that respondent and his authors have been in actual, open, notorious, corporeal, and peaceable possession of said tract as a portion of said plantation for more than 50

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

years. Defendant further avers continued acts of ownership, such as payment of taxes, surveys, plats, and the taking of wood from the tract in controversy.

The case was tried, and there was judgment in favor of the defendant, rejecting and dismissing plaintiff's demand, and maintaining the defendant in its possession of the tract in dispute, and dissolving the injunction, all at plaintiff's cost.

The plaintiff has appealed, and the only question before us is the issue of *actual* possession.

In order to maintain a possessory action, the law requires that the possessor "should have had the real and actual possession of the property at the instant the disturbance occurred; a mere civil or legal possession is not sufficient." Code Prac. art. 49. Also that the possessor should have had that possession quietly and without interruption as owner of the property, or of some real right therein, for more than a year previous to his being disturbed, unless evicted by force or fraud.

Plaintiff alleges actual possession at the time of the disturbance, and for more than a year previous thereto, of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, section 20, township 15 S., range 10 E., in the parish of St. Mary.

Plaintiff purchased this tract, and another 80-acre tract in section 34, township 14, range 10, in July, 1899, at a probate sale in the vacant succession of Robert Gibbs.

In June, 1849, Robert Gibbs sold the north fractional half of the north fractional half of the same section 20, and other lands, to Adelard Carlin. The deed was indorsed:

"Recorded June 29, 1849."

In inscribing this deed in the conveyance book, the recorder wrote:

"The north fractional half and the southwest quarter of the northeast fractional quarter of section twenty."

In 1873, the real estate and other property of Adelard Carlin, deceased, was partitioned among his heirs, and the defendant claims title through mesne conveyances from the heir to whom, it is alleged, the particular tract of land now in dispute was allotted.

As the question of legal title cannot be considered in this action, it suffices to say that the defendant went into actual possession under color of title and claim of right.

The first witness for the plaintiff, Mr. Gardner, went on and over the tract a number of times, traced the lines of previous surveys, and watched that and other tracts in the interest of the plaintiff. This witness stated that the plaintiff company never did any work in that swamp, never cut or deadened any trees, nor made any official survey to his knowledge.

The next witness, Mr. Kemper, a surveyor, was never sent out to survey the tract in dispute, but in 1906 and 1907 ran lines and made surveys in the immediate vicinity.

When asked as to facts of possession in plaintiff, the witness replied:

"Unless the indication of this land on their map is considered, I know of no positive facts."

And to acts of possession by Gardner, Mr. Kemper said:

"At the time I ran the lines around the Kramer plantation, for the purpose of cutting out the lands that did not belong to the Hanson Lumber Company, Mr. Gardner was with me, and, had he considered that this 80 acres did not belong to the Hanson Lumber Company, would have had the lines run around it also. I do not recall that he actually stated that was the Albert Hanson Lumber Company's land. I believe that we both supposed that it was. If that can be considered as showing possession, why they possessed it."

Gardner, being recalled, testified that on his first visit to the land he cut the letter H on each of the four corners of the tract, as a sign that the land belonged to the Hanson Lumber Company. Mr. Kemper testified that he believes he saw one of these letters. Defendant's employes, who traced the lines and superintended the deadening of the timber on the tract in dispute, testified that they saw no such letters at the corners of the tract.

Plaintiff did not offer in evidence his alleged title deeds to the Garden City tract, and therefore there is nothing in the record to warrant the application of the rule that possession of a part is possession of the whole according to the title of the possessor. Civ. Code, arts. 3437, 3498.

On the other hand, the defendant company, owner of the contiguous lands, on which it was operating a sawmill, took actual possession of the tract in dispute, under color of title, more than a month before the institution of this suit. As defendant was admittedly in actual possession, and the plaintiff was not, the alleged misdescriptions in defendant's chain of title are foreign to the present inquiry.

Plaintiff's proposition, that a title, assessment for taxation, and the going of an agent around the lines and cutting the letter H on the corner trees, constitute actual possession of wild lands sufficient to maintain a possessory action, is clearly untenable. In the case of *South La. Land Co. v. Riggs Cypress Co.*, 119 La. 193, 43 South. 1003, cited by the plaintiff, the court indicates that actual possession of cypress lands may be taken by the cutting of trees for the purposes of removal, and by preparations carried on for the pulling of timber from season to season. In *Frederick et al. v. Goodbee et al.*, 120 La. 783, 45 South. 606, also cited by the plaintiff, it was held that a survey of the land, and the cutting and removal of bark and wood therefrom at long intervals, did not prove actual and continued possession as owners sufficient to serve as a basis of the prescription of ten years. In *Chamberlain v. Abadie*, 48 La. Ann. 590, 19 South. 574, also cited by plaintiff, the court held that the payment

of taxes is not in itself evidence of corporeal possession; that for the purposes of prescription there must be, at the least in its commencement, a corporeal possession, by the use of immovable property according to its nature, such as grazing of cattle on swamp lands subject to overflow, accompanied by the regular payment of taxes, and in case of timbered lands by their inclosure, cutting trees, building roads, or by other similar acts.

Actual possession is the real or corporeal detention of property. Civ. Code, arts. 3434, 3442. The possessor must hold the thing "in fact." Civ. Code, art. 3487. Natural possession is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a moveable in possession. Civ. Code, art. 3428. Such a possession in its nature must be visible, open, and public.

It goes without saying that the plaintiff never had this kind of possession of the property in dispute, and, whatever his right of civil possession may be, it is excluded from consideration by the text of the Code of Practice.

Judgment affirmed.

(126 La.)

No. 18,153.

STATE v. HOWARD.

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by Editorial Staff.)

INFANTS (§ 18*) — COURTS — JURISDICTION — JUVENILE DELINQUENTS — STATUTES.

Bill of Rights, art. 9, declares that in all criminal proceedings the accused shall have the right to trial by jury, except in cases where the penalty is not necessarily imprisonment at hard labor or death, Act 1908, No. 83, creating a juvenile court, and providing for trial therein of offenses committed by juvenile delinquents under 17 years of age, did not authorize the trial by such court of an indictment of a child under 17 for murder; the trial of such indictment being exclusively within the jurisdiction of the district court.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. § 18.*]

Appeal from Twentieth Judicial District Court, Parish of Lafourche; W. P. Martin, Judge.

James Howard was indicted for murder, and from an order referring the case to the juvenile court, the State appeals. Reversed.

Walter Gulon, Atty. Gen., and H. M. Bourg, Dist. Atty. (R. G. Pleasant, of counsel), for the State. Taylor Beattie, for appellee.

Statement of the Case.

NICHOLLS, J. Defendant was indicted by the grand jury for the parish of Lafourche for murder. When he was arraigned before the district court he pleaded "not guilty," but

subsequently withdrew his plea. The indictment against him still stands in that court unacted upon. When the case was attempted to be fixed for trial in that court in session as for cases generally, his counsel objected to this being done. The objection was sustained, and the case was referred to the "juvenile court," to be therein tried under Act No. 83 of 1908, p. 96.

The state has appealed, calling attention to State v. Ragan, 125 La. 121. 51 South. 89.

Opinion.

The accused party in this case is a boy under 17 years of age. No claim has been made that he should not be made to answer for the crime of murder under an "indictment" against him, returned by a grand jury. In order that he should be called to answer for that crime, it was necessary, under article 9 of the Bill of Rights, that the accusation against him should emanate from that body in the form of a presentment or indictment. The same article of the Bill of Rights declares that, "in all criminal prosecutions, the accused shall have the right to a public speedy trial by an impartial jury," and provides that "cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury or by a jury less than twelve."

The present case is one in which the penalty is necessarily imprisonment at hard labor or death, and the accused is entitled to demand a trial by jury of not less than 12, and that right the accused is not permitted to waive. State v. Thompson, 104 La. 168, 28 South. 882.

If the Legislature, in enacting Act No. 83 referred to, had contemplated that children less than 17 years of age, charged with the crime of murder by indictment, should be tried before the juvenile court, the statute would certainly have provided for such trials therein; but the act fails to do so. Cases in which children are charged with the commission of a crime carrying with it the death penalty are nowhere referred to.

The seventeenth section of the statute declares, in relation to the effect of the enactment of the law, that it only repealed such laws or parts of laws as were in conflict with the statute. The General Assembly certainly did not propose, through the enactment of the statute in question, that any article of the Constitution should either presently or prospectively be affected or repealed by it. We cannot reasonably so construe the act as to result in leaving a child under 17 years of age free to commit murder under no greater penalty than being subjected to reformatory discipline during the period of his minority.

The vote of the people ratifying the act did not extend the terms of the statute. We have not the slightest idea that the General Assembly intended that charges for murder

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as having been committed by children under 17 years of age should fall under or be governed by the provisions of the act in question.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby annulled, avoided, and reversed, and it is ordered, adjudged, and decreed that the case be remanded to the district court and reinstated on its docket, to be further proceeded with in the district court according to law.

(128 La.)

No. 18,023.

KELLY v. PETERS.

(Supreme Court of Louisiana, May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

SHIPPING (§ 84*)—INJURY TO EMPLOYÉ WHILE UNLOADING VESSEL—NEGLIGENCE OF DEFENDANT—EVIDENCE.

Two different sets of workmen were engaged in removing a lot of staves from a barge landed at the foot of Marengo street in the city of New Orleans, to the wharf opposite that landing, and in taking the logs from the wharf to the cars waiting for them. One set were in the employ of the Leyland Company; the other in the employ of the defendant. The two sets of workmen, though they co-operated with each other to a certain extent, had separate and distinct duties, and were under different management and control. The plaintiff, an employé of the Leyland Company, engaged on the wharf in receiving the logs when they should have been hoisted over to the wharf through the instrumentality of a derrick, was injured by the careless and negligent handling of the derrick in allowing the boom attached to it to swing one of the logs over and on to the spot where the employés of the Leyland Line were at work receiving and carrying away the logs as received. The man in charge of the operation of the derrick was an employé of the defendant who did not act under the orders of the foreman of the "receiving gang" or any employé of the Leyland Company. The defendant was the party responsible for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 349-351; Dec. Dig. § 84.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Somerville, Judge.

Action by George Kelly against Henry Peters. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

Theodore Peters and Robert H. Marr, for appellant. Samuel Sansum, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff prayed for judgment against defendant for the sum of \$10,000, on the ground that on November 20, 1908, the defendant had possession of a certain derrick and barge, upon which a number of large and heavy logs had been laden for the Frederick Leyland Company; and, at the direction and by the order of defendant, the defendant's servants and employés, duly appointed by defendant, and acting within

the scope of their employment for defendant, were unloading said logs by means of said derrick; and the said Frederick Leyland Company directed plaintiff and a number of other laborers to go to the place where said logs were being unloaded, and receive said logs, and roll said logs back on the wharf; and about half past 8 o'clock in the morning of the day and year first aforesaid, while plaintiff and said other laborers were endeavoring to roll back on the wharf a certain log which was then on a dolly, the defendant's said servants, agents, and employés, acting within the scope of their employment for defendant, negligently and carelessly allowed and permitted a certain log, which defendant's said servants, agents, and employés were attempting to put on said wharf by means of said derrick, to swing against and strike with great force and violence plaintiff's right hand, while plaintiff's right hand was resting on the log, which plaintiff and said other laborers were endeavoring to roll back on said wharf, and smashed plaintiff's right hand and cut off the second finger of plaintiff's right hand that it had to be amputated, and broke, crushed, and bruised the third finger of plaintiff's right hand; that all said injuries were caused by the negligence and carelessness of defendant's said servants, agents, and employés, acting within the scope of their employment for defendant, in negligently and carelessly allowing and permitting the log which they were attempting to put on the wharf to swing against and strike plaintiff's right hand, and in negligently and carelessly attempting to put into the very place where plaintiff and said laborers were working the log which injured plaintiff's hand.

Plaintiff avers that he did not know that defendant's said servants, agents, and employés were going to place a log into the very place that plaintiff was working, and that he did not know of the presence of the log that struck his hand until the log struck and injured his hand. Plaintiff also avers that the injury to his said hand, and the cutting off of his said fingers, has caused and is still causing him great pain and suffering, and that all his said injuries are permanent and greatly reduces his earning capacity.

In view of the premises, plaintiff prayed that defendant be cited to appear and answer the matters and things aforesaid, and, after due proceedings shall be had according to law, plaintiff have judgment in his favor and against defendant for the sum of \$10,000, with interest at the rate of 5 per cent. per annum from date of judgment, and all costs of suit, and plaintiff prays for all general relief.

Defendant filed a general denial, and prayed that the plaintiff's suit be dismissed.

The case was tried before the district judge

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

who rendered a judgment in favor of the plaintiff against the defendant for \$1,000, with legal interest from date of judgment. Defendant appealed.

Plaintiff answered the appeal, praying that the judgment be increased to \$5,000.

On the morning of the 20th of November, 1908, while a number of logs were in process of being unloaded from a barge at the foot of Marengo street, in the city of New Orleans, for the purpose (after being received at the wharf) of being removed therefrom by cars, George Kelly, a laborer, in the employ of the Leyland Company was severely injured. The fingers on his right hand were mashed by one of the logs as it was being hoisted from the barge to the wharf, through the instrumentality of a derrick belonging to and controlled by an employé of the defendant, Henry Peters.

There were two distinct sets of men engaged in this work; one set for the purpose of removing the logs from the barge up to the wharf, the other set for the purpose of receiving the logs after they should have been so raised, and placing them on dollies or trucks, and rolling them back upon them to the cars.

The logs, after being raised to the wharf, were swung into the desired position upon the wharf by means of a boom connected with the derrick. The machinery employed to work the derrick was controlled as to its operations by a person known as the "derrick man," who gave orders to the engineer when to start and stop, and who also controlled the movement of the boom. The derrick man in this case was an employé of the defendant, as was also the engineer. The logs were raised by means of a chain attached to them, and the attaching of this chain to the logs was intrusted to two men upon the barge in the employ of the Leyland Company. It will be seen that part of the work for raising the logs to the wharf was done by employes of the Leyland Company, and part by employes of the defendant, while part of the workmen on the wharf were employes of the Leyland Company, and part were employes of the defendant. Both sets of employes, however, had separate and distinct duties and were under different managements, though each had to be guided to some extent by the action of the other; for instance, the men upon the barge gave notice to the derrick man when they had finished chaining a log so that he might give proper orders to the engineer under him, when and how the derrick should be moved and so the foreman of the receiving gang on the wharf (employed by the Leyland Company) would give notice to the derrick man (employed by defendant) when they were prepared to receive another log to be placed on the dolly.

The mere notification by the Leyland Company's men upon the barge to the derrick man that a log had been chained by them and was ready to be hoisted did not warrant him in

at once thereupon giving his order to his engineer to start the machinery.

Before giving such an order, it was his duty to make certain that the situation on the wharf was such as to justify him in view of the danger to the men working at the dolly in having a log hoisted and swung across to the dolly at that time. This duty, the derrick man did not properly perform on this particular morning. The engine was by his order prematurely and negligently started, and a log hoisted and swung across to the dolly before the men who were at work at the time at the dolly had succeeded in removing the one which had just before been hoisted and swung across to them. The result was that the log so prematurely swung across struck the one that was at the dolly upon which the men were at work, mashing, and crushing the fingers of the plaintiff who had his hand upon it while at work.

The fact that the derrick man was in the employ of the defendant, Henry Peters, as was also the engineer, is shown beyond question by the evidence. The fact that neither the derrick man nor the engineer were authorized to receive orders from any one in the employ of the Leyland Company was also established.

Phillip Noeb, employed himself by the Leyland Company, and in charge as foreman of the employes of that company engaged in receiving the logs swung over to the dolly, being on the stand as a witness for the defendant, being questioned as to the manner in which the logs were handled, testified:

"They were taken from the derrick, you know, to be put over on the walk for the railroad. They were hooked on with a chain sling, and run up from the derrick to the height of the walk, and then we (the receiving gang) had to take them off the derrick. There was a dolly (owned by Thriffly & Co.) with a rope attached to the dolly, and a half hitch on the log in order to steer it and take it out away from the derrick. As the derrick landed it on the dolly, we would take it from the derrick over to the Illinois Central Landing so that the logs could be put on the cars when they came along. * * * When the log came over from the derrick it was swinging in, and he (the plaintiff) got his hand caught in some way."

Being asked on cross-examination:

"Q. Who was the man that directed that log to be swung in there?"

He answered:

"I don't know who it was. I am positive I don't know."

Being asked:

"Did Mr. Peters have a man there in charge of that instrument (the derrick), that they had to use for unloading the logs?"

He replied:

"Yes."

"Q. Was he the man that directed the log to be swung in—the log that struck the man?"

"A. No, sir."

"Q. Well, who was the man that did that?"

"A. One of the men of my men on the barge;

he was the man who gave the order to swing the log in.

"Q. Was the log lowered by your orders?

"A. No, sir.

"Q. Was there nobody there to represent Mr. Peters?

"A. Yes, sir; there was.

"Q. Well, who was that man?

"A. That was the man we called the 'derrick man' in our line of work—he was the man that was there.

"Q. What is his name—wasn't he known by the name of Vic?

"A. Well, I know him by hearing them say it; but whether that is his name or not I do not know.

"Q. Was he not present at that time?

"A. Yes, sir.

"Q. He was an employé of Mr. Peters?

"A. Yes, sir.

"Q. You know that to be a fact, do you not?

"A. Yes, sir.

"Q. Isn't he the man that gives the order to swing in the logs?

"A. No, sir; he is not.

"Q. For what purpose is he there? What is he doing there?

"A. He is there for the purpose of taking orders from me to give me a log when I want it.

"Q. Well, did you give him any orders?

"A. No, sir; I did not, but one of the five men of the Leyland Line who was on the barge, he did. I did not give any orders to any one on the barge at the time.

"Q. What is this employé of Mr. Peters to do?

"A. He is there to act as derrick man.

"Q. What are his duties as derrick man?

"A. To see that the logs come from the derrick and are placed on those dollies.

"Q. Safely?

"A. Yes, sir.

"Q. Isn't he to look out and see that it (the log) does not land on the men who are working there?

"A. Yes, sir.

"Q. What was this man to do? He was in charge of the derrick, wasn't he?

"A. Yes, sir; he is to take orders from the foreman.

"Q. Is that all he does just to take orders?

"A. Yes.

"Q. Then there is nobody to see that those logs are safely landed on the dollies?

"A. According to my instructions.

"Q. This man was there, and that was his duty, was it not?

"A. Yes, sir."

Henry Peters, the defendant, testified that he was the owner of the derrick barge; that he was present at the time of the accident; that the derrick was in charge of "Vic" on that morning; witness did not know his full name. Witness' son, Eugene, was the foreman for him at the time; he was present when the accident happened. This man Vic at the time was standing on the cap of the wharf.

"Q. Was he at the time giving orders to the man who was running the winch which witness was operating?

"A. Well, the way that was—I will tell you—

"Q. I just asked you if he was ordering this man telling him or instructing him how to run the winch and how to lower the logs?

"A. He orders our engineer to go ahead when he gets orders to put the log on.

"Q. Was this man Vic in your employ at that time?

"A. Yes, sir; Vic is boss of the derrick. Vic was standing at that particular time on the cap of the wharf. From where he was standing

he was in a position to see the men who were at work trying to roll those logs off.

"Q. What did his duty consist of? What was his work out there?

"A. He was to take orders from the longshoremens on the barge hooking the logs. When they hook on a log, then they tell him to go ahead, and the log comes up and comes over to the wharf. The men who were on the barge could not see the men working on the wharf for the simple reason that the barge is about 15 feet below the wharf. Vic hasn't anything at all to do with the men who are working on the wharf. The men that hook the logs on don't have anything to do with our derrick. The man on the cap of the wharf is the man giving the signals to our engineer, because the longshoremens don't give him any orders. The longshoremens hook the logs on, and our man Vic is to look out for our derrick, and the engineer takes orders from Vic. The longshoremens do exactly what they want, and they won't take any order from us or from any of our men at all.

"Q. Does not your man Vic give orders to the winchmen to lower the logs?

"A. When he gets the order from the longshoremens.

"Q. But he gives the order to the engineer.

"A. Yes, sir, to the engineer.

"Q. Didn't he give the order to the winchman by reason of which the log was swung in and this man was hurt?

"A. Well, the man on the deck they are the ones that told him to go ahead and they swung it on.

"Q. Then Vic gave the order to the engineer to swing it after he got orders from the longshoremens?

"A. Yes, sir.

"Q. That the way it was?

"A. Yes, sir."

Vic Zichirichi was called as a witness for the defendant (he is the party referred to as the derrick man Vic); he testified that he was in the employ of the defendant, Peters; that he was handling the derrick at the time of the accident; that he was standing on the wharf at that time; that Engineer Peters, son of the defendant, was his foreman at that work; it was he who gave him his orders; he gave witness the order to lower the log down, and so the log was lowered the way he said; he was the one that gave the order to him to tell the engineer to lower it.

We do not think we should go further into the evidence than to make it clear who was in charge of the derrick at the time of the accident. We are satisfied that it was in charge of an employé of the defendant, and that he was not under the orders of any one in the employ of the Leyland Line. We are satisfied that under the evidence the judgment of the district court is correct as to the liability of the defendant for the injury which plaintiff received. Plaintiff prays that the judgment appealed from should be increased as to amount.

We are of the opinion that the amount of the judgment is too small, and that the judgment in that respect should be amended.

It is therefore ordered, adjudged, and decreed that the judgment be amended, and the amount of the same be, and the same is, increased to the sum of \$2,500, and, as so

amended, the judgment appealed from is hereby affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 17,625.

SMITH v. D. A. SELF & CO., Limited, et al.
(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by the Court.)

RECEIVERS (§ 145*)—SALE OF INSOLVENT'S PROPERTY—CLAIM OF PRIVILEGE.

Where all the property of an insolvent was sold in lump by a receiver under order of court, a claim of privilege on open accounts included in the sale cannot be enforced, where there has been no separate appraisal of the property.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 145.*]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas M. Burns, Judge.

Action by Hardie H. Smith against D. A. Self & Co., Limited. The New Orleans Acid & Fertilizer Company appealed from the judgment homologating the final account of the receiver. Affirmed.

Prentiss B. Carter, for appellant. Gordon W. Goodbee and Ott, Johnson & Ott, for appellee. Edward H. Richard, for plaintiff.

LAND, J. The opponent has appealed from a judgment homologating the final account of the receiver, on which the claim of the opponent for \$1,357 appears as an ordinary debt.

In its opposition the appellant prayed to be recognized as a privileged creditor, on the ground that the receiver had come into possession of notes and accounts representing the proceeds of fertilizers sold by Self & Co. as the agent of the opponent.

It appears that after the appointment of the receiver the opponent ruled him to show cause why he should not be ordered to turn over the notes and accounts representing the proceeds of the consignment of fertilizers previously made to Self & Co. On the trial of the rule it was admitted that no fertilizers and no notes had come into the hands of the receiver; but there were on the books of Self & Co. open accounts representing sales of fertilizers. The judge held that the opponent was a creditor of Self & Co., and that its remedy was by opposition to the final account of the receiver. No appeal was taken by the opponent from the judgment dismissing the rule.

Subsequently the receiver obtained an order of court for the sale in lump of all the property, including rights and credits, of the insolvent. No opposition was made to the granting or execution of the order, and all the assets were sold by the receiver en

bloc for the price of \$2,000. The opponent made no opposition to the sale, and made no application for the separate appraisal and sale of the open accounts in question. As to such open accounts, whatever their amount or value may have been, it is certain that the proceeds of their sale cannot be identified. The result is that, whether opponent's claim of privilege be considered as arising from the ownership of said accounts or from sales made to the insolvent, it is impossible to recognize and enforce the same against the proceeds of the receiver's sale.

Judgment affirmed.

(126 La.)

No. 17,871.

JACOBS et al. v. JACOBS et al.
(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. PARTITION (§ 77*)—SALE OF MINORS' LAND—FAMILY MEETING.

In a partition suit, in which some of the defendants are minors, the obligation of convening a family meeting to advise with regard to the terms of the sale rests upon those by whom the minors are represented, and, in default of action by them, the court may order the sale to be made for cash.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 217, 218; Dec. Dig. § 77.*]

2. PARTITION (§ 77*)—INDIVISIBILITY OF PROPERTY—DETERMINATION.

The indivisibility in kind of property sought to be partitioned may be made to appear by a comparison of the inventory thereof with the number of lots into which the property would have to be divided.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 219-223; Dec. Dig. § 77.*]

3. PARTITION (§ 114*)—COSTS.

Whilst the cost of the partition itself must be borne by the mass, the cost of obtaining a judgment ordering the partition, against a defendant who resists and denies the right thereto, falls upon the party cast.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by A. C. Jacobs and others against A. G. Jacobs and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Buck, Walshe & Buck, for appellants. Ross E. Breazeale, for appellees.

Statement of the Case.

MONROE, J. The two plaintiffs, Alexander C. Jacobs and Mary Jacobs, are owners in indivision with eleven other persons, who are made defendants, of certain improved real estate in New Orleans; the interest of each plaintiff being $\frac{3}{64}$, that of one of the defendants $\frac{1}{4}$, of six others each $\frac{3}{32}$ and of the four others (minors) each $\frac{3}{128}$. The property consists of lots, with buildings on

them, one on Delechaise street, two on Dryades street, three on Magazine street, and one on Carondelet street. Plaintiffs allege that Charles W. Jacobs has been in possession of the property since February, 1904, as agent of the coheirs (and co-owners), and that he has rendered no account of his gestion, and they pray that he and the others be cited, that he be ordered to account, and that there be judgment decreeing a partition by licitation.

It is admitted that all of the parties are nonresidents of the state, and that they were put in possession of the property sought to be partitioned, as the heirs of Thomas B. Jacobs, by judgment of the civil district court of date February 28, 1904. As a result of exceptions filed by defendants, the demand against Charles W. Jacobs for an accounting was eliminated. The answer of the defendants sets up an alleged agreement between the owners then of age (and concurrence by those of the minors who afterwards attained majority) to the effect that the property should be held in indivision until the youngest minor should reach the age of 21 years, and it alleges that plaintiffs cannot force the partition before the time agreed on, which has not yet arrived. It appears from the evidence adduced on the trial that Thomas B. Jacobs died intestate in November, 1900, leaving as his heirs his mother, two brothers, four sisters, three nephews, and three nieces, several of the latter being minors, and also leaving an estate, consisting in part of the immovable property hereinabove mentioned. His brother, C. W. Jacobs, was appointed administrator, and in December, 1903, was appointed the agent and attorney in fact of the other (major) heirs, by written instruments conferring upon him full authority to represent and act for his principals in all matters relating to the estate, and that was followed, in February, 1905, by a judgment putting the heirs in possession. Several of the major heirs, other than plaintiffs, testify that there was a verbal agreement among them (the major heirs) to the effect that the property inherited by them should be held in indivision until the youngest of the minors should attain majority, and that C. W. Jacobs should administer; but plaintiffs deny that it was so agreed, and we do not find, as to them,

that it is established, there having been, evidently, a misunderstanding in the matter. There was judgment in the district court decreeing the litigants to be the owners in indivision of the property described in the petition, ordering a partition thereof by licitation, directing the sale to be made by an auctioneer, who is named, and referring the parties to a notary for the completion of the partition. Defendants have appealed.

Opinion.

It is argued on behalf of defendants that the agreement set up in the answer was proved, and should be sustained; but, as we have stated, we do not think, as to plaintiffs, that it was proved.

It is said that a family meeting should have been convened to fix the terms of the sale as to the interests of the minors; but the minors are defendants, and the obligation to convene a family meeting for the purpose stated devolved upon those by whom they are represented, in default of whose action in the premises the court was authorized to order the sale to be made for cash. *Succession of Becnel*, 117 La. 749, 42 South. 256.

It is said that the record contains no evidence that the property is indivisible in kind, and hence that the decree ordering the partition by licitation was unauthorized; but the record contains an inventory which shows that the property consists of the several lots of ground which have been mentioned, with the buildings on them, and we do not think anything more is necessary to authorize the conclusion that it cannot advantageously be divided into 128 parts, which would be necessary for a partition in kind. *Kohn v. Marsh*, 3 Rob. 51; *Florange v. Hills*, 11 La. Ann. 388; *Cameron v. Lane*, 36 La. Ann. 724 (concurring opinion).

It is said that the trial court erred in condemning the defendants to pay costs; but, whilst the costs of the partition itself are to be borne by the mass, the cost of obtaining a judgment ordering the partition, against a defendant who resists and denies the right, falls upon the party cast.

Judgment affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 18,076.

ANSLEY v. STUART.

(Supreme Court of Louisiana. May 9, 1910.
On Application for Rehearing,
June 6, 1910.)

*(Syllabus by Editorial Staff.)***1. APPEAL AND ERROR (§ 150*)—PERSONS ENTITLED TO APPEAL—PERSONS INTERESTED.**

After the amount tendered to redeem a pledge in an action for that purpose was deposited with the clerk of court to be paid to the pledgee, and the pledged property was surrendered to the owner, it was immaterial to the pledgor whether the deposit was paid to the proper person, so that he had no appealable interest in a rule directing its payment to certain persons, on the ground that they were not shown to be proper parties to receive it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

2. COSTS (§ 260*)—ON APPEAL—FRIVOLOUS APPEAL.

In view of Code Prac. art. 890, providing that, if appellee neglect to answer the appeal within the time allowed, appellant may have the cause set for argument, appellee is not entitled to damages for a frivolous appeal, where he did not answer the appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1003; Dec. Dig. § 260.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by M. E. Ansley against C. D. Stuart. From a rule ordering money deposited with the clerk of court to be paid certain persons, W. J. Gex, the transferee of a judgment for plaintiff, appeals. Judgment affirmed.

See, also, 123 La. 330, 48 South. 953.

Lazarus, Michel & Lazarus and David Sessler, for appellant. Dinkelspiel, Hart & Davey and Girault Farrar, for appellee.

PROVOSTY, J. Plaintiff claimed to be owner of certain certificates of stock, which he alleged he had pledged to defendant, C. D. Stuart, to secure a debt of \$750. Plaintiff tendered this sum, and deposited same in the hands of the clerk of court, to be paid over to the defendant. Judgment was rendered in favor of plaintiff, ordering the certificates to be turned over to plaintiff, and enjoining defendant from assigning them, or making any other disposition of them, and ordering the \$750 to be paid over to the defendant, C. D. Stuart. An appeal was taken from this judgment to this court. Pending this appeal, the defendant Stuart died, and his widow and heirs were made parties. The judgment was affirmed. The plaintiff, Ansley, transferred his judgment to one W. J. Gex. Then the said widow and heirs of C. D. Stuart and one Frank P. Stuart took a rule upon the said subrogee, Gex, to show cause why the \$750 should not be paid over to them; the certificates having been surrendered. Gex appeared, in response to the rule, and made no objection to the payment,

except that he contended that certain costs should be first paid. The court made the rule absolute, and Gex has taken this appeal. In this court his contention is that the plaintiffs in rule did not make the proper proof of their case by showing that the widow and heirs were really such, and that Frank P. Stuart was entitled to a part of the fund.

From the moment Ansley, or his subrogee, Gex, had received the certificates in redemption of which the \$750 had been deposited, their connection with this money ceased entirely. The fund was, from that moment, in the hands of the clerk for the sole purpose of being paid to whosoever was entitled to receive it. Whether the plaintiffs in rule had, or not, proved their case, on the point of being entitled to the money, was from that moment a question with which the defendant in rule had absolutely nothing to do. The responsibility for paying the \$750 to the right persons lay with the clerk. The present appeal has therefore been taken by a party without interest, and therefore a proper case is presented, we think, for condemning the appellant to the usual 10 per cent. damages for frivolous appeal.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, at the cost of the appellant, W. J. Gex, and that the said appellant, W. J. Gex, pay to the appellees herein, Mrs. C. D. Stuart and the children of Charles D. Stuart and Frank P. Stuart, 10 per cent. on the \$750 involved in the present appeal.

On Application for Rehearing.

PER CURIAM. Our attention has been called to the fact that the appellees did not answer the appeal, and therefore have no standing to demand damages for a frivolous appeal. Code Prac. art. 890. The point is well taken. Otherwise we find no merit in the application for a rehearing.

It is therefore ordered that our decree herein be amended, by striking out the award of damages for a frivolous appeal, and, as thus amended, is reaffirmed, and that the application for a rehearing be refused.

(126 La.)

No. 17,674.

Succession of LANDERS et al.

(Supreme Court of Louisiana. April 25, 1910.
Rehearing Denied June 6, 1910.)

*(Syllabus by the Court.)***EXECUTORS AND ADMINISTRATORS (§§ 29, 464*)
— APPOINTMENT—ACCOUNTING—LIABILITY
OF DECEASED ADMINISTRATOR'S ADMINIS-
TRATRIX.**

Where a major heir applies, in the district court of a country parish, for the administration of the successions of his parents, obtains an order for the publication of his application and for the making of an inventory, causes the inventory to be made and filed, and, there be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing no opposition, receives letters of administration, issued by the clerk, after which, assuming the quality of administrator, he obtains an order for the sale of succession property, to pay debts, and collects money due the successions, his answer, to a demand for an account, that he has never been appointed administrator, is not well founded. And, where such administrator dies, pending an appeal from a judgment ordering him to file an account, and his widow, administering his succession as natural tutrix of their minor children, makes herself party to the appeal, the obligation to account will be transferred to her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1989; Dec. Dig. §§ 29, 464.*]

Appeal from Third District Court, Parish of Claiborne; B. P. Edwards, Judge.

Proceedings by heirs of E. and J. R. Landers to compel D. B. Landers to file an account as administrator, etc. From a judgment decreeing D. B. Landers to be the administrator and ordering him to file an account, he appeals. Pending appeal he died, and his widow, as such and as legal representative of his heirs, was substituted in his stead. Affirmed.

Richardson & Richardson, for appellant.
Wimberly & Reeves, for appellee.

Statement of the Case.

MONROE, J. This is a proceeding by three of the children, major heirs, of E. and J. R. Landers, to compel their brother, D. B. Landers, to file an account as administrator, to have him removed from office, and to obtain judgment against him for certain penalties for failure to deposit the funds of the succession in bank. His answer is that, though he took the oath and gave bond as administrator, he was never appointed and never acted as such; that the present assets of the succession consist of one horse and, say, 480 acres of land; that plaintiffs objected to the sale of the land; that he has been cultivating it and is willing to pay \$50 a year for its use; that he is a judgment creditor of the successions in the sum of \$640.54, with interest and attorney's fees; that he has paid a debt due by his late father, amounting to \$160.50, with interest and attorney's fees; that he has paid taxes on the property of the successions since the death of his father (in 1900 or 1901); that the property is not divisible in kind, and he desires that it be sold in order to effect a partition. Wherefore, he prays that the partition be ordered, the property sold, the amount due him allowed, and the balance distributed among the heirs.

It appears from the evidence that on April 4, 1905, defendant filed a petition alleging that his father had died some four years prior to that time; that his mother had died on February 25, 1905; that an administration of their estates was necessary; and praying that, after due advertisement and delays, he be appointed administrator, and that an in-

ventory be ordered. The order for the publication of the application and for the taking of the inventory is indorsed on the petition. On April 25th the clerk of the court, and ex officio notary, was commissioned to take the inventory. On May 1st defendant took the oath and gave bond as administrator, and an order was made by the clerk, reading as follows:

"State of Louisiana, Parish of Claiborne. Whereas, by an order of court in and for said parish and state, D. B. Landers has been appointed administrator of the estates and successions of E. Landers and J. R. Landers, deceased, and has taken the oath and given bond as the law directs: Therefore, he is hereby fully authorized and empowered to do and perform all the duties incumbent on him by law in said capacity. Given under my hand and the seal of office, May 1, 1905.

"[Signed] Drew Ferguson. C. D. C."

On the same day, in the capacity of administrator, defendant filed a petition alleging that it was necessary, in order to pay debts, to sell the property, movable and immovable, belonging to the successions, and an order to that effect was made. On May 25th the other heirs (present plaintiffs) filed a petition alleging that defendant had advertised the property for sale, and that they opposed the sale, because: (1) Said D. B. Landers had never been appointed administrator; (2) the pretended judgment in favor of "said D. B. Landers, in suit of 'Farmer's Union Co-operative Commercial Association v. E. Landers,' was, and is, an absolute nullity, for the reason that the judgment, pretended to be revived, had prescribed; and, further, that said pretended revival of said judgment was obtained by fraud and ill practice in giving the pretended acknowledgment of service a date three days prior to the real signing thereof, and there are ample assets to pay all just debts of said successions, without selling the property." The petition concludes with a prayer for an injunction, but none appears to have issued. The defendant had, however, accepted service of the petition before it was filed; and, thereafter, he appears to have taken no further steps looking to the sale of the property. In fact, nothing more was done in the successions until after April 6, 1906, when the opponents, by their counsel, appear to have moved to dismiss their opposition, though the motion, itself, is not in the record. On May 25, 1906, this proceeding was instituted. It was admitted on the trial that \$600, collected by defendant for account of the successions, had not been deposited in bank, and the records showing the judgments referred to in defendant's answer were excluded as irrelevant. There was judgment decreeing defendant to be the administrator and ordering him to file an account, on or before May 3, 1906, and to pay costs, and dismissing the rule, in other respects, as in case of nonsuit. Defendant alone has appealed. Since the appeal was taken, defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs, 1907 to date, & Reporter Indexes

ant has died, and his widow, as such, and as the legal representative of his heirs, has been made party defendant in his stead.

Opinion.

The application for administration and the order for the publication of the same were regular, and we find no defect or irregularity in the order of appointment. It was made by the clerk who (there being no opposition) was authorized to that effect, after a delay within which it will be presumed (there being no evidence to the contrary) that the proper publication was made. The oath and bond, also, are regular, and the defendant, thereafter, assuming the quality of administrator, prayed for, and obtained, an order for the sale of the property and acted as administrator in collecting funds due the successions.

The allegation, contained in the opposition which the plaintiffs filed, to the effect that D. B. Landers was not the administrator, seems to have been without foundation, so far as we can discover, and the opposition was, subsequently, dismissed by the opponents, themselves. Under the circumstances, we can see no reason why it should not now be held that the original defendant herein acquired the status and incurred the liability of administrator of the successions. As he is no longer living, the obligation imposed by the judgment appealed from must be transferred to his legal representatives. It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to transfer the obligation of accounting, thereby imposed, to Mrs. Mattie Landers, widow of D. B. Landers, deceased, administering his succession as natural tutrix of their minor children, and, as thus amended, that said judgment be affirmed, at the cost of the appellants.

(126 La.)

No. 17,960.

CLUSEAU v. WAGNER.

GARVEY v. SAME.

(Supreme Court of Louisiana. April 25 and May 9, 1910. On Application for Rehearing, June 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 492*)—INSCRIPTION OF JUDGMENT BEFORE SUSPENSIVE APPEAL—ERASURE.

A judgment debtor, who has appealed suspensively from the judgment, can compel the erasure of the judgment from the mortgage books, even though the inscription was made before the appeal was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2281; Dec. Dig. § 492.*]

2. APPEAL AND ERROR (§ 492*)—RECORD OF JUDGMENT—ERASURE.

In a case appealable to this court, the court has power to order a defendant in rule and the recorder of mortgages to erase from the mortgage books a judgment which has been record-

ed under circumstances and facts stated in the opinion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 492.*]

3. FACTS IN CASE.

Gallagher transferred to Bernhardt what purported to be a promissory note subscribed by Wagner and secured by special mortgage granted by him on certain property. The instrument so transferred with its accessory mortgage were forgeries throughout made by a forger to represent an actual note and mortgage which had been executed by Wagner. The holder of the genuine note and mortgage brought suit to enforce them. Bernhardt intervened, claiming to hold the original note with its mortgage, and called Gallagher in warranty to defend their genuineness. The trial court rendered judgment against Bernhardt adjudging the note and mortgage declared on by him to be forgeries, at the same time rendering judgment in favor of Bernhardt against Gallagher on his warranty as transferor of the note. Gallagher appealed from this judgment against him.

It appeared on the trial that, when the note held by Bernhardt matured, Wagner, not discovering the forgery, paid interest upon it and extended it for a year. Among other defenses, Gallagher claimed that by so doing Bernhardt lost all recourse against him. The judgment appealed from is affirmed.

4. BILLS AND NOTES (§§ 324, 326*)—SALE—WARRANTY.

He who sells a credit or an incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned. The action of Bernhardt in accepting interest at the date of the maturity of the instrument he held and extending the note for a year did not prejudice his right to recover judgment against Gallagher on his warranty. Gallagher had at no time held rights against Wagner as to which he was entitled to subrogation, nor held rights from the loss of which he should have been safeguarded.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 780-787; Dec. Dig. §§ 324, 326.*]

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Consolidated actions by August Cluseau and by Wm. S. Garvey against W. S. Wagner, in which David Bernhardt intervened, calling Peter Gallagher in warranty. There was judgment for intervener, and the warrantor appeals and applies for a rule upon the intervener and Recorder of Mortgages to show cause why the inscription of a judgment against warrantor should not be erased. Inscription ordered erased, and judgment modified and affirmed.

Geo. W. Flynn, for appellant Gallagher. Gilbert L. Dupre, Jr., for appellant Bernhardt. J. B. Rosser, Jr., for appellee Cluseau. Edw. P. Foley, for appellee Garvey. John P. Sullivan and Arthur Landry, for appellee Wagner.

BREAUX, C. J. This court, on warrantor's application, issued a rule directed to David Bernhardt and the recorder of mortgages for the parish of Orleans to show cause within a limited delay stated why they should not cancel and erase the inscription of a judg-

ment rendered against mover Gallagher for \$5,350, recorded in the office of the recorder of mortgages for the parish of Orleans, October 9, 1909.

Plaintiff in rule alleged that of the property of mover, which is subject to the judicial mortgage, there are four lots, which he describes in his motion, which he has sold, but which he cannot deliver because of the inscription rendered in favor of the intervenor in the suit.

He alleged further that the bond covers in amount the judgment, interest, and costs, and that its solvency is not questioned; that the inscription of the judgment is not legal.

The defendants in rule admit that they have a judgment as alleged by plaintiff in rule. They further admit that they caused the judgment to be inscribed and recorded in the recorder's office before the 10 days for a suspensive appeal had elapsed. But they allege that the petition of Peter Gallagher for a suspensive appeal was not filed until October 15, 1909, and that the order of appeal was entered and the bond of appeal was accepted on that day, and these proceedings, although within the 10 days, were of a date subsequent to the inscription of the judgment.

The defendant in rule admits that this court has decided, in *Charlton v. Charlton*, 113 La. 282, 283, 36 South. 965, that the inscription of a mortgage after an order granting the suspensive appeal has been issued is premature.

But defendants in rule take the position that this court has never decided that a judicial mortgage recorded before the taking of a suspensive appeal will be erased where a suspensive appeal is taken and granted after the inscription of a judgment.

That plaintiff in rule not having taken the appeal forthwith, and having given no evidence of intention to take an appeal, defendants were justified in having their judgment inscribed.

In a separate return, the defendants in rule alleged that this court is without jurisdiction *ratione materiae*.

Opinion and Judgment.

We will take up the points urged in the order in which they are presented. First. Judgment inscribed within the 10 days before the suspensive appeal has been taken.

No question but that in the cited case—different from the case before us for decision—the judgment was inscribed after the suspensive appeal. Having been inscribed after, the point is somewhat different from what it is when inscribed before, the suspensive appeal has been taken.

The correctness of the cited decision in regard to when inscription of the appeal has been taken is not drawn in question.

It only remains for us to decide whether a judgment, having been inscribed before the 10 days allowed for the suspensive appeal, if

taken after the suspensive appeal, should be canceled and erased.

We said in the cited case:

"Judicial mortgages may be inscribed, as heretofore, in the office of the recorder of mortgages prior to the suspensive appeal."

The effect of the inscription will be considered later.

We have considered the effect which should be given to the inscription of such a judgment.

If it be inscribed, and no suspensive appeal is taken, it should have effect from the date of inscription.

If it be inscribed, and thereafter a suspensive appeal is taken, and a valid and solvent bond is furnished, and all that is necessary has been done to secure a suspensive appeal, persons in interest can then have the inscription canceled and erased, at the cost of the judgment creditor at whose instance the judgment was recorded.

The next point urged by defendants in rule is that the court is without jurisdiction to order the cancellation.

The question is one which arises incidently with the appeal; it follows it and is inseparably connected with the issues on appeal.

This court may exercise jurisdiction in aid of its appellate jurisdiction. Inscribing the judgment is in the nature of an execution. When an attempt is made to execute a judgment before the court on appeal, if this attempt interferes with the appeal, this court may interfere to the extent that there is interference.

In a case appealable here, this court, after all has been done necessary to secure an appeal, has jurisdiction to order that no other security be required. In the decision cited *supra*, the question of jurisdiction was considered and overruled.

The plea to our jurisdiction is, therefore, overruled.

It is ordered, adjudged, and decreed that the defendants in rule and the recorder of mortgages are ordered to erase and cancel the inscription of the judgment recorded in this case, and that they pay the costs of cancellation and erasure.

It is further ordered, adjudged, and decreed that defendants in rule pay the costs of this rule.

NICHOLLS, J. The following statement of facts is taken from the brief of one of the parties, which is recognized as correct:

"On the 14th day of September, 1907, William S. Wagner, of this city, executed a note, subscribed and indorsed by himself, for \$5,500 payable one year after date at the Teutonia Bank & Trust Company and bearing interest at the rate of 8 per cent. per annum from date until paid. This note was secured by special mortgage on certain real estate as per act before Robert J. Maloney, notary public, of date September 14, 1907, and was paraphrased for identification therewith.

"On the 17th day of October, 1908, one August Cluseau, alleging that he was the holder and owner for valuable consideration and be-

fore maturity of this note, caused executory process to issue thereon. On the 1st day of December, 1908, one William S. Garvey, alleging that he was the holder and owner for valuable consideration and before maturity of this note, caused executory process to issue thereon.

"The former suit was allotted to division A, and the latter to division D. To these proceedings William S. Wagner filed an answer admitting that he had executed and subscribed one such note secured by mortgage as alleged and by act as alleged, but denying that either of the notes sued on was the note executed, subscribed, and indorsed by himself. He alleged that each of the notes and the signatures and indorsements thereon were forgeries, and prayed for an injunction in each proceeding restraining execution. Injunctions were issued. Thereafter Wagner moved to consolidate the two suits, and they were consolidated in division A under the No. 87,981. At this stage of the proceedings, one David Bernhardt, alleging that he was the owner and holder for valuable consideration and before maturity of this note, filed a petition in the consolidated suit alleging that both the Garvey and Cluseau notes were forgeries; that he (David Bernhardt) had the valid and good note; and prayed that execution on the Cluseau and Garvey notes be enjoined. Injunction issued as prayed. Garvey and Cluseau answered. Each denied that the note of the other was valid, and each insisted that his was the valid and genuine note. Wagner filed an answer to each of the petitions denying the validity of each of the three notes. In other words, Wagner executed one mortgage note, Maloney forged two, thereby putting three notes in circulation. One was good, the remaining two were bad, and each of the three parties claimed the good note.

"David Bernhardt then filed a supplemental petition reiterating the allegations of the original petition and the further allegations that on June 9, 1908, he had purchased the note held and sued on by him from Peter Gallagher, a resident of this city, and that he had paid him therefor the sum of \$5,823.25; that is, the face value of the note, \$5,500, and the interest which had accrued up to the date of purchase. He averred that Peter Gallagher in selling this note warranted and guaranteed that the note or instrument and the signatures and indorsements thereon were genuine and valid; that he had a good title thereto; that the note was in all respects what it purported to be; that it was a genuine existing and valid obligation; and that therefore Peter Gallagher was responsible to him as warrantor. He reiterated his original prayer, and then prayed that Peter Gallagher be cited and called in warranty to appear and protect him, or to take such action as he might deem fit and proper to protect himself. He further prayed, in the event that his demand be rejected, that there be judgment in his favor and against Peter Gallagher as warrantor, in the sum of \$5,823.85, the amount paid Peter Gallagher for the note, together with interest from judicial demand for costs of the proceedings, and for general and equitable relief.

"Peter Gallagher answered admitting that he was the owner of the note and that he had sold same to David Bernhardt as alleged, but denied that he was responsible as warrantor, or otherwise, for the return of the purchase price, for the reason that he had sold the note in good faith. He further answered that on September 7, 1908, when the note became due, David Bernhardt had agreed to an extension thereof, for one year without his (Peter Gallagher's) consent, and that for this reason he was relieved from any responsibility or liability to David Bernhardt for the return of the purchase price.

"The case was regularly tried, and evidence oral and documentary was taken as to the validity vel non of each of the three notes.

Although the evidence seemed to favor the Cluseau note, yet it was unsatisfactory and not conclusive. As a result all persons concerned requested the court to appoint an expert to examine the notes and make a report thereon. The expert was appointed, examined the notes, and made a report. He accompanied and substantiated his report with photographs and other data. He reported the Cluseau note to be the valid note and declared the notes held by Bernhardt and Garvey to be forgeries. The report was so conclusive that all parties to the litigation tacitly accepted and acquiesced therein.

"David Bernhardt on the trial proved every allegation of his petition with reference to the purchase from Gallagher, and particularly that he had purchased his note from Peter Gallagher, that he had paid him therefor the sum alleged, and that he had purchased same before maturity and in good faith. No evidence was offered by Gallagher, though present in court in person and through counsel in rebuttal thereof.

"In accordance with the expert's report and the evidence produced, there was judgment decreeing the Cluseau note to be the valid note, decreeing the Garvey and Bernhardt notes to be forgeries, and decreeing in favor of Bernhardt and against Gallagher for \$5,883.85, interest and costs, and decreeing that all other demands of all parties be dismissed.

"Peter Gallagher appealed from this judgment. David Bernhardt in this court answered the petition, praying that judgment in his favor be increased from \$5,823.85. The only parties practically before this court are David Bernhardt and Peter Gallagher. The question of the validity of the three notes vel non is not really before the court. All parties to this litigation, though technically before the court, as a result of the Gallagher appeal, have and are tacitly acquiescing in the judgment of the lower court. Therefore there are only three questions for decision:

"First. Does the transferror of a negotiable instrument by delivery for valuable consideration and before maturity warrant the validity and genuineness thereof?

"Second. Had David Bernhardt, the transferee, committed any act which estops him from asserting this right?

"Third. Should the judgment be increased from \$5,883.85 to \$5,823.85?"

Opinion.

The only appeal in this case is one by Peter Gallagher from the final judgment rendered therein in favor of David Bernhardt against himself. The only prayer for amendment of judgment is that made by David Bernhardt praying that the judgment rendered in his favor against Peter Gallagher be increased in amount. Gallagher, when called in warranty, asked for no relief other than that he should not be held liable on his warranty to Bernhardt for the precise reasons assigned by him. He cannot set up on appeal for the first time in his brief alone grounds for resisting his obligations in warranty which at the best are purely conjectural and are supported by no evidence. He asks for no judgment against Wagner and acquiesces in the correctness of the judgment in favor of Cluseau against Wagner. The liability in warranty of a vendor or assignor to his vendee or assignee is expressly recognized and granted by articles 2475, 2501, and 2505 of the Civil Code.

"He who sells a credit or an incorporeal right warrants its existence at the time of the trans-

fer though no warranty be mentioned in the deed." Civ. Code, art. 2646.

See section 65, p. 137, Act No. 64 of 1904; Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199 (the Burke La. Bond Litigation); Knight v. Lanfear, 7 Rob. 172; Corcoran v. Liddell, 7 La. Ann. 269; Pugh v. Moore, Hyams & Co., 44 La. Ann. 209, 10 South. 710; Jones v. Ryde, 5 Taunt. 488; Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; People's Bank v. Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Barton v. Trent, 3 Head (Tenn.) 167; Lyons v. Miller, 6 Grat. (Va.) 427, 52 Am. Dec. 129; Griffert v. West, 37 Wis. 117; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382; Wright v. First Crockery Ware Co., 1 N. H. 281, 8 Am. Dec. 68; U. S. v. National Exchange Bank of Boston (C. C.) 141 Fed. 209.

Appellant contends that by extending payment of the note for a year, and by receiving interest on the same, Bernhardt has estopped himself from recovering judgment against him on his warranty, as he thereby forfeited his rights.

We are not of that opinion. Bernhardt was justified in taking the course he pursued. He had every reason to believe himself to be the owner of a valid and legally existing mortgage note executed by Wagner. Gallagher warranted that such was the fact. On that assumption Bernhardt's course was not open to criticism, and, as counsel of Bernhardt correctly says, Gallagher received no damage or injury thereby. Had Bernhardt taken no action whatever in regard to the note, as he unquestionably had the right to do, the ultimate relations between himself and Gallagher would have been the same as they are at present. Gallagher, holding a piece of worthless paper creating no right ab initio in Gallagher and no obligations ab initio in Wagner, cannot legally claim by way of defense that, had Bernhardt insisted upon and received immediate payment of the note from Wagner, payment of that worthless piece of paper by Wagner, though made in error by him, would not have entitled him to have recovered back the amount of the payment so made from any one. If it be assumed, as it was authoritatively determined in the trial court, that the paper called a promissory note was an absolute nullity throughout, Wagner was not a party to it at any time. He was an utter stranger to it and not in privity with any one in respect to it. Wagner occupied a very different position in respect to that paper from what he would have held had he been in point of fact the maker of the note and had paid it under a forged indorsement. We have, besides, no reason to suppose that Wagner was prepared to pay, and could have paid, the note at maturity. We have every reason to suppose that he could not and would not have paid it at that time.

If so, the note would still be in the hands of Bernhardt, and the relations between him and Gallagher would be the same as if no extension had been granted.

There is in this case no inability by Bernhardt to subrogate Gallagher to original rights held by him against Wagner, for, under the circumstances disclosed, Gallagher never held rights to be subrogated to and none from the loss of which Bernhardt should have been safeguarded.

Appellee is entitled to the amendment he prays for.

For the reasons assigned herein, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby amended so as to increase the judgment in favor of the plaintiff and against the defendant from the sum of \$5,383.85 to \$5,823.85, and, as thus amended, the judgment appealed from is hereby affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

On Application for Rehearing.

MONROE, J. It is ordered that the decree heretofore handed down be so amended as to allow David Bernhardt, in his judgment against Peter Gallagher, the sum of \$5,823, with legal interest thereon from June 9, 1908, until paid, subject to a credit of \$440, as of date September 14, 1908, with like interest.

Rehearing refused.

(126 La.)

No. 18,100.

GIROD v. MONROE BRICK CO.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR (§ 627*)—RECORD—FILING—EFFECT OF FAILURE TO FILE IN TIME.

When the transcript on appeal is filed in the Supreme Court after the return day, the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744, 3126; Dec. Dig. § 627.*]

2. APPEAL AND ERROR (§ 628*)—RECORD—TIME FOR FILING—EXCUSE FOR DELAY.

Where an appeal was returnable January 20th, and appellant obtained an extension to February 20th, but the transcript was not filed until February 24th, the fact that the appellant trusted to the clerk to send the transcript to his counsel in time for transmission to the Supreme Court, and that the clerk, on account of the rush of business and short help in his office, neglected to transmit it until the 23d of February, though it had been completed on February 18th, did not excuse the failure of appellant to transmit it in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2751-2754; Dec. Dig. § 628.*]

Appeal from Sixth Judicial District Court, Parish of Ouachita; J. P. Madison, Judge.

Action between Charles C. Girod and the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Monroe Brick Company. From the judgment, Girod appeals. Appeal dismissed.

O. C. Dawkins, for appellant. Hudson, Potts & Bernstein, for appellee.

On Motion to Dismiss Appeal.

PROVOSTY, J. Appellee has moved to dismiss the appeal, on the ground that the transcript was filed in this court after the return day.

The appeal was returnable on January 20, 1910. Appellant obtained an extension to February 20, 1910. The transcript was filed February 24, 1910, four days after the extended return day. Nothing is more firmly settled than that, when the transcript is filed in this court after the return day, the appeal must be dismissed. Code Prac. art. 594; *State v. Clark*, 49 La. Ann. 780, 22 South. 257; *Laussade v. Maury*, 31 La. Ann. 858; *Boudreaux v. Boudreaux*, 122 La. 433, 47 South. 758; *Selber v. Young*, 109 La. 1080, 34 South. 95; *Succn. of Theriot*, 118 La. 648, 43 South. 285; *Brooks v. Smith*, 118 La. 758, 43 South. 399; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 South. 814.

In the cases of *Succession of Henry*, 113 La. 787, 37 South. 756, *Succession of Bothick*, 110 La. 109, 34 South. 163, *Gagneaux v. Desonier*, 109 La. 460, 33 South. 561, and *Cockerham v. Bosley*, 52 La. Ann. 65, 26 South. 814, the trouble was, not that the transcript had been filed after the return day, but that (through no fault of the appellant) the citation had been defective.

Appellant contends that the appeal will not be dismissed where the tardiness in filing the transcript has been due to circumstances over which the appellant had no control. Whether that contention be or be not well founded, it has no application to the facts of this case. The circumstances in this case are that the appellant trusted to the clerk to send the transcript to his counsel in time for it to be timely transmitted to this court, and that the clerk, "on account of rush of business and short help in his office, simply neglected to transmit" it to the counsel until the 23d of February, too late for it to be timely lodged in this court, although it had been completed on February 19th, amply in time for transmission to this court before the return day. Manifestly the circumstances here detailed were not beyond the control of the appellant. He could have obtained the delivery of the transcript from the clerk on the 19th, and transmitted it to this court. If he did not do this, the fault is his own. He cannot screen himself behind the neglect of the clerk. In the very case cited by him (*McDowell v. Read*, 5 La. Ann. 42), where the appellant had had an agreement with the clerk of the lower court to transmit the transcript direct to this court, the court said:

"If the neglect was on the part of the clerk of the district court, he was in that matter the

mere agent of the appellants, and his negligence is theirs."

In other words, that the functions of the clerk of the trial court, as clerk, are limited to making the transcript and delivering it when called for (Code Prac. art. 585), and that if, by agreement with the appellant, he undertakes to file it in this court, he becomes, in the latter respect, the agent of the appellant, for whose negligence the appellant is responsible.

In *Championier v. Washington*, 2 La. Ann. 722, the court would have relieved the appellant if he had succeeded in proving that the reason why the transcript had not been filed in time was that the clerk of the Supreme Court had violated his agreement to file it, and had failed to notify the appellant of the nonfiling.

French v. Harrold, 9 La. Ann. 21, is simply to the effect that the fact that the court was in vacation was no excuse to the appellant for not filing the transcript before the expiration of the return day.

Whether the appellant may or not take another appeal is not a question before this court at present.

Appeal dismissed.

(126 La.)

No. 17,890.

BROOKS v. MAGEE, Sheriff, et al.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 720*)—RES JUDICATA.

Plaintiff, in a suit for an injunction to prevent the seizure and sale of his property, cannot withhold grounds which he should have stated, and then, when he is cast in the action, file another suit, setting forth the facts originally alleged and those withheld.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1262; Dec. Dig. § 729.*]

2. EXECUTION (§ 333*)—SEIZURE AND SALE—RETURN OF WRIT.

The law does not require a sheriff to return a writ of seizure and sale within 70 days. *Taylor v. Graham*, 18 La. Ann. 658, 89 Am. Dec. 699. The sheriff, under a writ of seizure and sale, holds the property under the writ until the sale. *Monition of Hall*, 21 La. Ann. 693.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1002-1004; Dec. Dig. § 333.*]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas M. Burns, Judge.

Action by John Brooks against Joe N. Magee, Sheriff, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Benj. M. Miller and Lindsay McDougall, for appellants. Prentiss B. Carter, for appellee.

BREAUX, C. J. The plaintiff claims a homestead to land he owns, and its exemp-

tion from seizure and sale, under the provisions of article 244 of the Constitution.

The property was in the first place sold by plaintiff, Brooks, to the Bickman Mercantile Company, and immediately afterward it was sold by the said company to Brooks, in order to retain a mortgage to secure a debt due by the latter to the former.

Foreclosure proceedings were instituted by the defendant on the vendor's lien and privilege and mortgage.

The property was advertised for sale in the foreclosure proceedings.

The opponents to this sale (John Brooks and wife) claimed the land seized as a homestead.

They alleged, in their petition for an injunction, that the note sued on in foreclosure was made for the purpose of securing a pre-existing debt; that the act of sale was a mortgage in disguise; that the note was owned by the Bank of Covington, and was not the property of Smith and Bullock; that he paid it; and that its pledge to the Bank of Covington was made after maturity, and after its payment, as just stated.

Upon the foregoing grounds, and others, they enjoined the sale.

The injunction suit was tried. The district court decided that plaintiff in injunction had no right to a homestead.

A suspensive appeal was taken to this court from the judgment dissolving the injunction and rejecting plaintiff's demand for a homestead.

On technical grounds this court dismissed the appeal. *Brooks v. Smith*, 118 La. 758, 43 South. 399.

Thereafter, plaintiffs brought up a second appeal to this court (i. e., a devolutive appeal).

This appeal was dismissed, on the ground that a second appeal did not lie in the case. *Brooks v. Smith*, 120 La. 454, 45 South. 388.

After this last decision had been rendered, plaintiff in executory process attempted a second time to foreclose.

The plaintiff (defendant in the executory proceedings) obtained an injunction, and again claimed that the land seized was his homestead.

This is the second suit, brought by plaintiff alone (and not, as in the first suit, by plaintiff and wife), and in this second suit plaintiff again claims a homestead. This appeal is the third appeal in the case.

In this suit plaintiff in injunction reiterates all the grounds alleged in the first petition, save that he did not allege in the first suit with full particularities that the defendants in injunction and plaintiffs in the executory proceedings were not the owners of the mortgage note, although all parties treated the case as one in which all necessary evidence, including the note, were regularly before the court, on which they sought to foreclose; nor did he allege in the first suit that the writ of seizure and sale had

not been returned within the time required, as plaintiff contends.

The district court sustained plaintiff's injunction and decided that he is entitled to a homestead.

The defendant in injunction, plaintiff in executory proceedings, appealed.

Res judicata:

Defendant pleads *res judicata* in the present case on the ground that the issues are the same as in the first suit.

Plaintiff's claim for a homestead is concluded by that plea. It was well and completely litigated in the first injunction suit in the district court. True, it never reached this court on appeal; but the issue was directly tendered by plaintiff in that suit, and it was met by defendant. There was judgment rendered, as before stated.

After trial, the court decided that plaintiff was not entitled to the homestead he claims. That decision remains in full force and effect, and we have no authority to go beyond the decree, which has the force of the thing adjudged.

Of the two grounds not heretofore alleged, as plaintiff contends, one existed at the date that the petition for an injunction (the first time) was filed. The first related to the ownership of the note (and really was decided in the first suit); the other related to the sheriff's return. The ground based on the fact that the writ was not returned in due time, but was retained by the sheriff after the 60 days had expired from the date that it was issued, is properly before us, and was considered in rendering this decision.

When the first injunction issued, the time to return the writ of seizure and sale had not elapsed.

That is the only ground left for our consideration; for all the other grounds were well known at the time the first injunction was issued, and they really were all decided. We are of opinion that they were all alleged, and it follows that they are all disposed of; but, even if any small part of the well-known issues were not covered by the allegation (we repeat, they were all included), the plaintiff in injunction cannot be permitted to withhold grounds which he should have alleged, and subsequently make them the basis for an injunction.

Moreover, defendants in injunction were at the time owners and in possession of the note sued upon, and they are now its owners, and protected by *res judicata*.

As relates to the asserted failure to return the writ of seizure and sale, that is not a fatal irregularity.

The article of the Code of Practice relating to the writ of *fiel facias* has here no application. The article relating to the writ of seizure and sale does not require a return to be made as in case of the former. It may be returned, but it is not imperative. The sheriff holds the property under the writ until the sale. That has been decided in a num-

ber of cases, notably *Monition of Hall*, 21 La. Ann. 693, in which the court held:

"The law does not require the sheriff to return an order of seizure and sale in 70 days."

See, also, *Taylor v. Graham*, 18 La. Ann. 653, 89 Am. Dec. 699.

The law and the evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that the judgment appealed from be, and it is hereby, annulled, avoided, and reversed.

It is ordered, adjudged, and decreed that the seizure be proceeded with in accordance with the law, and that plaintiff in injunction pay the costs of both courts.

(126 La.)

No. 18,079.

STATE ex rel. MARTIN et al. v. WEBSTER PARISH SCHOOL BOARD.

(Supreme Court of Louisiana. May 23, 1910.)

(*Syllabus by Editorial Staff.*)

1. EXCEPTIONS, BILL OF (§ 56*)—REQUISITES—SUFFICIENCY.

Where exceptions are not found in the transcript, nor is any reference made to them in the minutes of the court, and the so-called "bill of exceptions" is not signed by the judge and is not referred to in the minutes, there is no bill of exceptions which can be considered on appeal.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 94, 95; Dec. Dig. § 56.*]

2. MANDAMUS (§ 164*)—PROCEEDINGS—RETURN—HEARING.

Where defendant's exceptions to an alternative writ of mandamus were overruled, and the defendant filed its return, the objection of plaintiffs to the filing of the return that all the defenses to an alternative mandamus must be presented at one time, and cannot be allowed to be presented separately as in ordinary suits, was properly overruled; the defendant being entitled to a hearing on the regular return after the denial of such a hearing on the exceptions.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 344; Dec. Dig. § 164.*]

3. STATUTES (§ 166*)—IMPLIED REPEAL—ENACTMENT OF NEW STATUTE—OMISSION OF PROVISION.

The titles of Acts 1888, No. 81, and of Acts 1902, No. 214, being the same, word for word, and section 8 of the later statute being a reproduction of section 7 of the earlier, except that a provision for the apportionment of school funds is left out, such omission being intentional as indicated by its repetition in Acts 1904, No. 167, and Acts 1908, No. 49, such provision was impliedly repealed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 230, 241, 242; Dec. Dig. § 166.*]

4. STATUTES (§ 157*)—REPEAL—EXPRESS REPEAL.

The provision of Acts 1888, No. 81, § 7, for the apportionment of school funds, is expressly repealed by Acts 1902, No. 214, repealing all laws in conflict with itself, since the provision requiring apportionment is in conflict with the provision of the act of 1902 requiring school boards to determine the number of schools to be opened, the location of the schoolhouses,

the number of teachers to be employed, and their salaries.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 225; Dec. Dig. § 157.*]

Appeal from Second Judicial District Court, Parish of Webster; R. C. Drew, Judge.

Application by the State, on the relation of J. W. Martin and others, for mandamus to the Webster Parish School Board. From a judgment denying the application, the relators appeal. Affirmed.

Wimberly & Reeves, for appellants. Sandlin & Percy, for appellee.

PROVOSTY, J. The numerous plaintiffs in this case are residents and taxpayers of school district No. 7 of the parish of Webster and the parents of school children in said school district. They complain that the apportionments which the school board of the parish has heretofore been making of the school funds of the parish have not been in proportion to the number of children of school age, as is required by section 7 of Act No. 81 of 1888; and that, as a consequence, district No. 7 has failed of receiving its just quota of the said school funds by \$4,500, even reckoning only since 1892; and they pray for a mandamus to compel the school board to make good that shortage, and in future to apportion the school funds in accordance with said statute.

In their petition the plaintiffs further complain that they have not even been allowed the full amount of a special tax voted by them in their district, nor their legal share of the sixteenth section school fund; but, in their brief, they do not insist upon the latter complaints.

Something was also said, in the oral argument, about the defendant's having filed exceptions, and of the exceptions having been overruled, and of the defendant having then filed its return to the alternative mandamus, and of the plaintiffs having objected to the filing of the return, on the ground that all defenses to an alternative mandamus must be presented at one time and cannot be allowed to be presented separately as in ordinary suits, and of the court's having overruled said objection, for the reason that the defendant was entitled to a hearing, and had not had it on the prematurely filed exceptions which had not been considered at all, but had been simply thrown out as premature; and we find in the transcript a document purporting to be a bill of exception reciting the foregoing, and in a vague and general way allusion is made to all of this in the brief. But we do not find the exceptions in question in the transcript, nor any reference to them in the minutes of the court; and the so-called "bill of exceptions" is not signed by the judge, and is not referred to in the minutes, and therefore is not a

bill of exceptions, and cannot be considered by this court. [We will add, however, that nothing could be more correct than the ruling of the court allowing the defendant a hearing. A hearing having been denied on the exceptions, the defendant was most unquestionably entitled to be heard on the regular return.] Moreover, we find in the transcript an express agreement of counsel that the case be disposed of on its merits.

The defense is that section 7 of Act No. 81 of 1888, relied upon as requiring the school board of each parish to apportion the school funds of its parish among the school districts of its parish in proportion to the number of school children in the several school districts of the parish, was repealed by Act No. 214 of 1902, both by implication and expressly—by implication, because the said section was re-enacted verbatim and literatim, omitting the clause requiring said apportionment to be made; and expressly, because said act of 1902 repeals all laws in conflict with itself, and the provision requiring apportionment is thus in conflict. It conflicts with that clause making it obligatory upon the school boards to “determine the number of schools to be opened, the location of the schoolhouses, the number of teachers to be employed, and their salaries.”

We agree with both of these contentions. Section 8 of Act No. 214 of 1902 is a re-enactment in full of section 7 of Act No. 81 of 1888, with the provision with regard to apportionment of the parish school funds left out. And it stands to reason that this provision for apportionment, by which the funds are to be distributed among the several districts by a cast-iron rule, is in conflict with the provisions which require the school boards to determine the number of schools to be opened, the location of the schoolhouses, the number of teachers to be employed, and their salaries.

We agree with defendant that it is impossible to read section 7 of Act No. 81 of 1888, in connection with section 8 of Act No. 214 of 1902, and not be convinced that the latter was intended to be a complete substitute for the former. In the first place, said Act No. 214 of 1902 appears to have been intended to be a complete substitute for Act No. 81 of 1888. Both acts seem to have been intended to provide a complete system of public schools. Their titles are the same, word for word, and the ground covered by every provision of the one is covered by a corresponding provision of the other. Section 8 of the later statute is a reproduction of section 7 of the earlier, save and except that the provision for the apportionment of the school funds is left out. And the omission was not accidental or unintentional, for the section was again enacted with the same significant omission by special act of 1904 (Act No. 167 of that year), and again in 1908 (Act No. 49 of that year). The provision having thus been intentionally omitted, the purpose must have been to repeal it;

there could not possibly have been any other purpose. The rule is that:

“In case a statute is re-enacted and some of the provisions of the old law are omitted from the new, this constitutes a repeal of the omitted provisions.” 26 A. & E. E. of L. 735.

From the Lawyers' Co-Operative Publishing Company's Digest of United States Supreme Court Reports (1908) vol. 5, p. 5422, we take the following, in support of which several cases of the United States Supreme Court are cited, and a long list of the decisions of state courts:

“604. Although two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.”

From *State ex rel. Broussard v. Sheriff*, 120 La. 535, 45 South. 430, we take the following:

“Whilst it is well settled that repeals by implication are not favored, it is equally settled that, in determining whether one law conflicts with another, it is necessary to consider the purposes of both, and if it appears that the purpose of the law last enacted is to cover the whole subject-matter dealt with, and to modify or supersede those previously enacted, their modification of supersession results and must be declared.”

From *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176, we take the following:

“It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled.”

From *Murdoch v. Memphis*, 20 Wall. 590, 22 L. Ed. 429, we take the following:

“A statute revising the whole subject of a former statute, and intended as a substitute therefor, preserves all of the old law that is embraced therein and repeals all that is omitted, without words to that effect.”

The repeal is express, because Act No. 214 of 1902 repeals all laws in conflict; and this provision for apportionment is in conflict with the provisions making it obligatory upon the school boards to “determine the number of schools to be opened, the location of the schoolhouses, the number of the teachers to be employed, and their salaries.” The latter provision invests the school board with absolute discretion in the matter of what number of schools there shall be, and what number of teachers and what their salaries shall be. For the exercise of this discretion, a discretionary control of the school funds is absolutely necessary, because schools cannot be established and maintained without funds. Discretionary control of the one necessarily carries with it discretionary control of the other.

The learned counsel for defendant suggests that the reason for the repeal of the cast-iron mode of distribution of the funds was that, in a great measure, it deprived the local authorities of a very necessary discretion in

the apportionment of the school funds as between the races, with the result that in some parishes the colored children received the bulk of the school funds, although the whole of said funds, practically, had been contributed by the parents of the white children; and that it also had the effect of making it impracticable to maintain schools in the sparsely settled parts of the country.

Be these reasons as they may, we find this provision in conflict with the later law, and therefore repealed.

The defendant board has submitted a full return to show that the charge of discrimination is unfounded; but that is a matter pertaining to the merits, into which we are not called upon to go.

The lower court denied the mandamus. Judgment affirmed.

(126 La.)

No. 18,217.

GOOCH v. TOWN OF PATTERSON.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 918*)—TAXATION—SPECIAL TAX ELECTION—VALIDITY.

Where a special election was, as a matter of fact, held pursuant to the requirements of article 281 of the Constitution of 1898, relative to the levying of special taxes and the issue of bonds by municipal corporations, it matters not that the proceedings were carried on nominally under article 232 and its enabling acts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 1000*)—SPECIAL TAX ELECTIONS—LIMITATION OF ACTIONS—VALIDITY OF STATUTE.

Section 16 of Act No. 145, p. 254, of 1902, bars all actions to annul special tax elections held pursuant to article 281 of the Constitution of 1898 brought after a delay of six months from the date of the promulgation of the result.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

3. MUNICIPAL CORPORATIONS (§ 918*)—TAXATION—SPECIAL BOND ELECTION—CORRECTION OF CLERICAL ERROR.

A clerical error as to the date of the payment of interest, patent on the face of election proceedings, may be corrected by the supervising municipal authority before the bonds are issued.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Charles A. O'Niell, Judge.

Action by W. N. Gooch against the Town of Patterson. Judgment for defendant, and plaintiff appeals. Affirmed.

Percy Saint, for appellant. Emmett Alpha, for appellee.

LAND, J. Plaintiff in the court below sought by injunction to restrain the defendants from issuing certain bonds to fund cer-

tain special taxes for a series of years voted by the taxpayers for the purpose of erecting a system of waterworks in the town of Patterson. The cause was tried on the merits, and the plaintiff has appealed from a judgment rejecting his demand.

Plaintiff contends that the election and proceedings were held under article 232 of the Constitution of 1898, authorizing the levy of special taxes for public improvements when voted by a majority of the taxpayers in number and amount voting at the election; that said article does not authorize the funding of special taxes in bonds; and that Act 84 of 1906, which empowers municipal corporations to fund into bonds the proceeds of such special taxes, is violative of article 281 of the Constitution of 1898, providing that municipal corporations may incur debt, issue negotiable bonds therefor, and levy special taxes, within certain limitations, by a vote of a majority in number and amount of the property taxpayers, qualified as electors, voting at an election held for that purpose.

Defendant's reply to this contention is that, as a matter of fact, the question of the levy of the proposed special taxes to be funded into a certain number of negotiable bonds was submitted to the taxpayers, and was carried by an almost unanimous vote in numbers and amount. The record shows the correctness of this contention, and it matters not under what article or statute the proceedings purported to have carried on, as the conditions required by article 281 were substantially fulfilled.

It appears that throughout the proceedings there was a clerical error made as to one date on which the interest was payable semi-annually; June being substituted for July. The bonds were made payable on January 15th, and, the same date being fixed for the payment of one half of the annual interest, the other half necessarily became payable on July 15th following. The error was one of calculation, and was properly corrected by the municipal council as the representative of the taxpayers. "An error in the name of a thing is never prejudicial, if it be clear as to the identity of the thing itself, i. e., where the intention is clearly known." 16 Cyc. 536. The contention of the plaintiff that an election was necessary to correct this clerical error is without merit.

Section 16 of Act No. 145, p. 254, of 1902, passed to enforce article 281 of the Constitution of 1898, provides that, after a delay of six months from the date of the promulgation of any election held under the act, no one shall have any cause of action to contest the regularity, formality, or legality of any of the election proceedings or any requirement in relation thereto. The argument that this section is unconstitutional because it does not except fraud rests on the false premise that the Legislature is prohibited by the organic

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law from barring actions of nullity on the ground of fraud by statutes of limitation. Moreover, as the plaintiff has not charged fraud, he is without interest to raise the question of the constitutionality of section 16. The prescription of six months was pleaded, and properly sustained.

The last ground of nullity urged in plaintiff's brief is as to the validity of the affidavit of the publisher of the ordinances relating to the election. The promulgation was proven allunde, and the defects, if any, in the affidavit have been cured by prescription.

Judgment affirmed.

(126 La.)

No. 18,250.

STATE v. WALL.

In re WALL.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by the Court.)

1. STATUTES (§§ 86, 118*)—SPECIAL LEGISLATION—TITLE OF ACTS—CRIMES AND PUNISHMENTS.

The General Assembly has authority by special statute to carve misdemeanors of different grades out of facts declared to be felonies by an existing law, but it must do this through a statute whose title conforms to the requirements of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 86, 158-160; Dec. Dig. §§ 86, 118.*]

2. CRIMINAL LAW (§ 27*)—"MINOR OFFENSE."

An offense which is punishable by an imprisonment in the parish prison or by hard labor in the penitentiary, at the discretion of the trial judge, has been held to be a "minor offense," and not a felony under our law. State v. Eubank, 114 La. 428, 38 South. 407.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662.]

3. EMBEZZLEMENT (§ 2*)—CRIMINAL LAW (§ 94*)—MINOR OFFENSE—MISDEMEANOR—JURISDICTION.

At the date of the enactment of Act No. 107 of 1902, embezzlement was punishable by an imprisonment in the penitentiary not less than seven years, regardless of the value of the thing embezzled. It was not a "minor offense." It could not constitutionally be made so, nor was it a "misdemeanor" through Act No. 107 of 1902. The First city criminal court had no jurisdiction to try a person upon a charge of embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 2; Dec. Dig. § 2.* Criminal Law, Cent. Dig. § 148; Dec. Dig. § 94.*]

H. V. Wall was convicted of embezzlement, and appeals to the Criminal District Court and applies for certiorari and prohibition. Reversed, and judgment annulled, and prosecution dismissed.

Henry O. Hollander, for relator. St. Clair Adams, Dist. Atty., for the State.

NICHOLLS, J. Relator's application is based upon the grounds: (1) That on the 19th

day of October, 1909, an affidavit was filed against him in the First city criminal court for the parish of Orleans, charging him with embezzlement of \$19.10, and numbered 22,000 on the docket of the said court. That the case was tried on the 2d day of December, 1909, before John B. Fisher, judge thereof, and was taken under advisement, and on the 8th day of March, 1910, he was found guilty as charged by the said judge.

Immediately after the court had rendered its opinion finding the relator guilty, and after sentence was passed, he, through his counsel, moved for an appeal to the criminal district court for the parish of Orleans, and which was granted, and the accused was admitted to bail. Article 140 of Constitution of 1898 in re appeal, etc.

The sentence thus imposed upon him was based on section 7 of Act No. 107 of 1902, wherein the offense of embezzlement is graded thereby, giving the said First city criminal court for the parish of Orleans jurisdiction *ratione materiae*, which in so far as the amount of punishment is concerned is not greater than six months for embezzlement under \$20.

He further shows that this court has judicially determined that Act No. 107 of 1902 is unconstitutional in so far as it attempts to grade felonies. State v. Evans et al., 122 La. 273, 47 South. 603; State v. Dalcourt, 112 La. 420, 36 South. 479. But relator relies for this writ and the setting aside of the court's sentence on the fact that the crime of breach of trust and embezzlement, as herein alleged in the said affidavit as made before the First city criminal court for the parish of Orleans, and upon which offense he was convicted and sentenced under the said affidavit, by the said judge of the First city criminal court, and from which judgment and sentence he had appealed to the criminal district court, is, in accordance with section 905 of the Revised Statutes, as amended by Act No. 31 of 1888, p. 23, as felony, made punishable at hard labor not exceeding seven years, and is therefore, in accordance with article 116 of the Constitution of 1898, triable by a jury of 12, 9 of whom concurring may render a verdict.

That the article 140 of the Constitution of 1898, creating the First city criminal court for the parish of Orleans, only confers jurisdiction *ratione materiae*, wherein the offense against the state and where the penalty did not exceed six months' imprisonment in the parish jail or a fine of \$300 or both. In all other cases the judge of the said court was only to act as committing magistrates with authority to bail or discharge, and as this court has judicially determined that embezzlement is a felony, and as section 905 of the Revised Statutes, as amended by Act No. 31 of 1888, has never been repealed, and as the statutes relative to embezzlement does not state what amount is necessary to be em-

bezzled, but fixes the maximum penalty not to exceed seven years at hard labor and the minimum not less than one year, it necessarily follows that the amount herein alleged to have been embezzled, \$19.10, being a felony, therefore the First city criminal court for the parish of Orleans was without jurisdiction *ratione materie* to pass judgment and sentence, but only rely on section 7 of Act 107 of 1902, relative to grading misdemeanors and other offenses, to pass judgment and sentence on relator, which said Act 107 of 1902 this court has judicially determined was unconstitutional in so far as it attempts to grade felonies (see *State v. Evans et als.*, 122 La. 273, 47 South. 603; *State v. Dalcourt*, 112 La. 420, 38 South. 479), and that the said sentence imposed upon him by the said court was contrary to law and is without effect.

That the Legislature of 1902, when they enacted Act 107 of 1902, in accordance with the direction to the General Assembly as contained in article 155 of the Constitution of 1898, and attempted to grade the crime of embezzlement, exceeded its authority, and in enacting section 7 of said Act 107 of 1902 the said section is unconstitutional and *ultra vires*, because their direction was, and as the title to the said act reads, as follows:

"An act to grade misdemeanors and minor offenses against the state and to fix the minimum and maximum penalties therefore, in accordance with the direction to the General Assembly contained in article 155 of the Constitution."

That he presented this fact to the court before sentence was pronounced against him, and also upon his appeal in the criminal district court, but all without avail or effect. Relator shows that he has no redress by appeal for considering the sentence imposed, to wit, 30 days' imprisonment in the parish prison. This court has no appellate jurisdiction of the case, and relator's only remedy or redress is through writs of prohibition and certiorari.

That his case in this respect comes within the rule laid down in *State v. Abrams*, 119 La. 981-983, 44 South. 807, wherein this court held practically at least that the remedy in such cases was through writs of certiorari after sentence has been passed, and as he has also appealed to the criminal district court, according to his rights under articles 140 and 139 of the Constitution of 1898, there is no other way that relator can obtain justice than by this remedial writ, being without the right of appeal. He represents that, if he is made to serve the sentence imposed on him, he will have been done a grave injustice and likewise a great injury. He shows that due notice of this application has been given as the law directs.

The premises considered, relator prayed that writs of certiorari and prohibition issue herein according to law, directed to the honorable judge aforesaid, forbidding the execution of said sentence.

He prayed that a day and hour be fixed by your honorable court for the said judge to show cause why the writs applied for should not be made perpetual, that it be required to send up the record in the case aforesaid, to wit, No. 22,600 on the original docket of the First city criminal court for the parish of Orleans, and now known as record "No. 37,862" of the docket of the criminal district court for the parish of Orleans, to the end that the validity of the proceedings herein may be inquired into and passed upon by your honorable court, and that, on the hearing had, the sentence aforesaid be annulled and set aside as being without sanction of law, that the writs applied for be made perpetual, for all orders and decrees necessary, and for general relief.

The judge of the criminal district court, having been ordered to show cause why the writs prayed for should not be granted, has answered as follows:

"Act No. 107 of the Session of the Legislature of 1902, known as an act to grade misdemeanors and minor offenses, does not, as charged by relator in said suit, grade any felonies. By section 7 of said act the embezzlement of property of less value than \$20 is graded into two classes:

"First the embezzlement of all property of less value than \$20 and of a value exceeding \$5 is made punishable by imprisonment in the parish prison for not more than six months and not less than one month, and the embezzlement of all sums of money of less than \$5 is made punishable by imprisonment for not more than 60 days nor less than 10 days in the parish prison. The embezzlements thus graded are not felonies, as they are made punishable by imprisonment in the parish prison only, and not in the penitentiary, and the embezzlement cannot by virtue of said section 7 be punished by a term of imprisonment exceeding six months in the parish prison. Under said act the jurisdiction of the offense charged against the defendant was vested in the First city criminal court, which, assuming the jurisdiction, tried the defendant and found him guilty as above stated.

"The Constitution of the state directed that all misdemeanors and minor offenses should be graded, and, in obedience to said mandate, the said act 107 of the Session of the Legislature of 1902 was adopted. While previous to the passage of said act embezzlement was known as a felony in the state of Louisiana, your respondent respectfully submits that it was within the province of the Legislature to reduce a felony to a misdemeanor, and, after the said felony had thus been reduced, to grade the crime; thus reduced it is a misdemeanor as directed by constitutional provision.

"In support of your respondent's answer, respondent begs leave to refer this court to a case involving the same principle decided by it at page 428 of 114 La., page 407 of 38 South., entitled *State v. Eubanks*. Respondent begs leave therefore to be permitted to file this, his answer to the writs herein issued. He submits the matter for adjudication."

The case of *State v. Dalcourt*, 112 La. 420, 38 South. 479, came before this court on appeal from the district court for the parish of St. Martin, a court of general criminal jurisdiction. There was no question raised on the appeal as to the jurisdiction of that court, nor was there any complaint as to the mode

of trial. Appellants had made a motion in arrest of judgment in the district court urging that he had been illegally prosecuted, convicted, and sentenced under Act No. 107 of 1902, as that statute was unconstitutional, and being so, there was no basis for prosecution, judgment, or sentence. The defendant, charged with having stolen two hogs and convicted, was sentenced to four months' hard labor in the penitentiary. This court held that the accused had not been prosecuted under any particular statute; that at the time of the commission of the offense and of the prosecution there was a statute antecedent to that of 1902 (Acts 1874, No. 124, § 8) under which the defendant could be tried, found guilty, and sentenced, should the last-named act be held unconstitutional. The judgment appealed from was, however, reversed, and the case remanded, but by reason of an erroneous ruling by the trial court, upon a matter of evidence. The court nevertheless expressed its opinion as to the constitutionality of the act of 1902, declaring that section 3 of the act, to the extent that assumed to grade the offense of larceny when the article or thing stolen was of the value of \$20 (as was the case), could not stand the test of constitutionality. That the statute had made the offense a felony by declaring that the theft of an article of that value should be punished by imprisonment in the parish prison or in the penitentiary for a term not exceeding two years.

State v. Evans, 122 La. 273, 47 South. 603, like that of *Dalcourt*, was decided by this court on an appeal to it from the judgment and sentence of a district court against defendant charged, together with one Wiley, with the "larceny" of \$50. Wiley was acquitted, and Evans found guilty of an "embezzlement." A motion in arrest made by Evans was sustained, and the state appealed. The gist of the motion in arrest was that embezzlement, being a felony necessarily punishable at hard labor, was triable by a jury of 12, and not by a jury of 5 under article 116 of the Constitution.

The state contended that, where "larceny" was charged in a bill of information, a verdict of embezzlement might be returned, and that by virtue of section 7 of Act No. 107 of 1902 the embezzlement of property of less value than \$20 was made a misdemeanor. The Supreme Court declared that it had held in the *Dalcourt* Case that the law cited was unconstitutional in so far as it attempted to grade felonies; that it followed that the jury of five was without jurisdiction in the premises; and that the sentence was properly arrested. It therefore affirmed the trial judge in sustaining the motion in arrest.

The respondent judge calls our attention to *State v. Eubanks*, 114 La. 428, 88 South. 407. That case came before us on appeal from the district court for the parish of East Baton Rouge. Appellant stood charged in that court on an information with the lar-

ceny of seven sacks of cotton seed of the value of \$15. He was tried before the district judge without the intervention of a jury. He was found guilty by the court, and sentenced to an imprisonment of six months in the parish prison. He moved in arrest of judgment on the ground that he had been denied the constitutional right of trial by jury, and that Act No. 107 of 1902 was unconstitutional in so far as it purported to grade "larceny" as a misdemeanor. The motion in arrest was overruled. *Eubank's Case*.

On the appeal the contention of the appellant was that petty larceny was a "felony," and not therefore within the purview of article 155 of the Constitution, nor of the title of Act No. 107 of 1902, which was "an act to grade misdemeanors and minor offenses against the state and to fix the minimum and maximum penalties therefor."

The Supreme Court dismissed the appeal taken by defendant for want of jurisdiction in itself. In its opinion the court referred to *State v. Dalcourt*, 112 La. 420, 36 South. 479, saying: That in that case defendant's conviction was within the purview of both Act No. 107 of 1902 and Act No. 124 of 1874. That the decision in that case did not affect that part of section 5 of the act of 1902 which made the larceny of property of value less than \$20 punishable by imprisonment in jail, as in case of misdemeanor. That the court had held in that case that under article 155 of the Constitution of 1898 it was not competent for the Legislature in grading misdemeanors and minor offenses and fixing penalties therefor to make an offense a felony punishable at hard labor in the penitentiary. That it had not held, nor did it intend to hold, that it was not competent for the Legislature to grade petty larceny as a minor offense and make it punishable by imprisonment in the parish prison.

That the Constitution of 1898, through article 155, authorizing the Legislature to grade all the misdemeanors and minor offenses against the state and to fix the maximum and minimum penalties therefor, unquestionably delegated to the Legislature the right to alter and change the penalties prescribed by existing laws. That, in so far as the case then before the court was concerned, Act No. 107 of 1902 was constitutional.

The present case is before us, not on appeal, but under our supervisory jurisdiction. There is no question as to our authority to deal with it. At the time of the passage of Act No. 107 of 1902, the crime of "embezzlement" was a crime punishable by an imprisonment at hard labor not exceeding seven years," regardless of the value of the thing embezzled. This punishment resulted from the passage of Act No. 31 of 1888, which amended section 905 of the Revised Statutes. Up to that time, the punishment had been "an imprisonment at hard labor not exceeding seven years nor less than one year."

Act No. 107 of 1902 was entitled:

"An act to grade misdemeanors and minor offenses against the state and to fix the minimum and maximum penalties therefor in accordance with the direction to the General Assembly contained in article 155 of the Constitution."

By the seventh section of that act it was enacted that the embezzlement of property of a less value than \$20 shall be graded as follows:

"Any person who shall, by virtue of his office, trust or employment have had intrusted to his care, keeping or possession the money or other property of another, who shall wrongfully use, dispose of, conceal, or otherwise embezzle such property so to him intrusted, shall, if such property be of less value than five dollars be imprisoned for not more than sixty days, nor less than ten days, if the value of said property be less than twenty dollars, but five dollars or more, such person shall be punished by imprisonment for not more than six months nor less than one month; provided that this section shall not apply to any curator, testamentary executor, administrator, tutor, or to any person collecting, safe-keeping, disbursing money or funds under the order of any court of this state, or to any officer of this state or of any political subdivision thereof or to any person authorized to collect, disburse, or safely keep any portion of public money, or to the president, cashier, other officer or servant of any bank, or banking institution, but all such persons shall be punished in the manner pointed out by existing laws."

In the brief filed on behalf of the state it is urged that "the contention of defendant that section 7 of Act No. 107 of 1902 is unconstitutional, because the mandate of the General Assembly contained in article 155 of the Constitution of 1908 was only to grade misdemeanors and minor offenses against the state, and that inasmuch as embezzlement is a felony that is punishable at hard labor for a term not exceeding seven years, the Legislature necessarily has no right to grade it" is not sound because Act No. 107 of 1902, section 7, known as "the act to grade misdemeanors and minor offenses," does not (as charged by defendant) grade any felonies.

Section 7 of said act does make the embezzlement of property less than the value of \$20 and of a value exceeding \$5 punishable by imprisonment for not more than 60 days nor less than 10 days in the parish prison. Of course, under section 905 of the Revised Statutes as amended by Act 31 of 1888, embezzlement is a felony. If the grading offense act of 1902 graded embezzlement and made the punishment in the penitentiary, it would have been incompetent for the Legislature to have made such a case triable before a judge without a jury of 12. But Act 107 of 1902, § 7, does nothing of the kind. It makes embezzlement of property of less value than \$20 punishable by imprisonment in the parish prison. The jurisdiction of the offense charged against the defendant was properly vested in the First city criminal court. The contention of the state is that the Legislature had the right to carve a "misdemeanor" or "minor offense" out of a felony and to

make it punishable in the parish prison, and it is supported in that contention by the decision of the Supreme Court in *State v. Eubanks*, 114 La. 423, 38 South. 407. The case of *State v. Evans*, 122 La. 273, 47 South. 603, is not at all in point, as the question raised in it related entirely to the number of jurors necessary to try an embezzlement of a sum of money exceeding \$50. The *Evans* Case was not a prosecution under section 7 of Act 107 of 1902, but under section 915 of the Revised Statutes. The *Dalcourt* Case is likewise inapplicable to the case at hand. That case is cited in the *Eubank* Case, which latter case is now the law upon the subject.

Reference to the *Dalcourt* and *Evans* Cases show that the offense with which the defendants were charged in both of them was "larceny," which, at the time of the passage of Act No. 107 of 1902, had already been divided into "petty larceny" and "grand larceny" by the act of 1874; the larceny of any property of the value of \$100 constituting grand larceny, while larceny of property of less value than \$100 constitutes petty larceny. Grand larceny was made punishable by the statute with imprisonment in any parish prison or at hard labor in the penitentiary, at the discretion of the court, for not more than 10 years.

Petty larceny was made punishable with imprisonment in any parish prison or in the penitentiary, at the discretion of the court, for not more than two years.

By Act No. 107 of 1902 larceny of less value than \$100 was graded as follows: Larceny of property of less value than \$5 was punishable by imprisonment of not more than 60 days nor less than 10 days. Larceny of the property of value of \$5 or more but less than \$20 was punishable by imprisonment not more than six months nor less than one month. Larceny of property of the value of \$20 or more but less than \$100 was punishable by imprisonment with or without hard labor not exceeding two years and not less than three months.

Embezzlement, as we have seen, was punishable at the time of the passage of Act 107 of 1902 with imprisonment at hard labor for a term of seven years, regardless of the value of the thing embezzled, with no discretion as to the penalty left to the judge. By the said Act No. 107 embezzlement of property of less value than \$20 was made punishable as follows:

Embezzlement of property of less value than \$5 by imprisonment for not more than 60 days nor less than 10 days.

Embezzlement of property less than \$20 but \$5 or more by imprisonment for not more than six months nor less than one month.

Leaving embezzlement of property of \$20 or more punishable as before. Under this statute (if valid) the embezzlement of property up to the value of \$20 became a misdemeanor.

The Legislature has authority outside of article 155 of the Constitution of 1898 by

means of an independent and special act to carve out a crime which by an existing statute was denounced as a felony, lesser crimes to fall under the class of misdemeanors.

It had the right, by reason of the particular circumstances under certain acts committed, to take such acts so committed out of the class of felonies into which they would have otherwise fallen by existing statutes, and constitute them misdemeanors; but the question is: Could it do so otherwise than by a statute which as to its title could withstand the charge of unconstitutionality.

Could the General Assembly, by special act bearing the title of Act No. 107 of 1902, reduce a crime denounced by existing statutes as felony to a misdemeanor, and by so doing vest in the First city criminal court jurisdiction to try such misdemeanors without a jury.

The jurisdiction of that court is confined to cases against the state where the penalty does not exceed six months' imprisonment in the parish jail or a fine of \$300, or both.

The jurisdiction of the court which convicted defendant was dependent upon the constitutionality of the act of 1902, which, under the title which that act bore, undertook to reduce a statute existing at that time not as a "minor offense," but absolutely as a felony, into a "misdemeanor." In undertaking to accomplish this in manner and form it did, we are of the opinion that the General Assembly acted beyond its authority.

For the reason herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the criminal district court for the parish of Orleans herein brought up for review is hereby set aside and annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that the judgment and sentence of the First city criminal court for the parish of Orleans, which was affirmed by said criminal district court for the parish of Orleans, be, and the same is, set aside and annulled, avoided, and reversed, and the prosecution in that case dismissed.

(126 La.)

No. 18,005.

COOK & LAURIE CONTRACTING CO. v. DENIS.

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL (§ 4*)—COSTS—TAXATION—INJUNCTION—LIS PENDENS.

An injunction suit, instituted by the defendant, to prevent the execution of a judgment for costs, taxed on an ex parte rule, does not stop the plaintiff from taking another rule to have these costs taxed. Where both proceedings are before the same court, lis pendens cannot be pleaded.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-38; Dec. Dig. § 4*]

2. COSTS (§ 61*)—APPORTIONMENT.

In a suit where the defendant becomes plaintiff in reconvention, and the judgment taxes plaintiff with the costs of the reconventional demand and the defendant with the costs of the main demand, the plaintiff must pay for the testimony necessary to sustain the reconventional demand, while the defendant must pay for the testimony necessary to sustain the main demand.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 272; Dec. Dig. § 61*]

Appeal from Civil District Court, Parish of Orleans; Fred. D. King, Judge.

Suit by the Cook & Laurie Contracting Company against Henry Denis. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 124 La. 161, 49 South. 1014.

Hall, Monroe & Lemann, for appellant.
P. M. Milner, for appellee.

BREAUX, C. J. Defendant is appellant from a judgment condemning him to pay certain costs.

Plaintiff claimed costs of suit which accrued in a decided case between it and the defendant.

Plaintiff sued the defendant on a building contract for \$2,062.37 commission. It made allegations setting up its claim, and further alleged that under article 7 of the contract in question it was only liable in damages to defendant for delays due to causes within its control, and not for those not within its control, and that the causes of delay were not within its control.

The defendant denied all of plaintiff's allegations. Further, he assumed the character of plaintiff in reconvention, and alleged that he was induced by plaintiff to enter into the contract upon plaintiff's representations.

The case, referred to above, was decided in the district court.

On appeal to this court, this court amended the judgment appealed from by reducing the amount of the judgment, rendered in the district court, in favor of the defendant, from \$1,700 to \$1,600, and condemned the defendant to pay the costs of the main demand, and the plaintiff to pay the costs of the reconventional demand. With this amendment, the court affirmed the judgment of the district court.

As relates to costs: July 2, 1909, counsel for plaintiff wrote to defendant's counsel a letter stating that the balance due by defendant to plaintiff was \$637.30, and inviting attention to the judgment of this court condemning the parties to the suit to pay costs as before stated; also containing the statement:

"As no separation was made in the testimony or in the evidence offered, I have disallowed these costs in toto, as it is impossible to separate the costs of your defense and the costs of your reconventional demand."

Counsel for defendant in reply said that the costs of the main demand consisted only

of the initial costs expended in filing the suit; that there were no costs incurred and no evidence taken on the trial of the main demand, which was for \$2,062.32.

On the 7th day of July, 1909, plaintiff filed an ex parte motion, and costs were taxed by the court at \$151.81.

On that day the court issued a writ of fieri facias against the defendant, Mr. Denis, for the amount taxed.

The day following the defendant filed a petition and obtained an injunction; stated and averred that the contracting company, instead of endeavoring to adjust amicably the question of the disputed costs, maliciously and without right obtained a writ of fieri facias, not as originally claimed for \$687.30, but for \$678.71, with instructions to deduct from that amount petitioner's stenographic fees of \$17.15, leaving an alleged balance of \$661.56.

The plaintiff abandoned its ex parte motion to tax costs, the motion just above referred to.

Subsequently plaintiff filed another rule to tax costs to which we will refer later.

The amount should be as follows, is petitioner's contention:

Plaintiff's claim.....	\$2,062 37
5% from December 6, 1906, to July 7, 1909.....	267 35
Clerk's costs, civil district court.....	8 35
Clerk's costs of appeal.....	51 65
Sheriff.....	4 00
Crier.....	1 00
Supreme Court deposit.....	25 00
Total	\$2,419 61

From which should be deducted:

Judgment on reconventional demand	\$1,600 00
5% from February 6, 1907, to July 7, 1909.....	193 15
Clerk's costs.....	8 80
Sheriff.....	2 00
Stenographer's costs.....	17 15
	\$1,821 50
Balance due plaintiff.....	\$598 11

Defendant in the original suit, plaintiff in injunction, alleged that he had tendered the amount which plaintiff declined to receive; that the costs had not been fixed by a legal judgment as they were fixed ex parte; that the fixing is null and void.

He claims \$500 damages, and asks that the injunction be made perpetual.

The injunction accordingly issued.

Subsequently an amended petition was filed by plaintiff in injunction, averring that the tender of \$600, alleged to have been made, which averment was made in error, that no tender was made owing to failure to locate counsel for defendant in injunction proceedings.

On July 15, 1909, plaintiff filed a rule which was duly served on defendant on the 20th day of July, 1909, in which he prayed that costs be taxed in accordance with the judgment of this court.

Defendant in injunction filed a rule to dissolve the injunction on the ground of untruthfulness and the asserted illegality of the affidavit.

This rule was referred to the merits to be tried with the injunction.

This was on October 28, 1909.

On the 29th following of that month, plaintiff in injunction filed an exception to the rule on the ground that the rule tendered an issue alleged in the injunction suit, in which plaintiff has asked for the dissolution of the injunction, "an issue which had already been determined adversely to it in this cause; that these issues cannot be raised by rule, but can only be raised and determined upon a trial upon its merits of said injunction suit."

The contention of plaintiff in injunction was that by deciding the issues presented by rule the district court anticipated the issues in the injunction proceedings.

We will state, in answer to plaintiff's contention just above stated, that the injunction suit, enjoining execution of the judgment, did not have the effect of preventing plaintiff in the original suit from filing a rule to tax costs. There was no pending suit to prevent plaintiff from proceeding by rule to collect costs due by defendant.

The injunction is not before us. Whatever issues it presents, if any, are not to be considered on this appeal.

The defendant alleged that there was lis pendens between the demand to the injunction and that on the rule.

The question has recently been decided in *Saint v. Martel* (17,981) 52 South. 474, in which this court held that the plea of lis pendens does not lie when the suits are pending before the same court. It is only when the suit pleaded as lis pendens lies in another court.

The purpose of the law evidently is to prevent one from suing in two courts, and thus vex the one sued, by separate demands in different courts, and by seeking to obtain separate judgments in two different courts.

This is not the case here. The proceedings are all before the same court and do not come within the article of Code Prac. art. 335, prohibiting suits from being brought "in different courts of competent jurisdiction."

It does seem very clear that, this court having condemned the defendant to pay the costs of the main demand, the plaintiff has a right to whatever costs may be due, and, when a rule is subsequently filed asking that costs be taxed, they ought to be taxed.

There was an issue tendered in the first suit by defendant controverting every item of plaintiff's claim. Whatever evidence was admitted to the end of meeting that issue is chargeable to him.

The judge of the district court wrote an elaborate opinion. In his judgment he taxed the costs as follows:

Clerk's costs.....	\$ 26 05
Sheriff's costs.....	4 00
Crier's fee.....	1 00
Stenographer's costs.....	38 75
Costs of appeal transcript.....	50 00
Binding transcript.....	1 00
Supreme Court deposit.....	25 00

Making total of..... \$145 80

This amount was considerably reduced, as will be shown in a moment.

There is no question about the three last items of the above account.

Learned counsel for defendant inform us in their brief that the said amount is reduced to \$60.61; difference between plaintiff and defendant.

In oral argument, plaintiff's counsel referred to that as being the remaining difference between the two; that is, whether that sum is due by plaintiff or by defendant.

The testimony was offered in the first suit before referred to (17,467) without any special mention upon the subject; that is, as to whether it was offered to prove the main or reconventional demand.

The answer did not admit any liability to plaintiff. In addition, the prayer of the answer is, in said suit:

"That plaintiff's demand be rejected at its costs and for judgment in reconvention."

It was necessary for plaintiff in said first suit to introduce evidence to sustain its demand in face of the defense raised and issues presented.

Even had defendant not pleaded in reconvention, under the allegation of his answer to plaintiff's suit, there would have been a suit and necessity for evidence to sustain its demand.

The amount is not disputed. The question is: Who ought to pay the amount of costs before mentioned?

The assertion is made in defendant's brief that all the costs, to wit, \$17.25, clerk's costs, and \$44.75, stenographer's fee, were incurred in the trial of the reconventional demand.

We cannot agree with that view.

The clerk's costs, up to the filing of the papers, amounted to.....	\$ 8 80
The clerk's costs for filing 50 documents	15 00
Testimony and duplicate.....	2 10

	\$25 90
Motion of appeal.....	60

\$26 50

Whether these documents were filed on the trial or prior to going to trial, they were offered to sustain the main demand. It does not appear conclusively that the purpose in filing them was to defeat defendant's reconventional demand.

Plaintiff, in his petition, in said first suit in which the costs were incurred, alleged, substantially, that no deduction should be made for demurrage. It had the right to prove that allegation.

Now, as to the amount due the stenographer:

The contention is that the \$44.75 (stenographer's fee) were incurred on the trial of the reconventional demand.

There were five witnesses examined for plaintiff, and one of the number was recalled and examined on rebuttal.

Their testimony covers a number of pages of the transcript.

While only two witnesses were examined for defendant.

The testimony of Mr. De Buys, the architect, covers 4 pages of the transcript of 138 pages.

The pages of testimony for which the stenographer had a right to charge were 74.

The defendant in his own behalf was the only other witness for the defense. His testimony covers 10 pages, so that 60 pages of testimony represent the number for which plaintiff is liable and 14 pages for which the defendant is liable.

Seventeen dollars and twenty-five cents of the stenographer's fee were charged to defendant and the balance to plaintiff.

In our opinion, that was a fair apportionment of the costs and charges.

It is not possible with any degree of certainty here to separate the testimony of witnesses and hold that such an amount shall be charged to defendant's reconventional demand and the other to the main demand, particularly as the nonliability for demurrage was alleged by plaintiff, and forms part of the same issue presented by the defendant in the reconventional demand.

We arrived at the conclusion to leave it as it is, as it does substantial justice.

For reasons stated, the judgment is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 17,896.

TAYLOR v. NEW ORLEANS TERMINAL CO.

(Supreme Court of Louisiana. May 9, 1910.
On Application for Rehearing,
June 6, 1910.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 268*)—RIGHTS OF LANDOWNER—ACTION FOR DAMAGES.

If an owner of land fails to object in due time to an appropriation of part of it by a railroad, he is concluded from reclaiming the land free of the servitude imposed thereon and is relegated to the right of claiming damages. *St. Julien v. Morgan's R. R. Co.*, 35 La. Ann. 924.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 697, 736-742; Dec. Dig. § 268.*]

2. EMINENT DOMAIN (§ 284*)—RIGHT TO DAMAGES—PASSING OF RIGHT.

The right to claim these damages is personal to the owner of the land and does not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pass to successive owners, unless they have been specially subrogated to it, for it does not pass with the title. *McCutchen v. Railroad*, 118 La. 438, 43 South. 42.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 789, 790; Dec. Dig. § 284.*]

3. RAILROADS (§ 72*)—DUTY TO FENCE AND DRAIN—SALE OF LAND—RIGHTS OF GRANTEE.

Where a railroad acquires land with the obligation to fence and drain it and construct crossings thereon, this right is a servitude in favor of the land and the right to enforce it passes with the title.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Action by Raphael E. Taylor against the New Orleans Terminal Company. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

Saunders, Dufour & Dufour, for appellant. James J. McLoughlin and Frederick A. Middleton, for appellee.

BREAUX, C. J. Plaintiff sued the defendant for the sum of \$3,750, with legal interest from judicial demand.

He describes in his petition the land he owns; refers to his plat of survey and to the origin of his title.

He charges in his petition that defendant appropriated a strip of his land and constructed a switch track thereon, occupying about five acres of his land; that this alleged appropriation cuts off access from his said tract of land to a larger triangular shaped tract he owns, forming part of the southeast area of his property used by him as a pasture.

He fixed the value of the appropriated land at the sum of \$1,000, and the damages growing out of the appropriation at \$500, and avers that there is continuing damage committed which he alleges he "reserves the right to claim."

Plaintiff avers that defendant is bound, under the title which it holds, to construct wire fences, maintain ditches, and build gates and crossings, which it has failed to do.

Plaintiff charges that defendant entered upon his land with workmen and ran a preliminary line for a switch track; they cut down trees and damaged the property in the sum of \$250.

Plaintiff, in addition to the foregoing amount, claims \$1,000 damages caused by a preliminary survey.

The answer is:

(a) That the land used for the switch was taken by defendant many years ago, but with the tacit consent of the then owner, and defendant has ever since been in the open, continuous, and peaceable possession of the land so taken; except that plaintiff did re-

cently attempt to interfere with defendant's possession, and thereupon plaintiff was promptly enjoined, at the instance of defendant, from further disturbing defendant.

That defendant had been in the possession and enjoyment of said switch track for many years before plaintiff bought the land through which the said tract runs, and when he bought plaintiff bought the land as it then stood, and has no right now to claim damages or compensation for the land which defendant had previously taken and was then occupying with its switch track.

(b) That access to part of plaintiff's land is not prevented by the switch above mentioned, and, if access is in some degree impeded, the damages which plaintiff claims in his petition as being caused thereby are grossly exaggerated.

(c) That plaintiff is a stranger to and without any rights under the contract for right of way made with a former owner of the land, and his suit on this contract must, therefore, be rejected.

(d) That defendant had the legal right to make a preliminary survey for its contemplated new switch, and that it did make such a survey without damage to plaintiff's property, but has never actually built the contemplated new switch; and plaintiff's claim for damages is fictitious and wholly unfounded.

There can be no right to punitive damages.

The judge a quo gave judgment in favor of plaintiff:

First, for the value of three acres of land, which he found had been taken for, and were being occupied by, the switch, at \$300 an acre; in all, \$900.

Second, for \$100, amount of damages done by the preliminary survey.

Third, ordering the defendant to build the fences, ditches, etc., within a year; and, if it should not build them in that time, to pay the plaintiff \$500 with which to build them, and the defendant to maintain them thereafter.

The other demands of plaintiff were rejected.

The defendant appealed, and the plaintiff has answered praying for the amendment of the lower court's judgment.

By defendant's appropriation with the tacit consent of the owner at the time, the right to the strip of land passed from the owner to the appropriator—the right became segregated from the property, and the owner became a creditor for the value of the property taken.

The right was personal. The owner at the time had a claim personally for the amount.

The purchaser by the act of purchase does not become invested with a right to the value of the property taken unless the right is transferred with the property.

In a leading case (*St. Julien v. Morgan's*

R. R. Co., 35 La. Ann. 924) it was decided that the owner is concluded from reclaiming his property free of servitude imposed thereon if he failed to object to the appropriation in due time.

He is allowed compensation for value instead of the property taken.

The right inures to him personally and not to successive owners.

This right to recover compensation is not connected with the title.

In the cited case, the plaintiff sought to return into possession of the property and to have himself recognized as the owner with all the rights which the word "owner" implies.

The railroad track, instead of being the track of a quasi public corporation, would have become, had his demand been granted, to the extent that plaintiff claimed, the private property of the plaintiff.

The court in the cited case solved the difficulty by which it was confronted by relegating the plaintiff in that case to a compensation for value.

In another case, the court holds that plaintiffs "should have denied defendant's access and have prevented it by using legal process"; that defendants thereby became creditors for value. *Bourdier v. Railroad Co.*, 35 La. Ann. 961.

The company was not a trespasser, but had acquired, by absolute silence, an absolute right. *Day v. Railroad Co.*, 36 La. Ann. 244.

Again, his acquiescence did not prejudice his claim to damages. *Lawrence v. Railroad*, 39 La. Ann. 427, 2 South. 69, 4 Am. St. Rep. 265.

The owner has a right to damages; he cannot, however, treat the entry as a trespass for which the company is liable at the place of the asserted injury. *St. Julien v. Railroad Co.*, 39 La. Ann. 1063, 3 South. 280.

Again, this court said: "The claim is in the nature of a personal action for value of the land." *Mitchel v. Railroad Co.*, 41 La. Ann. 363, 6 South. 522.

There are other decisions to the same effect and not one to the contrary.

The question is settled by repeated decisions. If it were *res nova*, it would, perhaps, be different.

This brings us to a consideration of the question whether the plaintiff owns the right and has the authority to sue the defendant for the value.

Under prior decisions, he does not have the right to sue for value or damages, as it was not sold to his vendor, and his vendor did not sell it to him.

The taking of the right of way was done many years prior to plaintiff's becoming the owner of the land.

In order that a vendee may have the right of his vendor in this respect, as it is a personal right, there must be a special subrogation to him by his vendor.

That point was conclusively decided in the following cases: *Matthews v. Alsworth*, 45

La. Ann. 465, 12 South. 518; *Bradford v. Damare*, 46 La. Ann. 1533, 16 South. 487; and in the case recently decided of *McCutch-en v. Railroad Co.*, 118 La. 438, 43 South. 42.

The damages done by the preliminary survey gives rise to the next question for decision.

The defendant unlawfully acted in the matter of this survey, in that it took possession of plaintiff's property, cut down his trees (about 52 in number), and made an opening through his woods.

They were small trees, it is true, of no great value. Yet this was an infringement upon plaintiff's right of property for which defendant should be made to pay.

The amount allowed for this item, viz., \$100, is not too large; it cannot be less in view of defendant's invasion of plaintiff's right of property.

No one prompted by right feeling will trespass upon the land of another and cut down his trees without at least seeking his permission.

We come to a consideration of plaintiff's claim for the failure of defendant to make ditches, put up fences, and construct crossings along the right of way.

This was never done, although in the *Lochte* deed to plaintiff's author the defendant had bound itself to make these improvements.

Subsequently, the plaintiff bought the property.

The right followed the property and was not personal to the owner.

The original owner acquired the right as a servitude for the benefit of the estate and not for his own benefit.

Without the stipulation in the first deed, plaintiff had a right to these improvements; the railroad track was laid across plaintiff's land; the defendant had no reason to expect that it could take the land and escape making these improvements to drain the land and afford a crossing to the owner. It is in itself a right of servitude which plaintiff's author had acquired and which passed to the subsequent owner.

The defendant cannot keep the right of way and deny to the owner the improvements always made by railroad companies in the interest of the owner.

The court a quo condemned the defendant to make these improvements for which it had by agreement made itself liable, and for which it was liable under every principle of right and justice.

It should make them.

To the end of protecting the land, it became a part of plaintiff's right to a servitude. It became a part of the place, a part of the right bought.

The other items claimed by plaintiff are not allowed, as they are not sufficiently sustained by the evidence. It follows that the motion to amend before referred to is overruled.

For reasons assigned, the judgment ap-

pealed from is amended by striking therefrom \$900, amount allowed for the value of the land.

As amended, the judgment is affirmed, at appellant's costs.

PROVOSTY, J., takes no part, not having heard the argument.

On Application for Rehearing.

PER CURIAM. Our decree herein is amended by condemning the plaintiff and appellee, instead of the appellant, to pay the costs of appeal, and, as thus amended, is reaffirmed, and the applications for a rehearing are refused in all other respects.

(126 La.)

No. 17,860.

MORASCA v. ITEM CO., Limited.

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 51*)—PUBLICATION OF NEWS—MALICE.

The publication by a newspaper of a report made by the police in the regular course of police administration, to the effect that persons had been poisoned by sugar purchased at the store of the plaintiff, will not of itself support an allegation of malice on the part of the defendant.

In order to support the allegation of malice, there must be evidence of an act showing a wanton inclination to mischief, an intention to injure or wrong, or a depraved inclination to disregard the rights of others.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 150; Dec. Dig. § 51.*]

2. LIBEL AND SLANDER (§ 120*)—LIBELOUS PUBLICATION—DAMAGES—MALICE.

Facts exciting public comment, regarding public health or safety, may be published by a newspaper, and comment, if made and published fairly and in good faith, is not a libel and will not give rise to an action for punitive damages.

If deductions are made from the facts of a case and published by a newspaper, it will be liable for damages only where actual damages are shown when the publication was not inspired by malice. Newell (2d Ed.) p. 591.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

3. FAILURE TO SHOW ACTUAL DAMAGES.

Under the circumstances, it was incumbent upon plaintiff to show actual damages in order to recover, and he has failed to do so.

The case is distinguished from Billet v. Times Democrat Case, 107 La., 32 South., 52 L. R. A.

Monroe, J., dissenting.

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"LEGAL MALICE."

"Legal malice" is defined as an act growing out of the wicked or mischievous intention of the mind; an act showing a wanton inclination to mischief, an intention to injure or wrong,

and a depraved inclination to disregard the rights of others.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Benedetto Morasca against the Item Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

T. M. & J. D. Miller, for appellant. Saunders, Dufour & Dufour and Henry Mooney, for appellee.

BREAUX, C. J. Benedetto Morasca was the owner of a grocery store in the city of New Orleans.

He sued the defendant for \$5,000 damages.

Plaintiff charges the "New Orleans Item," a daily, with having published a false and libelous report, which reflects upon him and his business, which has occasioned damages in the sum before stated.

The police authorities were investigating a case of reported poisoning of three persons.

The newspaper stated at the time, in one of its columns, under the heading, in capital letters, that it was believed that the negroes had been poisoned from sugar contained in tea, for which they were under medical treatment.

Their names were given in the printed report, which stated that the sugar was bought from a "grocery store at Sixth and Rampart."

The negro child died.

The day following that publication just mentioned, the defendant published on the fourth page that the "Poison Was Being Investigated" (heading of the report), and the article stated that the coroner thought that the child died from tartar emetic poisoning; that the chemist had the examination of the stomach, kidneys, and liver in charge; and that he also had samples of the sugar and tea procured from the grocery store of Benedetto Morasca, where the occupants of the house who were poisoned made their purchase which was believed to have caused the child's death.

The article read:

"It is the opinion of Coroner O'Hara that the child died from tartar emetic poisoning. He thinks that some of this substance, which is used in the composition of ant poison, may have accidentally gotten in the sugar at the grocery."

The first complaint of plaintiff is that his name was stated—his grocery—and that in connection with the statement that the persons named were further referred to as "the poison patients," poisoned by sugar bought from his grocery; and the second complaint of plaintiff is that it was given as the opinion of the coroner that the sugar sold in plaintiff's store contained poison.

The articles were pleaded in the words of the publication.

The defendant admitted the publication, denied malice, pleaded privilege, and alleged the articles were printed as ordinary news taken from the public records and were given no more prominence or space than is usually given to similar articles.

The defendant offered the report of the police sergeant commanding the Sixth precinct police—a report made in accordance with the rule of the police department, and filed with the inspector.

In the report, the sergeant stated that he had instructed the patrolmen to investigate the suspicious cases of poison, and that he found a colored woman "named Sylvester Heins, aged 70 years, John B. Powell, Jr., aged 2 years and 7 months, and Nathaniel Burns, aged 16, all colored, residing in the same house apparently sick and claiming that they were attended by Dr. Deboffe and Dr. DeJole, who stated that the sickness was caused by the sugar put in the tea Saturday evening. The officer procured a sample of the sugar from the grocery of Benedetto Morasca, * * * where the sugar was bought by the sick family."

One of the doctors afterward informed the policemen that the patients had taken something that caused irritation of the stomach causing them to throw up; that he had administered medicine; and that they were all doing well.

The coroner the same day went to the house, made an investigation, and said that he could find no trace of poisoning; they were doing well; in his opinion they were ailing from a disease prevalent in the city at the time.

At the autopsy, held by the coroner and jury over the body of the dead child, they arrived at the conclusion that death was due to antimony et potassi tartarici.

The Item published, three days after the casualty, that Benedetto Morasca denied that sugar purchased at his store can in any way be responsible for the death of the two year old negro, and that paper stated that it was the opinion of Dr. O'Hara that the child died from tartar emetic poisoning, that proper examination by the city chemist was under way, and samples were taken from plaintiff's grocery to see whether any poison used for roaches, ants, or other vermin had by accident gotten into the grocery.

That plaintiff said:

"The only sample taken from our store was some sugar. I have here the signed names of persons who bought sugar from the same barrel and were not hurt by it.

"In fact, we never used any poisons about the store to kill vermin, and it is not possible that any of our groceries could contain injurious matters of any kind. To prevent ants from getting into the sugar barrel, we used nothing but a rag soaked in coal oil tied on the outside at the bottom of the barrel."

That the report did them an injustice and subjected them to loss.

Morasca, the plaintiff, is the owner of the grocery that is conducted by his daughter.

He has very little to do with it, as he is a musician, and his time is taken up in teaching music.

As a witness, he sought to prove the extent of his loss by the failure of those who had bought to continue in buying from him.

Pressed to answer as to the extent of his loss, he was not at all exact in his answers, nor did he succeed in proving the extent of his loss.

Discussion and judgment:

The result shows that the report that there was poison in plaintiff's barrel of sugar was entirely untrue. It originated among the negroes who had bought sugar from the grocery. They insisted—particularly the mother of the dead child—that the sugar she bought from the grocery was the cause of death. To such an extent this report spread that the police authorities very properly undertook to investigate and see for themselves if there was any truth in the report.

It was during that time, and while proper report was forwarded to the central office, that the police reporter of the newspaper wrote the two articles—one on one day and the other on the next day—of which plaintiff earnestly complains.

As to malice, it is not charged *eo nomine*, although the charge may be inferred from the fact that plaintiff charged it was "false," "misleading," "libelous," and "defamatory in the highest degree and calculated to injure plaintiff."

All of which, to an extent, is true; but we have not found that there was express malice on the part of defendant as a fact. The publication does not appear in the light of a publication made with actual knowledge of the charge as false. We can only say that it is not sufficient to show actual malice.

"Legal malice" is defined as an act growing out of the "wicked or mischievous intention of the mind; an act showing a wanton inclination to mischief, an intention to injure or wrong, and a depraved inclination to disregard the rights of others."

We are unable to say that such was the intention of the defendant, for in our opinion it was not. The most that can be said is that there was indifference.

There was no negligence imputed to the plaintiff nor the least wrong charged. There was no intimation that one person had attempted to poison others.

In the second publication, which followed the first in date, it was stated that the coroner thought that the child died from tartar emetic poisoning. "He" (the paper stated) "thinks that some of this substance, which is used in the composition of ant poison, may have accidentally gotten into the sugar at the grocery."

Taking the whole statement, nothing was said that may not occur in nearly all groceries without its being possible to attach the least blame to any one.

The child died of poison; to that point the

facts were correctly stated. It was not bought from plaintiff.

He was not defamed, for his name was not connected with any wrongful act; besides, he was not in charge of the grocery.

There was reason for inquiry and probable cause for some concern. It became proper for the police department to act as it did.

The defendant, through its police reporter, took up the report and made it known, not by large and sensational headlines, as stated by plaintiff. It mentioned that there was an investigation on foot. It sought to set forth the facts. There does not appear to have been ill will or malice on its part.

There was extravagant talk among the negroes, many of whom bought groceries at plaintiff's store. The mother of the dead child talked excessively, and altogether there were rumors that prompted an investigation.

It does not seem that it went too far under the circumstances. Reference by the newspaper to the steps taken was not actionable.

Whenever poison is mentioned as having been taken, it always attracts attention among all persons. It will be talked of and even published. If done, as in this case, to report the facts, there is no ground of action for punitive damages at any rate. In other words, the fact invites attention and excites comment, which, if fairly published or made in good faith, is not libel or slander.

Furthermore, questions relating to life, health, and welfare may be commented upon, and, if erroneous deductions be made, it does not give cause for damages unless special damage can be shown; that is, when persons taking part in the inquiry are not prompted by malice. Newell (2d Ed.) p. 591.

As to an arrest, the following has the sanction of a well-considered opinion:

While comments should not be made, the arrest of a person and the charge against him may be published. *Tresca v. Maddox*, 11 La. Ann. 206, 66 Am. Dec. 198.

The defendant did not go further than sanctioned by the foregoing.

The case of *Billet v. Times Democrat Publishing Co.*, 107 La. 751, 32 South. 17, 58 L. R. A. 62, is not pertinent, as the publication in the case before us for decision—different from the cited case—did not assume that the plaintiff was guilty of the lesser offense or impropriety.

Besides, the defendant in the cited case undertook to justify by proving the truth of the fact stated.

In the present case there was no refusal to retract; on the contrary, without request, the defendant within four or five days after the first publication published an explanatory account relieving the plaintiff of blame.

The plaintiff, in support of his claim, confidently cites *Cass v. New Orleans Times*, 27 La. Ann. 215.

The facts of the cited case are different;

the charge constituting libel was untrue and defamatory. The affidavit made the basis of the report published by the *Times* was false and malicious. There was a direct attempt made to humiliate and degrade the plaintiff.

Here, there is nothing of the kind.

The question of privilege *vel non* does not arise in the case at hand, as there was no libel committed at any time nor by any one.

In the other decisions cited, a libel had been published without the least necessity or the most remote justification.

There is unquestionably no ground upon which to allow punitive damages. A claim for punitive damages finds no support in any of the authorities we have read.

There is better ground, of course, upon which to claim actual damages.

But as to these, the attempt of plaintiff to prove that he had suffered losses in his business has failed. The allegation in this respect is not sustained; the nature or the extent of the loss are not sufficiently evident to have a judgment thereon for damages. The testimony fixes no amount of loss.

For reasons stated, the judgment is affirmed.

MONROE, J. I dissent.

PROVOSTY, J., takes no part, not having heard the argument.

(128 La.)

No. 18,150.

STATE v. IRVINE et al.

(Supreme Court of Louisiana. May 23, 1910.)
(*Syllabus by Editorial Staff.*)

1. NEGLIGENCE (§ 144*)—"CRIMINAL NEGLIGENCE."

Where one is charged with a special duty, the nonperformance of which involves danger to the safety of others, the failure to perform the duty, even through inattention, is gross and culpable, or, in other words, criminal negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 408; Dec. Dig. § 144.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1750.]

2. CRIMINAL LAW (§ 1043*)—APPEAL—OBJECTIONS—SUFFICIENCY.

An objection to a charge that it is contrary to the law governing the case on trial is too vague and general to be available on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

3. CRIMINAL LAW (§ 811*)—INSTRUCTIONS.

While, as a rule, it is not permissible to make in an instruction special mention of particular facts or groups of facts, thereby attracting special attention to them and giving them undue prominence, the charge must cover every phase of the case, and, if one of the phases depends on certain particular facts or groups of facts, these may be alluded to in

order to convey to the jury a practical idea of the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.*]

4. HOMICIDE (§ 288*)—TRIAL—INSTRUCTIONS.

In a trial of a railroad employé for manslaughter through criminal negligence in causing a collision, an instruction that if the switch train left the depot on the night of the collision on the incoming track, instead of the outgoing track, by order of the defendant, if he was in charge of the engine, and it was unlawful or in violation of the rules of the yards to take such incoming track, defendant was held to a greater degree of care and circumspection than if the taking of such incoming track was not unlawful, and that, if the taking of the incoming track was not unlawful, it would take gross carelessness to make defendant's conduct criminal, was not prejudicial to defendant as throwing the entire responsibility on him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 593; Dec. Dig. § 288.*]

5. CRIMINAL LAW (§ 1043*)—APPEAL—OBJECTIONS—SUFFICIENCY.

In a criminal trial, an objection to a charge as misleading and not explaining the law of the case, and as an erroneous interpretation of the law of the case, was too vague and general for consideration on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

6. CRIMINAL LAW (§ 1043*)—TRIAL—INSTRUCTIONS—OBJECTION.

An objection to a charge should be so framed as to enable the judge to correct his mistake if he has made one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

7. CRIMINAL LAW (§ 23*)—CRIMINAL NEGLIGENCE—INTENT.

Gross and culpable negligence will supply criminal intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 21; Dec. Dig. § 23.*]

8. HOMICIDE (§ 288*)—CRIMINAL NEGLIGENCE—INSTRUCTIONS.

In a trial of a railroad employé for manslaughter through criminal negligence in causing a collision by running on the wrong track, instructions not sufficiently taking into account the fact that, if a special duty rested on defendant as foreman to see that the engine did not go on the incoming track, his omission to perform that duty would constitute criminal negligence, making him liable even though it was the result simply of inattention, were properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 593; Dec. Dig. § 288.*]

9. HOMICIDE (§ 145*)—INTENT.

The doer of an unlawful act is conclusively presumed to know the result of the unlawful act, and, if the death of a human being results from the doing of such act, it is either murder or manslaughter, according to the circumstances of the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 262-264; Dec. Dig. § 145.*]

10. HOMICIDE (§ 288*)—MANSLAUGHTER—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In a trial of a railroad employé for manslaughter through criminal negligence in running a train upon a wrong track, thereby causing a collision resulting in the death of cer-

tain persons, an instruction, "It is indispensable for the state to prove beyond a reasonable doubt that defendant did that which he ought not to have done in such a gross or negligent way that the law would impute to him criminal intent," was properly refused, being open to the objection that, even if defendant's going on the wrong track was culpable negligence, nevertheless he was not guilty if the manner of his doing it was not negligent; that is to say, if before venturing on the track he looked carefully to be sure that it was free, and, if, after going upon it, he kept careful and sharp lookout.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 593; Dec. Dig. § 288.*]

11. HOMICIDE (§ 285*)—TRIAL—INSTRUCTIONS—CONTRADICTORY INSTRUCTIONS.

In a trial of a railroad employé for manslaughter for running a train on the wrong track, thereby causing a collision resulting in the death of others, an instruction that, if homicide results from negligence, it is manslaughter, and exists when the act resulting in death was done under such circumstances that it could not reasonably be supposed that injury would follow, was contradictory and properly refused, as supposing an act which because of its dangerous character constitutes carelessness and negligence, may be done under circumstances excluding the idea of danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 585; Dec. Dig. § 285.*]

Appeal from First District Court, Parish of Caddo; Thomas F. Bell, Judge.

L. F. Irvine and another were tried for manslaughter. From his conviction, Irvine appeals. Affirmed.

Wm. A. Mabry and Cal. D. Hicks, for appellant. Walter Guion, Atty. Gen., and J. M. Foster, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

PROVOSTY, J. The defendants, Irvine and Madox, were tried together for manslaughter. Madox was acquitted. Irvine was convicted, and was sentenced to five years at hard labor; and he has appealed.

He was foreman, and Madox was engineer, of a switch engine which between 11 and 12 o'clock at night had moved a Pullman coach to a side track at the passenger railroad depot in the city of Shreveport, and left the coach in position, and was returning to the roundhouse when it came in collision with a passenger train, whereby several persons were killed. The cause of the accident was that, instead of taking the outgoing track for returning to the roundhouse, the engine took the incoming track. It seems that when the engine reached the switch for transferring to the outgoing track, the switchman announced that it was "spiked," or, in other words, had been nailed up and put out of service, and that the engineer, without consulting Irvine, took the incoming track, in violation, as he knew, of the rules of the company. Irvine was at the back end of the engine, standing on the footboard. They had gone a little over a quarter of a mile, perhaps half a mile, on this wrong track.

when the collision occurred. The engine was moving at five or six miles an hour. The crew jumped off, except the engineer, who set about reversing his engine, and was at his post when the impact came. Those of the crew who survived testified that they knew they were on the wrong track, except Irvine, who testified that he became aware of their being on the wrong track only just before the collision, too late to remedy the situation.

The case is before this court on several bills of exceptions to certain parts of the charge of the court, and to the refusal to give certain special charges.

There could be, and there was, no dispute as to the fact of the collision and of several persons having been killed by it, and of its having happened because the incoming train had no reason to know, or suspect, the presence of the switch engine on this track; and the bills raise no question in those connections.

It will conduce to brevity if, before undertaking to discuss the bills, we come to a definite and clear notion of the law applicable to the disputed points. It is that if the going upon this incoming track was against the rules of the company, and if it was defendant's duty as foreman to know this, and to see to it that such a thing did not happen, defendant is guilty even if he did not know that the engine was on this wrong track; because, where one is charged with a special duty the nonperformance of which involves danger to the safety of others, the failure to perform the duty even through inattention is gross and culpable, or, in other words, criminal, negligence. On the other hand, though the track was the wrong one for the engine to be on, and defendant knew it, he is not guilty, if he was not charged with a special duty in the premises; and, even though charged with a special duty in the premises, still he is not guilty if in going upon this wrong track he did so, not through negligence, but merely through error of judgment.

In support of the proposition that defendant's ignorance of the engine's being upon the wrong track will not exculpate him if as foreman he was charged with the special duty of taking care that it should not go there, we will cite the following:

"Every negligent omission of a legal duty whereby death ensues is indictable either as murder or manslaughter. If a man, says Archbold, take upon himself an office or duty requiring skill or care, if, by his ignorance, carelessness, or negligence, he cause the death of another, he will be guilty of manslaughter." Bishop, *Crim. L.* (8th Ed.) § 314, p. 178.

"Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested, though in such cases they may constitute indictable offenses. * * * When a responsibility specially imposed upon the defendant is such that an omission in its performance is, in the usual course of events, followed by an injury to another person or to the state, then the defendant is indictable for such an omission. If the duty is absolute, then de-

fendant is responsible for its nonperformance." 1 Wharton on *Crim.* (9th Ed.) § 130, p. 157.

"We have already seen that an omission is not the basis of penal action unless it constitute a defect in the discharge of a responsibility specially imposed. And the converse is true that, when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, when acting injuriously on the party to whom the duty is owed, is an indictable offense." *Id.* § 329, p. 355.

From note 61 L. R. A. 277, we take the following:

"Every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter."

"Where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide."

The charge of the learned judge a quo was as follows:

"Gentlemen of the Jury:

"(1) The two defendants in this case, Irvine and Madox, are charged in the state's indictment with the crime of manslaughter, a crime defined by the law as the unlawful killing of a human being without malice.

"(2) The state charges that these defendants while in charge of a locomotive switch or yard engine, in the service of the Kansas City Southern Railroad Company, and operating the same on the railroad yards in the city of Shreveport, collided their engine with a passenger train of the Texas & Pacific Railway Company while on the railroad yard in the city of Shreveport as it was backing into the Union Depot, and by said collision caused the death of the three persons named in the indictment.

"(3) In your investigation I charge you to bear in mind that these defendants are presumed to be innocent until the state overcomes that presumption by evidence establishing their guilt beyond a reasonable doubt. The defendants are not required to establish their innocence. The state must establish their guilt to that degree of certainty that leaves no reasonable doubt in the minds of the jury as to their guilt. A reasonable doubt is one contradistinguished from a mere conjectural doubt. It is a doubt for which some reason can be given, and must be raised on the evidence or some lack of evidence.

"(4) You will naturally and logically first inquire as to the death of one or more of the three persons alleged to have been killed. When you are satisfied as to that fact, you will next inquire and satisfy yourselves that they came to their death by reason of the alleged collision. Being satisfied that one or more of the alleged decedents came to their death by reason of said collision, you will next inquire was this collision simply a misadventure, or was it the result of criminal recklessness or carelessness of some person or persons charged with the handling or operating of one or both of the colliding trains. If you find that the criminal recklessness or carelessness of one or both of these two defendants was the proximate cause of the death of one or more of the alleged decedents, they cannot escape the responsibility for such death, because there were others whose criminal recklessness or carelessness contributed to such death. All who by such collision contributed to said death are likewise guilty.

"(5) The general rule is that, when one by his negligence contributes to the death of another, he is criminally responsible therefor, and that every act of gross negligence and every omission of legal duty whereby death ensues is indictable either as manslaughter or murder.

"(6) If a person does an act which is danger-

ous without taking proper precaution to prevent danger arising therefrom, and the death of a person results, it is a criminal act against the person killed.

"(7) If the act from which injury to another ensues is one lawful in itself, there must be gross negligence in its performance to warrant criminal liability.

"(8) But, if the act was unlawful in itself, a greater degree of care and caution is required to exempt from criminal liability, and, as a necessary corollary of this rule, it follows that a less degree of negligence is required to make it criminal. The more dangerous the act done the greater degree of care and caution to guard against injury is required.

"(9) In other words, the rule of law can be briefly and correctly stated that the degree of negligence in the performance of an act is to be determined in each particular case by the nature of the act and the particular circumstances of each case.

"(10) In this connection I charge you that the General Assembly of this state has declared all railroads in this state to be public highways and foot passengers are not prevented from walking thereon, and that the drivers of all locomotive engines are held to a greater degree of care and diligence when driving through a populous part of a city than on some parts of the track in a lonely and retired part of the community.

"(11) In this case, as in every one charging death from criminal negligence, it is for the jury to determine from all the facts and circumstances in the case, by the evidence, and under the charge of the court, whether or not the alleged negligence is criminal. If under the circumstances of the case you consider they exercised the care and precaution which prudent and careful persons in the case would have observed, you should acquit them.

"(12) But when the act complained of, though careless in itself, is committed under circumstances from which it might be reasonably inferred that no injury could happen, the person performing it is not criminally responsible.

"(13) But the mere fact that an accident through an honest misapprehension of the surrounding circumstances or by reason of a mistake in judgment will not excuse the person whose act caused it, when such misapprehension or omission resulted from negligence in failing to observe and obey any rule or precaution which it was his duty to obey and observe.

"(14) Where one by his negligence has caused or contributed to the death of another, it is not necessary that there be any intent or will concurring in the negligence or omission of duty which causes death.

"(15) If the act were intended and with a purpose of causing death, the homicide would be murder. And, if the negligence of others as well as that of defendant has contributed to the result, he nevertheless will be responsible.

"(16) It will be immaterial that there was negligence on the part of the deceased contributing to the result; the doctrine of contributory negligence having no place in the laws of crime.

"(17) But you are charged to inquire into the guilt or innocence of these two defendants over the death of one or more of the named decedents, due to the criminal negligence or carelessness of one or both of these defendants.

"(18) I call your attention to what the law means by the words 'criminal negligence'.

"(19) 'Criminal negligence' is an unlawful act done carelessly or negligently, or a lawful act done without due caution or circumspection. 'Carelessness' is criminal and within the limits supplies the place of direct criminal intent, and gross carelessness resulting in injury to others is criminal even if the act done is lawful.

"(20) For the purpose of impressing on you the distinction just referred to, I charge that if you find the switch train left the depot on the night of the collision on the incoming track, in-

stead of the outgoing track, by the order of the defendant Irvine, if you find he was in charge of said engine, and if you also find that it was unlawful or in violation of the rules of the yard to take such incoming track, he, the said Irvine, is held to a greater degree of care and circumspection than if the taking of said incoming track was not unlawful. If the taking of the incoming track was not unlawful, it would take gross carelessness to make his conduct criminal.

"(21) And if you find that defendant Madox was subject to the orders of Irvine, his superior, he was under no obligation to obey an order of his superior that called him to do an act unlawful, or to do a lawful act in a grossly reckless and careless manner.

"(22) You are the exclusive judges of the evidence in this case, as well as to the credibility of witnesses. Nine of you must agree on a verdict.

"(23) If from the evidence you believe beyond a reasonable doubt that the defendants in charge of the switch engine in leaving the depot on the night of the collision took the incoming track, and that it was unlawful to do so, and failed to exercise the diligence, caution, and circumspection that good and prudent persons in such department of service are accustomed to exercise, and that such conduct on their part resulted in the collision which caused the death of any one of the alleged decedents, they are both guilty as charged.

"(24) And if you find in taking said incoming track when leaving the depot they did an unlawful act, and that in moving their engine on said incoming track they did not exercise the care and caution which prudent and good officials in such departments are accustomed to exercise, but in a grossly careless and reckless manner, they are guilty as charged. But, if after a careful conscientious survey of all the evidence in the case you have abiding with you a reasonable doubt as to their guilt your duty is to give them the benefit of that doubt and acquit."

Defendant excepted to paragraph 19 of this charge on the ground that "it was contrary to the law governing the case on trial."

We need hardly say that such a vague and general objection as this can avail nothing.

Defendant excepted also to paragraph 20 of the charge on the ground that it was—

"prejudicial to Irvine's cause and defense in that it threw the entire responsibility on him, and was, indirectly at least, a comment on the facts and to Irvine's disadvantage; and for the further reason that, according to the testimony given in the case by the railroad men, Irvine was no more responsible for any accident which might happen than was the engineer, and by this explanatory charge of the court the entire responsibility was placed on the defendant Irvine."

We do not find this objection well founded. The case was peculiarly one in which the charging of mere abstract principles of law, without illustrating them by application to the facts of the case, would be of little assistance to the jury; and this charge did no more than make such application. True, as a general proposition, it is not permissible to make special mention of particular facts, or groups of facts, thereby attracting special attention to them and giving them undue prominence; but the charge must cover every phase of the case, and if one of the phases depends upon certain particular facts, or groups of facts, these may have to be alluded to in order to convey to the jury a

practical idea of the law of the case. In the present instance, Irvine, as foreman, occupied a special position, different from that of the engineer, and different principles of law applied to their two cases; and it became necessary to allude to the facts from which this difference arose in order to give the jury a practical, or working, idea of the principles of law called into play by this difference. We do not think the charge complained of did more than this. Indeed, we think that in its phraseology it was more favorable to the defendant Irvine than he could have required. The contention that according to the testimony of the railroad men, Irvine, as foreman, had no greater responsibility resting upon him than did the engineer, is not borne up by the testimony brought up by the bill.

Defendant excepted, also, to paragraph 14 of the charge as "misleading and not explaining the law of the case, and as an erroneous interpretation of the law of the case."

This objection is too vague and general to be of any service. An objection should be so framed as to enable the judge to correct his mistake if he has made one. No such opportunity is afforded when such a vague and general objection is made as the one we have here. We will add, however, that, when read in connection with the other parts of the charge, this particular paragraph means simply that gross and culpable negligence will supply intent; and is therefore good law and unobjectionable.

Defendant excepted also to paragraph 8 of the charge, as "not applicable to the facts of the case."

We think the charge was eminently applicable.

The special charges which the defendant requested the judge to give the jury were as follows:

"I charge you that, if you find by the evidence in this case that in going on the wrong track, on which the collision occurred, the defendants, or either of them, did so without intending to be disregarding of the danger which others might be placed in, or that they were not indifferent to the danger which might result from the act, then it is your duty to find them, or the one to which this charge will apply, not guilty.

"(2) I charge you that, before you can find either of the defendants guilty, you must be convinced beyond a reasonable doubt from the evidence adduced in this case that one acted in such a manner as to be indifferent to what might result from the act of going upon the track on which the collision occurred. You must be convinced that the wrong track was gone onto knowingly, and with indifference to the danger which might ensue from the act. If the evidence does not support these conditions, it is your duty to bring in a verdict of not guilty.

"(3) I charge you that if you find by the evidence in this case that the defendant Irvine was ignorant of his engine's being on the wrong track, and that he was guilty of no gross negligence in being there, and had a good reason to believe that all was right, it is your duty to bring in a verdict of not guilty as to him.

"(4) No one is responsible for death resulting from misadventure, even though he act with gross ignorance, and even if the act is unlawful, though mistakenly believed to be innocent. Excusable homicide imports some fault, error, or omission so trivial that the law excuses from punishment, but not from blame.

"(5) There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness, without which it cannot be. * * * It is therefore a principle of our legal system that the essence of an offense is the wrongful intent, without which it cannot be.

"(6) I charge you, to render a person guilty of homicide because of the performance of a negligent act causing death, the negligent act must have been his personal act. So when a person charged with the performance of an ordinary duty cannot be held criminally responsible for negligent homicide, because death resulting from a failure to perform, or an improper performance of such duty, where he has procured a competent agent to perform such duty in good faith, and the negligence is that of the agent and not of himself, as in this case, if you find from the evidence that the signal or order was given by a fellow workman with Irvine to go on the wrong track without Irvine's knowledge, you should bring in a verdict of not guilty as to him.

"(7) To fasten criminal responsibility upon a person for criminal negligence, causing the death of another, it is indispensable to prove beyond a reasonable doubt that he omitted to do something which he ought to have done, or that he did that which he should not have done, in such a grossly negligent way that the law would impute to him the criminal intent which is the essential ingredient of crime. So, to render a person liable criminally for neglect of duty, there must be such a degree of culpability as to amount to reckless and negligent conduct.

"(8) I charge you that an exception to the rule that, if homicide results from negligence, it is manslaughter, exists, when the act resulting in death, although careless in itself was done under such circumstances that it could not reasonably be supposed that injury would follow.

"(9) I charge you that negligence, to be criminal, must be so great as to indicate on the part of the person guilty of it an indifference to the consequences which might result therefrom. I therefore charge you that it is not manslaughter where the act resulting in death, although careless in itself is the result of an honest mistake of judgment.

"(10) Mere negligence, with no intent to do harm, and under the belief that no harm was possible, but from which death results, does not render the negligent person criminally responsible therefor.

"(11) An act lawful in itself, when properly performed, may be performed so improperly (that is recklessly and wantonly) as to render it unlawful, and, in such case, if the death of another result directly and proximately therefrom, it is manslaughter; the wanton recklessness or gross negligence in such case supplying the place of a direct criminal intent. But inferences of guilt are not to be drawn from remote causes, and the law does not hold a person criminally responsible for slight negligence, nor for even a mere failure to observe ordinary care and diligence, but for only gross negligence, which alone supplies the place of the criminal intent.

"Negligence to be gross and criminal must be so grave as to indicate upon the part of the person guilty of it an indifference to the consequence which might result therefrom.

"The negligence must be gross and such as an ordinarily reasonable and prudent person (that is a person of ordinary discretion and judgment) might, and reasonably ought to, foresee and anticipate would endanger the lives and safety

of others, and be likely to result in fatal injuries to others."

All of these special charges, except the sixth, seventh, and ninth, are objectionable, in that they do not sufficiently take into account the fact that, if the special duty rested upon defendant as foreman to see to it that the engine did not go upon this incoming track, his omission to perform that duty would constitute criminal negligence, making him liable, even though it was the result simply of inattention; and most of these charges present other objectionable features.

According to No. 1, the defendant could be guilty only if he had intended to be disregarding of, or indifferent to, the danger which might result from his taking his engine upon this incoming track. Intent is, of course, a necessary ingredient in crime; but to be unobjectionable the request should have gone on and explained that, while intent was necessary, the law would supply it from recklessness and culpable disregard of the safety of others.

According to charge No. 2, defendant can be guilty only if he went upon the track "knowingly and with indifference." This means that defendant was relieved from the duty of using the precaution to learn whether or not the engine was on the right track. In other words, negligent acts of omission would not be punishable. According to that theory, a conductor or engineer who would take a trainload of human freight into an open drawbridge would not be criminally liable, provided he did not know it was open, although he knew the drawbridge was there, and that it was liable to be open.

According to charge No. 3, defendant is exculpated by his ignorance, even though he was charged with the special duty of being informed, and the safety of others depended directly and immediately upon his fulfilling that duty.

According to special charge No. 4, a person who brings about the death of another as the result of doing an unlawful act commits no crime, if he believes the unlawful act to be innocent. This assumes that one can be permitted to believe that an unlawful act is innocent; or, in other words, that one can plead ignorance of the law. The well-recognized rule is that the doer of an unlawful act is conclusively presumed to know the unlawfulness of the act, and that, if the death of a human being results from the intentional doing of such unlawful act, it is either murder or manslaughter according to the circumstances of the case. Bishop, Crim. L. (8th Ed.) § 698 et seq.

The special request No. 5 in order to be unobjectionable, should have been qualified by adding that recklessness or gross culpable negligence may supply intent.

Charge No. 6 is good law, but inapplicable to the facts of the case, in that no one on the trial undertook to say that defendant had "procured an agent to perform the duty"

which, as foreman, rested upon him. Defendant does not deny that he was foreman of the engine, and in the actual discharge of the duties of that office, when the engine went upon this wrong track. He does not pretend to say that he had abdicated for the time being his said office and transferred its functions to another. The only thing he says in that connection is that the engine's having gone upon the wrong track was unknown to him until too late for the situation to be mended.

Charge No. 7 is so worded as to be calculated to mislead the jury. It reads that:

"It is indispensable for the state to prove beyond a reasonable doubt that Irvine * * * did that which he should not have done in such a grossly negligent way that the law would impute to him criminal intent."

This is open to the construction that, even if Irvine's going upon this wrong track was culpable negligence, nevertheless he is not guilty if the manner of his doing it was not negligent; that is to say, if before venturing upon the track he looked carefully to make sure that it was free, and, after going upon it, he kept careful and sharp lookout. Moreover, if in going upon this track Irvine violated a rule of the company adopted for the safety of this incoming track—in other words, failed in a plain duty involving directly the safety of others—his conduct in the premises, whether it was an act of omission, or commission, was criminal, irrespective of whether it was or not reckless.

The special request No. 8 was inapplicable to the facts of the case, because those in charge of this engine could not possibly suppose that injury would not follow their going upon this track when the very reason of their being forbidden to go upon it was that to do so would be too dangerous for the risk to be incurred. The charge is self-contradictory. It supposes that an act which because of its dangerous character constitutes carelessness and negligence may be done under circumstances excluding the idea of danger. In other words, that an act admittedly dangerous can reasonably be supposed not to be dangerous.

Special request No. 9 is the only part of the case that has caused us some hesitation. We have concluded to sustain the ruling of the trial judge, and our reasons are these. The defendant Irvine, in testifying for himself as a witness, did not claim that the engine's going upon this wrong track was the result of an exercise of judgment on his part. On the contrary, he denied that he had any knowledge of the engine's having gone on this wrong track until just before the collision. He was therefore in no position to request a charge to the effect that he is not guilty if the engine's going upon this wrong track was the result of an error of judgment on his part. It is noteworthy that this special charge was prepared and presented by the attorney for the defendant Madox,

and was merely joined in by the attorneys for Irvine; also, this charge may be said to be practically covered by paragraph 13 of the general charge.

Special request No. 10 is inapplicable to the facts of the case.

Special request No. 11, in so far as good law, is covered by the general charge.

Judgment affirmed.

(126 La.)

No. 17,956.

Ex parte RYAN.

(Supreme Court of Louisiana. Feb. 28, 1910.
On the Merits, May 9, 1910. Rehear-
ing Denied June 6, 1910.)

(Syllabus by the Court.)

On Motion to Dismiss.

**1. APPEAL AND ERROR (§ 801*)—DISMISSAL—
MATTERS NOT APPARENT OF RECORD.**

Appellee moves to dismiss the appeal basing his motion upon alleged proceedings taken in the district court after appellant has executed an appeal bond of which proceedings there has been no evidence produced in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3161; Dec. Dig. § 801.*]

**2. HABEAS CORPUS (§ 85*)—CUSTODY OF CHILD
—DISMISSAL OF WRIT.**

Relator, as father, seeks through a writ of habeas corpus directed against the brother of his deceased wife to obtain the care and custody of his daughter, about 13 years of age, living with her uncle. The district court refused relator's application to have the child surrendered to him, and he has appealed. Under the facts disclosed by the evidence the judgment is affirmed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 78; Dec. Dig. § 85.*]

**3. HABEAS CORPUS (§ 90*)—CUSTODY OF
CHILD—BEST INTERESTS OF CHILD.**

A writ of habeas corpus issued by a court on the petition of the father of a girl 13 years of age, directed against the brother of relator's deceased wife, to compel defendant (with whom the child was living) to surrender possession of her to him, can scarcely be regarded in the light of an ordinary suit between relator and his brother-in-law. It is a matter in which the state has an interest beyond the mere right and authority of the father. The welfare and happiness of the child are involved and have to be considered by the court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 90; * Parent and Child, Cent. Dig. §§ 4-32.]

4. HABEAS CORPUS (§ 34*)—CUSTODY OF CHILD.

When called into court by a writ of habeas corpus issued on the petition of the father of the child to show cause why he should not surrender to him possession of his child, defendant has the right by way of defense to urge before the court any good reason why relator's prayer should not be granted and relief be refused.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 7; Dec. Dig. § 34.*]

5. HABEAS CORPUS (§ 90*)—CUSTODY OF MINOR—DETERMINATION.

Relator having invoked in his behalf the exercise of the court's authority in the premises, it has the legal right from a consideration of all the issues raised to determine on the trial

of the writ whether a proper case has been shown calling for its interposition.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.*]

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; R. Emmett Hingle, Judge.

Application of John F. Ryan for writ of habeas corpus. Application denied, and relator appeals. Affirmed.

See, also, 124 La. 286, 50 South. 161.

John C. Wickliffe, for appellant. Fernand J. Nunez, for appellee.

On Motion to Dismiss.

NICHOLLS, J. This case comes a second time before this court. The pleadings and facts connected with it will be found reported in 124 La. 356, 50 South. 385.

The trial of the writ of habeas corpus which was suspended for a time through a misapprehension was finally taken up, and resulted in a judgment adverse to the relator, and from that judgment he appealed.

Appellant executed an appeal bond, and we are informed that, by proceedings subsequently taken in the district court, the appeal was, on motion of the respondent, dismissed on the ground of the insufficiency of the surety on the appeal bond.

The transcript of appeal had been none the less filed in this court, but the appellee, taking as his basis therefor the proceedings in the district court, moved this court to dismiss the appeal. Before the case was submitted to us, counsel for appellant filed an ex parte copy of an order of the lower court setting aside its prior order dismissing the appeal, and reinstating for subsequent action the motion to dismiss.

The proceedings in the district court in respect to the dismissal of the appeal are not in this record. The motion to dismiss is hereby overruled. The appeal is sustained.

Statement of the Case.

NICHOLLS, J. This case comes a second time before this court. The pleadings and facts connected with it will be found reported in 124 La. 356, 50 South. 385.

The trial of the writ of habeas corpus, which was suspended for a time through a misapprehension, was finally taken up, and resulted in a judgment adverse to the relator, and from that judgment he appealed.

The relator does not bring this action as tutor of the child, Frances Elizabeth Ryan, but under his asserted legal rights as her father. The defendant, Edward Peter, is the brother of relator's deceased wife. He claims to be entitled to the care and custody of the little girl by reason of the fact that, when her father and mother disagreed and parted, the mother and the child went at once to his home, and after a visit to her

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mother in Carrollton on which visit she (the mother) died the child was again taken to respondent's house, where she has since continued to live. Respondent urges that as her near relative it is his duty to guard against her being brought under influences calculated to injure her, and to see to her welfare and happiness.

It is disclosed by the testimony that the father shortly before his marriage with defendant's sister had had illicit relations with a young girl, and that a child (a boy) was the result of such connection. The young girl herself married a short while after a man by the name of F.

The district judge in rejecting the demand of the father to be awarded the care and custody of his daughter referred to this matter in the following language:

"The relationship with Mrs. F. before the latter's marriage should have ceased when he himself married. He should have put that affair behind him. However, a careful consideration of the entire testimony on this point cannot but lead to the conclusion that his relatives had not only come in contact with her, but also he had stooped so low as to bring his child Frances Elizabeth (just reaching the age of womanhood) into the company of this woman and his ill-begotten child by her. Relator makes no denial of this, but on the contrary brings this Mrs. F. into court into constant company of members of his family to testify in his behalf in this suit, and it appears from the record that she had not been previously summoned to testify as a witness herein. This latter fact alone should lead to the immediate inference that the relations presently existing between relator and Mrs. F. can result in aught but good, should the child be given into his custody. For a child to be forced into the company of a woman who has been the cause of so much misery to the departed mother of the child foreshadows for her little of the good and happiness coveted by all. Believing firmly in the preservation of those ties binding a father to his child, it is indeed with reluctance that I have arrived at the conclusion that the relator herein should not be awarded the custody of the child; and I have been largely influenced in this connection by the presence in court of Mrs. F. Her being in the constant company of relator's family (his mother, sister, and brother) in the train to and from the courthouse—her demeanor therein as a witness—all are facts whereof I am bound to take judicial cognizance in the consideration of this case, wherein are involved questions which are more than sacred—the character and future of the child just budding into womanhood."

Opinion.

The testimony in the record does not justify the conclusion of the trial judge as to the continuance of relator's relations with Mrs. F. since his marriage. Both she and the relator testified that they had ceased after his marriage, and there is nothing in the transcript to establish the contrary. There was no attempt to impeachment further than the fact mentioned by the judge that she was a voluntary witness on the trial of the writ, and went from New Orleans to St. Bernard in the same car with the mother, brother, and sister of the relator.

There is nothing to show that if the care of the child be given to the father that she will be brought into contact with the woman. She does not appear to visit at his mother's house at which he lives or to have anything to do with the family.

As was likely to be the case, these prior relations of her husband with Mrs. F. and the existence of this illegitimate child were made known to the wife, and became the occasion of constant trouble and dissension between the spouses. Their married life was unhappy. They separated several times, and finally the husband left the matrimonial domicile, and went to his mother's house, leaving his wife and child at home; assigning as a reason for so doing that he was sick and did not receive proper attention and treatment at home. The wife and child thereupon went to live with her brother claiming his sympathy and support. Relator does not seem to have objected to their doing so. In his testimony, he says:

"I met my landlord, and he told me that my wife was going to sell everything out, and I went home and found my wife there, and asked her about it, and she told me 'Yes'; and she said she was going to her brother Ed. I was a very sick man, and I said, 'Kate, if you think it is better, all right; and if you want anything let me know.'"

It appears from the record that she did let him know that she needed assistance for herself and child and that he failed to respond; that she thereupon made an affidavit against him under the statute charging him with "having willfully and unlawfully deserted his minor child, Frances Ryan, aged thirteen years, and failed to support and provide for said minor child, having left her in destitute circumstances"; that relator was found guilty by the juvenile court of the offense charged, and sentenced to pay \$5 weekly to the criminal sheriff; that having failed to do so a rule was taken against him under which he was sentenced to three months' imprisonment in the parish jail.

Relator subsequently brought a suit for separation from bed and board, and asking for the custody of the child, but, before that case was brought to trial, the wife died. The little girl was placed upon the stand, and testified that she did not want to go to her father. Referring to conditions existing at the time that she and her mother left to go to her mother's brother, in respect to which relator testified that he left the house for want of proper treatment, she said that a doctor had been sent to attend him; that her mother did not speak to him, so she had to wait on him; that her father would not let her mother come to him; that she would speak to him, but he would not speak to her—she speaking to him, but he would not let her come near him.

We are satisfied that out of the troubles and dissensions between the parents the child has grown up to have no affection to-

wards her father; that she has reached an age when to be forced to live with him and his family and to separate from those to whom she has become attached would be productive of future unhappiness to her, resulting in anything but good.

It is not pretended that the relations presently in charge of her are not perfectly able and willing to support and take all proper care of her, or that there is anything in the present situation which calls for a change. There are no property rights involved in this case. There is one circumstance shown by the testimony which we have not noticed, which under existing conditions unquestionably tended to widen the breach between the parents, which was that relator declared to one of the witnesses that he intended to take care of and support the illegitimate child, and that he did not care what the consequences would be. Relator questions the power and authority of the trial judge to examine into and pass upon his fitness to take charge of the child. He urges that his own domicile is in the parish of Orleans as is legally that of the child, and that the civil district court is the only court to which such matters should be submitted. There is no question before the court touching the matter of tutorship and the rights and obligations of parties arising therefrom. Relator has not sought to be nor has he been appointed tutor.

The child, as a matter of fact, has been and is in the care and custody of respondent in the parish of St. Bernard. Such being the case, relator has himself properly invoked the power and authority of the judge for that parish by way of habeas corpus, and respondent has answered the writ showing cause. By so doing he has raised issues which it became necessary for the judge to incidentally determine. Cases are constantly occurring before courts wherein questions are passed upon incidentally for the purpose of deciding a particular case before them when the same issues would, if made the subject-matter of a direct action between the parties, be properly referred to some other tribunal. These proceedings by habeas corpus can scarcely be regarded as a suit between the relator and the defendant.

It is a matter (as was said in *Lasserre v. Michel*, 105 La. 741, 30 South. 122, 54 L. R. A. 927) in which the state has an interest which goes beyond the mere right and authority of the father. The welfare and happiness of the child have to be considered by the court.

In view of all the facts and circumstances of this case, we find no error in the judgment appealed from. It is therefore affirmed, with costs.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 17,995.

CITY OF NEW ORLEANS v. LENFANT
et al.

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 692*)—NUISANCE (§ 5*)—NUISANCE PER SE—WHAT CONSTITUTES.

An unauthorized obstruction upon a public street is a nuisance per se, but no lawful use which an individual makes of his own property is a nuisance per se, nor can it be made so by a municipal ordinance; and whether it is a nuisance, in fact, or per accidens, depends upon the circumstances and surroundings.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1493; Dec. Dig. § 692.* *Nuisance*, Cent. Dig. § 6; Dec. Dig. § 5.*]

2. MUNICIPAL CORPORATIONS (§ 605*)—RAILROADS (§ 237*)—ORDINANCES—PARKING OF CARS.

An ordinance which absolutely prohibits the doing of things, upon property which appears to be the subject of private ownership, which are harmless, in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and where it imposes arbitrary and unreasonable obligations it is illegal, for that reason.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1338; Dec. Dig. § 605.* *Railroads*, Dec. Dig. § 237.*]

(Additional Syllabus by Editorial Staff.)

3. RAILROADS (§ 237*)—"PARKING" CARS—REGULATION—VALIDITY.

"Parking," literally speaking, is the assembling of things or animals within a park, as the parking of artillery, or the parking of deer; and, as applied to an ordinance forbidding the parking of cars at a certain place, it means the assembling of cars, few or many.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 237.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7745.]

4. NUISANCE (§ 1*)—"NUISANCE PER SE"—"NUISANCE IN FACT."

A "nuisance" is anything which incommodates, annoys, or produces inconvenience or damage. A "nuisance per se" is one which is always a nuisance in certain localities. A "nuisance in fact" is one which becomes a nuisance by reason of circumstances and surroundings.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4855-4866; vol. 8, p. 7734.]

Appeal from Second Recorder's Court, City of New Orleans; Charles J. Gauthreaux, Recorder.

Joseph Lenfant and others were convicted of violating an ordinance of the City of New Orleans, and appeal. Reversed and defendants discharged.

Denegre & Blair and Victor Leovy, for appellants. I. D. Moore, City Atty., and John J. Reilley, Asst. City Atty., for appellee.

Statement of the Case.

MONROE, J. The defendants in this case are prosecuted under an affidavit which charges:

"That on or about the 25th day of October, 1909, on Elysian Fields street, between Dauphine and Marais streets, * * * one Jos. Lenfant, Jos. Kinkaid, Jno. McGuire, and Charles Marshall, each, employes and officers, did then and there willfully viol. Ord. 6,057 N. C. S., and particularly sects. 1, 2, 3, and 4, of said Ord. 6,057, N. C. S. All against the peace and dignity of the city of New Orleans."

By which we understand is meant that the parties named, acting as officers and agents, violated ordinance No. 6,057 new council series, which ordinance reads and provides as follows:

"Whereas, numerous complaints have been made, and are being made, in regard to the parking of cars by the Louisville & Nashville Railroad Company and the Southern Pacific Railroad Company, on Elysian Fields street, to the great discomfort of persons living on that street, and with increase of danger to all persons crossing Elysian Fields street; and, whereas, these complaints tend to show that such use of the neutral ground in the middle of Elysian Fields street by such railroad companies is wholly unnecessary on the part of said companies and has led to many serious accidents, and to the depreciation of property on that street; and, whereas, the operation of said companies, in parking their cars and making up their trains, can be, and ought to be, carried on off Elysian Fields street; now, therefore:

"Section 1. * * * That the Louisville & Nashville Railroad Company, the Pontchartrain Railroad Company, the Southern Pacific Railroad Company, and all other railroad companies which have hitherto used the neutral ground of Elysian Fields street for parking their cars and for carrying on the work of making up trains, watering engines and doing other similar yard work, be, and they are, hereby, prohibited from using said neutral ground for such purposes.

"Sec. 2. * * * That said neutral ground shall not be made use of, at any point, for the purpose of cleaning cars or locomotives or blowing out or watering engines, or cleaning furnaces, or switching cars or making up trains.

"Sec. 3. * * * That the said railroads shall, within thirty days after the passage of this ordinance, keep and operate gates on both sides of Elysian Fields street, at right angles, and it shall be the duty of the gatemen operating said gates to notify, by signals, all street cars and vehicles crossing said street of the approach of trains, and the fact that said gates are open shall be deemed and treated as notice justifying vehicles in crossing said street, without further special notice from the gatekeeper. Said gates shall be operated so as to interfere as little as possible with traffic and travel across Elysian Fields street.

"Sec. 4. * * * That all cars moving through said street shall, within thirty days after the passage of this ordinance, be provided with modern and efficient spark arresters and smoke consumers.

"Sec. 5. * * * That any officer, agent, or employe of any railroad company, violating any of the provisions of this ordinance, shall, upon conviction * * * be condemned to pay a fine of not more than \$25, or imprisonment for not more than 30 days, or both, in the discretion of the recorder, each day that any of the provisions of this ordinance shall be violated constituting a separate offense."

Defendants filed a plea, in which they allege that the ordinance relied on by the prose-

cution is unconstitutional, for the reasons: That it contravenes various specified articles of the state and federal Constitutions, in that, if enforced, it will impair the obligations of contracts, divest vested rights, take or damage private property, without compensation previously made, operate as a regulation of interstate commerce, deprive defendants and the corporations named of their liberty and property without due process of law, and deprive them of the equal protection of the law; and that it is illegal because the things forbidden by it are legal and proper, and those commanded wholly unreasonable and ultra vires of the city of New Orleans. They further allege that the so-called "neutral ground" is a strip of land, say, 53 feet wide, separating the two roadways of Elysian Fields street, which is, and for many years has been, the private property of the Pontchartrain Railroad Company, having been purchased by it from Bernard Marigny in 1830, and the title to which, as so acquired, has been adjudicated upon and affirmed by the Supreme Court of this state in a litigation, to which the city of New Orleans was a party, and the record of which is annexed to the plea; that the railroad companies named in the ordinance, other than the Pontchartrain, are using the property, under the authority of the latter, and defendants are using it under the authority of, and contracts with, said three companies; that the city of New Orleans brought a civil suit alleging that the said strip of land had been dedicated to public use, but, upon the filing of exceptions by the Pontchartrain Company, resorted to the present proceeding, to drive it, and those holding under it, off therefrom. Defendants annex to their plea the petition in said suit, and various titles, ordinances, contracts, etc., as establishing the facts alleged, and they sum up their position by averring that the different sections of the ordinance in question are unconstitutional, illegal, and unreasonable: (Section 1) Because it prohibits the Pontchartrain Railroad Company and the companies and persons acting under its authority, including defendants, from using the alleged neutral ground for parking cars, making up trains, watering engines, and other "yard work," all of which is necessary for the purposes of the traffic, interstate and intrastate, in which said companies and persons are engaged, and none of which constitute nuisances; (section 2) because it prohibits said parties from using the alleged neutral ground, at any point for cleaning cars or locomotives, or blowing out or watering engines or furnaces, or switching cars, or making up trains, none of which are nuisances; (section 3) because it imposes upon said parties the burden of erecting gates and maintaining watchmen, day and night, along the whole length of Elysian Fields street, including sparsely settled localities, where there is little traffic by day, and none by night, which is unnecessary and unrea-

sonable; (section 4) because it fails to define modern and effective smoke consumers and spark arresters, and there are no smoke consumers for locomotives.

Counsel for the prosecutor objected to the plea, in so far as it sets up the title of the Pontchartrain Railroad Company, and objected to the documents annexed thereto, in support of said title, and the objections, as also an objection to the entire plea, having been sustained, defendants took their bills of exception. Bills were also taken to the exclusion of the documents referred to, when they were offered in evidence; to the exclusion of testimony offered to show the cost of erecting and maintaining gates between Claiborne street and the lake; and to the refusal of the recorder to inform defendants, after he had found them guilty, whether they were convicted under one, or another, or all, of the sections of the ordinance.

Opinion.

The appellate jurisdiction of this court, which is here invoked, "extends to all cases in which the constitutionality, or legality, of * * * any fine, forfeiture, or penalty, imposed by a municipal corporation, shall be in contestation; * * * in such case," says the Constitution, "the appeal, on the law and the facts, shall be directly from the court in which the case originated to the Supreme Court." Const. art. 85. Under this grant, the inquiry into the facts of a case, thus made appealable is confined to the facts necessary to the determination of that question. *State ex rel. Graffina v. Finnegan*, Recorder, 52 La. Ann. 695, 27 South. 564; *Louisiana Society, etc., v. Moody*, 52 La. Ann. 1815, 28 South. 224; *State v. Pearson*, 110 La. 398, 34 South. 575.

From a reading of the preamble of the ordinance under consideration, it will be seen that its main purpose, as there declared, is to prohibit the "parking" of cars upon the neutral ground of Elysian Fields street, which practice is said to occasion great discomfort to the residents of that street, to be wholly unnecessary, and to have led to many serious accidents and to the depreciation of property. The preamble further declares that the making up of trains on said neutral grounds can, and ought to be, carried on elsewhere, and the text of the ordinance prohibits and penalizes not only the parking of cars, and the making up of trains, but the watering of engines and other similar "yard work," including the cleaning of cars, locomotives, or furnaces, the blowing out of engines, the switching of cars for the making up of trains, and it proceeds to command the railroad companies, using the said neutral ground, to keep and operate gates on both sides of Elysian Fields street and to provide its "cars" with modern and efficient spark arresters and smoke consumers.

The ordinance appears to have been enacted either upon the theory that the neutral

ground is part of Elysian Fields street, or upon the theory that it is immaterial whether it is a public highway or the private property of those who are prohibited from using it for the purposes mentioned. The contention of the learned counsel representing the city of New Orleans is that "this is, primarily, a prosecution to abate a nuisance," and "that it is perfectly immaterial whether the nuisance is committed on private or public property," and it was in accordance with the theory last mentioned that he objected to, and the recorder excluded, the evidence offered on behalf of defendants to show that the property belongs to the Pontchartrain Railroad Company, and that they (defendants) are using it under the authority of that company. We agree with the learned counsel that the purpose of the city is to abate what it, in effect, characterizes as a "nuisance," since the preamble of the ordinance declares that the things prohibited by it occasion discomfort to the residents, lead to accidents, and operate to depreciate property, and a "nuisance," in the broad sense, is anything which incommodes or annoys or produces inconvenience or damage. There are, however, "public nuisances" and "private nuisances," and a nuisance may be, at the same time, both public and private, if it, at the same time, affects the general public and also inflicts upon a private individual some special injury that is not inflicted upon the general public. There are, also, "nuisances per se," and "nuisances in fact," or "per accidens"; the former being those which are always nuisances, or always nuisances in certain localities, and the latter being those which become nuisances by reason of circumstances and surroundings. We do not, however, agree with the learned counsel that it makes no difference whether the act complained of as a nuisance is committed in a public street or upon private property. The city of New Orleans is vested with the power to regulate the use of its streets, in the interest of the public; but it could not, if it would, lawfully surrender a street to a railroad company as a park for the assembling of its rolling stock, or as a railroad yard for the watering and blowing out of its locomotives, the cleaning of its cars, the making up of its trains, etc., for that would be to give to a private concern that which belongs to the public and is inalienable, and such use of a street would constitute a nuisance per se. On the other hand, no lawful use made by an individual of his own property is a nuisance per se, nor can it be made so by municipal ordinance; the most that the municipal authorities can do being to suppress those uses which are nuisances per se, or upon inquiry, are found to be nuisances per accidens. Whilst, therefore, it is entirely competent for the city of New Orleans to prohibit the parking, cleaning, switching, etc., of cars, and the making up of trains, on Elysian Fields street, simply because it is the judge

of what constitutes an obstruction in its streets, and an obstruction is a nuisance per se, a very different question is presented when it undertakes to prohibit a railroad company from using its own property in that way; such uses not being nuisances per se, and the city having no power to make them so by ordinance. Considering the ordinance here in question, we have stated that the main reason for its enactment, as declared in the preamble, is to prevent the parking of cars on what is called the "neutral grounds of Elysian Fields street." But the defendants say that the so-called "neutral ground" is the property of the railroad company, under the authority of which they are using it, and, though they were denied the privilege of introducing their proof on the subject, it has been brought up in the record, with the bills of exception, and appears to make out a prima facie case, at least as to a strip of land having a width of 50 feet (French measure). We do not consider this a proper occasion upon which to express any final opinion upon the title so exhibited, but will remark that, in the case of Pontchartrain Railroad Company v. City of New Orleans, 27 La. Ann. 162 (the record of which was offered by defendants), the city was sued for damages for having destroyed the plaintiff's depot, which appears to have been built partly on the strip of land thus referred to, and partly on the roadways upon either side, and there was judgment in favor of plaintiff in the sum of \$30,000. The opinion of the court (Morgan, Judge) begins as follows:

"Plaintiff purchased from Bernard Marigny a strip of land 50 feet wide. The purchase was made on the 23d of February, 1830. The title of Bernard Marigny to the land in question cannot be denied. The land was bounded on either side by a public street."

The opinion then goes on to state that in March, 1830, the city council authorized the company to make use of the streets on either side of its own land, to a width of 12 feet, and that, acting under the authority so granted, the company built "a depot which covered their own land; the outside pillars thereof, side walls, side columns, and other portions of the depot rested upon the two strips of 12 feet each, on either side of their property." That in 1870 the city revoked the permission to use said 12-foot strips and notified the company to vacate, and that there followed a litigation, pending which the city had the entire depot destroyed. Wherefore it was condemned in damages, as stated.

In State v. Marshall, 50 La. Ann. 1176, 24 South, 186, one of the defendants now before the court was prosecuted under an ordinance which denounced, as a nuisance, the parking of cars on the neutral ground of Elysian Fields avenue (being the thoroughfare here in question), and made it unlawful for a "railroad company to permit its engines, cars, or trains of cars to remain standing upon any portion of the ground known as Elysian Fields avenue, or the neutral ground, between

the levee and Miro street, except so far as may be done by trains in motion." In that case, as here, the defendant sought to prove that the neutral ground (so called) belonged to the Pontchartrain Railroad Company, and the documents offered were excluded, and, as in this case, were brought up with the bills of exception. It appeared, too, that some parol testimony was taken down showing the company's possession of the property, and, upon the whole, Mr. Justice Breaux, as the organ of the court, said:

"We feel justified in considering the ordinance as one applying to the owner of the property, the 'neutral ground,' to which it (the ordinance) refers."

And, proceeding so to consider it, he said:

"We are compelled to decline to give the sanction of this court to an ordinance so needlessly restraining in its character."

On application for rehearing it was further said:

"The court desires to have it well understood that it does not decide that, as between the city of New Orleans and any one else who may claim any interest of any kind, the city is not the owner of 'Elysian Fields avenue,' or that it is the owner. * * * The whole question related to the parking of cars on Elysian Fields. We decided that parking of cars was not, of itself, a nuisance."

In State v. Owen, 50 La. Ann. 1181, 24 South, 187, the defendant appears to have been prosecuted under the same ordinance for delivering and exchanging cars on the "neutral ground," and it was said by the court:

"Different from the 'neutral ground' on Canal street, these grounds, as we are informed, are private property. It sufficiently appears of record, for the purpose of this case, that the title is in the Pontchartrain Railroad Company, and that the grounds are partly in the possession and use of the Louisville & Nashville Railroad Company, with the written consent of the owner, the Pontchartrain Railroad Company. * * * We are not dealing with the possibilities of the ordinance, but with the ordinance as it is. Interpreting it as it reads, we do not think it is legal. It treats as a nuisance, per se, an exchange, which is manifestly not a nuisance, per se. The offense charged here is the delivery of cars and an exchange of cars. There is no question here of the improper carrying on of the work of exchanging cars and the injury thereby occasioned. The ordinance seeks to stop the work. In our view, the collecting of cars, or stopping them, on Elysian Fields, done in a fair and reasonable way, gives no ground of complaint."

In the instant case, as in those cited, we must assume, for the purposes of the question at issue, that the "neutral ground," referred to in the ordinance under which defendants are prosecuted, is the private property of the Pontchartrain Railroad Company, and that defendants are making use of it with the consent of the owner. "Parking" (literally speaking) is the assembling of things, or animals, within a park, as the parking of artillery, or the parking of deer, and we should take it rather to refer to things, or animals, not, at the moment, in actual service, but so

held, to be used, within a longer or shorter period, as required. As applied in the ordinance, it means the assembling of cars, few or many, upon what we must assume to be private property. We are unable to discover in what way such parking constitutes a nuisance in fact, and still less a nuisance per se, since cars are ordinarily inanimate and inoffensive, and, so far as we can see, there can be no more reason why a person should not store them on his property than why he should not store other vehicles, or lumber, or bricks, or anything else, inoffensive, in itself, in which he deals, or which he chooses to store. As to the obstruction of the view, if the Pontchartrain Railroad Company owns the land in question, it has the right to rebuild its depot, or to build a succession of depots, extending from one cross-street to another, along Elysian Fields street, and the owners of the property on either side would have no better cause of complaint than would a property owner, upon one side of an ordinary (single-road) street, should the owner of the vacant square, on the other side, conclude to cover it with tall buildings. The same thing may be said of the other uses of the property which are prohibited by the ordinance. Though the things prohibited are harmless, in themselves, they are prohibited, absolutely, as only acts constituting nuisances per se are prohibited, and a person prosecuted under the ordinance can as well be convicted for doing those things in a manner which could inflict no legal injury and furnish no just cause of complaint as for doing them in such a way as to create a nuisance. The defendants before the court are not charged with doing the prohibited things in any particular way. The charge is that "they did, then and there, viol. ord. 6,057, N. C. S.," and, as we have said, the ordinance prohibits, absolutely, uses of (what, so far as appears, is) private property, which, in themselves, are legitimate and void of legal offense.

With regard to the command contained in section 3 of the ordinance to maintain gates, it applies as well to that portion of Elysian Fields street which is almost uninhabited as to that portion which is built up and is crossed by street cars and vehicles engaged in the ordinary city traffic, and we are of opinion that the command is unreasonable, and hence illegal, in failing to distinguish between places where gates should be maintained and places where they would serve no useful purpose, but, according to the evidence, would constitute an element of danger. Section 4 of the ordinance requires that "all cars * * * shall * * * be provided with modern and efficient spark arresters and smoke consumers"—thus failing to distinguish between an ordinary car and a locomotive, and also failing to distinguish between locomotives which burn oil and those which burn coal.

It appears from the testimony, however, that the locomotives of one of the companies named in the ordinance use oil, and emit no sparks, and we can take notice of the fact that the vast majority of "cars" carry no fire. Our conclusion, then, is that the ordinance No. 6,057, N. C. S., is unconstitutional, in that it seeks, unduly, to regulate and trammel the use of property which appears to be the subject of private ownership, and that it is illegal, because arbitrary and unreasonable.

It is therefore ordered, adjudged, and decreed that the convictions and sentences appealed from be annulled and set aside, and that the defendant be discharged.

PROVOSTY, J., takes no part, not having heard the argument.

TOWN OF JONESTOWN v. GANONG. (No. 13,730.)

(Supreme Court of Mississippi. June 13, 1910.)

1. JUDGMENT (§ 143*)—DEFAULT—SETTING ASIDE—EXCUSE FOR DEFAULT.

On an application for a writ of mandamus to a town to compel the payment of a judgment and the levy of a tax, it is not a sufficient excuse for default of defendant town, to authorize setting aside of default judgment, that the officers of the town, duly summoned, thought the suit was one for the purpose of making final the judgment previously recovered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 143.*]

2. JUDGMENT (§ 101*)—DEFAULT—PLEADING TO SUSTAIN DEFAULT.

Code 1906, § 811, providing that in actions founded on an instrument of writing showing the sum due, or on an open account where a copy of the account is filed with the declaration, if judgment be rendered by default, the clerk shall calculate the amount due, and judgment shall be entered therefor, does not apply to an application for mandamus to a town to compel the payment of a previous judgment against it, so as to require as an essential to the validity of a default judgment in mandamus that the previous judgment be made an exhibit to the petition.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 101.*]

3. MUNICIPAL CORPORATIONS (§ 1037*)—ACTIONS AGAINST—FORM OF JUDGMENT.

A judgment in mandamus to compel the payment of a prior judgment is not void because rendered against the mayor and board of aldermen, when the suit was against the town, in view of Code 1906, § 3300, providing that a town may sue in its corporate name, and section 3361, providing that in suits against municipalities, summons shall be executed on the mayor or municipal clerk, and making it the duty of such officer to give notice of the suit to the board.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1037.*]

4. MANDAMUS (§ 112*)—SUBJECTS OF RELIEF—PAYMENT OF JUDGMENT—LEVY OF TAXES.

Under Code 1906, § 3317, fixing the limit of taxation for municipalities, a mandamus can-

not be issued to compel the levy of a tax beyond the statutory limit.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 246; Dec. Dig. § 112.*]

5. MANDAMUS (§ 172*)—SCOPE OF INQUIRY—ENFORCEMENT OF JUDGMENT—LEVY OF TAXES.

Where a petition for mandamus to a town to enforce a judgment against it does not allege that the mayor and board of aldermen are guilty of fraud in refusing to have the property of the town assessed, or that they have fraudulently assessed the property at too low a valuation, the court has no power to inquire into the valuation of the property listed and approved for assessment, or to order the levying of any tax solely for the purpose of paying the judgment.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 172.*]

6. MANDAMUS (§ 176*)—SUBJECTS OF RELIEF—ENFORCEMENT OF JUDGMENT—ISSUANCE OF WARRANT.

Under Code 1906, § 339, making it the duty of the clerk of the board of supervisors to register all warrants issued by the board, to be paid in the order of their registration, on a petition for mandamus to enforce a judgment against the town, the court may require the municipal authorities to issue a warrant in payment of the judgment as required by section 8379, and direct that the warrant be filed with the treasurer and have priority from the date of filing over all other debts payable out of the general revenue of the town.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 176.*]

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Application by W. L. Ganong for a writ of mandamus to the Town of Jonestown. From a judgment granting the writ, defendant appeals. Reversed and remanded, with directions.

J. W. Cutrer, for appellant. D. A. Scott and Tim E. Cooper, for appellee.

MAYES, C. J. On the 18th day of February, 1907, W. L. Ganong filed a petition in the circuit court of Coahoma county, praying for a mandamus against the proper officers of the town of Jonestown. The object sought to be accomplished by the proceeding was to compel the payment of a certain judgment which Ganong had obtained against the town, and which it refused and failed to pay. The substance of the petition is that the town of Jonestown is a municipal corporation, created under the laws of the state of Mississippi, and deriving its corporate powers by virtue of the general Code chapter on the subject of municipalities, being chapter 93 of the Code of 1892. The petition further alleges that at the April term, 1905, of the circuit court of the county in which the petition is filed, petitioner recovered a judgment against the town for the sum of \$1,346.45. This judgment was subsequently appealed to the Supreme Court by the town, and the judgment was affirmed. On affirming the judgment the Supreme Court

awarded damage on the judgment of 5 per cent. on the principal and interest then due, together with all costs. The petition then alleges that no part of the judgment has been paid, and that the town steadily refuses payment, and all executions issued on the judgment have been returned "nulla bona" by the sheriff. The petition further alleges that petitioner has frequently and repeatedly requested the mayor and board of aldermen to levy a tax upon the real and personal property within the corporate limits of the town for the purpose of raising an amount sufficient to pay the judgment, but the mayor and board of aldermen fail and refuse to do this. The petition concludes with a prayer for a mandamus, commanding the town, through its proper officers, to pay petitioner, out of any money in their hands, the full amount due on the judgment, together with interest, damage, and costs. It further prays that, if there are not sufficient funds in possession of the town for this purpose, it be required through its legally constituted officers to levy a tax sufficient for the purpose, and that the judgment be paid as soon as this tax shall be collected. The petition further prays for such other or additional relief as the circumstances of the case may justify, and which may seem proper when the court shall have heard the cause.

On filing this petition a summons issued, directed to the sheriff of the county, commanding him to summon the town of Jonestown to answer this petition. This summons was executed on C. W. Butler, the mayor of Jonestown, on the 22d day of February, 1907. At the succeeding April term of court, the town not having answered, a judgment by default was taken, which recited as follows: "That said petitioner, W. L. Ganong, have judgment against the town of Jonestown, and that the writ of mandamus issue, directed to the mayor and board of aldermen, requiring them to pay over to Ganong the sum of \$1,568.56, being the sum adjudged to be due and payable to Ganong in the case of W. L. Ganong v. Village of Jonestown, together with interest, damage, and costs. In default of payment in accordance with the judgment of the court, or if it should appear that the town of Jonestown has not in its hands, possession, or control a sufficient amount to pay the judgment, then the mayor and board of aldermen of the town are required to levy a tax upon all the property situated in the corporate limits and subject to taxation for a sum sufficient to discharge the judgment, with interest and costs already accrued, and the cost to accrue in this suit." And it is then directed in the judgment that the sums collected as provided in the judgment shall be applied to the discharge of the debt due petitioner. The judgment further requires that the mayor and board of aldermen pay

this judgment on or before the 20th day of December, 1907. The judgment bears date of the 24th day of April, 1907. On the 3d day of May the town, through its attorney, filed a motion to vacate the judgment, assigning therefor seven causes. The first is that the defendant has a meritorious defense; the second, that the declaration did not make the judgment an exhibit to the petition, and therefore the court was without authority to enter any judgment; the third, because there was no writ of inquiry; the fifth, because the judgment required the defendant to do things beyond its legal power; the sixth, because the judgment is rendered against the board of mayor and aldermen, and there was no suit against the board of mayor and aldermen, but against the town of Jonestown. We need take no note of the other causes assigned. In support of the motion, the mayor filed an affidavit in which he states that the mayor and board of aldermen of the town of Jonestown were not advised of the nature of the proceedings, and believed that this last proceeding only related to the making final of the judgment before that time affirmed by the Supreme Court, and because of this and acting on this assumption they did not pay any attention to the suit of petitioner; that the town has a meritorious defense to the action, which consists in this: That the assessed valuation of all the real and personal property in the corporate limits liable to taxation is not more than sufficient, when taxed to the utmost allowed by law, to meet the current expenses of the municipality; that the judgment of the court requires the mayor and board of aldermen to levy taxes for the purpose of paying this judgment greatly in excess of all possible revenues of the town at the highest rate of taxation allowable by law; that the ends of justice require that they be permitted to make proof of that fact; that when the writ was served on the affiant the city had no legal representative or adviser, nor means to secure one, and has but lately been able to secure the services of the attorney to represent it.

Some testimony is taken in the case, but we do not deem it necessary to enter into any discussion of that, since, in our judgment, the case turns upon other questions which are raised in the proceedings we have set out. We may say in the outset that, so far as the application to set aside this judgment rests in any excuse offered by the mayor as a reason for permitting the judgment by default to be taken, there is no sort of merit in it. When suits are brought against municipal corporations, they are to be treated as any other litigants, and any fact which warrants the taking of a judgment by default against a private individual is warrant for the same thing when the defendant is a municipal corporation. The municipality is given authority under the law to select the officers that shall represent it. The inhabit-

ants of a municipality are given the ballot for the purpose of allowing them to select suitable and faithful representatives, and if such representatives are not selected the fault lies with the improper use of the ballot, and the remedy must come by its rightful use. This record shows that the mayor was duly summoned, and it then became his duty to find out for what purpose he had been summoned into court; but as the city's representative he paid no attention to it, but allowed judgment to go by default. His excuse is that he thought the suit was only for the purpose of making final the judgment previously recovered by Ganong against the town, and on this account he asks that it be set aside. It was gross neglect on the part of the mayor not to have informed himself on this subject, and his failure can never furnish any legal reason why this judgment should be vacated. However meritorious may be the defense of the town, it has lost its right to make any defense by the neglect of its mayor, if there are no reasons for vacating this judgment outside of the excuse offered, and this disposes of the first error assigned.

It is next insisted that, because the petition did not make the judgment an exhibit to the petition, the court was without authority to enter any judgment. Counsel for appellant cite section 811 of the Code of 1906 as authority for this proposition. It is our view that this section has no application to this case. The above section has application only in a case where it is sought to recover a money judgment. Where the sum does not appear in the pleadings, then a writ of inquiry is made necessary after judgment by default. But in this case the judgment sought is not a money judgment, but the enforcement of one already recovered. The petition shows what judgment it is that petitioner is seeking to compel the municipality to pay. A reference to the record of that judgment specifically fixes the amount, and if the mayor and board of aldermen answer the mandate of the court with a certificate showing that they have paid the judgment, interest, and costs, to enforce which this suit is brought, they will show compliance with the court's order. It is true that the judgment of the court in the mandamus proceeds to specify the amount to be paid; but this is mere useless verbiage placed in the judgment, and may be so treated. The thing sought to be done by the petition, and the duty directed by the court to be performed by the mayor and board of aldermen, is the payment of the judgment recovered by Ganong against the town of Jonestown. This disposes of the second and third contention of counsel for appellant.

It is next contended that the judgment is void because it is rendered against the mayor and board of aldermen, when in truth the suit was against the town of Jonestown. It

is quite true that this suit is styled "*W. L. Ganong v. Town of Jonestown*"; but the prayer of the petition is that the town of Jonestown, through its proper officers, be required to do the things sought to be accomplished by the mandamus proceeding. The town of Jonestown cannot act, except through its municipal authorities, and any command addressed to it in any other manner than through its officers could have no compulsory force. In addition to this, section 3300 of the Code of 1906 expressly provides that it may be sued by its corporate name. Section 3931 provides that in suits against municipalities summons shall be executed on the mayor or municipal clerk, and the same section makes it the duty of such officer to give notice of the suit to the board, and on failure to do so he is liable on his bond for all damage caused by any such failure. These sections apply to every kind of suit which may be instituted against a municipality, whether in tort, on contract, or in mandamus proceedings, and all are just as much parties, in their official capacity, as if each had been named in the proceeding. These statutes expressly make them parties when the requirements of the statute have been complied with. It was the town of Jonestown that Ganong was seeking to make pay this debt, not the individual members of the board. The members of the board unofficially had no concern about this claim. Being the town of Jonestown that Ganong sought to compel to pay the judgment, he instituted proceedings against the town as the statute required, and after service of summons on the mayor all proper authorities of the town became parties thereto and subject to any order or judgment made by the court. See, also, *Mayor v. Lord*, 9 Wall. 409, 19 L. Ed. 704.

We now come to the most serious contention in the case. The judgment rendered by the trial court commanded the mayor and board of aldermen to pay the judgment; but it further directed that, if there was not a sufficient amount on hand to pay the judgment, then the mayor and board of aldermen are directed to levy a tax on all the property in the municipality in an amount sufficient to pay off the judgment. There is an affidavit in the record to the effect that the taxable value of all the property in the town is not more than sufficient to pay the current expenses, and that to obey the judgment of the court would compel the levying of a tax forbidden by law. It appears that our statute (section 3317) fixes the limit of taxation for municipalities, and it seems well settled that a mandamus cannot be issued to compel the levy of a tax beyond the statutory limit. This proceeds upon the idea that the courts cannot create, but they can only enforce, a legal duty. All contracts with municipalities must be made with reference to their legal power to raise revenue wherewith to pay their obligations, and all judgments recovered against a municipality have written into them

the law subservient to which the municipality owes its legal existence. *Beard v. Board of Supervisors*, 51 Miss. 542. And see note on page 706 of 19 L. Ed., in case of *Mayor v. Lord*. It will be borne in mind that there is no allegation in the petition that the mayor and board of aldermen are guilty of fraud in refusing to have the property of the town assessed, or that they have fraudulently assessed the property at a valuation so low as to defeat, and for the purpose of defeating, the collection of petitioner's claim; and, this being the case, we do not think that the court had any power to inquire into the valuation of property listed and approved for assessment by the municipal authorities, or to order the levying of any tax solely for the purpose of paying this debt. If the authorities refused to assess at all, or fraudulently assess, and it is so alleged, a different question would arise. We speak in reference to this claim which is payable out of the general revenues of the town.

We cannot accede to the contention that a municipality may defeat a judgment by consuming all its revenues for general municipal purposes for current expenses. Like individuals, the municipalities must meet their just debts. When the state incorporates municipalities, and gives them the extensive and important powers which are found in their charters, giving to them the right to make contracts and vesting in them important powers of government, the faith of the state is pledged to individuals dealing with them that the state will afford a remedy to compel payment of their just debts. In this case there is the judgment of a court, which is the highest evidence of the justice of the claim, and the courts will not permit municipalities to set at defiance their decrees. In the case of *Evans v. Pittsburg*, Fed. Cas. No. 4,567, it is said: "The great multiplication of corporations of modern times, the readiness of Legislatures in conferring on them most extensive and dangerous powers, demand of the courts the most liberal application of the remedy by mandamus to prevent a failure of justice." Again in the same case it is said: "Cities are often possessed of stock and other property, not devoted to special public use, which might well be levied on to satisfy a judgment against it. But where a city has no such property (as in this case), and its officers obstinately refuse to satisfy a claim which courts of justice have pronounced to be legal and just, there will be an entire failure of justice unless this remedial writ of mandamus be issued and enforced by the court whose judgment is publicly set at defiance. States claiming sovereign or equal sovereign powers may repudiate their contracts if they are content to abide the scorn of the civilized world, because there is no superior with power to compel obedience. But this sovereign right to defraud makes no part of the privileges or immunities granted by the charters of city corporations. They are subject to the laws as much as pri-

vate corporations or individuals, and where the court has adjudged that they shall pay a sum of money due on their contracts, it is bound to find a remedy for the party aggrieved by their refusal." The judgment of the court in favor of Ganong is itself an appropriation of enough of the general revenues of the town to pay the judgment. On the hearing the trial court should have required the municipal authorities to issue a warrant in payment of the judgment, as required by section 3379, Code of 1906, and should then have directed that this warrant be filed with the treasurer, and have priority from the date of filing over all other debts payable out of the general revenue of the town. No express provision is to be found in the statute as to the manner in which municipalities shall pay their obligations when warrants are issued, where there is not a sufficient fund to pay all warrants; but section 339, Code of 1906, applying to boards of supervisors, makes it the duty of the clerk to register all warrants issued by the board, and they are to be paid in the order of registration, unless there is sufficient money to pay all warrants. Thus we see that the law contemplates priority, and it is to be applied by the remedial writ of mandamus to municipalities as well as to counties, when without it the writ would prove futile.

We may say that it appears from this record that the town of Jonestown has owed this debt for more than 15 years, that it has recognized the validity of the claim under the sanction of its official action more than once, and surely justice demands that this long-delayed creditor find some remedy in the law to compel the liquidation of this claim. We reverse and remand this case, with directions to the trial court to require the municipal authorities to issue their warrant in satisfaction of this debt, and when the warrant so issued is filed it shall take precedence of all other claims, payable from the general revenues, from the date of its filing.

Reversed and remanded.

WALKER-DURR CO. et al. v. MITCHELL et al.

(Supreme Court of Mississippi. June 13, 1910.)
EQUITY (§ 66*)—MAXIMS—NECESSITY OF DOING EQUITY.

Defendant rented land to another for a certain amount of cotton as rent, and such other subrented, and the subtenant thereafter sold two bales of cotton to plaintiffs in payment of a debt secured by a trust deed on his crop. Defendant, upon learning of the sale and removal of the cotton, sued out attachment against the tenant for rent, and the writ was levied on the two bales bought by plaintiffs, whereupon the latter signed a replevin bond as surety for the tenant and the attachment was released, and on the trial judgment was rendered against the tenant and plaintiffs as surety for the amount of the rent. Defendant had a landlord's lien on

the cotton sold to plaintiffs, which was sufficient to pay the rent. *Held*, that plaintiffs could not enjoin the execution of the judgment against them, even if the attachment, replevin bond, and judgment were void, under the maxim that one seeking equity must do equity; the evidence showing that defendant was entitled to the cotton sold to them under her landlord's lien, and plaintiffs not having offered to pay her the value of the cotton which was due her for rent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188-190; Dec. Dig. § 66.*]

Appeal from Chancery Court, Simpson County; Sam Whitman, Jr., Chancellor.

Action by the Walker-Durr Company and others against Cora Mitchell and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is a bill to enjoin execution of a judgment of the justice of the peace for \$100 and costs, by the appellants, Walker-Durr Company and others, against Mrs. Cora Mitchell, the plaintiff in the judgment, and the justice of the peace who rendered the judgment, and the sheriff who had the execution for levy, the appellees. The court below rendered a decree in favor of the appellees, dissolving the injunction, and for the amount of the judgment sought to be enjoined, with interest and cost and attorney's fees. The controlling facts, about which there is no controversy, are as follows:

Mrs. Cora Mitchell rented some land to Hugh Bass for the year 1906, for which Bass agreed to pay her 1,000 pounds of lint cotton. Bass subrented the land to Jack and Hosea Griffin. In the fall Jack Griffin sold two bales of cotton raised on Mrs. Mitchell's land to Walker-Durr Company in payment of a debt he owed them and for which they had a deed of trust on his crop. The Walker-Durr Company was a mercantile corporation. Mrs. Mitchell, hearing of the removal from leased premises and sale of this cotton, sued out an attachment for rent against Hugh Bass before a justice of the peace. The justice of the peace deputized one Lee, who was not an officer, to execute this writ. He levied the same on some seed cotton on the leased premises and on the two bales of cotton bought by the Walker-Durr Company; and the latter, for the purpose of retaining the cotton in their hands and releasing the seed cotton from the levy of the writ, signed a replevin bond as surety for the tenant, Hugh Bass, and accordingly the attachment was released. This bond was returned into court, and at the time fixed for trial the tenant, Hugh Bass, appeared and consented to judgment, and the justice of the peace thereupon rendered judgment against Bass, the tenant, and Walker-Durr Company, the surety on his replevin bond, for the amount of the rent, \$100, and costs. From this judgment an appeal was taken to the circuit court, and by the circuit court dismissed, and a writ of procedendo awarded.

Walker-Durr Company allege in their bill that they owed Mrs. Cora Mitchell nothing, and the judgment was void because the writ of attachment was levied by Lee, who was not a constable or other officer authorized to levy such writs, having been appointed specially so to do without authority of law, and because judgment was rendered against W. M. Durr as surety on replevin bond, when in fact he was not a surety, and because the replevin bond was void and did not bind Walker-Durr Company. There is no dispute about the fact that the two bales of cotton bought by the Walker-Durr Company, and the other cotton on which the attachment was levied, was raised on Mrs. Mitchell's place, and the rent was unpaid, and that she had a landlord's lien on all the cotton, and the value of 1,000 pounds of lint cotton, agreed to be paid as rent, was \$100.

W. M. Lofton, for appellants. Hilton & Hilton and J. B. Sullivan, for appellees.

ANDERSON, J. (after stating the facts as above). The decree of the court below must be affirmed, even though the levy of the attachment writ, the replevin bond, and the judgment sought to be enjoined are void (which we do not decide). The equitable maxim that "he who seeks equity must do equity" applies. It was incumbent on Walker-Durr Company to allege in their bill and prove that they had a valid defense to the demand on which the judgment was founded. This they failed to do. It is alleged, but not proven. On the contrary, the evidence indisputably shows that they purchased from the tenant cotton raised on the leased premises of sufficient value to pay the rent, thereby under the law becoming indebted to the landlord, Mrs. Mitchell, for the amount of such rent, which is the demand on which the judgment is founded. They will not be permitted to invoke the aid of a court of equity and at the same time withhold from Mrs. Mitchell the value of the cotton in their hands, due her for rent. *Stewart v. Brooks*, 62 Miss. 492; *Newman v. Taylor*, 69 Miss. 670, 13 South. 881.

Comenitz v. Bank, 85 Miss. 662, 38 South. 35, does not overrule the *Stewart* and *Newman* Cases, *supra*. This question was not decided in that case.

Affirmed.

BOONE v. MENDENHALL LUMBER CO.
(No. 14,813.)

(Supreme Court of Mississippi. June 20, 1910.)

FIXTURES (§ 21*)—CHATTEL—ANNEXATION.

Where an engine was placed on a concrete foundation, and attached thereto by eight 1¼-inch steel bolts, and a house afterwards built over it, the character of the engine was not changed from that of a chattel to realty, so as to become a fixture, and title to the engine

would not pass to the grantee in a deed conveying the land on which it stood.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. § 21.*]

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Replevin by A. R. Boone against the Mendenhall Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is an appeal from a judgment of the circuit court based on a peremptory instruction granted for appellee, who was defendant in a replevin suit brought by appellant to recover possession of an engine.

J. O. Oakes and Hilton & Hilton, for appellant. Currie & Currie, for appellee.

SMITH, J. The question for determination in this case is whether an engine installed for the purpose of furnishing motive power for a planing mill was so annexed to the realty as to become a fixture, and a part thereof, so that title thereto would pass to the grantee in a deed conveying the land on which same was situated.

The testimony simply shows that the engine was by the owner of the land placed upon a concrete foundation, attached thereto by eight 1¼-inch steel bolts, and that after same was installed a house was built over it. Some evidence was offered by appellee, and excluded by the court, which would probably have thrown some additional light upon the matter. Tested by the rules announced in *Weathersby v. Sleeper*, 42 Miss. 732, it cannot be said that the character of the engine was changed from that of a chattel to realty. The peremptory instruction granted by the court, by which it held that this had been done, was erroneous, and should not have been given.

Reversed and remanded.

SEALS v. PERKINS. (No. 13,553.)

(Supreme Court of Mississippi. July 5, 1910.)

For majority opinion, see 51 South. 806.

MAYES and SMITH, JJ., concur in the result of the case, but do not concur in the reasons assigned therefor.

POSTAL TELEGRAPH & CABLE CO. v. DICKERSON. (No. 14,412.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Attala County; G. A. McLean, Judge.

Action by Essie Dickerson against the Postal Telegraph & Cable Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Harper and J. B. Harris, *amicus curiae*, for appellant. S. L. Dodd and Flowers, Fletcher & Whitfield, for appellee.

PER CURIAM. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

OUSLEY v. STATE (No. 14,342.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Desoto County; W. A. Roane, Judge.

Nathan Ousley was convicted of assault with intent to kill, and appeals. Affirmed.

Farley & Lauderdale, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

BUCHANAN v. STATE (No. 14,660.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Pontotoc County; Jno. H. Mitchell, Judge.

C. B. Buchanan was convicted of illegally selling intoxicating liquors, and appeals. Affirmed.

Geo. T. Mitchell, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

REEVES v. COLLUM (No. 14,453.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Smith County; R. L. Bullard, Judge.

Action between J. R. Reeves and L. Collum. From the judgment, Reeves appeals. Affirmed.

Hughes & Wills, for appellant. J. J. Stubbs and O. S. Cantwell, for appellee.

PER CURIAM. Affirmed.

COPELAND v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(No. 14,403.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Jones County; Robt. L. Bullard, Judge.

Action between J. W. Copeland and the Cumberland Telephone & Telegraph Company. From the judgment, Copeland appeals. Affirmed.

C. R. Gavin, for appellant. J. B. Harris, for appellee.

PER CURIAM. Affirmed.

HEARN v. P. B. MATHISON MFG. CO.

(No. 14,402.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Action between James A. Hearn and the P. B. Mathison Manufacturing Company. From the judgment, the P. B. Mathison Manufacturing Company appeals. Affirmed.

Hardy & Arnold, for appellant. Deavours & Shands, for appellee.

PER CURIAM. Affirmed.

BOND v. STATE (No. 14,518.)

(Supreme Court of Mississippi. June 20, 1910.)

On Suggestion of Error, July 4, 1910.)

On Suggestion of Error.

CRIMINAL LAW (§ 1064*)—APPEAL—WAIVER OF EXCEPTIONS.

Exception reserved to language used by the court in the presence of the jury in ruling on evidence is waived, and so cannot be considered on appeal; such language not having been assigned in the

trial court as ground for new trial in the motion therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2631; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Omer Bond was convicted of crime, and appeals. Affirmed.

W. G. Evans and Jeff D. McLendon, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

On Suggestion of Error.

SMITH, J. Appellant "suggests that the court, in affirming the judgment of the court below, may have overlooked some vital matters in connection with the testimony of Edna Davis, the little 10 year old girl upon whose testimony alone this defendant has been convicted and sentenced to life imprisonment in the state penitentiary."

The matter referred to was certain language used by the trial judge in the presence of the jury in ruling upon the admissibility of the testimony of this witness. This assignment of error was not considered by us when we first had this cause under investigation, nor can it be considered by us now for the reason that this language of the judge was not assigned in the court below as ground for a new trial in the motion therefor; consequently the exception reserved thereto at the time same was used was waived. *Richburger v. State*, 90 Miss. 808, 44 South. 772.

OSYKA MERCANTILE CO. v. WM. ATKINSON BACAT CO. (No. 14,476.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Chancery Court, Amite County; J. S. Hicks, Chancellor.

Action between the Osyka Mercantile Company and the William Atkinson Bacat Company. From the judgment, the Mercantile Company appeals. Affirmed.

Howie & Howie and Potter & Hindman, for appellant. Cassidy & Cassidy, for appellee.

PER CURIAM. Affirmed.

BROWN v. McWILLIAMS (No. 14,579.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Chancery Court, Coahoma County; M. E. Denton, Chancellor.

Action between Felix Brown and R. N. McWilliams. From the judgment, Brown appeals. Affirmed.

Maynard & FitzGerald, for appellant. O. G. Johnston, for appellee.

PER CURIAM. Affirmed.

STATE v. MORRIS et al. (No. 14,189.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by the State, for the use of, etc., against Thomas W. Morris and others. From a judgment for defendants, the State appeals. Affirmed.

C. F. Engle and L. H. Doty, for the State. E. H. Ratcliff, for appellees.

MAYES, C. J. The principles of this case are settled by the case of *Adams v. Miller*, 81 Miss. 613, 33 South. 489.

Affirmed.

**ATLANTIC COAST LINE R. CO. v.
TURNER.**

(Supreme Court of Florida, Division B. May 21, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE DAMAGES.

Where the evidence in a case is such as to warrant the finding of the jury, and there is no certain, uncontroverted evidence which would authorize the appellate court to say that the verdict was excessive, the judgment will not be reversed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Error to Circuit Court, Polk County; J. B. Wall, Judge.

Action by Owen Turner against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sparkman & Carter, for plaintiff in error. J. W. Brady, for defendant in error.

HOCKER, J. Owen Turner sued the Atlantic Coast Line Railroad Company in the circuit court of Polk county for damages for injuries sustained by the negligence of the railroad company in permitting a box car to run into a wagon on which Turner was riding at a street crossing in the town of Mulberry. Turner was thrown from the wagon and claims to have been injured. On the trial the plaintiff recovered a judgment for \$2,500, with 8 per cent. interest from the 21st of July, 1908. The defendant has brought this judgment here for review on writ of error.

The only question insisted on here by the plaintiff in error is that the judgment is excessive. There was evidence that Owen Turner, the defendant in error, was a farmer living on the Alafia river about 5 miles from Mulberry. He had a small farm of about 12 acres, upon which he had lived about 20 years, and upon which he had raised a portion of his family of children. He cultivated the farm from year to year, and when he was not thus employed he had been doing work on the public roads, for which he received \$1.50 a day. At the time of the alleged injury Mr. Turner was 57 years old. At that time he had a slight rupture or hernia, which had never before given him any special trouble or prevented him from following his usual avocations. When the wagon he was in was struck by the car, it was pushed along the track for some distance, and the wheels broken. Mr. Turner was thrown from the wagon, and pushed or dragged for a few feet, but finally rolled off the track. He claims that his hernia was increased and aggravated by being thus thrown from his wagon and dragged along the track, and that ever since he has suffered

more or less pain in his back, stomach, chest, and hips; that he has been incapacitated from following his usual avocations, and is not able to do a day's work; that he will never be in a condition to labor as before he was hurt. There is some confusion in the testimony of the physicians as to the extent of Mr. Turner's injuries, and as to whether they are remediable, though they seem to think his only remedy is a surgical operation, which might or might not relieve him, and which he might or might not survive. Mr. Turner's life expectancy, according to the American Experience Mortality Tables in evidence, was about 16 years. We think that the jury might very well have concluded from the evidence that Mr. Turner's capacity for earning money and working his farm was practically destroyed. They may also have concluded from the evidence that his earning capacity as a laborer before he was hurt was as much as \$400 a year, and this sum multiplied by 16 years, his life expectancy, would amount to \$6,400. The present value of this amount, even using as high as 8 per cent. interest as the basis of calculation, will be \$2,800. This is \$300 more than the jury allowed in their verdict, and leaves out of consideration any compensation for pain and suffering or medical expenses. There is no certain, uncontroverted evidence in this case which would authorize us to say the verdict and judgment are excessive.

The judgment below is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

SHOMAKER et al. v. WATERS et al.
(Supreme Court of Florida, Division B. May 20, 1910.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 137*)—WIFE'S SEPARATE ESTATE—MORTGAGE BY HUSBAND—VALIDITY.

Under the Constitution and laws of Florida a husband has no power to mortgage the crops grown on the separate statutory real estate of his wife, without her written consent as required in the Constitution, and a mortgage on such crops without her written consent, as thus required, is void, and affords no basis for a claim against parties who buy such crops.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 521; Dec. Dig. § 137.*]

Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

Action by J. R. Shomaker and another against T. Waters and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

See, also, 47 South. 936.

Wm. B. Farley, for plaintiffs in error. D. J. Jones, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

HOCKER, J. The plaintiffs in error sued the defendants in error in the circuit court of Jackson county for damages, which the declaration alleges they sustained by reason of the purchase by the defendants in error of certain bales of cotton from one J. T. B. Adams upon which the plaintiffs claimed a lien by virtue of a mortgage upon all the cotton, corn, and other products grown by Adams upon his farm in Jackson county during the year 1904, and also upon a gray mare and two mules. It is alleged that said mortgage was given to secure the purchase price of the two mules, amounting to \$275.60, and also to secure all other advances made by the plaintiffs to said Adams in money, groceries, goods, wares, and merchandise to aid him, said Adams, in the business of planting and farming in Jackson county; that \$314.60 is still due upon said mortgage, besides interest and attorney's fees; that the cotton crop raised by said Adams upon his farm in Jackson county in 1904, was subject to the lien of the mortgage and liable for his debts aforesaid; that the defendants in September, 1904, purchased of said Adams three bales of the lint cotton raised on his farm and subject to the aforesaid lien, and did place the same beyond the reach of the plaintiffs, to their damage of \$300. It is alleged that the mortgage was dated 7th of December, 1903, and duly recorded in the record of mortgages of Jackson county on the 10th of December, 1903, and was due and payable October 1, 1904. The defendants pleaded not guilty, and that the plaintiffs were not damaged as alleged. Issue was joined on these pleas, and a trial had, which resulted in a judgment for the defendants. The plaintiffs are here on writ of error to this judgment.

There are a large number of assignments of error; but, as it seems to us the whole case of the plaintiffs turns on one point, we shall confine ourselves to the consideration of that question. It is shown in the evidence that, when the mortgage was executed upon which the plaintiffs base their rights, J. T. B. Adams was married to Mrs. Kate Schouppe. He lived with her on her own farm, and the cotton which Adams sold the defendant was raised on his wife's farm. It does not appear that she contracted, or authorized her husband to contract, any part of the debt secured by the mortgage. Mrs. Schouppe says that the crop raised on her farm was her crop. She paid for some of the labor employed by Adams in raising the crop, and for a part at least of the fertilizer, and also furnished the provisions. Adams appears to have left his wife in the latter part of 1904. She says she cultivated all the farm, and called it her farm; that the crop was made by her children and the hired man. Adams seems to have furnished the mules that worked on the farm, and to have had, as the husband of his wife, some sort of control over the farm. It does not appear that he had any interest in the farm or the crops, other

than that which the statute gives him. The mortgage is not signed by Mrs. Schouppe (Adams), nor does it appear that she in any way authorized its execution. We are thus brought face to face with the question whether a husband, under our Constitution and statutes, has any authority or right to mortgage the crops grown on his wife's land to secure his own obligations without her consent given as provided in the Constitution. We presume that the plaintiffs rely upon section 2208, General Statutes of 1906, which provides that any person may give a lien upon crops and products for advances procured to aid him in planting. We do not think this section of the statutes can be held to authorize a person to give a lien upon any crop or product which is not his own.

Article 11 of the present Constitution is as follows:

"Section 1. All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"Sec. 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated for the purchase money thereof; or for money or thing due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"Sec. 3. The Legislature shall enact such laws as shall be necessary to carry into effect this article."

When the case of *Marye v. Root*, 27 Fla. 453, 8 South. 636, was decided, it involved the construction of the constitutional provision of 1868, regarding the property rights of married women. The constitutional provision at that time (paragraph 26, art. 4) was as follows: "All property both real and personal of the wife owned by her before marriage or acquired afterwards by gift, devise, descent or purchase shall be her separate property and not liable for the debts of her husband."

It was contended in the above-cited case, under the statutes and law as it then existed, the rents and profits of the wife's land belonged to the husband and could be subjected to the payment of his debts. But the court held otherwise. It was held that the beneficial use of the wife's land could not be subjected by creditors to the payment of these debts; that the only qualification was the statutory provision "that the property of the female shall remain in the care and man-

agement of the husband," and that this proviso was to be strictly construed; that "the title to the wife's property shall not be taken on execution for her husband's debts, yet the property shall remain in the care and management of the husband. This was nothing more than consigning to the care and management of the husband the wife's property, with the unmistakable declaration that the title to it should continue separate, independent, and beyond the control of her husband, and the property should not be taken against her will to pay his creditors." The further discussion of this question in the opinion emphasizes the proposition that the rents and profits of the wife's land did not become the husband's by virtue of the provision giving him the control and management of the property, or by virtue of other provisions of the statute.

The Constitution of 1885 does not modify or change the relation of the husband to the wife's property thus ascertained in the case of *Marye v. Root*, supra, except that it provides specifically how her separate property may be made liable for his debts; that is to say, with "her consent given by some instrument in writing executed according to the law respecting conveyances by married women." It seems, therefore, to be settled that the rents and profits of a wife's separate statutory property are her property. The title to the crops raised on her land by her husband is prima facie in her, and not in him. To hold that the crops raised by the husband on the wife's land are his, and the title to them is in him, would be equivalent to depriving her of the title to the rents and profits. For other features of the law relating to a married woman's property rights, see *Fritz v. Fernandez*, 45 Fla. 318, 84 South. 315; *Graham v. Tucker*, 56 Fla. 307, 47 South. 563, 19 L. R. A. (N. S.) 531; *Micou v. McDonald*, 55 Fla. 776, 46 South. 291. This is not a suit to subject a married woman's property in equity or otherwise. We are simply required to determine as a matter of law whether the husband, without the written consent of his wife as required in the Constitution, can lawfully mortgage the crops on her land. It is admitted by the plaintiff in error that the land belonged to Mrs. Schouppe before Adams married her, and belongs to her yet. It does not distinctly appear whether her title is a legal or an equitable one; but the witnesses call it *her land* and *her farm*, and we presume that they mean she has the legal title to the land, as this is the usual custom among the laity in speaking of legal titles. If her title is an equitable one, we do not see how that fact could give validity to the mortgage in this case. Our opinion is that the mortgage upon which plaintiffs rely to give them a lien on the cotton bought by the defendants is void as to cotton and other products of Mrs.

Schouppe's land, and affords no basis for a claim against the defendants.

We have not considered any other question as to the right of action.

The judgment below is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

ARCADIA MERCANTILE CO. v. BRANNING et ux.

(Supreme Court of Florida, Division A. May 9, 1910.)

(Syllabus by the Court.)

1. EQUITY (§§ 148, 223*)—PLEADING—"MULTIFARIOUS."

A bill of complaint may be deemed to be multifarious when it states distinct, separate, and independent equities that can better be adjudicated in more than one suit. Unless multifariousness clearly appears from the allegations of a bill of complaint, it is not subject to a demurrer on that ground.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367, 502; Dec. Dig. §§ 148, 223.*]

For other definitions, see Words and Phrases, vol. 8, p. 7726.]

2. EQUITY (§ 149*)—PLEADING—MULTIFARIOUSNESS.

Where the parties complainant in an equity proceeding have a common interest in the subject of the litigation, and have some relation to each other growing out of the common interest, and the allegations are of a single distinct equity, as to which a specific relief is prayed against a single defendant, the bill of complaint is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. § 149.*]

Appeal from Circuit Court, De Soto County; J. B. Wall, Judge.

Bill by Alpha Branning and wife against the Arcadia Mercantile Company. A demurrer to the bill was overruled, and defendant appeals. Affirmed.

W. E. Leitner, for appellant. Jno. W. Burton, for appellees.

WHITFIELD, C. J. The appellees, husband and wife, filed a bill in equity in the circuit court for De Soto county against the appellant, in which it is in substance alleged that Alpha was the owner in fee simple and in possession of certain described land, and for a valuable consideration moving from the wife conveyed the land to her, and she took and holds possession; that the appellant here procured a judgment against J. H. Jenkins and Alpha Branning individually upon a service made only on J. H. Jenkins, when no partnership relation existed between them; that the land was sold under an execution to the appellant. The prayer is for a cancellation of the judgment and deed of conveyance, and for general relief. A demurrer to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the bill was overruled, and on appeal the sole contention is that the bill of complaint is multifarious.

A bill of complaint may be deemed to be multifarious when it states distinct, separate, and independent equities that can better be adjudicated in more than one suit. Unless multifariousness clearly appears from the allegations of a bill of complaint, it is not subject to a demurrer on that ground. See *Murrell v. Peterson*, 57 Fla. 480, 49 South. 31.

Where the parties complainant in an equity proceeding have a common interest in the subject of the litigation, and have some relation to each other growing out of the common interest, and the allegations are of a single distinct equity, as to which a specific relief is prayed against a single defendant, the bill of complaint is not multifarious.

Whether the husband or the wife was the real owner of the land, the allegations of the bill of complaint made them both proper parties complainant, and the relief sought against a sole defendant is based upon allegations of a distinct equity.

The interlocutory order appealed from is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, P. J., and HOCKER and PARK-HILL, JJ., concur in the opinion.

RAY v. WILLIAMS PHOSPHATE CO. et al.
(Supreme Court of Florida. May 9, 1910. Re-hearing Denied June 9, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 481*)—FORECLOSURE—DEED—COLLATERAL ATTACK.

A master's deed under foreclosure proceedings in one circuit will not be declared void in another circuit in behalf of one not a party, but who had actual knowledge of the proceedings prior to the sale, upon allegations of fraud as between the original parties, jurisdictional facts appearing in the former case.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 481.*]

2. COURTS (§ 480*)—RESTRAINING SUIT IN COURT OF CO-ORDINATE JURISDICTION.

One court of equity should not enjoin a party from proceeding in another court of equity of equal and co-ordinate jurisdiction merely because of convenience.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1270-1278; Dec. Dig. § 480.*]

3. COURTS (§ 475*)—JURISDICTION—COURTS OF CO-ORDINATE POWER.

As between courts of co-ordinate power, the one first acquiring jurisdiction of the subject-matter should as a general rule be permitted to retain it to the end.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229-1239; Dec. Dig. § 475.*]

In Banc. Appeal from Circuit Court, Citrus County; W. S. Bullock, Judge.

Bill by Walter Ray against the Williams Phosphate Company and another. A demurrer to the bill was sustained, and complainant appeals. Affirmed.

H. L. Anderson and H. M. Hampton, for appellant. E. E. Gunby and M. G. Gibbons, for appellees.

COCKRELL, J. Upon the return of this case (55 Fla. 723, 46 South. 158), the bill was amended and a demurrer thereto sustained, from which this appeal is taken.

The bill, as now before us, prays the judge of the Fifth judicial circuit to cancel a deed of sale made and confirmed under a decree of foreclosure and sale rendered by the judge of the Sixth judicial circuit because of fraud upon the latter's jurisdiction. It is alleged that a bill of complaint was filed in 1895 in Pasco county within the Sixth circuit to enforce a mortgage lien given by the Globe Phosphate Company to the St. Petersburg State Bank as trustee, upon which a final decree was entered in 1902; that Ray purchased the lands named in the mortgage taking possession in 1901, without actual or constructive knowledge of the foreclosure proceedings, and was not made a party thereto; that the mortgage was collusive and void by reason of certain acts of one Bishop who was president of the phosphate company and the bank; that all the lands named in the mortgage lie in the Fifth circuit, but that to confer ostensible jurisdiction on the judge of the Sixth circuit advantage was taken of a provision in the mortgage covering after-acquired property, in that Bishop out of his personal funds procured a conveyance of a half interest in a small tract of land in Pasco county to the corporation mortgagor.

Exactly when Ray learned of the proceedings is not shown, but it does appear that he knew of them before the sale took place and notified Trice of his adverse holding. No attempts were had in that suit to stop the sale or to show fraud in fact upon the court's jurisdiction. It cannot now in view of the admitted facts be argued that upon the face of the record the judge of the Sixth circuit had not jurisdiction to enter the decree that was entered, and, with the actual knowledge then possessed by Ray, he should have applied to that forum for relief.

We need not now concern ourselves with the *lis pendens* statute. As incidental to the prayer that the master's deed be declared null and void, the bill alleges an abortive attempt to sue out a writ of assistance and a fear that other attempts will be made. This is not a case where a court of equity is asked to enjoin an action at law, but where one court of equity is asked in effect to enjoin a party from proceeding in another court of equity of equal co-ordinate and prior jurisdiction merely because of physical convenience.

The general rule is, as between courts of

co-ordinate power, the first acquiring jurisdiction of the subject-matter is permitted to retain it to the end, and there is not sufficient showing here to justify an exception to that rule.

The order is affirmed.

WHITFIELD, C. J., and TAYLOR, HOCKER, and PARKHILL, JJ., concur.

SHACKLEFORD, J., disqualified.

OLIVER v. VEAZEY.

(Supreme Court of Alabama. May 12, 1910.)

COURTS (§ 62*)—TERMS.

Under Code 1907, § 3245, authorizing a term of circuit court in a particular county on the third Monday after the third Monday in September, continuing two weeks, a judgment rendered October 15, 1909, is not void, as rendered at a time not authorized by law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 207; Dec. Dig. § 62.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Action between Alex Oliver and W. E. Veazey. From the judgment, Oliver appeals. Affirmed.

Frank W. Lull, for appellant. T. G. Hil-
yer, for appellee.

SAYRE, J. This appeal is from a judgment rendered in the circuit court of Elmore on October 15, 1909. Appellant's assertion is that the judgment is void, for the reason that the court is shown by the record to have been held at a time not authorized by law. The court was held as provided in section 3245 of the Code, and the identical objection here taken was disposed of adversely to appellant's contention in State ex rel. Gipson v. Pearson, 160 Ala. 131, 49 South. 236.

The judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and Mc-
OLELLAN, JJ., concur.

CITY OF BIRMINGHAM v. STEPHENS & KERR.

(Supreme Court of Alabama. May 12, 1910.)

1. INTOXICATING LIQUORS (§ 10*)—MUNICIPAL CORPORATIONS—POWERS.

A municipal corporation can exercise only such powers as are clearly comprehended in the grant of power, or necessarily implied therefrom, or incidental to the purpose and object of the corporation; and a city may not adopt an ordinance providing for the seizure and destruction of intoxicating liquor held for unlawful purposes, unless specially authorized so to do by the Legislature.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

2. INTOXICATING LIQUORS (§ 10*)—ORDINANCES.

Code 1907, § 1251, authorizing municipal corporations to adopt ordinances and to enforce obedience thereto by fine and imprisonment, does not authorize a city to seize and destroy intoxicating liquor held for unlawful purposes, though the owner thereof has been convicted of violating the prohibition law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

3. INTOXICATING LIQUORS (§ 10*)—SEIZURE AND DESTRUCTION OF LIQUORS—ORDINANCES.

A city, seizing and destroying intoxicating liquors held for unlawful purposes under a claim of right, because the owner of the liquor has been convicted of violating the prohibition law, cannot justify the act on the ground that Code 1907, § 1278, gives it the right to abate nuisances.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

Appeal from City Court of Birmingham; O. C. Nesmith, Judge.

Action by Stephens & Kerr against the City of Birmingham. From a judgment for plaintiffs, defendant appeals. Affirmed.

R. H. Thach, for appellant. Ullman & Winkler, for appellees.

ANDERSON, J. As stated in brief of counsel for the appellant, the only question to be considered upon this appeal is the validity of an ordinance, set up in the special plea, in so far as it provides for a seizure and destruction of liquor held for unlawful purposes. Whether the state has the right to seize and destroy we need not decide, as the city would not have the right to do so, unless authorized by the Legislature, even if the right existed in the state. It is a well-established principle that municipal corporations can exercise only such powers as are clearly comprehended in the grant, or necessarily implied, or that may be incidental to the purpose and object of the corporation. Ex parte Mayor of Florence, 78 Ala. 419. Section 1251 of the Code of 1907 authorizes municipal corporations to adopt ordinances not inconsistent with the laws of the state, and to provide for the safety, promote the health, etc., of the inhabitants, and to enforce obedience to such ordinances by fine not exceeding \$100 and by imprisonment or hard labor not exceeding six months, one or both. It is clear that the city derives no right to seize and destroy property under this section as a punishment for violating its ordinances, or to enforce obedience thereto, as the only right to punish is fixed by fine and imprisonment, one or both.

It is further insisted that section 1278 of the Code of 1907 gave the city the right to abate nuisances, and that the liquor was kept for unlawful purposes, and was therefore a nuisance per se. Whether it was or was not a nuisance, or the city would have the right to abate same summarily, and to destroy the property, upon that theory, which may be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

doubtful (29 Cyc. 1218), we need not decide, as the plea in question proceeds upon the idea that the defendant had the right to destroy the liquor because the plaintiff had been convicted for violating the prohibition law. The maintenance of a nuisance and the right to abate the same, and to summarily destroy the liquor in order to do so, is foreign to the said plea.

We have considered the only point argued and insisted upon in brief of counsel for appellant, and in disposing of same we do not wish to be understood as holding that the city would be liable for the acts of its officials in the enforcement of a void ordinance. 20 Am. & Eng. Ency. of Law, p. 1195. The action of the trial court, however, in rendering judgment for the plaintiff upon the facts, is not urged as error in brief of counsel.

The judgment of the city court is affirmed. Affirmed.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

M. WEINSTEIN & SONS v. YIELDING BROS. & CO.

(Supreme Court of Alabama. May 12, 1910.)

1. ATTACHMENT (§ 308*)—CLAIMS OF THIRD PARTY—BURDEN OF PROOF.

On the trial of the right of property between a claimant of attached goods and the plaintiff in attachment, plaintiff must prove the levy of process to make out a prima facie case, and was not entitled to recover where no attachment or levy were shown to have been made.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1113; Dec. Dig. § 308.*]

2. EVIDENCE (§ 158*)—BEST EVIDENCE—SALE. A sale and delivery of goods need not be proved by the introduction of the bill of lading.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 474½, 515; Dec. Dig. § 158.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in attachment proceedings, certain goods sold by plaintiff to claimants were not identified as part of the goods sought to be attached as defendant's, any error in excluding evidence as to the sale and delivery of such goods was harmless; it being immaterial what goods were sold the claimants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4207; Dec. Dig. § 1056.*]

4. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE—ACTIONS—ADMISSION OF EVIDENCE.

One who saw goods sold, and knew that they were sold, could testify to the sale, though he did not sell them himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

5. ATTACHMENT (§ 308*)—PROCEEDINGS—PARTIES—DEFENDANTS.

In proceedings on a claim by third parties to property levied on by plaintiff in attachment against S. L. W., it was immaterial whether S. L. W. was a man or woman; no question of coverture being involved.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 308.*]

6. ATTACHMENT (§ 308*)—CLAIMS BY THIRD PERSON—EVIDENCE.

Defendant's claim of exemptions, which was contemporaneous with her sale of the attached goods to claimant and defendant's failure, was properly admitted in evidence on the trial of the right of property between plaintiff in attachment and claimant.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 308.*]

7. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—ERROR FAVORABLE TO APPELLANT.

In attachment proceedings, in which others intervened as claimants of the goods, any error in admitting evidence of a claim of exemptions was favorable to claimants, if the exemption involved the goods sought to be attached, since plaintiff cannot complain of defendant giving away exempt property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Attachment proceedings by Yielding Bros. & Co. against S. L. Weinstein, in which M. Weinstein & Sons, a copartnership, intervened as claimants. From a judgment for plaintiffs, claimants appeal. Reversed and remanded.

The evidence for the plaintiff tended to show that the goods were levied on in the store on Nineteenth street, between Second and Third avenues, in the city of Bessemer, under an attachment against S. L. Weinstein, but the attachment writ, affidavit, etc., were not introduced. There seems to have been a question as to whether S. L. Weinstein was a woman or a man. It seems that S. L. Weinstein was the wife of M. Weinstein, and conducted a business in several different places in Bessemer for about five years prior to December 1907, and on December 26, 1907, M. Weinstein & Sons acquired a part of the stock of goods by purchase after S. L. Weinstein had filed her claims of exemption to the same on December 16, 1907. Kronenberg was introduced as a witness for the plaintiff, and testified that on January 25, 1908, he sold and delivered to claimant certain shoes, which were levied on; that he shipped them by railroad, and received a bill of lading for the shipment. Failing to produce the bill of lading, on motion of the plaintiff the court excluded the statement as to the shipment, and as to the sale and delivery. The same thing was true as to the witness Goldstein, who testified as to other goods sold claimants, but whose evidence was ruled out. The statement of neither Kronenberg nor Goldstein identified the goods sold by them as part and parcel of the goods levied on and claimed.

George Huddleston, for appellants. Pinkney Scott, for appellees.

ANDERSON, J. This was a trial of the right of property, and it was incumbent upon

the plaintiff, in order to make out a prima facie case, to prove the levy of valid process. The bill of exceptions purports to contain all of the evidence, and there is nothing to show that the attachment writ and levy were introduced in evidence. This being true, the claimant was entitled to the general charge, the refusal of which was error. *Jackson v. Bain*, 74 Ala. 328; *Cochran v. Garrard*, 150 Ala. 579, 43 South. 721.

Kronenberg did not have to produce the bill of lading in order to show a sale or delivery of the goods testified to having been sold; but the trial court will not be put in error for sustaining the motion to exclude his evidence, as the articles sold were not identified as part of the goods involved in this suit. If Kronenberg sold the claimants the goods involved, or some of them, then what he sold could not be subjected to the attachment against the defendant; but, unless the goods sold by Kronenberg formed a part of the goods involved in this suit, it was immaterial how many goods this witness sold the claimants.

Goldstein's testimony should not have been excluded upon the ground that he did not sell the goods himself, as he stated that he remembered the transaction and knew that it occurred. Whether he sold the goods in person or not, if he saw them sold, and knew that they were sold, he could testify to said sale. But the action of the court can be sustained for excluding this evidence, for the reason discussed in dealing with evidence of Kronenberg.

There was no question of coverture involved, and it was immaterial whether the plaintiff thought S. L. Weinstein was a man or a woman.

The claim of exemptions was contemporaneous with the sale and failure of the defendant, and there was no error in allowing it in evidence. Moreover, if it contained the goods involved, it was favorable to the claimants, for the plaintiff cannot complain if she gave away property that had been legally exempted to her.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

MARTINEZ et al. v. MEYERS et al.

(Supreme Court of Alabama. May 12, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 509*)—PROBATE DECREE—VACATION—FRAUD.

Where a bill to vacate a probate decree for fraud alleged the investment of some of complainants' funds in certain stock and bonds, and that respondent held the proceeds of the bonds and only accounted for the stock, and so framed her account as to fraudulently mislead the court and complainants into the belief that she was

accounting for all that had been received as the result of the investment, and complainants were ignorant until after the settlement as to the bonds purchased with the stock, which respondent fraudulently concealed from her account and inventory on final settlement, it stated grounds for equitable relief.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2190-2219; Dec. Dig. § 509.*]

2. EXECUTORS AND ADMINISTRATORS (§ 509*)—PROBATE DECREE—REVISION.

Code 1907, § 3914, authorizing the correction of any mistake of fact or law in the settlement of a decedent's estate to the injury of any party, without fault or neglect on his part, within two years after final settlement, was not intended merely to authorize the chancery court to revise a probate decree by correcting errors committed, when all the parties were cognizant of the facts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 509.*]

3. FRAUDULENT CONVEYANCES (§ 263*)—BILL—KNOWLEDGE OF GRANTEE.

A bill to set aside an alleged conveyance as fraudulent, but not as a voluntary conveyance, failing to aver that the grantee knew of or participated in the fraud, is defective.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 779; Dec. Dig. § 263.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Suit by Mary J. Martinez and others against Elizabeth D. Meyers and others. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed in part, and reversed in part.

Brooks & Stoutz, for appellants. Flitts & Leigh, for appellees.

ANDERSON, J. The bill in this case does not seek to vacate the decree of the probate court for fraud, but proceeds under section 3914 of the Code of 1907 to correct the same as to certain items of the account, because of mistake of law or fact in the settlement induced by the fraud of the guardian, one of the respondents. The bill charges the investment of some of complainants' funds in certain street railway stock and bonds, and that the respondent Meyers held out the proceeds of the bonds, and only accounted for the stock, and so framed her account as to fraudulently mislead the court and the complainants into the belief that she was accounting for all they had as a result of the investment in the Meridian Street Railway Company; that complainants were ignorant until after the settlement as to the bonds being purchased with the stock, and which the respondent Meyers purposely and fraudulently concealed from them, and omitted from her account and inventory upon final settlement. As to this item, we think the bill contains equity.

It was not the purpose of this statute, however, to merely authorize the chancery court to revise the decree of the probate court by correcting errors committed when all parties were cognizant of the facts upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which they may have been predicated. *Waldrom v. Waldrom*, 76 Ala. 285. It may be that after the marriage of the respondent Meyers, and the separation of the family, the complainants were, under section 4200 of the Code of 1907, entitled to their share of the exempt property; but the existence of said exemption was known to all parties and to the court at the time of the settlement. It was disclosed by the inventory marked "Exhibit G," and was known to the complainants and the court, when the settlement was had, and they had every opportunity, with a full knowledge of the facts, to make her account for said exempt property, and whether they can get their share in a subsequent proceeding or not we need not decide; but it is clear that the failure to have her account for same was not such an error as the present statute was intended to correct. For like reasons the item of interest of \$30 omitted from the mortgage of \$750 would not justify reopening the settlement. The note, coupons, and mortgage were all before the court, and by the exercise of proper diligence the omission of this item of interest was easily ascertainable.

The bill does not attack the conveyance from Meyers to her sister, Jane Drysdale, as being a voluntary one, but upon the ground that it was fraudulent, and failing to aver that the grantee knew of and participated in the fraud made it defective, and subject to the demurrer interposed. *Pipkin v. Tapia*, 148 Ala. 353, 42 South. 545.

The decree sustaining the demurrers going to the whole bill was error, as well as the one testing the street railroad stock and bonds, and is reversed in this respect, and one is here rendered overruling same. The decree sustaining the demurrers as to the other items of the account, and as to the conveyance to Drysdale, is affirmed. The cost of appeal will be equally divided between appellants and respondents.

Affirmed in part, and reversed and rendered in part.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

KINNEY v. STEINER BROS.

(Supreme Court of Alabama. May 12, 1910.)

1. QUIETING TITLE (§ 35*)—BILL—REQUISITES.

To maintain a bill under the statute to quiet title, it is necessary to aver and prove that at the time of the institution of the suit complainant's possession was peaceable, as contradistinguished from disputed or contested, and that it was under claim of ownership.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 74; Dec. Dig. § 35.*]

2. QUIETING TITLE (§ 44*)—POSSESSION—EVIDENCE.

In suit to quiet title to land, evidence held to show that defendant had possession when the

bill was filed, and that complainant's acts were a mere device to get possession in order to file the bill.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 91, 92; Dec. Dig. § 44.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Steiner Bros. against F. H. Kinney to quiet title to certain lands. From a decree for complainants, respondent appeals. Reversed and rendered.

Stallings & Drennen, for appellant. A. Latady, for appellees.

ANDERSON, J. To maintain a bill under the statute for the determination of claims to real estate and to quiet title thereto, it is necessary for the complainants to aver and prove that at the time of the institution of the suit the complainants' possession of the land involved was peaceable, as contradistinguished from disputed or contested, possession, and that it was under claim of ownership. *Lyon v. Arndt*, 142 Ala. 486, 38 South. 242; *Randle v. Daughdrill*, 142 Ala. 490, 39 South. 162. We think the complainants' possession was, at best, a mere scrambling one, attempted for the purpose of making the respondent the actor in the courts. It was undisputed that the land is wild or timber land, that respondent had it inclosed with a barb-wire fence, and to all intents and purposes was in possession; and complainants' counsel admitted as a witness that he advised the planting of oats on the land for the purpose of compelling the proprietor of the fence to resort to an action of ejectment. The effort made to suddenly transform this forest, or densely timbered piece of land, into a flourishing oat field in so short a time, did not, we think, materialize to the extent of terminating the respondent's possession. The oats may have been sown, but there was no proof that they came up or were harvested. Indeed, the weight of evidence is that the planting was a mere sham for the purpose of dispossessing the respondent, and that what was done gave no signs that the land was being cultivated by any one or that respondent had been dispossessed. The witnesses all testify that the land showed no signs of cultivation. Orr testified that he saw no oats on the land; that they might sprout, but would not grow, on the land in its condition. He did admit on cross-examination that, if he saw oats growing on the land, he would think some one planted them there. "I would think that he was a mighty big fool, if he thought he would make a crop." We think that the proof shows that the respondent, and not the complainants, had the possession of the land when the bill was filed, and that the acts of complainants were but a scramble to get in possession in order to file said bill.

The chancellor erred in granting complain-

ants' relief, and the decree of the chancery court is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

SLOSS-SHEFFIELD STEEL & IRON CO. v. DICKINSON.

(Supreme Court of Alabama. May 12, 1910.)

1. CONVICTS (§ 10*)—ASSAULT—LABOR CONTRACTS.

In an action by a convict for assault and battery, where it appeared that defendant corporation was operating its mine under rules promulgated by the state board regulating corporal punishment, and authorized and required such punishment, defendant was not entitled to the general charge on the ground that a corporate wrong was alleged.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 10.*]

2. CONVICTS (§ 10*)—ASSAULT AND BATTERY.

The whipping for neglect of duty of plaintiff, a convict hired by the state board to defendant corporation, was unreasonable, if not for a proper cause, and there was proof authorizing the jury to infer that it was cruel.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 10.*]

3. ASSAULT AND BATTERY (§ 24*)—COMPENSATORY DAMAGES—PLEADING.

Compensatory damages may not be recovered in an action for assault and battery, unless specially claimed.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 26; Dec. Dig. § 24.*]

4. CONVICTS (§ 10*)—ASSAULT AND BATTERY.

If the servants of defendant, to whom plaintiff, a convict, was hired, wrongfully caused the latter to be whipped, defendant was liable for the assault, though the whipping was done by a state deputy warden.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 10.*]

Mayfield and Sayre, JJ., dissenting.

Appeal from Circuit Court, Walker County; James J. Ray, Judge.

Action by W. M. Dickinson against the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plaintiff was a county convict from Walker county, and was hired to the Sloss-Sheffield Steel & Iron Company, and worked by them under the regulations prescribed by the state board of convict inspectors for working convicts. The assault and battery charged as having been committed by the defendant grew out of corporal punishment inflicted by the deputy warden for an alleged infraction of the rules. Seven lashes were administered with a leather strap, and the plaintiff lost no time from his work. The main controversy was over the disputed fact as to whether or not the plaintiff was chargeable with slate found in the coal cars under plaintiff's check number; plaintiff being what is

known as a check runner, with a number of miners working under him, and the coal mined by them sent out under his check number. The task of each miner was 20 tons a day, and the check runner was responsible for the task of the men under him, and also responsible for the quality of the coal. Plaintiff claims that when he was whipped he was told that he was whipped because he was two cars short, and defendant contends that he was whipped for having slate in the coal after being warned against sending out slate, and after having been accused of a former dereliction.

The following charges were refused to the defendant: (2) Affirmative charge as to the second count. (4) "The court charges the jury that you cannot allow the plaintiff any damages under the first count for mental suffering and humiliation." (6) "If the evidence reasonably satisfies you that Mr. Hall, who whipped the plaintiff, was at the time deputy warden, in the service of the state, you must find for the defendant."

Bankhead & Bankhead, for appellant. M. D. McCullom and A. F. Fite, for appellee.

ANDERSON, J. This is an action for assault and battery, and the appellant contends that, inasmuch as it charges a corporate wrong, the defendant was entitled to the general charge, under the Henry Case, 139 Ala. 161, 34 South. 389, and subsequent cases approving same. Whether the rule there laid down would or would not apply to an action of this character is immaterial, for, if it did, there was evidence from which the jury could infer that the whipping of the plaintiff was inflicted under a rule adopted by the defendant corporation and which was in existence at the time of the whipping. The state board promulgated certain rules as to inflicting corporal punishment, and the jury could infer that the defendant was operating its mine under said rules, and authorized and required corporal punishment when the task was checked up short, or when the coal cars contained slate and dirt. The defendant was not, therefore, entitled to the general charge upon the theory advanced in brief. Daffin v. Zimmerman, 158 Ala. 637, 48 South. 109.

It is insisted that charge 2 should have been given for the defendant, for the reason that the second count charges cruel and unreasonable punishment. It was a question for the jury as to whether or not the punishment was cruel and unreasonable. It was clearly unreasonable, if not given for a proper cause, and there was proof from which the jury could infer that it was cruel.

The first count of the complaint was in Code form, and contained no claim for mental anguish. This court, in the recent case of Powell v. Schimpf, 154 Ala. 665, 44 South. 1044, reaffirmed the case of Irby v.

Wilde, 150 Ala. 402, 43 South. 574, and stated in the opinion in manuscript, but which is not reported in full, that compensatory damages could not be recovered in an action for assault and battery unless specially claimed. We now adhere to this rule, and hold that the trial court erred in refusing charge 4 requested by the defendant.

There was no error in refusing charge 6, requested by the defendant. There was proof from which the jury could infer that the defendant's servants wrongfully caused the whipping, and if they so caused it the defendant would be liable, notwithstanding Hall may have been the deputy warden of the state.

For the error heretofore pointed out, the judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McLELLAN, JJ., concur.

MAYFIELD and SAYRE, JJ. (dissenting). We cannot accede to the proposition that a complaint in the Code form for an assault and battery will not authorize the recovery of actual damages for physical pain and injury, the result of the beating alleged. In this case the undisputed evidence showed that the plaintiff was whipped and beaten with a leather strap, and we are unable to understand why, if entitled to recover at all, he was not entitled to recover actual damages for the pain and suffering, the result of the beating, which was both alleged and proven. The result of the holding in this case is that, in an action for assault and battery, in which the complaint is in the form prescribed by the Code, the plaintiff cannot recover any actual damages, but only nominal or vindictive damages. We do not think this was the intention of the Legislature when it prescribed this form and made it sufficient; nor do we think the rule here announced consonant with a proper construction or application of the rules of pleading and practice, whether they be common-law or Code form. We think the Code form was intended, and is sufficient, to support a judgment for actual damages, if the evidence warrants it.

In this case, of course, it is conceded that the evidence warranted actual damages, if it did nominal damages. There can be no doubt that this complaint, in the Code form as it was, would authorize evidence that defendant beat plaintiff; and, if shown, as it was in this case, that he was so beaten with a leather strap, it certainly cannot be denied that pain and suffering were the natural consequence of such beating. This being true, it is difficult to assign a reason why such damages are not recoverable. The error the

court has fallen into results from following a dictum in the case of Irby v. Wilde, 150 Ala. 402, 43 South. 574, and holding that, because there may be a technical assault and battery without pain or anguish, if such damages are sought to be recovered they are special, and must be specially pleaded. The questions decided in Irby's Case were probably correctly decided, but the dictum which this case follows is wrong. The truth is that pain and suffering are necessary results of beating a person with a strap, or even with the hand or fist; and the damages resulting therefrom are general, as distinguished from special. If not, then there are no general damages in actions of assault and battery. The mere fact that the evidence in some cases might show that there was no pain or suffering does not prove that such are special and not general damages, when proven. In such cases it is a mere failure of proof, and not of pleading.

The rule that special damages, to be recovered, must be alleged with particularity, while general damages need not be specially pleaded, is a rule of pleading, not of fundamental right. The end of the rule is that the defendant may not be taken by surprise on the trial. It is, however, a rule of right that recoverable damages, whether general or special, must result proximately from the wrong charged. The necessary relation of cause and effect between the injury done and the damages suffered must be shown. There are many cases which state in a loose way that general damages are such as necessarily result from the injury counted on. But the expression must be accepted with some reserve. General damages are such proximate damages as result in the usual course of things, and of which the defendant does not need to be specially informed. General damages are defined by the Supreme Court of Massachusetts as "only such damages as any other person, as well as the plaintiff, might, under the same circumstances, have sustained from the act set out in the declaration." *Baldwin v. Western Railway Corp.*, 4 Gray (Mass.) 333. They are presumed to follow the wrong charged, though they may in fact be nominal only. Special damages are such as result proximately, but not ordinarily, from the wrong complained of. They are either superadded to general damages arising from an act injurious in itself, or are such as will arise from an act not actionable in itself, but injurious only in its consequences—such as really occur. Of a claim of such damages the defendant ought to be specially informed. The law of the subject was stated by Chief Justice Stone in *Dowdall v. King*, 97 Ala. 635, 12 South. 405. But, except in quotation, he found no use for the word "necessary" in the description of general damages. See *Wat. Per. Inj.* § 690.

ABINGDON MILLS v. GROGAN.

(Supreme Court of Alabama. May 10, 1910.)

1. MALICIOUS PROSECUTION (§ 47*)—ACTIONS—ALLEGATIONS OF COMPLAINT.

In an action against a corporation for malicious prosecution in which the corporation was charged with instituting the prosecution, the complaint need not allege that the act was done by defendant through its agents, acting within the scope of their authority, or set forth the names of such agents.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 91, 92; Dec. Dig. § 47.*]

2. MALICIOUS PROSECUTION (§ 55*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for malicious prosecution on a charge of enticing laborers from defendant's mills, defendant could show under the general issue that, before the deputy sheriff who arrested plaintiff made the affidavit for his arrest, it consulted a reputable practicing attorney and made a full and fair statement of the facts tending to show plaintiff's guilt.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 110; Dec. Dig. § 55.*]

3. APPEAL AND ERROR (§ 843*)—REVIEW—NECESSITY—RULINGS ON PLEADINGS.

Where everything contained in a special plea in an action for malicious prosecution was admissible under the general issue, it need not be decided on appeal whether it was error to sustain a demurrer to the plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. § 843.*]

4. EVIDENCE (§ 183*)—BEST EVIDENCE—SECONDARY EVIDENCE—SUFFICIENCY OF PREDICATE.

While the degree of diligence in searching for the original document, essential to make secondary evidence thereof admissible, depends largely upon the circumstances and the character of the document, every reasonable effort must be made to produce the original, and, in an action for malicious prosecution, a sufficient showing of the loss of the affidavits and warrants therein was not made to admit secondary evidence of their contents where no effort was made to ascertain what had become of them from any member of the grand jury in whose custody they were last known to be, and the deputy sheriff stated that the grand jury returned some papers, but he did not know whether they included the affidavits, etc., or whether the papers returned were given to himself or the clerk who was in the office at the time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 614; Dec. Dig. § 183.*]

5. MALICIOUS PROSECUTION (§ 61*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for malicious prosecution, the grand jury's docket entry showing no bill was admissible to show the termination of the prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 146, 147; Dec. Dig. § 61.*]

6. MALICIOUS PROSECUTION (§ 64*)—ACTIONS—SUFFICIENCY OF EVIDENCE—IDENTIFICATION OF PROSECUTION.

In an action for malicious prosecution, the numbers of the charges on the grand jury's docket were prima facie sufficient to identify the charges under investigation by the grand jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.*]

7. EVIDENCE (§ 253*)—DECLARATIONS OF CO-CONSPIRATORS.

When conspiracy is shown prima facie, acts or declarations of co-conspirators in connection with the furtherance of the common purpose are admissible, so that in an action for malicious prosecution and false imprisonment on a charge of enticing away defendant's laborers, in which the evidence authorized a finding that C. and another conspired to entice away defendant's laborers, and that plaintiff went to a certain place to co-operate with them for that purpose, it was error to exclude evidence of what C. told witness as to what plaintiff came to such place for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 904-1002; Dec. Dig. § 253.*]

8. MASTER AND SERVANT (§ 343*)—INTERFERENCE WITH RELATION—OFFENSES—"SERVANT"—"LABORER."

Code 1907, § 6849, provides that one who entices, decoys, or persuades any apprentice or servant to leave the service or employment of his master shall be fined a certain sum, etc. Section 6850 provides that one who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, any laborer or servant, who has contracted in writing to serve such other for a given time, before the expiration of the time contracted for, shall be fined, etc. Held, construing the sections so as to permit each to operate, that section 6849 applies to employees of a cotton mill and not merely to menial servants; the word "servant" being synonymous with "laborer" as so used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1288; Dec. Dig. § 343.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6422-6429; vol. 8, p. 7798; vol. 5, pp. 3952-3968; vol. 8, p. 7700.]

9. MASTER AND SERVANT (§ 343*)—INTERFERENCE WITH RELATION—OFFENSES—STATUTORY PROVISIONS.

To convict under Code 1907, § 6850, the servant or laborer enticed away must be under a written contract of employment at the time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1288; Dec. Dig. § 343.*]

10. STATUTES (§ 225*)—CONSTRUCTION—CONSTRUING RELATED STATUTES.

Statutes in pari materia must be construed so as to permit each to operate if that can be done without violating their language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 308; Dec. Dig. § 225.*]

11. MALICIOUS PROSECUTION (§ 71*)—PROBABLE CAUSE—JURY QUESTION.

In an action for malicious prosecution, whether defendant made a full and fair statement of the facts to an attorney before instituting the prosecution is a question for the jury; the facts stated to the attorney being detailed.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 165; Dec. Dig. § 71.*]

12. EVIDENCE (§ 471*)—CONCLUSIONS.

Testimony, in an action for malicious prosecution, that defendant's agent made a full and fair statement of the facts to an attorney before instituting the prosecution, was a conclusion, as the facts themselves should have been detailed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2170; Dec. Dig. § 471.*]

13. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where the part of the excluded evidence remaining after the part thereof was excluded as being a conclusion was irrelevant and immaterial, the court will not be put in error for ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cluding all the testimony, though no part of it was objected to as being irrelevant and immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. § 1066.*]

14. MALICIOUS PROSECUTION (§ 58*)—FALSE IMPRISONMENT (§ 23*)—ACTIONS—EVIDENCE.

In an action against a corporation for malicious prosecution and false imprisonment on a charge of enticing defendant's employes away, plaintiff could show that the deputy sheriff who arrested him was appointed at defendant's request, in determining whether he was acting as defendant's agent in arresting plaintiff, and not in his official capacity.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 117; Dec. Dig. § 58; * False Imprisonment, Cent. Dig. § 100; Dec. Dig. § 23.*]

15. MALICIOUS PROSECUTION (§ 21*)—ACTIONS—DEFENSES—ADVICE OF ATTORNEYS.

That a prosecution was begun on the advice of a reputable practicing attorney given after a full and fair statement by plaintiff of all the facts known to him on which he could have learned by proper diligence was a defense to an action for malicious prosecution, though the advice was not warranted by the facts stated.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40-44; Dec. Dig. § 21.*]

16. TRIAL (§ 186*)—ACTIONS—INSTRUCTIONS—REQUESTS—PROVINCE OF JURY.

In an action against a corporation for malicious prosecution for enticing away defendant's employes, defendant requested charges that if plaintiff offered certain employes higher wages, if they would go into another city knowing them to be defendant's employes, it would be probable cause for his prosecution for enticing laborers, and that, though some of defendant's employes had written letters indicating that they would like to go to such place to work, if plaintiff thereafter offered them higher wages or to pay their debts if they would go he would be guilty of enticing them away. *Held*, that these charges were properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 409, 410; Dec. Dig. § 186.*]

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Action by A. R. Grogan against the Abingdon Mills. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint contained five counts, all of which were in Code form. Plea 4, to which demurrer was sustained, is as follows: "The affidavit for the arrest of the plaintiff was made by W. B. Sanders, and the arrest of the plaintiff was made by the said Sanders as a deputy sheriff of Madison county, Alabama, and before making said affidavit and said arrest said Sanders made to James H. Pryde, a reputable practicing attorney at law and solicitor, from Madison county, Alabama, a full and fair statement of all the facts tending to show that plaintiff was guilty, as said Sanders understood they would be shown by the evidence, and after such statement, and upon the advice of said Pryde,

said Sanders in good faith instituted the prosecution by making affidavit as aforesaid."

The facts as made by the proof were that Grogan was connected with the Fulton Bag & Cotton Mills, of Atlanta, and came to Huntsville to go back with certain mill hands, employes of the Abingdon Mills, with whom one of the officers of the first-named mill had had correspondence relative to their going to Atlanta to become employes of the said Fulton Company. While at Huntsville, he was arrested by one Sanders, and employes of the Abingdon Mills, and also a deputy sheriff, on a warrant issued by one Vaught, a justice of the peace, charging him with enticing away laborers from the Abingdon Mills; the affidavit having been made by Sanders. He was arrested and imprisoned for about 16 hours. The grand jury did not indict him for enticing away laborers, but did indict him for carrying on the business of an immigration agent without license, of which charge he was acquitted. Humes, an attorney for the Abingdon Mills, and one of its stockholders, then dictated an affidavit, which was sworn to by Sanders, again charging Grogan with enticing away laborers, and he waived to the grand jury, and was not indicted. It seems that Brown, Herring, and Sanders were employes of the Abingdon Mills, in the situation of paymaster, assistant superintendent, and general utility man, in the order named. It seems that Maggie Clutch signed several of the letters written to the Fulton Mills, and that upon his arrival Grogan went out and had a conference with the said Maggie Clutch.

The plaintiff objected to that portion of the showing made for the witness Herring, which is as follows: "That said witness went with W. B. Sanders and Roy Brown to see James H. Pryde, county solicitor, before plaintiff was arrested, and that they stated to said Pryde all the facts known to them relative to Grogan's trying to hire laborers and all the information they had about said matter, and asked Mr. Pryde's advice, and that he advised that Grogan be arrested on a charge of enticing away laborers."

The following charges were refused the defendant, among others; "(8) If Grogan offered Couch or Anelton higher wages if they would go to Atlanta, knowing them to be employes of the Abingdon Mills, this would be probable cause for the prosecution of Grogan on the charge of enticing labor. (9) Even though some of the employes of defendant may have written letters to Brown, in Atlanta, indicating that they would like to go to Atlanta, if thereafter Grogan came to Huntsville and offered them higher wages if they would go, or offered to pay their debts if they would go, this would make Grogan guilty of enticing them away."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Paul Speake and Cooper & Cooper, for appellant. M. H. Lanier and Taylor & Drake, for appellee.

ANDERSON, J. Each of the counts of the complaint were for a malicious prosecution and were in Code form, and which said form applies to corporations as well as persons. The counts charged the corporation with the act complained of, and the averment that the prosecution was instituted by its agents was superfluous and unnecessary, as the act charged could have only been done through its agent or representative. It charges the corporation with instituting the prosecution, and in order for it to have been done by the corporation it must have appeared that the agent or representative was acting within the scope or line of his authority, and it was not necessary to aver that the agent or representative was so acting. Nor did the complaint have to aver the name of the agent or representative. *Birmingham Ry. Co. v. City Stable Co.*, 119 Ala. 615, 24 South. 558, 72 Am. St. Rep. 955. The trial court did not err in overruling the demurrers to the complaint.

Whether the trial court did or did not err in sustaining the demurrer to plea 4 we need not decide, as the defendant could get the benefit of the matter there set up, under the general issue, which was pleaded and under which the defendant offered evidence of the facts set up in said plea 4. *O'Neal v. McKinna*, 116 Ala. 620, 22 South. 905; *McLeod v. McLeod*, 73 Ala. 42; *Shannon v. Simms*, 146 Ala. 673, 40 South. 574; *Goldstein v. Drysdale*, 148 Ala. 486, 42 South. 744.

While no general rule can be laid down as to the degree of diligence to be used in making search for the original document, in order to lay a predicate for the introduction of secondary evidence of the contents thereof, it depending largely upon the circumstances of the case and the character of the document, yet it must be shown that every reasonable effort which would result in its production was made without avail. *Sims v. State*, 155 Ala. 96, 46 South. 493; 1 *Greenleaf on Evidence*, 558; *O'Neal v. McKinna*, 116 Ala. 606, 22 South. 905; *Boulden v. State*, 102 Ala. 78, 15 South. 341; *Ala. Construction Co. v. Meador*, 143 Ala. 336, 39 South. 216. Applying the foregoing rule to the case at bar, we are of the opinion that the plaintiff did not lay a sufficient predicate of the loss of the affidavits and warrants, and the trial court erred in permitting secondary evidence of their contents. They were last traced into the custody of the grand jury, and there was no effort to show by the foreman or any other member thereof what had become of same. Townes, a deputy clerk, said they returned some papers; but he did not know whether they returned all papers, or that the ones that were returned included the ones in question. He said, "Sometimes they

do not turn over to the clerk all their papers." He also stated that Roper, the clerk, was in the office at the time, and he did not know whether the papers were turned over to the clerk or himself. They may have been turned over to Roper, or they may have been destroyed by the grand jury, or may still be in the custody of the foreman or some other member, or they may have been turned over to some one other than the deputy clerk Townes. We think the case of *O'Neal v. McKinna*, supra, is an authority in point against the sufficiency of the predicate attempted in the present case.

The entry in the grand jury docket showing no bill was properly admitted to show the termination of the prosecution, and the numbers were sufficient as prima facie evidence to identify the charge under investigation. *Shannon v. Simms*, 146 Ala. 673, 40 South. 574.

The conversation between the plaintiff and "Herring" the night of the arrest was competent to show motive or malice, as it appeared from the evidence that Herring was at the time acting as defendant's superintendent, was, in fact, its alter ego.

There was evidence from which it could be inferred that "Maggie Clutch" and Brown, of the Fulton Bag & Cotton Mill of Atlanta, had conspired to entice away certain laborers of the defendant, that the plaintiff went to Huntsville for the purpose of co-operating with them in the scheme, was closeted with said "Maggie Clutch" and became a party to said scheme, and which was a misdemeanor, if committed, and under section 6471 of the Code of 1907 can be the basis of a conspiracy. It is also a well-settled proposition of law that, when a prima facie conspiracy is established, any acts or declarations on the part of any of the co-conspirators in connection with and in furtherance of the common purpose may be shown in evidence. The trial court erred in not letting the witness James White tell what Maggie Clutch told him the plaintiff came to Huntsville for. Of course, the discussion of this question is entered into as a mere guide upon another trial and upon the theory that the secondary proof discloses the real affidavit. If the proper affidavit has been set out, then it must have been made under section 6849 of the Code of 1907. It does not aver that the laborers were under a written contract, and was not therefore made under section 6850 of the Code of 1907. We cannot agree with the contention of appellee's counsel that section 6849 has no application to employes of a cotton mill, but applies to menial servants only. The word "servant" is broad enough to cover laborers at a cotton mill, and we think, as used in said section, is synonymous with "laborer." It is true that section 6850 uses the words servant and laborer as well as others not mentioned in the preceding section, but we do not think that said last section pre-

vents section 6849 from applying to "laborer" as included in the word "servant." The rule of construction is that, when statutes are in pari materia, they must be so construed as to give each a field of operation when it is possible to do so without doing violence to the language of either. The result is that section 6849 applies to apprentices and servants and which last word includes laborers, whether under written contract or not, and fixes a fine of not less than \$20 nor more than \$100, and may be imprisoned for three months, but no part of the fine goes to the injured party. On the other hand, section 6850 relates to persons not included in section 6849 as well as servants therein included, provided they were under a written contract, fixes a different fine, and provides for indemnity to the injured party. The result is, when a servant is enticed away from his master, whether under a written contract or not, he can be convicted under section 6849 and punished accordingly; but, in order for him to be convicted and punished under section 6850, it must be averred and proven that the servant or laborer was under a written contract of employment.

There was no error in excluding so much of the Herring showing as was excluded by the trial court. Whether or not Herring made a full and fair statement of all the facts to solicitor Pryde was a question for the jury. Goldstein's Case, supra. In order for the jury to determine this question, the facts should have been detailed and the statement of Herring that he made full and fair statement was but a conclusion. It is insisted, however, that only a portion of the excluded evidence was a conclusion, and that the other part of the excluded evidence was not subject to the grounds of the motion, whether good evidence or not. With the conclusion excluded, the other part that went with it was irrelevant and immaterial, and the trial court will not be put in error for excluding it all. The rule that counsel for the appellant attempts to invoke applies to the sustaining of the court when the motion to exclude is overruled, and not to reversing the court for sustaining a motion to exclude.

There was no error in permitting the plaintiff to show that Sanders was appointed a deputy sheriff at the instance and request of the defendant. It is true, if he acted solely as a deputy, and not as the defendant's agent, the defendant would not be liable for his act; but the defendant's interest in getting him appointed might be a factor in determining whether or not he was acting as the defendant's agent rather than in the sole capacity of a deputy sheriff.

The trial court did not err in refusing the general charge requested by the defendant. Whether or not the plaintiff was guilty of the offense with which he was charged was a question for the jury and not the court. It

is also true that if the prosecution was instituted on the advice of a reputable practicing attorney, given on a full and fair statement by the prosecutor of all the facts known to him, or which by proper diligence he could have ascertained, even though the advice was erroneous or was not warranted by the facts stated, there would be a complete defense to the action; but it was a question for the jury to determine whether or not Pryde unequivocally advised the prosecution, and whether or not a full and fair statement was made to him. Nor do we think the defendant was entitled to the general charge under the Henry Case, 139 Ala. 161, 34 South. 389—a case so generally misunderstood by the profession that it is often resorted to as a panacea for all corporate wrongs.

The trial court did not err in refusing charges 8 and 9, requested by the defendant. If not otherwise bad, they invaded the province of the jury.

For the errors suggested, the judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

LOUISVILLE & N. R. CO. v. ZEIGLER.
(Supreme Court of Alabama. May 10, 1910.)

1. RAILROADS (§ 439*)—ANIMALS ON TRACK—LIABILITY FOR KILLING—COMPLAINT.

In an action against a railroad company for negligently killing plaintiff's dog, the complaint need not name the employees of defendant in charge of the train by which the killing was done.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 439.*]

2. RAILROADS (§ 405*)—DOGS KILLED ON TRACK—LIABILITY OF RAILROAD COMPANY.

That plaintiff's dog was a trespasser on defendant's railroad track at the time of the passing of one of defendant's trains did not preclude a recovery for his death.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 405.*]

3. WITNESSES (§ 245*)—KNOWLEDGE—VALUE.

Where, in an action for negligently killing a dog, a witness testified that he did not know the value of the dog, and had no knowledge of the value of dogs, the court did not err in sustaining objections to questions put to the witness as to whether the dog was worth \$5, or more than \$10.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 245.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Action by T. J. Zeigler against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count was as follows: "Plaintiff claims of the defendant the sum of \$100 as

damages, for that on, to wit, the 23d day of February, 1908, plaintiff owned a certain dog, whose value was \$100, being a thoroughbred hound; that on said date the defendant corporation was engaged in operating a railroad in the state of Alabama, in Elmore county, between the stations known as Elmore and Coosada; that on said date the said Louisville & Nashville Railroad Company, had under its direction and control a train of cars, same being operated between said stations of Elmore and Coosada on said railroad; that the said Louisville & Nashville Railroad Company had in its employ certain servants and agents in charge of said railroad train, and that the said servants, agents, and employes of said railroad company so negligently and carelessly operated said train on said date that the locomotive attached to said train was propelled with great violence and force against the said dog of this plaintiff, whereby the death of the said dog was caused, to the damage of plaintiff," etc.

Count 2: "For that on February 23, 1908, the defendant operated a railroad in the county of Elmore, state of Alabama, and a certain train of cars on said railroad, between the stations of said county known and called Elmore and Coosada; that at a point between said Elmore and Coosada on said railroad is a small trestle; that the plaintiff on said date owned a certain valuable dog, which was on said bridge going along or across said trestle; that the said train of cars, under the control, superintendence, and direction of the servants, agents, and employes of the defendant corporation, was being operated on said track of said railroad, and that the said train of cars was so negligently operated through said servants, agents, and employes of said corporation in crossing said trestle that the plaintiff's dog was struck by the locomotive attached to said train of cars, and was mangled, torn and killed. Wherefore the plaintiff was deprived of the said valuable dog, of the value of \$100; hence this suit."

The demurrers assigned were: "(1) That it did not show that the dog killed was of any value. (2) It failed to show any duty owing from the defendant to the plaintiff in regard to the dog killed. (3) It shows that the dog was a trespasser. (4) Because it is a matter of common knowledge that a thoroughbred hound has no value. (5) Because it fails to aver the name of the servant or employe of the defendant in charge of the train."

Goodwyn & McIntyre, for appellant. Frank W. Lull, for appellee.

DOWDELL, C. J. On the trial of the case the court charged out the third, fourth, and fifth counts of the complaint, and consequently the rulings of the court on the demurrers to those counts need not be considered.

The first and second counts of the com-

plaint, which confessedly charged a negligent killing of the plaintiff's dog, were not subject to any of the grounds stated in the demurrer to the complaint. It is insisted in brief by counsel for appellant that no liability for damages rests upon the railroad company for the negligent killing, for the reason that it is inferable from the complaint that the dog was a trespasser on the track when killed. The law of this state as to trespassing animals is opposed to the contention of appellant. *Central of Ga. Ry. Co. v. Martin*, 150 Ala. 388, 43 South. 563, and many other cases might be cited.

No reversible error was committed in sustaining the objections to the defendant's questions to the witness Jack Long, viz.: "Was the dog worth \$5?" "Was the dog worth more than \$10?" This witness testified that he did not know the value of the dog, and, further, that he had no knowledge of value of dogs. In the light of this statement the witness could have made no other answer than that he did not know, unless he wished to change his evidence, and there was no offer by the defendant to show this.

There was evidence sufficient to submit the case to the jury, and therefore the general charge requested by the defendant was properly refused. *Mobile & Ohio R. R. Co. v. Glover*, 150 Ala. 386, 43 South. 719.

Affirmed.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

TRIBBLE v. CRESTLINE LAND CO.
(Supreme Court of Alabama. May 19, 1910.)

1. BILLS AND NOTES (§ 520*)—FRAUD—EVIDENCE.

Where, in an action on certain rent notes, defendant pleaded fraudulent representations by plaintiff's agent that a street car line was projected through or near the land leased, but there was no proof as to when the representations were made, or as to the authority of the agent to make them, that the notes were given on the faith of such representations, or as to whether the car line would add to the value of the property, the defense of fraud was not sustained.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1836; Dec. Dig. § 520.*]

2. NEW TRIAL (§ 76*)—EXCESSIVE VERDICT.

A verdict in an action on certain rent notes for more than the amount claimed in the complaint was ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action in assumpsit by the Crestline Land Company against George Tribble. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

The contract referred to in the opinion as a part of plea 4 is as follows: "State of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Alabama, Jefferson County. This lease, made this the 15th day of August, 1907, by and between the Crestline Land Company, party of the first part, and George Tribble, party of the second part, witnesseth: That the party of the first part does hereby rent and lease unto the party of the second part the following property near Birmingham, Ala.: Lot No. 13, in block No. 8, in the survey or plat of the Crestline Land Company, of real property located in said county and state (map of land is recorded in Map Book No. 7, on p. 16, of Map Records, in the probate office of said county and state)—for occupation by him as a residence for and during the term of 47 months, to wit, the 15th day of August, 1907, to the 15th day of July, 1911. In consideration whereof, the party of the second part agrees to pay the party of the first part the sum of \$250, of which \$15 is paid in cash, the receipt of which is hereby acknowledged. The balance, \$235, is divided into 47 payments, each evidenced by notes payable at the office of the Jefferson County Savings Bank, Birmingham, Ala., on the 1st day of each month during said term, in advance, being at the rate of \$60 per annum. And should the party of the second part fail to pay the rents as they become due as aforesaid, or violate any other condition of this lease, the said party of the first part shall then have the right at their option to re-enter the premises and annul this lease. And in order to entitle the said party of the first part to re-enter, it shall not be necessary to give notice of the rents being due and unpaid, or to make any demand for the same; the execution of this lease, signed by the said parties of the first and second part, which execution is hereby acknowledged, being sufficient notice of the rent being due and demand for the same, and shall be so construed, any law, usage, or custom to the contrary notwithstanding. And the party of the second part agrees to comply with all the laws in regard to usage in so far as the premises hereby leased are concerned, and by no act render the party of the first part liable therefor, and to commit no waste of property, or allow same to be done, but to take good care of the same, nor to underlease said property, nor transfer this lease without the consent of the party of the first part hereon indorsed; further, this lease being terminated, to surrender quiet and peaceful possession of said premises in like good order as at the commencement of said term, natural wear and tear excepted." The next paragraph provides for the payment of attorney's fees by party of the second part, and for damages for failure to surrender in waiver of exemptions. The next provides for the payment of taxes by party of the first part until deed shall have been issued and the lease canceled. The next paragraph provides for the making of the deed to the party of the second part upon the payment of all the lease notes. "It is further understood and

agreed that if the party of the second part fails to pay the monthly rent as it becomes due, and becomes a month or two months in arrears, during the first year of the existence of the lease, or as much as three months in arrears on such payment at any time thereafter, or shall fail to comply with any conditions or requirements therein, then on the happening of any such event the party of the second part forfeits his rights to a conveyance of said property, and all money paid to the party of the second part under this contract shall be taken and held as payment of rent of said property, and the party of the second part should be liable to the party of the first part as a tenant for the full term of said lease, and the provision herein 'that the rent paid under this lease shall be considered a payment for said property, and the party of the first part shall make and execute a deed with warranty of title conveying said property to the party of the second part,' shall be a nullity and of no force and effect; and the failure of the party of the second part to comply with any of the conditions of this instrument shall ipso facto render the said provisions a nullity, and make the said party of the second part a lessee under this instrument, without any rights whatever except the rights of the lessee, without any notice or action whatever upon the part of the party of the first part." The next provision provides for the payment of the entire sum before maturity, with a rebate of interest.

C. D. Ritter, for appellant. J. F. Perry Baugh, for appellee.

SIMPSON, J. The suit in this case was brought by the appellee against the appellant for the recovery of \$45, with interest, due by nine promissory notes for \$5 each, and for \$50, with interest, due by ten promissory notes for \$5 each. There were two complaints, afterwards consolidated, each alleging at the end of the complaint that defendant had waived the benefit of the exemption laws, and agreed to pay a reasonable attorney's fee. The first plea alleged that \$15 was a reasonable attorney's fee, and the second that \$20 was a reasonable attorney's fee; but neither complaint *claimed* any attorney's fee. Pleas of no consideration and failure of consideration were filed; also special pleas. Plea 4 sets up the special contract, which was introduced in evidence (and will be set out by the reporter), admits the failure to pay the notes, but claims that defendant is not liable for more than the fair rental value of the property rented, which it is alleged is not more than \$15, which was paid in advance. Pleas 5 and 6 set up the same defense. Pleas 7 and 8 set up the defense that the notes were obtained by fraudulent representations that a street car line was projected through or near the land leased or bought.

There was no evidence tending to sustain

the plea of no consideration, nor that of failure of consideration, and the only evidence on the subject of fraud was the statement by the defendant, as a witness, that "the agent of plaintiff, from whom he rented or purchased the property, represented to him that at the time he purchased said lot there was a car line projected through said property, and showed him on the map of said property where said street car line would run, and that after purchasing said lot he learned that said car line was not projected through said property, and that said car line had not been run through said property"; the nearest line being 1, 1½, and 2 miles distant. There was no testimony as to just when the representations were made, though inferentially it may be said that the intent was to say that the representations were made at the time he purchased. There was no proof as to the authority of the unnamed agent to make the representations, nor that the notes were given on the faith of such representations, nor as to whether the street car line would add any value to the property, or how much. So there was no proof to sustain this, the only plea which set up any defense.

The defendant, having entered into a written agreement to pay so much for the rent of the land, of course, was bound for that much, unless the defense of fraud was sustained. These being the facts, the plaintiff was entitled to the general charge, and there was no reversible error in giving or refusing any of the charges; but, as before stated, the complaints claimed only \$90, with interest, and the verdict was excessive. This matter was brought to the attention of the court by a motion for a new trial, and the motion should have been granted. *Drake v. Johnson*, 50 Ala. 1; *Ritch v. Thornton*, 65 Ala. 309; *Gilliland v. Dunn & Co.*, 136 Ala. 327, 34 South. 25.

The judgment of the court is reversed, and an order will be here entered granting the motion for a new trial.

Reversed and rendered.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

MAY v. STATE.

(Supreme Court of Alabama. May 12, 1910.)

1. HOMICIDE (§-190*)—EVIDENCE—THREATS—WHAT CONSTITUTES.

Statements made by decedent at various times remote from the killing, to the effect that accused was a coward, and the use of profane words in referring to him, did not amount to threats so as to be admissible as such, having no tendency to illustrate decedent's conduct at the time of the killing.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

2. HOMICIDE (§ 191*)—EVIDENCE—OTHER DIFFICULTIES.

In a prosecution for homicide, in which the evidence tended to show self-defense, ac-

cused having testified that decedent and others came to his house for the purpose, as accused claimed, of procuring his attendance at a civil trial, and that he then heard decedent threaten him, questions to accused as to how long they had remained at his house were properly excluded as involving a previous difficulty, as were other questions involving a previous difficulty between decedent and accused.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 414; Dec. Dig. § 191.*]

3. HOMICIDE (§ 190*)—EVIDENCE—THREATS—THREATS BY LYING IN WAIT.

The presence of decedent and others at accused's house did not involve a threat by lying in wait.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

4. CRIMINAL LAW (§ 1128*)—REVIEW—THEORY OF TRIAL COURT—EXCLUDING EVIDENCE.

Any tenable ground will justify a ruling excluding evidence; the record not showing the ground upon which the trial court acted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2961; Dec. Dig. § 1128.*]

5. HOMICIDE (§ 190*)—EVIDENCE—THREATS—CERTAINTY.

Even if evidence of threats was admissible in a homicide case in explanation of accused's possession immediately before the killing, of the pistol which he used, as shown by the state, the occasion on which the threats were made should have been specified so as to permit the state to rebut evidence thereof, and hence where accused was asked whether at the time he had the pistol and prior thereto threats had been made against his life, his answer that it had been reported to him that his life had been threatened was too general, and was properly excluded.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

6. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE—CONCLUSION.

One may testify that another is drunk or drinking.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1044; Dec. Dig. § 448.*]

7. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE—CONCLUSION.

A question in a homicide case whether the voices witness heard appeared or sounded to him as if coming from drunken men, did not in strictness ask whether in witness' opinion such persons were drunk, and hence was not objectionable as calling for a conclusion, even if an answer that they were drunk was objectionable as such.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1044; Dec. Dig. § 448.*]

8. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where sufficient evidence was admitted to enable the jury to form a correct conclusion as to whether certain persons in a wagon were drinking or drunk, and accused testified without objection that in his judgment the men were drinking, any error in excluding a question to him as calling for a conclusion whether voices of those in the wagon which accused heard appeared or sounded to him as if coming from drunken men, could not have prejudiced him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3146; Dec. Dig. § 1170.*]

9. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY EVIDENCE.

A question to a witness as to why the state had subpoenaed him was properly excluded;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

witness being unable to answer from his own knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. §§ 419, 420.*]

10. HOMICIDE (§ 300*) — SELF-DEFENSE — INSTRUCTIONS.

A requested charge that the law is a reasonable master, and if at the time of the killing the appearances of danger surrounding accused were such as to produce a reasonable belief in his mind that his life was in danger, or that he was about to suffer some bodily harm, the jury should acquit if accused was himself without fault, was properly refused as ignoring his duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 630; Dec. Dig. § 300.*]

11. CRIMINAL LAW (§§ 763, 764*) — INSTRUCTIONS — WEIGHT OF EVIDENCE.

A requested charge that if on account of the unsatisfactory character of the evidence, or for any other reason, the jury were not satisfied of accused's guilt to a moral certainty, was properly refused as suggesting that the evidence of guilt was of an unsatisfactory character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1764; Dec. Dig. §§ 763, 764.*]

12. CRIMINAL LAW (§ 811*) — INSTRUCTION — PROMINENCE TO PARTICULAR MATTERS.

A requested charge in a homicide case that it was the jury's duty to consider the witnesses' manner on the stand as well as at the time of the killing, the varying statements, if any were made by them, as well as their condition as to sobriety, in order to give proper weight to their testimony, was properly refused as unduly emphasizing specified features of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1969-1973; Dec. Dig. § 811.*]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

John J. May was convicted of homicide, and he appeals. Affirmed.

The matters of evidence objected to sufficiently appear in the opinion. The following charges were refused to the defendant: (11) "The law is a reasonable master, and if the evidence shows you that at the time of the killing the appearances of danger surrounding the defendant were such as to produce a reasonable belief in the mind of the defendant that his life was in danger, or that he was about to suffer great bodily harm, and that the defendant was without fault in bringing on the difficulty, then you should acquit the defendant." (14) "If, on account of the unsatisfactory character of the evidence, or for any other reason, you are not satisfied that the defendant is guilty to a moral certainty, you should acquit him." (15) "It is your duty, gentlemen of the jury, to consider the manner of the witnesses on the stand, as well as their manner and conduct at the time of the shooting, the varying statements, if any have been made by the witnesses, and also the condition of witnesses as to sobriety or drunkenness, in order to enable you to give proper weight to the testimony."

A. H. Carmichael and George P. Jones, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. The homicide for which defendant was on trial occurred in the presence of a number of witnesses. There was evidence on behalf of the defendant which tended to show a case of self-defense. The trial judge admitted evidence of threats said to have been made by the deceased against the defendant on various occasions. A number of exceptions were reserved to those rulings of the court which denied defendant's offers to show circumstances not a part of the *res gestæ* nor amounting to threats, but in our judgment they hardly call for extensive treatment. Statements said to have been made by the deceased about the defendant at odd times, remote from the killing, to the effect that defendant was a coward and would not fight, and the fact that deceased used bad language and cursed when referring to defendant, did not amount to threats, had no tendency to illustrate the conduct of the deceased at the time of the homicide, and were excluded without error.

Defendant had testified to several difficulties with the deceased, and to threats made against him by deceased of which he had been informed. It appeared that some time before the fatal encounter there had been a trial of a civil cause before a justice of the peace. Defendant testified that he knew nothing of the facts of that case, and had not attended the trial. He further testified that one Mr. Wilkes had told him that deceased had said that there were nine of them at the trial, and, if defendant had been there, they would have fixed him. Defendant sought by a series of questions to be permitted to testify that deceased had summoned him to attend that trial, or that deceased had come to his house with a number of others, and represented to him that his presence at the trial was desired, or that deceased had come to his house late at night to get him to attend the trial, or that just before the trial deceased came to his house and knocked on the door, and that when thereupon he had left his house and gone down into a corner of the fence near the road, he had heard deceased say what they would do if he had been there. After the state's objections to these questions had been sustained, the defendant testified without objection in these words: "On the night last referred to, when said parties knocked at my door, it was pretty late—I think about 11 o'clock. I was awakened by the knock. I left the house, went down through the garden, and up through the orchard. I saw five men pass by. I could not tell who any of them were except Grover Patterson. I knew him. I heard him talking about me not being at home, and they said they did not think I was

there, and if I was, Patterson said, I was hard to wake. I heard Patterson say in that conversation: "I am sorry he is not there. If he was we would fix his clock." Defendant's counsel then asked this question: "How long did Patterson and those other persons remain around your place?" Objection to this question was sustained. Exceptions were reserved to the several rulings indicated. It is clear enough that the act of deceased in summoning defendant as a witness or the mere effort to induce his attendance on the trial, which the defendant sought to show by the first several of the questions, did not in itself constitute a threat. It is said, however, that the attempt to get defendant to a place where it had been planned to fix—to kill—him, would have given meaning to the threat testified to by Wilkes. But the alleged threat was no threat. It was nothing more than a statement by the deceased of what he would have done in an event which had not happened. Nor was there evidence that the deceased had planned to kill defendant at the trial. It requires conjecture on conjecture to inject hostile meaning into the mere act of summoning or requesting the presence of defendant as a witness. The objection to the question as to the length of time Patterson and others remained around the defendant's place, we suppose, was sustained on the authority of *Harkness v. State*, 129 Ala. 71, 30 South. 73. The doctrine of that case was soon reaffirmed in *Willingham v. State*, 180 Ala. 35, 30 South. 429. We are not disposed to overrule those cases. The proposition that no consideration of convenience or inconvenience should have weight where life or liberty is at stake, is too comprehensive for practical purposes in the administration of justice. It is important, among other things, that cases, though involving life and liberty, be tried, and that the minds of the jury be not diverted from the merits of the case being tried by laying before them the details and merits of another. *McAnally v. State*, 74 Ala. 9. Nor did the occasion in question present the features of a threat by lying in wait, as was the case in *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17, nor such preparation for an attack as was shown in *Linehan v. State*, 113 Ala. 70, 21 South. 497. On due consideration we think the defendant had the advantage of every fact to which he was entitled, and that there was no error here.

The same disposition must be made of those offers on the part of defendant to show that, on the occasion of several difficulties between him and deceased, the latter had charged defendant with interfering with an unlawful traffic in whisky, in which, on the hypothesis of the questions, deceased was engaged. These questions plainly called for the details of those previous difficulties.

There was evidence for the state tending to show that, immediately before the encounter in which Patterson lost his life, de-

fendant had the pistol with which the killing was done concealed under the seat of his buggy. Defendant, as a witness, was asked by his counsel to state whether at that time and prior thereto threats had been made against his life. The defendant answered: "It had been so reported to me—been communicated to me that my life had been threatened." Appellant contends that there was error in sustaining objection to this question and the motion to exclude the answer for the reason that the evidence tended to show that defendant had reason to apprehend an attack, and thus to break the force of the suggestion of preparation carried by the state's evidence in respect to having the pistol concealed. The record does not disclose the grounds upon which the court proceeded. Any tenable ground will justify the ruling. The court allowed every offer to prove specific threats. If it be conceded that, in view of the testimony offered by the state on this point, evidence of threats was admissible to explain defendant's having a pistol, evidence of those threats ought to have been given in such form as to afford the state an opportunity for rebuttal—the occasions should have been specified. What defendant expected to prove might have been developed by proper questions. As it was, the question was a fishing question. The answer was too general. *Prince v. State*, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28.

An objection was sustained to this question put to the defendant: "Did the voices of those that you heard down the road (referring to the party of several in the wagon with the deceased) appear—sound to you as if coming from drunken men?" Immediately thereafter the defendant was allowed without objection to testify in this language: "I heard the hollowing before I saw the men, and it was my judgment that they were drinking." A witness may testify that a person is drunk or drinking. *Jones on Evidence*, § 360, and note with citation of authorities. It is urged that there is a wide difference between drinking and drunkenness, and that there was error which was not cured. There are degrees of intoxication. And it may be conceded that "drunk," as used in the vernacular, signifies a deeper degree than "drinking." If so, it still does not appear that there was error, for in strictness the question put did not ask for defendant's judgment as to whether the party in the wagon were drunk, but only whether the sounds were such as would come from drunken men—an inadequate basis for a judgment of drunkenness. But, however this may be, the question as to the degree of indulgence by the party in the wagon was the subject of elaborate examination. Apart from the opinion thus sought to be developed, the jury were in possession of every fact essential to a correct conclusion, including defendant's judgment that the party was drinking. It is not to be conceived in reason that the

opinion called for would have influenced the jury to a verdict in any respect different from that rendered. On the contrary, we are satisfied that no injury resulted to the defendant from its exclusion, and that there was no reversible error.

It seems evident that the witness Gresham could not have testified, as of his own knowledge, for what purpose the state had caused him to be subpoenaed as a witness, and that there was no error in refusing to permit him to make the effort.

Charge 11, refused to the defendant, ignored the duty of retreat.

Charge 14 assumed that the evidence of defendant's guilt was of an unsatisfactory character.

Charge 15 laid undue stress upon specified features of the evidence.

The general charge was manifestly erroneous.

After a consideration of the entire record we are of the opinion that no reversible error affected the defendant's trial and conviction, and, in consequence, that the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MCLELLAN, JJ., concur.

CRUMPTON v. STATE.

(Supreme Court of Alabama. May 19, 1910.)

1. HOMICIDE (§ 193*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, there was no error in excluding evidence that, the day before he was killed, deceased got a pistol from a certain person; there being no evidence or offer to prove that defendant knew thereof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.*]

2. HOMICIDE (§ 190*)—EVIDENCE—ADMISSIBILITY—THREATS.

Evidence of uncommunicated threats by deceased were admissible in a homicide case to show which party was aggressor, where it was doubtful who commenced the affray, and where there was obscurity in the testimony as to the conduct of the parties immediately preceding and attending the fatal act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

3. CRIMINAL LAW (§ 404*)—EVIDENCE—ADMISSIBILITY.

It was not error to admit in evidence the clothes of deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

4. HOMICIDE (§ 338*)—REVIEW OF EVIDENCE—HARMLESS ERROR.

It was not reversible error to admit evidence that deceased had been a marshal, as it could not injure defendant, and the same is true with reference to sustaining objection to a question to a witness as to protests against his being made marshal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 706-713; Dec. Dig. § 838.*]

5. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

Testimony of a witness as to a protest of citizens against a person being made a marshal is hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

6. CRIMINAL LAW (§ 390*)—EVIDENCE—MOTIVE.

Defendant, testifying in his own behalf, could not be asked to testify as to his motives, and hence it was not error to exclude a question as to why he did a particular act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.*]

7. CRIMINAL LAW (§ 759*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In a murder case, a charge that defendant did not provoke or bring on the difficulty, and that, if deceased turned towards him and put his right hand in his hip pocket so as to indicate to a reasonable man his purpose to draw a weapon and use it, defendant was authorized to anticipate him and shoot first, was properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1738, 1790-1793; Dec. Dig. § 759.*]

8. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—BURDEN OF PROOF.

There was no error in refusing charges that the burden was on the state to show that defendant was in fault in bringing on or provoking the difficulty, and to show that such was the case beyond a reasonable doubt, as they were misleading in not stating the conditions under which the state was called on to prove freedom from fault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1857; Dec. Dig. § 778.*]

9. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

There was no error in refusing to charge that in order to convict the state must prove there was no reasonable means of escape for defendant.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

10. CRIMINAL LAW (§ 807*)—ARGUMENTATIVE INSTRUCTIONS.

Defendant requested the court to charge that no theories, however fine, should persuade the jury to convict unless the evidence was strong enough to cause the conscience of mankind to respond to it, and that in the criminal department, the same as in the civil, our law and its enforcement were ordained to produce practical results, and not to vindicate theories of right, and that the policy of the law was that no man should suffer punishment unless he deserved it in pure retributive justice, aside from all collateral consideration, unless presumably it would contribute to the public good. *Held* properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

11. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a murder case, charges on apparent danger, requested by the defense, are properly refused, where they fail to hypothesize as a fact that defendant did believe that he was in imminent danger of death, or great bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. CRIMINAL LAW (§ 829*)—INSTRUCTIONS ALREADY GIVEN.

No error can be predicated on refusal of a charge covered or substantially covered by a charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

13. CRIMINAL LAW (§ 769*)—INSTRUCTIONS—CONSIDERING EFFECT OF CONVICTION.

Juries are to try and determine cases according to the law and the facts, and not according to their opinion as to whether public peace and good order will be promoted by a conviction; and hence a charge permitting the jury to consider the effect of a conviction in this respect was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 769.*]

14. CRIMINAL LAW (§ 805*)—INSTRUCTIONS—REQUESTS.

In a murder case, a requested charge that, "if there is a reasonable doubt that the defendant was free from fault in bringing on the difficulty, and that O. (deceased) made demonstrations which were calculated to lead a reasonably prudent man to the belief," was properly refused as incomplete and stating no proposition.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 805.*]

15. HOMICIDE (§ 300*)—INSTRUCTIONS.

The court properly refused to charge that, if defendant shot in self-defense as defined by the court, he did not kill deceased voluntarily in the sense used in the Code in defining murder, and the jury should acquit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

16. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

A charge to acquit unless the evidence against defendant "should be" such as to exclude to a moral certainty "every hypothesis" but that of his guilt was properly refused, as it is not a question as to what the evidence "should be," but what it was; nor is it every hypothesis that should be excluded, but every reasonable hypothesis.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

17. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

A charge to acquit on the ground of self-defense without hypothesizing all the elements thereof was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Mal Crumpton was convicted of manslaughter, and he appeals. Reversed.

The exceptions to evidence sufficiently appear in the opinion. The following charges were refused to the defendant: (1) "The court charges the jury that the defendant did not provoke or bring on the difficulty, and that if the deceased turned towards the defendant, and put his right hand in his hip pocket in such a manner as to indicate to a reasonable man that his purpose was to draw a weapon and use it, the defendant was authorized to anticipate him and shoot first." (2) "The court charges you that the burden was on the state to show that the defendant

was in fault in bringing on or provoking the difficulty." (3) "The court charges you that the burden is on the state to show beyond a reasonable doubt that the defendant was in fault in bringing on or provoking the difficulty." (4) "The court charges you that the burden is on the state to establish beyond a reasonable doubt that there was no reasonable means of escape open to defendant without increasing his peril, if you believe from the evidence that he was free from fault in bringing on or provoking the difficulty, and that it reasonably appeared necessary to the defendant to shoot at that time to save himself from death or great bodily harm." (5) "The court charges the jury that no theories, however fine, should persuade them to find the defendant guilty, unless the evidence in this case is so strong would cause the conscience of mankind to respond to it." (6) "The danger that will excuse one for killing another need not be real or actual. It may now be known that all the appearances of danger were false, and that Odom never intended to do the defendant any harm, and that he did not even have a pistol; yet, if the jury believe from all the evidence in this case that the appearance of danger surrounding the defendant at the time was such as to produce a reasonable belief in the mind of a reasonable man that his life was in danger, or that he was about to suffer great bodily harm, and that there were no other reasonable means at the time open to defendant to avoid the danger, but by taking Odom's life, defendant being without fault at the time, the law holds him harmless, and the jury must acquit him, whether in fact Odom had a pistol or not." (8) "The court charges the jury that if the defendant did not provoke or encourage the difficulty, but approached the deceased in an orderly and peaceful manner, and deceased turned towards the defendant and placed his hands behind him or in his hip pocket in such a manner as to indicate to a reasonable man that his purpose was to draw a pistol and fire, the defendant was authorized to anticipate him, and draw a pistol and fire and shoot him, if there was no reasonable means of escape without increasing his peril, and the rule in such cases would not be varied if it should turn out that the deceased was in fact unarmed, as the law of self-defense does not require the defendant to wait until the weapon is presented ready for deadly execution." (9) "The court charges the jury that in the criminal department, the same as in the civil, our law and its enforcement are ordained to produce practical results, not to vindicate theories of right." (10) "The court charges the jury that, in determining whether or not the defendant is guilty of the offense charged in the indictment, they are not simply to look at the morals of the act, or even at its practical enormity; but they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are to consider whether or not to punish the defendant will as a judicial rule promote on the whole the public peace and good order."

(11) "The court charges you, gentlemen of the jury, if there is a reasonable doubt that the defendant was free from fault in bringing on the difficulty, that Odom made demonstrations which were calculated to lead a reasonably prudent man to the belief." (12) General affirmative charge. (13) "The court charges you, gentlemen of the jury, that the danger which will justify the taking of human life need not be actual; but it is sufficient if there is actual apparent danger at the time the shooting took place." (14) "I charge you, gentlemen of the jury, that if the defendant shot the deceased in self-defense, as defined to you by the court, then he did not kill him voluntarily, in the sense used in the Code in defining murder, and you should acquit him." (16) "The court charges you, gentlemen of the jury, that you should find the defendant not guilty, unless the evidence against him should be such as to exclude to a moral certainty every hypothesis but that of his guilt." (15) "The court charges the jury that the policy of the law is that no man should suffer the punishment unless he deserved it in pure retributive justice, aside from all collateral consideration, unless presumably it will contribute to the public good." (17) "That there was actual or apparent danger, which was calculated to produce death or great bodily harm, and that the defendant shot in pursuance to the danger, and had no reasonable means of escape without increasing his peril, that is, apparent means of escape, which would lead a reasonable man to the belief that he could safely escape without increasing his peril, then, gentlemen of the jury, you cannot convict the defendant of any offense, and you should acquit him."

Leith & Gunn, Bankhead & Bankhead, Acuff & Cooner, and L. D. Gray, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was indicted for murder in the second degree, and convicted of manslaughter in the first degree.

A witness for the state, Mrs. Green, who witnessed the shooting, and who testified that just before the firing Odom (the man who was shot) was standing with his hand in his hip pocket, and seemed to be moving his hand, was asked on cross-examination if said Odom did not, on the day before he was killed, get a pistol from her husband. The state objected, and the objection was sustained. There was no error in sustaining this objection. There was no evidence or offer to prove that the defendant knew of the circumstance referred to. *Robinson v. State*, 106 Ala. 14, 15, 16, 18 South. 732; *Wilson v. State*, 140 Ala. 43, 50, 37 South. 93.

The cases of *Wiley v. State*, 99 Ala. 146, 13 South. 424, *Linehan v. State*, 113 Ala. 71,

82, 83, 21 South. 497, and *Naugher v. State*, 116 Ala. 463, 466, 23 South. 26, all relate to threats brought to the knowledge of the defendant, or to facts known by him.

There was error in overruling the objection to the question to the witness Davidson as to a statement made to said witness, shortly before the difficulty, which referred to a threat. This court, in the *Roberts Case*, modified the former rule that uncommunicated threats are not competent evidence, to the extent that threats recently made are admissible, "if the deceased had sought a conflict with the accused, or was making some demonstration or overt act towards the accomplishment or perpetration of such threats. In other words, the circumstances in evidence must properly raise a case of self-defense." Also, that they are admissible in corroboration of threats which have been communicated. Also, "where it is doubtful, from the testimony, which party commenced the affray, threats of this character are admissible, as in the nature of facts, to show who was probably the first assailant." *Roberts v. State*, 68 Ala. 156, 164. In that case it was proved that the deceased was a violent, overbearing, and vindictive man; that he had made threats one or two hours before the killing, had loaded his gun, said he would kill the defendant before night, and gone to his store. The *Roberts Case* was followed in a case where there was "obscurity in the testimony relating to the conduct of the parties immediately preceding and attending the fatal act," and where on hearing the report of the pistol a witness looked and saw the deceased with "his arm extended, pistol in hand, pointing towards the door" where the accused had last been seen; this court holding that threats made by deceased shortly before the difficulty, while loading his pistol, were admissible, as tending to show his animus, and as to which commenced the difficulty. *Green v. State*, 69 Ala. 6, 9. Again, where evidence showed that B. and D., on their way to defendant's store, threatened to kill him, and it was communicated to the defendant, and according to the defendant's evidence, they did in fact go there and make an attack on him, it was allowed to prove also that they had laid in wait for him the night before, as tending to show their motive in going to the store, as corroborative of the communicated threats, and to aid the jury in determining who was the aggressor. *Gunter v. State*, 111 Ala. 24, 28, 29, 20 South. 632, 56 Am. St. Rep. 17. In a later case this court said: "There are cases involving self-defense where, under the rules laid down in *Roberts v. State*, uncommunicated threats are admissible as tending to show which of the parties to the difficulty was the aggressor, and also as showing the animus of an attack made on a defendant, and such threats are sometimes provable as corroborative of evidence of other threats which were communicated; but there was no evidence that defendant was really being attacked by Brown, and threats of

which he was ignorant could not have any agency in inducing him to apprehend an attack," etc. *Webb v. State*, 135 Ala. 36, 41, 33 South. 487, 489. In another case it was held that uncommunicated threats are inadmissible, unless there is a question in the case, as to whether the deceased was the aggressor, or made hostile demonstrations, etc. *Wilson v. State*, 140 Ala. 43, 50, 37 South. 93.

Where there are no communicated threats proved, these uncommunicated threats are admitted in evidence, not for the purpose of furnishing any excuse or justification to the defendant—for if he did not know of a threat it could not operate on his mind—but merely for the purpose of aiding the jury in ascertaining the animus of the deceased, so as to form a conclusion as to whether he was the aggressor.

In the present case it was "doubtful from the testimony which party commenced the affray." There was "obscurity in the testimony relating to the conduct of the parties immediately preceding and attending the fatal act." There was "a question in the case as to whether the deceased was the aggressor, or made hostile demonstrations." The threats were admissible for the purpose of showing which party was the aggressor.

There was no error in overruling the objections in regard to the introduction of the clothes of the deceased.

No injury could occur to the defendant by the evidence of Odum's having been a marshal, and it was not reversible error to admit it.

The same is true with reference to sustaining the objection to the question to the witness Staggs as to the protest of the citizens against his being made marshal; and, besides, it was hearsay.

There was no error in sustaining the objection to the question to the defendant as a witness as to why he got on the other track, as he could not be asked to testify as to his motives.

Charge 1, requested by the defendant, is invasive of the province of the jury, and was properly refused.

In the cases referred to by the attorney for appellant, the court was not requested to charge the jury what the evidence did prove.

There was no error in the refusal to give charges 2 and 3, requested by the defendant.

They were misleading, in not stating the conditions under which the state is called on to prove freedom from fault. *Etheridge v. State*, 141 Ala. 29, 30, 31, 37 South. 337; *McBryde v. State*, 156 Ala. 44, 55, 47 South. 302.

There was no error in the refusal to give charge 4, requested by the defendant. It asserts the strange proposition that the state must prove that there was no reasonable means of escape, in order to convict the defendant.

Charges 5, 9, and 15, requested by the defendant, are arguments and were properly refused.

Charges 6 and 8 were properly refused. Each fails to hypothesize the belief of the defendant that he was in imminent danger of death or great bodily harm, and, besides, charge C, given at the request of the defendant, substantially covers charge 6, if not also charge 8.

Charge 10 was properly refused; juries are to try and determine cases according to the law and the facts, and not according to their opinion as to whether public peace and good order will be promoted by a conviction.

Charge 11, requested by the defendant, is incomplete, states no proposition, and was properly refused.

Charge 12 (being the general charge) was properly refused.

Charge 13, requested by the defendant, is covered by charge C, given at the request of the defendant. Hence there was no error in refusing to give it.

Charge 14, requested by the defendant, was properly refused. As this charge was refused by the court, we cannot say whether or not the court had defined the essentials of self-defense.

Charge 16, requested by the defendant, was properly refused. It is not a question as to what the evidence should be, but what it is; nor is it every hypothesis that must be excluded, but every reasonable hypothesis.

Charge 17 was properly refused. It asks for the defendant an acquittal, and does not hypothesize all of the elements of self-defense.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

GRIFFITH et al. v. GRIFFITH.

(Supreme Court of Florida, Division A, June 21, 1910.)

*(Syllabus by the Court.)***1. HOMESTEAD (§ 136*) — DEVISE OF HOMESTEAD—VALIDITY.**

Where a person entitled to a homestead dies leaving children, the homestead is not subject to testamentary disposition.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 249, 250; Dec. Dig. § 136.*]

2. PARTITION (§ 74*)—WHEN MAINTAINABLE—SUBSTITUTE FOR EJECTMENT.

Where the bona fide object of a suit is the partition of land between common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in possession, then all controversies as to the legal title and right of possession may and should be settled by the court, as authorized by the statute. But a suit for partition cannot be resorted to as a substitute for the action of ejectment, nor used for the sole purpose of testing a legal title or trying an issue as to it.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 74.*]

Appeal from Circuit Court, Manatee County; J. B. Wall, Judge.

Bill by Walter R. Griffith against Rose S. Griffith and others. Decree for complainant, and defendants appeal. Reversed.

See, also, 51 South. 1059.

Sparkman & Carter and Singeltary & Reaves, for appellants. C. C. Whitaker, for appellee.

WHITFIELD, C. J. A decree of partition is appealed from. The amended bill alleges in substance that Walter R. Griffith, the sole complainant, and Rose S. Griffith, are the only son and daughter of Robert S. Griffith, who died about April 10, 1898; that Robert S. Griffith by will gave all his property to Anna W. Griffith, his wife, and appointed her sole executrix, with full power to sell and convey all the property of the estate; that an attempt was made to probate the will, and it was recorded in the public records of Manatee county; that at his death Robert S. Griffith was the head of a family residing in Manatee county, Fla.; that he had title to, and was seised and possessed in fee simple of, certain described real estate, and resided thereon at his death as his homestead; that said land was not subject to the will; that, the widow having taken certain property of the decedent of greater value than the homestead under the will, she should be barred of any right in the homestead, but in any event the widow is only entitled to dower in the homestead; that on February 23, 1899, the widow conveyed all her right, title, and interest in the homestead to Henry L. Coe; that Coe, claiming by virtue of such conveyance some interest, the nature of which is unknown to complainant, conveyed on August 2, 1899, his interest in a portion of the

homestead purchased from the widow to Benjamin H. Yeoman; that complainant is seised and possessed of a fee-simple title to an undivided one-half interest in the homestead; that complainant and the defendant Rose S. Griffith are tenants in common of the homestead; that Anna W. Griffith "claims some right, title, and interest therein, the exact nature of which is unknown to" complainant; that Henry L. Coe claims to hold some interest in a portion of the homestead; that, if Coe has any interest, it is the dower interest of the widow, conveyed to him by her; that Benjamin H. Yeoman claims some interest in a portion of the homestead, by his conveyance from Coe, who received conveyance from the widow, and such interest of Yeoman, if any, is the dower interest of the widow. Partition is prayed between the complainant and the defendants "according to their respective rights, estates, and interests therein." A demurrer to the bill, interposed by Henry L. Coe, was overruled. Henry L. Coe by answer called for strict proof as to the homestead right, and avers that Anna W. Griffith, claiming title under the will of Robert S. Griffith, "conveyed the said land to this defendant * * * by deed * * * on February 23, 1899, and this defendant, claiming and holding said land under and by virtue of said deed," on August 2, 1899, conveyed by warranty deed to Benjamin H. Yeoman a stated portion of the lands; that said Yeoman, claiming title under such deed, on August 2, 1899, entered upon and took possession of the land so conveyed, "and by virtue of said deed has been in continued uninterrupted possession thereof for more than seven years prior to the filing of this suit, * * * and now is in possession thereof and occupying the same as his home"; that defendant is the owner of the interest said Anna W. Griffith had in the land, except the part he has sold to Yeoman; that no dower has been assigned to the widow; that Yeoman for more than seven years held adverse possession of the part sold by Coe to him, and is now in actual adverse possession thereof, claiming to be the owner of it, and the real object of this suit is to determine the rights of Yeoman in the land. The answer of Yeoman claims title to a portion of the homestead by adverse possession for the statutory period under the conveyance to him from Coe. The answer of Rose S. Griffith admits the homestead rights and the dower rights of the widow, and admits that she and the complainant are each entitled to an undivided half interest in the homestead subject to the rights of the widow. A decree pro confesso was entered against the widow. Replications were filed to the answers of Rose S. Griffith and Henry L. Coe. The court decreed partition equally between Walter R. Griffith and Rose S. Griffith, subject to the dower right of the widow,

Anna W. Griffith. The defendants appealed, and contend that partition should not have been decreed, that if partition is made the interests of all the parties should be decreed, and that the defendant Yeoman has title by adverse possession to a portion of the homestead. There is testimony in support of the homestead rights and of the claims set up by the defendants Coe and Yeoman.

Under the Constitution "a homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars worth of personal property and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of the husband and wife, when that relation exists. * * *

The exemptions * * * shall inure to the widow and the heirs of the party entitled to such exemption. * * * Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner to be prescribed by law." Sections 1, 2, and 4, art. 10, Constitution of 1885. Chapter 4730, Acts of 1899, forbids a testamentary disposition of the homestead real estate by one having a wife. *Saxon v. Rawls*, 51 Fla. 555, 41 South. 594; *Thomas v. Williamson*, 51 Fla. 332, 40 South. 831. See, also, *Thomas v. Craft*, 55 Fla. 842, 46 South. 594.

Although the owner of the homestead died before the passage of chapter 4730, Acts of 1899, he had children living, and under the Constitution the homestead was not subject to testamentary disposition. As to such homestead the husband died intestate, and the widow is given her statutory interest therein. *Palmer v. Palmer*, 47 Fla. 200, 35 South. 983.

Where the bona fide object of a suit is the partition of land between common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in possession, then all controversies as to the legal title and right of possession may and should be settled by the court, as authorized by the statute. But a suit for partition cannot be resorted to as a substitute for the action of ejectment, nor used for the sole purpose of testing a legal title or trying an issue as to it. *Rivas v. Summers*, 33 Fla. 539, 15 South. 319; *Koon v. Koon*, 55 Fla. 834, 46 South. 633; *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 South. 722, 111 Am. St. Rep. 77; *Dallam v. Sanchez*, 56 Fla. 779, 47 South. 871.

In this case neither of the two heirs nor the widow of the decedent is in possession of any of the lands, and there appears to be no controversy between the two heirs nor between the heirs and the widow. The grantee of the widow claims her right in a portion of the homestead land, and his grantee claims title by adverse possession to another portion of it, to which he has a warranty deed from the widow's grantee. The proofs tend prima facie to support the adverse claims to a part at least of the lands, and such claims do not now clearly appear to be contrary to law as to the complainant. It is apparent that the only controversy is over the rights of the heirs as against those claiming adversely under the widow's conveyance. Under these circumstances partition is not the complainant's remedy.

The decree is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

McCULLOCH et al. v. DEKLE.
(Supreme Court of Florida, Division B. May 9, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 529*)—RECORD.

Where a motion is made under our statute to set aside an execution and judgment because of illegality in such judgment, the judgment and verdict assailed by such motion should be exhibited to the appellate court on writ of error in the record proper, under the certificate of the clerk below; and if such verdict and judgment are shown in the transcript only as exhibits to the motion to set aside, they cannot be considered by the appellate court, since such motions are not self-verifying.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2389, 2392; Dec. Dig. § 529.*]

Error to Circuit Court, Hillsborough County; J. B. Wall, Judge.

Action between F. L. McCulloch and others and Lee Dekle. From the judgment, McCulloch and others bring error. Affirmed on rehearing.

E. R. Gunby, T. E. Lucas, and P. O. Knight, for plaintiffs in error. Wall & McKay and Sparkman & Carter, for defendant in error.

On Rehearing.

TAYLOR, J. This cause comes on for further consideration upon a petition for rehearing, in which it is pointed out that this court in the former consideration of the case overlooked the fact that the verdict and judgment, assailed in the petition for stay of execution and for vacation of said judgment, are not so exhibited in the tran-

script of record brought here as that this court could consider the same. This contention of the defendant in error in his petition for rehearing we find to be well taken. The transcript of record brought here does not contain the verdict and judgment sought to be set aside, except as exhibits to the motion or petition for stay of execution and for vacation of such judgment, and there is no authentication of the fact that there was such a verdict and judgment as the ones assailed by such motion or petition. Alleged copies of such verdict and judgment are attached as exhibits to such motion or petition, but such motions are not self-verifying.

Inasmuch as such verdict and judgment were part of the record proper in the cause, no bill of exceptions was either necessary or proper to exhibit them to the appellate court; but they should have been included in the record proper brought here by writ of error, properly authenticated under the hand and seal of the clerk below, in order to a proper consideration thereof by this court. It follows from what has been said that this court erred in its former opinion in this cause, and the application for rehearing is hereby granted, and the former judgment of this court, reversing the judgment of the circuit court in said cause, is hereby vacated and set aside, and instead thereof the judgment of the circuit court in said cause is hereby affirmed, at the cost of the plaintiffs in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, O. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

ADAMS v. FRYER et al.

(Supreme Court of Florida, Division B. May 20, 1910.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 19*) — EVIDENCE—SUBSTANTIAL INCLOSURE.

Where a party, claiming under a tax deed that is admittedly void, bases his right to the land involved upon four years' actual adverse possession thereof under the provisions of section 591, Gen. St. 1906, and the only proof of such possession is that he stretched around the entire tract, containing upwards of 2,500 acres, one barbed wire nailed to trees and saplings and a few posts at a height of about four feet from the ground, and under this barbed wire two strands of small, smooth telephone wire, and it was proved without contradiction that cattle of the neighborhood roamed through and over it at will, and that the land was wild and unimproved, *held*, that this was not such a substantial inclosure as gave to the party adverse possession under our statute, and that under the proofs an affirmative charge should have been given to the jury to find for the plaintiff.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 99-105; Dec. Dig. § 19.*]

2. ADVERSE POSSESSION (§ 57*) — DURATION AND CONTINUITY—EVIDENCE.

Where a party claims title to land by adverse possession, he should show clearly, definitely, and with accuracy that he continuously maintained a legally recognized possession for the full statutory period necessary to bar the former owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278; Dec. Dig. § 57.*]

Error to Circuit Court, Liberty County; J. W. Malone, Judge.

Action by A. B. Adams against R. D. Fryer and J. M. Spence. Judgment for defendants, and plaintiff brings error. Reversed.

Blount & Blount & Carter and E. T. Davis, for plaintiff in error. Reeves & Watson, for defendants in error.

TAYLOR, J. The plaintiff in error, as plaintiff below, brought his action of ejectment against the defendants in error in the circuit court of Liberty county for the recovery of sections 1, 2, 11, and 12 in township 5 south, in range 8 west, containing 2,568 acres. There was a verdict and judgment in favor of the defendants below, and for its review the plaintiff below comes here by writ of error.

At the trial the plaintiff requested the court to give an affirmative charge to the jury to find in his favor, which instruction was refused. Such refusal was duly excepted to and is assigned as error.

This instruction on the testimony in the case should have been given, and the court below erred in its refusal to give it. The plaintiff below exhibited a complete chain of title in himself, running back to the Spanish government, and showed that the land was wild forest, unoccupied and unimproved. The defendants claimed under a tax title that was admitted to be void, but claimed that they had been in the actual possession of said lands for four years prior to the institution of the plaintiff's suit, invoking the provision of section 591, Gen. St. 1906, which provides as follows: "When the purchaser of land at a tax sale goes into actual possession of such land, no suit for the recovery of the possession thereof shall be brought by the former owner or claimant, his heirs or assigns, or his or their legal representatives for the recovery of the possession of such land, unless such suit be commenced within four years after the purchaser at such tax sale goes into possession of the land so bought."

The only proof offered by the defendant to show his possession of these lands was that he stretched around the entire tract one barbed wire nailed to trees, saplings, and some posts at a height of about 4 feet from the ground, and below this barbed wire, about 15 or 18 inches apart, two strands of small smooth wire, such as is usually known

as "telephone wire," and that he cut and sold from said lands at different times some saw logs and wood. No part of it was ever actually occupied by him or improved in any manner.

Section 1721, Gen. St. 1906, provides as follows in part:

"For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

"(1) Where it has been usually cultivated or improved.

"(2) Where it has been protected by a substantial inclosure."

Was the inclosure put by the defendants around these lands such a substantial inclosure as is called for by our statutes? We think not. The undisputed facts in proof show that the cattle of the neighborhood roamed through and over it at will.

But, besides this, we do not think that the proofs in the case show clearly, definitely, and with that accuracy that is called for in such cases, that the makeshift of an inclosure put around the land by the defendants had been put there and maintained continuously for four years prior to the bringing of the suit; but in our view the weight of the evidence shows that it was not so inclosed for four years prior to the institution of the suit.

For the reasons stated, the judgment of the court below is reversed, and a new trial ordered at the cost of the defendants in error.

HOCKER and PARKHILL, JJ., concur.
WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

DE SOTO NAT. BANK et al. v. ARCADIA ELECTRIC LIGHT, ICE & TELEPHONE CO.

(Supreme Court of Florida. May 27, 1910. Rehearing Denied June 11, 1910.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 116*) — STATUTORY REQUIREMENTS.

Where a statutory lien is given upon compliance with stated requirements, a lien is not acquired unless the requirements are substantially complied with.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 116.*]

2. MECHANICS' LIENS (§ 122*) — NOTICE BY SUBCONTRACTOR—SUFFICIENCY.

A notice, addressed to the owners of a building, stating that "this is to notify you that under our contract for electric light and annunciator in your new building, amounting to \$490, and extras as approved, \$100, making in all, for wiring to outlets, \$590, \$300 has been paid, and we are looking to you to protect the remainder of the contract price," is not suffi-

cient to create a materialman's and laborer's lien under the statute, even though the service of the notice be admitted.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 122.*]

Cockrell, J., dissenting.

In Banc. Appeal from Circuit Court, De Soto County; J. B. Wall, Judge.

Bill by the Arcadia Electric Light, Ice & Telephone Company against the De Soto National Bank and others. Decree for complainant, and defendants appeal. Reversed.

See, also, 57 Fla. 391, 48 South. 745.

John W. Burton and Treadwell & Treadwell, for appellants. W. E. Leitner, for appellee.

WHITFIELD, C. J. A decree enforcing a mechanic's lien against a purchaser of the property is appealed from. The bill of complaint alleges in substance that the complainant, appellee here, under a contract with P. R. Read, furnished material and labor in wiring for lighting, etc., a building on described lots owned by Simmons, Langford & Co., "a company composed of Washington W. Langford and Mary P. Simmons"; that, fearing P. R. Read would not pay according to contract, the complainant, long before the contract was complete, about May 10, 1907, served "the then owners, through their duly authorized agent, with a notice in writing, as required by statute, notifying said owners that it would hold them responsible for the said contract price, or so much thereof as remained unpaid, and said owners did then and at that time owe said P. R. Read a large amount of money, more than enough to pay complainant for said work"; that before the completion of said work on August 30, 1907, the land and building thereon were purchased by "the De Soto National Bank, with full knowledge that complainant was doing said work under the contract, and that complainant intended to hold a lien on said land and building"; that the work on said building was completed long after the said bank purchased it, and complainant "then and there notified the said defendant, the De Soto National Bank, that it would hold it liable for the said debt, or so much thereof as remained unpaid"; that a stated portion of the amount due on the work remains unpaid. The prayer is that a lien on the property be decreed and enforced.

By answer not under oath, the oath being waived, and signed only by counsel, the defendant W. W. Langford disclaimed any interest in the property, denied that he was a member of the firm of Simmons, Langford & Co., and avers that the firm of Simmons, Langford & Co. was composed of Mary P. Simmons alone, and avers that he was never indebted to Read in any sum whatever.

The answer of the defendant the De Soto

National Bank, signed only by counsel and not under the seal of the corporation bank, avers that "the owner of the property did not enter into any contract, so far as it is advised and believes, with the said P. R. Read, for the erection of the building upon said real estate, and that the said defendants or neither of them were on May 10, 1907, or at any other time, indebted to the said P. R. Read in any amount"; denies that the partnership consisted of W. W. Langford and M. P. Simmons, but avers that it was composed of Mary P. Simmons, a married woman, alone; admits the purchase of the property from Mary P. Simmons, trading under the name of Simmons, Langford & Co., but denies that it had full knowledge, or any knowledge whatever, that the complainant was furnishing and installing said wires and materials in said building under any contract with the owner, or with the builder of said building, and denies knowledge of any indebtedness of the contractor to complainant; denies any notice was given to it by complainant of the furnishing or intention to furnish the contractor with material, or to hold the defendant or the owner of the property, or a lien on the property, for the material, etc.; avers that at no time after May 1, 1907, was the owner of the property indebted to the contractor in any sum whatever.

Replication was filed and testimony taken. The court decreed a lien and its enforcement for a balance found to be due.

The appellants contend that no lien attaches to the property, as it belonged to a married woman, and that the De Soto National Bank is a purchaser of the property from the married woman without notice, and no lien exists as against it on the property.

The statute provides for liens for labor and for material furnished, and also that, "if the labor or materials mentioned herein shall be done or furnished by the procurement of the owner of the property, or his agent, or of a person contracting with him to have the work done or material furnished, the lien shall be upon interest of such owner; but if the labor be done or the materials furnished by the procurement of a person having less than the absolute interest, or of his agent, or of any person contracting with him to have the work done or materials furnished, the lien shall be only upon the limited interest of such person." It also provides that "a person entitled to acquire a lien, not in privity with the owner, as aforesaid, shall acquire a lien upon such owner's real or personal property as against him, and persons claiming through his death, and purchasers and creditors with notice, by the delivery to him, or his agent, of a written notice that the contractor or other person for whom the labor has been performed, or the materials furnished, is indebted to the person performing the labor or furnishing the materials in the sum stated in the notice; but if a person who is performing or is about to perform, by himself or oth-

ers, labor, or is furnishing or is about to furnish materials shall so desire, he may deliver to the owner, or his agent, a written cautionary notice that he will do certain work, or will furnish certain materials, or both. A lien shall exist from the time of the service of the notice for the amount unpaid on the contract of and by the owner to the contractor or the person for whom the work was done or the material furnished." Sections 2195, 2211, Gen. St. 1906.

The bill of complaint does not allege that the person to whom the materials and labor were furnished was the agent of the owners, or had contracted with the owners to have the same furnished, so as to warrant a lien under the statute; but the bill was not demurred to on that ground, and it appears from the record that P. R. Read had contracted with the owners to furnish the material and labor.

It is conceded that there was no privity between the complainant and the defendants; therefore, if the lien was acquired, it was by virtue of the proper service of the notice required by the statute.

In a former appeal in this cause (57 Fla. 391, 48 South. 745) it was held that, although the separate property of a married woman is not subject to a mechanic's lien (*Macfarlane v. Southern Lumber & Supply Co.*, 47 Fla. 271, 36 South. 1029), yet the interest of her partner in business could be subjected as the statute directs.

The answers of the defendants were not signed as required by proper equity practice. *City of Ocala v. Anderson*, 58 Fla. 415, 50 South. 572; *King v. Bell*, 54 Fla. 568, 45 South. 488. But no objection was made by the complainant to the omission of the signature and seal to the answers.

A replication was filed in this case, and it put in issue the allegation of the bill of complaint, denied by the answer not under oath, that the partnership owning the property upon which the lien is claimed was composed of W. W. Langford, one of the defendants below, and Mary P. Simmons, a married woman. The burden of proving this allegation was upon the complainant. The answers not being sworn to, the oath being waived, were not evidence, but only made an issue. *Griffith v. Henderson*, 55 Fla. 625, 45 South. 1003.

A witness for the complainant, in response to a question as to who composed the firm of Simmons, Langford & Co., testified that Langford stated to him "that he owned a controlling interest in the building, or very near all of it; that it was his money that was building the building." It was not denied, but was conceded, that the property was owned by the firm of Simmons, Langford & Co. An admission by a person that he is a member of a partnership is relevant testimony against him, its probative force to be determined as in other cases. See 30 Cyc. 408.

The defendants introduced no testimony. There was in the above admission of Lang-

ford at least some evidence that he was a member of the firm that owned the property, and such evidence was not contradicted.

The appellee, who furnished the material, etc., was not in privity with the owners of the property, and to show its lien the complainant put in evidence, over objection, among other grounds, that it was not a compliance with the statute, the following notice:

"Arcadia, Florida, May 10, 1907.

"Simmons, Langford & Co., City.

"Dear Sirs: This is to notify you that under our contract for electric light and annunciator in your new building, amounting to \$490, and extras as approved, \$100, making in all, for wiring to outlets, \$590, \$300 has been paid, and we are looking to you to protect the remainder of the contract price.

"Respectfully,

"Arcadia Electric Light Ice Co.,
"Mg."

From the notice above quoted it is clear that the statute has not been complied with. The tenor of the notice indicates a contract with the owners, when it is alleged that the contract was with a third person. The statute requires the service of "a written notice that the contractor or other person for whom the labor has been performed or the materials furnished is indebted to" the complainant. This notice is not of that character.

Where a statutory lien is allowed upon compliance with stated requirements, there should be a substantial performance of all the requisites, and a failure in this results in no lien. The notice was not a substantial compliance with the statute. As there was no lien as against the former owners, there is none against the purchaser.

The decree is reversed. All concur, except COCKRELL, J., who dissents.

TAYLOR et al. v. CUMMER LUMBER CO.
et al.

(Supreme Court of Florida, Division B. May 4, 1910.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 164*)—ESTOPPEL OF DORMANT PARTNER.

Where a dormant partner permits the business world to believe that the active partner is the sole owner of the business and of real estate belonging to the partnership, he is estopped from contesting the validity of a mortgage on the real estate made by the active partner to secure the payment for lumber furnished to the active partner, the mortgagee having no notice of the existence of the partnership when the mortgage was taken, and especially when, if the mortgagee had had timely notice of the existence of the partnership relation, he might have otherwise secured the payment of his debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 800; Dec. Dig. § 164.*]

2. EQUITY (§ 404*)—ACCOUNTING—HEARING BEFORE MASTER—ADMISSIBILITY OF EVIDENCE.

Testimony which has already been taken before an examiner, and which the court has used without objection in settling the equities of the case, may be used by a master subsequently appointed under the direction of the court in stating and settling an account between the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886-892; Dec. Dig. § 404.*]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by James W. Taylor and others against the Cummer Lumber Company and others. From the decrees, complainants appeal. Affirmed.

C. B. Peeler, for appellants. Young & Adams and Geo. U. Walker & Son, for appellees.

HOCKER, J. James W. Taylor, as sole surviving heir at law of Lorenzo Taylor, and James W. Taylor and Marcia I. Taylor, as executor and executrix of the estate of Lorenzo Taylor, deceased, brought a suit by bill in equity in the circuit court of Duval county, against Richard Silsbe, Jr., and his wife, Bertie L. Silsbe, and the Cummer Lumber Company, a corporation, in October, 1908, in which in substance the following allegations, among others, are made: That Lorenzo Taylor died on the 11th of February, 1908, leaving a will in which the complainants are named as executor and executrix, and have qualified as such; that James W. Taylor is the sole heir at law of Lorenzo Taylor; that during the month of June, 1907, Silsbe, Jr., acted for Lorenzo Taylor in purchasing and taking title to lot 12, block 12, Campbell's addition to Jacksonville; that Lorenzo Taylor furnished to Silsbe, Jr., the money with which to pay for said lot and did purchase the same through said defendant, Silsbe, Jr., in whom the title was placed in trust for the use and benefit of said Taylor, as and for the purposes set forth in an agreement attached to and made a part of the bill as "Exhibit A," which is as follows:

"(23103) Agreement.

"Richard Silsbe, Jr., to Lorenzo Taylor.

"Memorandum of agreement, made this 14th day of June, A. D., 1907, by and between Richard Silsbe, Jr., of the one part, and Lorenzo Taylor, of the other part.

"Witnesseth: Whereas, said Silsbe holds legal title to that certain parcel of land situate, lying and being in the city of Jacksonville, county of Duval; and state of Florida, known and described as lot 12, in block 12, of Campbell's addition to Jacksonville.

"And, whereas, said Taylor had promised and agreed to advance to said Silsbe, for the purpose of building certain houses on said premises, certain moneys as hereinafter specified:

"Now, then, in consideration of the prem-

ises, it is mutually agreed between said parties as follows:

"First. That said Taylor has heretofore advanced to said Silsbe for the purchase of said lot the sum of six hundred (\$600.00) dollars.

"Second. That said Taylor shall advance to said Silsbe for the purpose of building the several houses hereinafter specified, in convenient installments as same shall be needed, such sums of money as may be found necessary, now estimated at two thousand two hundred (\$2,200.00) dollars.

"Third. That said Silsbe shall use said moneys so advanced in the erection upon said land of five (5) one-story houses, to wit: Two houses of four rooms each, and three houses of three rooms each.

"Fourth. That said Silsbe shall stand seised of the title to said land and premises, as trustee, upon the following trusts, that is to say:

"To erect and complete, ready for use, the five houses hereinbefore mentioned.

"To sell and convey the said land, together with the said houses to be erected thereon, either together or separately as may be found most advantageous for such prices and upon such terms as shall be agreed upon by the parties hereto, the said Taylor and the said Silsbe.

"And it is particularly understood between these contracting parties, and is made a part of this agreement, that all losses, if any there be, and all profits, if any there be, in respect to the premises shall be shared equally between the parties of this agreement.

"In witness whereof, the parties of this agreement have hereto subscribed their names on this 19th day of June, A. D. 1907.

"Richard Silsbe, Jr. [Seal.]

"Lorenzo Taylor. [Seal.]

"Attest:

"C. B. Peeler.

"Jas. M. Peeler."

That after the execution of said agreement before the 15th of June, 1907, Lorenzo Taylor advanced \$2,200 to Silsbe, Jr., to build the houses on said lot.

Then follows several paragraphs charging bad faith on the part of Silsbe, Jr., in the use of the money advanced by Taylor for building the houses which it was agreed should be built, and in collecting rents, and alleges that Silsbe, Jr., is insolvent; that he has permitted the lot to be sold for taxes.

The bill then alleges that the Cummer Lumber Company have or claim some rights or interests in said lot 12, block 12, Campbell's addition to Jacksonville, but that all such rights and interests are inferior and subordinate to the rights and interests of complainants, who have the first right and claim to all the property and land herein described, and the rights and claims of every nature and kind of defendants hereto are subordinate to those of complainants.

The bill then prays, among other things, for an accounting of the uses made by him of the money advanced by Lorenzo Taylor, of the profits and gains made by him with said money, that the equities and interests of all the parties may be settled, and that the equities and interests of the Cummer Lumber Company may be determined and decreed to be inferior to those of complainants. The bill is very lengthy, but we think the foregoing is substantially all that it is necessary to consider.

Richard Silsbe, Jr., and his wife demurred to the bill for want of equity, but we do not find that there was any ruling on the demurrer. They also answered the bill, admitted the agreement, alleged in the bill as having been made with Lorenzo Taylor, but denied all the allegations as to mismanagement and misuse of the money advanced by Lorenzo Taylor, and admit that complainants are entitled to the return of the money under the contract, viz., \$2,800, and, if there be any profits realized on the sale of the property, to one-half of such profits.

The Cummer Lumber Company answered the bill, denying any knowledge of the facts set up in the bill as to the transactions between Lorenzo Taylor and R. Silsbe, Jr., and asserting that it has a right and interest in the lot of land described in the bill superior to that of complainants. The answer alleges that on the 13th of February, 1908, R. Silsbe, Jr., being indebted to it in the sum of \$4,043.84 on an open account for lumber and other materials sold and delivered to Silsbe, Jr., a large part of which it is informed and believes was used in the construction of houses by said Silsbe, Jr., upon the premises described in the bill, executed and delivered to this defendant a deed in form, but a mortgage in fact (see *Hull v. Burr*, 50 South. 754), of the lot described in the bill, with an abstract of title showing a fee-simple title in R. Silsbe, Jr., unincumbered except as to certain taxes. This mortgage is made a part of the answer, and is as follows:

"This indenture, made this 13th day of February, A. D. 1908, between Richard Silsbe, Jr., and Bertie Silsbe, his wife, of the county of Duval and state of Florida, parties of the first part, and the Cummer Lumber Company, a corporation doing business in the county of Duval and state of Florida, party of the second part,

"Witnesseth: That the said parties of the first part, for and in consideration of the sum of ten dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold to the said party of the second part, and its assigns forever, all interest, title and estate in and to that certain parcel of land situate in the city of Jacksonville, in the county and state aforesaid, known as lot twelve (12) in block twelve (12) of Campbell's addition to Jacksonville according to plat now of record in volume 2

of Plats, folio 21, of the current public records of Duval county, aforesaid.

"This conveyance is made and accepted as security for an open account between the said Richard Silsbe, Jr., and the said Cummer Lumber Company.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Richard Silsbe, Jr. [Seal.]

"Bertie Silsbe [Seal.]

"Signed, sealed and delivered in presence of: F. O. Nichols.

"B. F. McGraw."

The Cummer Lumber Company also filed a cross-bill to foreclose this mortgage, making R. Silsbe, Jr., and his wife, and the complainants in the original bill, parties defendant, and alleging, among other things, in detail, that when the mortgage was taken from Silsbe, Jr., its officers were ignorant of any interest of Taylor in the lot in question.

Silsbe, Jr., and the complainants in the original bill answered the cross-bill. Silsbe, Jr., admitted the execution of the mortgage to the Cummer Lumber Company, and asserts that he informed it of the interests of Lorenzo Taylor. The answers of the Taylors also assert that the Cummer Lumber Company took the mortgage from Silsbe, Jr., with knowledge of Lorenzo Taylor's interests in the lot in question. We do not deem it necessary to insert these answers at length.

Replications were filed and testimony taken. The chancellor on the hearing entered a decree settling the equities of the parties, dismissing the original bill as to the Cummer Lumber Company, and granting it the relief prayed for in the cross-bill for the foreclosure of its mortgage, and also referring the cause to a master to state an account of what was due the Cummer Lumber Company on said mortgage, using the evidence already taken and filed in the case. In the subsequent proceeding before the master, several objections were made and exceptions taken by the Taylors, which will be referred to hereafter. On final hearing these objections and exceptions were overruled, and a decree made ordering and decreeing that the defendants to the cross-bill pay the Cummer Lumber Company the sum of \$4,520, with interest from the 30th of September, 1909, and costs, within five days from the date of the decree and in default thereof that the master sell the lot described in the mortgage and out of the proceeds pay the costs and expenses, the amount due the Cummer Lumber Company, and to bring the balance, if there be any, into court to abide the order and decree of the court. These several decrees are brought here on appeal, for review.

The evidence shows that for several years before the date of the execution of the contract or deed between Silsbe, Jr., and Lorenzo Taylor, Silsbe had been in the business of trading in real estate, improving and selling the same in Jacksonville, and that during

that time he had been buying lumber from the Cummer Lumber Company, and running an account with it; that on May 1, 1907, he owed the company a balance of \$2,762.94; and that between that time and the 25th of October, 1907, he obtained a large number of items of lumber amounting with the above balance to \$6,043.84. On this account Silsbe, Jr., made a payment of \$1,000 on June 26, 1907, and a payment of \$1,000 on September 14, 1907, leaving due on the 25th of October the sum of \$4,043.84. It is shown that a considerable part of this lumber was used by Silsbe, Jr., in erecting houses on the lot in question. It seems that the Cummer Lumber Company insisted on the payment of this account or security for it, and on the 13th day of February, 1908, Silsbe, Jr., executed the instrument alleged to be a mortgage in the cross-bill as security for the open account between Richard Silsbe, Jr., and the Cummer Lumber Company. It is alleged in the cross-bill and proven by Mr. O. F. Flynn, the manager of the retail department of the Cummer Lumber Company, who took this mortgage, that before it was taken inquiry was made as to the title of said lot and an abstract obtained showing the title to be in Silsbe, Jr., and that neither he nor the company had any knowledge or notice that Taylor had any interest in the lot. Silsbe, Jr., says he told Mr. Flynn that Taylor had a contract with reference to this lot, but he is uncertain whether he told him before or after the execution of the mortgage. Mr. Flynn is positive that it was some time after the time when the mortgage was executed and delivered before he heard from Silsbe, Jr., of any contract of Taylor's. The contract or deed between Silsbe, Jr., and Taylor was not recorded until after the mortgage to the Cummer Lumber Company had been recorded.

It is contended by the appellants that, inasmuch as the consideration for the mortgage was a past one, the Cummer Lumber Company is not a purchaser for a valuable consideration, and the case of *Glinaski v. Zawadzki*, 8 Fla. 405, is relied on in support of this contention. In that case the facts were somewhat different from those of the instant one. In that case no question growing out of a partnership in which there was a dormant partner, and his liability for the acts of the active partner within the scope of his apparent authority, was involved. In the instant case the deed or contract between Silsbe, Jr., and Lorenzo Taylor provides for purchase, improvement, and sale of a lot of land and for the sharing of the profits and losses of the venture between them. We think this contract is one of partnership. *Mogart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, 7 Am. & Eng. Ann. Cas. 1140-1142.

The deed to the lot of land was taken in Richard Silsbe, Jr.'s name and was recorded. It showed no interest whatever in Taylor or any one else besides Silsbe. Mr. Taylor was

a silent or dormant partner and permitted this arrangement by which Silsbe was held out to the world as the owner of the legal title to the property. He was the active partner, and, so far as outsiders were concerned who were without notice of Taylor's interest, he had uncontrolled and unlimited power over this lot of land. If the Cummer Lumber Company had had timely notice of the partnership relation existing between Lorenzo Taylor and R. Silsbe, Jr., it might have protected itself by the liens provided by statute for furnishing material for buildings and structures (see sections 2193 et seq., Gen. St. 1906) to the extent probably of the whole amount of the account due it by R. Silsbe, Jr. The legal title to the lot in question was in Silsbe, Jr., and it is not clearly shown the company had any notice of Taylor's interest. It was lulled into the acceptance of what appeared to be a good mortgage security.

In the case of *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631, it was held: "A sale by a partner, in payment of his own debt, of goods which are in fact goods of the partnership, but which the partnership has so intrusted to him as to enable him to deal with as his own, and to induce the public to believe to be his, and which the creditor receives in good faith and without notice that they are the goods of the partnership, is valid against the partnership and its creditors." In this case the goods were given in payment of an antecedent debt and without any present consideration. The opinion in this case is by Chief Justice Gray, and is a very long and able discussion of the law thoroughly vindicating the principle already quoted.

In the case of *Willey v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508, 517, 75 Pac. 106, 109, it is said: "Where a dormant partner permits the business world to believe that the ostensible partner is the sole owner of the business, he is estopped from claiming the contrary against those who have in good faith acted upon such appearance, and cannot be heard to insist that a creditor has not the right to set off his debt against such ostensible partner." To the same effect, see *White v. Farnham*, 99 Me. 100, 58 Atl. 425, 105 Am. St. Rep. 261; *Lord v. Baldwin*, 6 Pick. (Mass.) 344, and cases cited.

There are assignments of error based on objections to the testimony taken by the special master and overruled by the chancellor. When the issues had been made up, the case was referred to an examiner, Eugene Hale, to take the testimony. When it had been taken the case was heard by the chancellor on the evidence thus taken, without objection, and the chancellor made and entered a decree settling the equities in favor of the Cummer Lumber Company, and dismissing the bill as to the company. He also referred the case to a special master, R. P. Daniel, Jr., to state an account of what was due the said com-

pany, and directed him to use the evidence already taken and filed in the case. This evidence was offered to the special master, over the objection of the appellants, and used by him in stating the account. We know of no authority which forbids such a use of the testimony and evidence already introduced, and none is cited to us. The amount found to be due by the special master was \$4,000, with interest from the 13th of February, 1908, and the evidence clearly warrants this finding. We can discover no reversible error in the decree of the court sustaining the report of the special master, or in any other respect.

There are some other assignments; but we think they are practically covered by what has already been said.

The decrees appealed from are affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

BURNHAM CITY LUMBER CO. v. RANNIE.

(Supreme Court of Florida, Division B. April 19, 1910. Headnotes Filed June 4, 1910.)

(Syllabus by the Court.)

1. BROKERS (§ 67*)—COMMISSIONS FROM BOTH PARTIES.

A declaration, in a suit to recover commissions paid the defendant by plaintiff, that substantially charges that the defendant undertook to obtain from the owners of land a contract embracing terms demanded by T., who was seeking to buy it for the plaintiff, a corporation to be organized to take them over, that the defendant represented to T. that the land could not be bought for a less price than that which he named to T., when in fact that price, unknown to T. or the corporation to which they were conveyed, covered commissions which the defendant was to receive from the owners, and which commissions on the completion of the transaction in ignorance of the facts were actually paid by the owners to the defendant, states a good cause of action.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 52-54; Dec. Dig. § 67.*]

2. PRINCIPAL AND AGENT (§ 70*) — DUTY OF AGENT—ACTING FOR OTHER PARTY.

When a person is employed to act as agent for another in dealing with a third person, and the nature of the employment is such that he is required to exercise judgment, discretion, or personal influence in the execution of such agency, he cannot act also as agent of the third party in the transaction without the knowledge and consent of his principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 146; Dec. Dig. § 70.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by the Burnham City Lumber Company against William R. Rannie. Demurrers to the declaration were sustained, and plaintiff brings error. Reversed and remanded.

The plaintiff in error sued the defendant in error in the circuit court of Duval county in an action at law to recover the sum of \$50,000 alleged to have been fraudulently had and received by the defendant of the plaintiff as commissions on the purchase price of certain real estate. There are six counts in the declaration. The last, a count for money had and received, and the fourth, are abandoned. The first count is as follows:

"Burnham City Lumber Company, a corporation created and existing under the laws of New York and having its principal place of business at New York City, county of New York, state of New York, by Owen & Royall, and Young & Adams, its attorneys, sues William R. Rannie, for that, whereas, heretofore, to wit, between the 5th day of December, 1905, and the 12th day of January, 1906, the said defendant made and entered into an agreement with one J. C. Turner and therein and thereby agreed with said Turner to act as the agent and broker of said Turner in purchasing for him from A. T. and F. W. Squires certain timber lands situated in Taylor county, Fla., containing 45,000 acres of land, or thereabouts, that as such agent and broker and in and by the terms of said agreement the said defendant covenanted and agreed with the said Turner to use his best efforts in purchasing said timber lands for said Turner at the lowest possible price at which the same could be obtained, and in performing his duties as such agent and broker for said Turner in regard to the purchase of said lands to observe the highest degree of good faith towards the said Turner, and not to receive any other commission or brokerage or compensation whatsoever for procuring the sale of said lands to the said Turner, except such sum as it was agreed should be paid to the defendant by the said Turner for his said services as such broker and agent, that the defendant then and there at all times stated to the said Turner that the price at which defendant stated to him said timber lands could be purchased was the lowest price at which said lands could be purchased, and that the defendant had no agreement whatsoever by which he was to receive any commission whatsoever from the owner of said lands or from any one else whomsoever for bringing about a sale thereof to the plaintiff. That said Turner believed and relied on the said statements of said defendant, and in the full belief thereof and reliance thereon agreed to pay to the defendant, in case he purchased said timber lands, a commission or brokerage amounting to \$50,000 or thereabouts. That afterwards the said Turner, who had been acting for the plaintiff in the said transaction, as the said defendant well knew, assigned his rights under said agreement with the defendant to the plaintiff, to which assignment the said defendant agreed and consented; and the plaintiff, believing and relying on the

said statements of the defendant to said Turner, as the defendant well knew, and in full belief thereof and reliance thereon, assumed the obligation of said Turner to pay to the defendant in the event of the purchase of the said timber lands a commission or brokerage amounting to \$50,000 or thereabouts.

"That subsequently, and on or about the 29th day of June, 1906, at the city of Jacksonville, Fla., the plaintiff did purchase said timber lands from said A. T. and F. W. Squires, and immediately thereafter, without having any knowledge that said defendant had not exercised the highest degree of good faith in his dealings with the plaintiff as plaintiff's agent and broker, and without knowing that defendant had an agreement with the sellers of said lands to receive from them a commission for bringing about a sale thereof, paid to said defendant the sum of \$50,000.

"That the said defendant did in fact at all said times, without plaintiff's knowledge or consent, have an agreement with said A. T. and F. W. Squires, the sellers of said timber lands, for a commission or brokerage for bringing about the sale thereof, and that the price at which said defendant sold said land to the plaintiff was not the lowest price at which said lands could be procured, and that the defendant did not exercise the highest degree of good faith in his dealings with the plaintiff as its agent and broker, but, on the contrary, sought to further the interests of the defendant himself and to cheat and defraud the plaintiff by causing it to pay a larger commission than it would otherwise have paid.

"That the defendant on or about the 29th day of June, 1906, without plaintiff's knowledge or consent, was paid by and received from said A. T. and F. W. Squires as commission for bringing about a sale of said timber lands to the plaintiff a commission of 2½ per cent. of the purchase price at which the property was purchased by the plaintiff from said A. T. and F. W. Squires.

"That plaintiff was wholly unaware that defendant had an agreement to receive commission from the sellers of said timber lands, or that he had received the sum as aforesaid on or about the 29th day of June, 1906, or that he had in any way failed in his duty as the agent and broker of the plaintiff, until after plaintiff had paid to defendant said sum of \$50,000 as defendant's commission or brokerage for bringing about the sale of said premises to the plaintiff.

"That because of defendant's said acts as aforesaid, defendant forfeited and lost all right and claim to receive from the plaintiff said sum of \$50,000, or any other sum as commission, and that said sum of \$50,000 so paid defendant by plaintiff as aforesaid, without plaintiff's knowledge of said deceit and wrongful acts on the part of the defend-

ant, was then and there wrongfully and fraudulently had and received by the defendant from plaintiff. That no part of the same had been paid by the defendant to the plaintiff, although duly demanded prior to the commencement of this action, and plaintiff claims \$75,000 as damages."

The second count is generally like the first count, except that it alleges the agreement to have been between the defendant and plaintiff through one J. C. Turner, who was acting for the plaintiff, and alleges a breach of faith on the part of Rannie in endeavoring to have the land overestimated in order to cause plaintiff to pay more for said property than plaintiff would have paid had the estimate been a correct and proper one.

The third and fifth counts are as follows:

"(3) And the said plaintiff, by its said attorneys, further sues the said defendant for that whereas, heretofore, to wit, between the 5th day of December, 1905, and the 12th day of January, 1906, the said defendant, for the purpose of inducing the plaintiff to employ the defendant as its broker and agent in purchasing from A. T. and F. W. Squires certain timber lands situated in Taylor county, Fla., and to pay defendant a commission as such broker and agent, falsely and fraudulently, and with intent to deceive and defraud the plaintiff, represented and stated to one J. C. Turner, who, as defendant well knew, was acting for the plaintiff in said transaction, that the price at which the plaintiff was offered said lands by defendant was the lowest price at which defendant could procure same for the plaintiff, and that defendant had no agreement whatsoever with said A. T. and F. W. Squires, or with any one else, whereby defendant was to receive any commission or brokerage for bringing about a sale of said lands to plaintiff. That the plaintiff relied upon the statements of said defendant and believed the same to be true, and relying on, and believing the same, then and there through said Turner employed said defendant as plaintiff's broker and agent in the purchase of said lands and agreed to pay to the defendant, in case plaintiff purchased said lands, a commission of \$50,000. That nevertheless said statements were, as defendant well knew, wholly false and fraudulent, and that at all said times defendant had an agreement with said A. T. and F. W. Squires, under the terms of which defendant was to receive a commission of 2½ per cent. in case he brought about a sale of said lands to said plaintiff, and that, as defendant well knew, the price at which said lands were offered by defendant to plaintiff was not the lowest price at which defendant could procure the same for plaintiff.

"That in pursuance of said agreement so entered into by plaintiff with defendant, and in reliance upon the said false and fraudulent statements of said defendant, and not knowing the same to be false, plaintiff sub-

sequently, and on or about the 29th day of June, 1906, purchased said lands from said A. T. and F. W. Squires, and thereupon paid to said defendant said commission of \$50,000. That subsequently, and on or about the 5th day of February, 1907, plaintiff learned for the first time that said defendant's said statements and representations to plaintiff were false and fraudulent, and that defendant had at all said times an agreement and contract with said A. T. and F. W. Squires whereby defendant was to be paid by said A. T. and F. W. Squires a commission for bringing about a sale of said lands, and that defendant was at all said times acting in the interest of said A. T. and F. W. Squires as their broker or agent, and not in the sole interest of the plaintiff, and that defendant had on or about the 29th day of June, 1906, received from said A. T. and F. W. Squires a certain sum of money in cash, being a commission of 2½ per cent. on the price at which said lands had been purchased by the plaintiff, and that the price at which plaintiff had purchased said lands was not the lowest price at which the defendant might have offered said lands to plaintiff for purchase.

"That because of said defendant's fraud and deceit as aforesaid the said sum of \$50,000 so paid as aforesaid by plaintiff to defendant on or about the 29th day of June, 1906, was money wrongfully and fraudulently had and received by the defendant from plaintiff. That thereafter and before this action the plaintiff demanded payment thereof from the defendant, but the defendant has not paid any part thereof, and plaintiff claims \$75,000 as damages."

"(5) That heretofore, to wit, in January, 1906, defendant was a real estate broker negotiating with one J. C. Turner for the sale of certain timber lands in Florida to a corporation to be organized by said Turner and his associates, which corporation was thereafter organized and is the plaintiff. That during the said negotiations defendant disclosed to said Turner the existence of a writing by the owners of said lands, whereby the owners of said timber lands agreed to sell to defendant or his assigns said timber lands for a price therein named, and defendant thereupon represented to said Turner that said price was the lowest price at which said timber lands could be obtained, and that said price did not include any commission to defendant, and said defendant did then and there contemplate and intend that said representation should be relied upon by said Turner, or by said Turner and his associates, duly incorporated as the plaintiff, in subsequent dealings with defendant. That thereupon said Turner caused to be prepared a contract for the sale of said timber lands upon certain terms and conditions therein set forth differing in some respects from the above-mentioned writing by the owners of said lands, but at the price specified in the

above-mentioned writing by the owners of said lands, and agreed with said Rannie, by and through one W. P. Smith, acting in behalf of said Rannie, that, if the said Rannie could procure the owners of said lands to sell the same upon the terms and conditions set forth in said contract, he should be paid a commission of 20 cents per 1,000 feet upon all the timber upon said timber lands as ascertained by an estimate to be made in accordance with certain provisions of said contract; that thereafter, on, to wit, the 15th day of June, 1906, this plaintiff became duly incorporated and took over by valid assignment all of the rights and liabilities of said Turner under the said agreements made in its behalf by said Turner, and on, to wit, the 28th day of June, 1906, said Rannie having procured the owners of said lands to enter into a contract in terms satisfactory to said Turner, the title to said lands was conveyed to the plaintiff, and plaintiff thereupon relying upon the representations of the defendant that said price was the lowest price at which said timber lands could be obtained, and that said price did not include any commission to defendant, and believing said representations to be true as made, and without any knowledge or information, upon its part or upon the part of said Turner or his associates, that defendant was in the transactions above mentioned the agent of the sellers of said lands, made or caused to be made in payment of said Rannie's said commission two certain negotiable promissory notes to said Rannie, by and through said W. P. Smith acting in behalf of said Rannie, each in the sum of \$25,000, which said notes were negotiated by said Rannie or by said Smith acting in behalf of said Rannie, and which said notes were paid or caused to be paid by plaintiff at maturity. That during all of the times aforesaid the owners of said lands had engaged to pay to said Rannie, or the firm of real estate brokers whereof said Rannie was a member, a commission contingent upon his or their effecting a sale of said lands, and did in fact pay said Rannie a large commission, to wit, \$31,700, for effecting the sale of said lands, and the aforesaid representation of said Rannie that said price was the lowest price at which said timber lands could be obtained, and that said price did not include any commission to defendant, was false and fraudulent at the time it was made, and then and there known to defendant to be false and fraudulent. Wherefore, plaintiff sues and claims \$100,000 damages."

These counts were severally demurred to, and the demurrers were sustained in the circuit court. Such of them as are argued here in the briefs will be noticed in the opinion. The plaintiff having declined to plead further, a final judgment was entered against it, which is brought here on writ of error for review.

Bisbee & Bedell and W. B. Owen, for plaintiff in error. Barrs, Odum & Browder and J. L. Doggett, for defendant in error.

HOCKER, J. (after stating the facts as above). The plaintiff in error discusses first in his brief the fifth count of the declaration, the defendant in error follows that order, and we will do the same. It is first contended by the defendant in error that this count first assumes that the defendant, Rannie, was a real estate broker, and was acting in that capacity in his dealings with Turner, and that in the next paragraph this assumption is negatived by the allegation that during the negotiations defendant disclosed to said Turner the existence of an agreement in writing between the owners of the land and Rannie whereby the former agreed to sell to the latter or his assigns the said timber lands for a price therein named. It is contended by the defendant in error that this clearly shows an option and a vested interest in the property in the defendant, that the relation of vendor and purchaser existed between Turner and Rannie, and that they were dealing at arm's length with each other. If this were all that the count contains on that feature of the case, there would be something in this contention; but it clearly appears that Turner did not buy this contract. He proposed to Rannie to obtain another contract from the owner, differing in some respects from Rannie's contract, and to give him a large commission if he would procure the owners to sell under this last contract. Rannie accepted this proposition and procured the sale and conveyance to the plaintiff under this last contract. It is plain, we think, that, if the written agreement to sell shown by Rannie to Turner was a bona fide agreement of sale, Rannie abandoned it when he procured the owners to sell the lands to the plaintiff under another agreement. The fifth count taken as a whole clearly alleges, we think, that Rannie was acting as the agent of Turner, who was himself acting for the plaintiff, a corporation to be formed for taking over these lands. Under the last contract he was to receive, and did receive, commissions from the plaintiff. If he was merely selling his vested interest, why should he receive commissions for selling his own property? We discover nothing contradictory in this count, which apparently undertakes to state the whole transaction just as it occurred, and we think that the count taken as a whole excludes the idea that Rannie, in consummating this sale, was acting for himself alone and not as agent for Turner. The effect of this count is that Rannie represented to Turner that the lands could be bought at a price which was stated in the writing he exhibited; that the price was the lowest price at which they could be bought. Rannie then at Turner's request undertakes and procures the sale of these lands to the plaintiff at that price for a large commission, at the same time receiving from the owners a large commission for the sale. What was the exact relation between the owners and Rannie is

not clearly apparent. It would seem that, while he had some sort of written agreement from them to sell him the land, yet he was to get a commission from the owners on the sale to himself. If such was the relation between them, it does not in the least relieve him from his duty to Turner, for it has the appearance of being a sort of blind to enable him to act as though he had bought the property, while in fact he was simply an agent to sell on a commission. It seems to us that this count alleges that Rannie acted as the agent of Turner in securing the purchase of the lands for the plaintiff; that he received commissions from the plaintiff, and at the same time, unknown to the plaintiff, received commissions on the sale from the owners of the land.

It is not disputed that if Rannie had been simply a middleman between Turner and the owners to bring them into communication with each other in order that they might do their own trading, and with nothing more to do than this, he might have legally recovered commissions from both—for the simple reason that no trust of any kind would then have been reposed in him by either. Nor is it disputed, if Turner or the plaintiff had known he was to receive commissions from the owners on the sale, that the plaintiff would have had no ground of complaint. The count negatives any such knowledge on the part of either the plaintiff or Turner.

In the case of *Skinner Mfg. Co. v. Douville*, 57 Fla. 180, 185, 49 South. 125, 127, this court had occasion to examine the duties of a real estate broker or agent to his principal. It was there stated that: "It is the duty of a real estate broker to remain loyal to the interests of his client during the continuance of his agency, to disclose to his principal any fact or circumstance that might naturally tend to influence the latter in the conduct of the transaction, and that would affect his interests. He cannot act adversely to his principal, and, if he does so, he forfeits his right to recover compensation for his services." It is said in the opinion: "It is unquestionably the law that a broker employed to effect a sale or find a purchaser must exercise the utmost good faith towards his principal." See authorities cited in the opinion.

In the case of *Carter v. Owens*, 50 South. 641, it is held: "A real estate broker employed to sell or to find a purchaser for land is bound to disclose to his principal any facts known to him material to the transaction; and, if the broker takes part in the negotiation, he is bound to exert his skill for the benefit of his principal. Any concealment from the principal of material facts, known to the agent, or any collusion by the latter with the purchaser, will forfeit the right of the agent to compensation for his services." These cases in a general way set

forth the duties of a real estate broker to his principal.

In the case of *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756, it is held: "A broker who has acted for both parties in negotiating an exchange of real estate between them, without informing either that he was employed by the other, is not legally entitled to commissions for his services; and evidence in his behalf to show a custom among brokers to charge a commission to both parties in such cases is admissible." The court in its opinion holds that an agent cannot be permitted to act for both vendor and purchaser without their authority or consent, and luminously sets forth the reasons why he should not be permitted to assume relations so essentially inconsistent and repugnant to each other.

In the case of *Berlin v. Farwell*, 96 Cal. xvii, 81 Pac. 527, it was held that a person could not act as the agent of both the vendor and purchaser in the same transaction, and where he sued under a contract with the defendant to find a purchaser, and was employed by the purchaser without defendant's knowledge to buy the land from the defendant at a price which would suit the views of the purchaser, he could not recover commissions from the defendant.

In the case of *McKinley v. Williams*, 74 Fed. 94, 20 O. C. A. 312, it is held that an agent of a vendor who speculates in the subject-matter of his agency or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commissions as agent, and becomes indebted to his principal for the profits he gains by his breach of duty.

In the case of *Cannell v. Smith*, 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395, it is held that money paid to a broker for effecting a sale of real estate in ignorance of the fact that he is also the agent of the purchaser may be recovered back, even if the sale is an advantageous one.

In *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, it is held that a broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both. To the same effect, see *Green v. Southern States Lumber Co.*, 141 Ala. 680, 37 South. 670; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Bunn v. Keach*, 214 Ill. 259, 73 N. E. 419; *Boswell v. Cunningham*, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54; *Phinney v. Hall*, 101 Mich. 451, 59 N. W. 814; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Henderson v. Vincent*, 84 Ala. 99, 4 South. 180.

In *Hanna v. Haynes*, 42 Wash. 234, 84 Pac. 861, it is held that a broker employed to purchase land, who conceals from the purchaser the fact that the vendor will pay the broker a commission on making a sale, has the bur-

den of proving perfect fairness in the transaction, and, in the absence of satisfactory proof, equity will treat him as guilty of constructive fraud.

In the case of *Palmer v. Pirson*, 4 Misc. Rep. 455, 24 N. Y. Supp. 333, it was held that where the commissions for the sale of property are paid in ignorance of fraud on the part of the agent, in consequence of which he was not entitled to recover such commissions, the amount so paid may be recovered. This judgment was affirmed in 144 N. Y. 654, 39 N. E. 494.

In *Clark & Skyles on Law of Agency*, vol. 1, par. 364, it is said: "When a person is employed to act as agent for another in dealing with a third person, and the nature of the employment is such that he is required to exercise judgment, discretion, or personal influence in the execution of the agency, he cannot act also as agent of the third party in the transaction without the knowledge and consent of his principal, for he would thus occupy a position inconsistent with the trust reposed in him by his principal. If, therefore, a person employed to act as agent of another in dealing with a third person involving the exercise of judgment, discretion, or personal influence, acts also as agent of such third person, without the knowledge of either, he cannot recover compensation from either; and, if he so acts with the knowledge and consent of one only, he cannot recover compensation from the other. If compensation is paid to an agent by his principal in such a case in ignorance of the fact that he was acting for both parties, it may be recovered back. Some cases go further than this and hold that an agent acting for two principals at the same time, and in the same transaction, can recover no compensation from either of them unless his double agency is known and assented to by both parties." It is further stated in section 405, *Id.*, that an agent will not be allowed to assume any position which is inconsistent with his duty to be loyal to his principal, or to place himself in an attitude of antagonism to the interests of his principal. He not only will not be allowed to acquire any personal interest or advantage by an actual violation of his duty, but he also will not be allowed to take a position without his principal's knowledge and consent which will have a tendency to cause him to violate such duty, and to act in his own interest, rather than that of his principal. If he does so, the principal may compel him to account, or set the transaction aside according to circumstances, and no local custom or usage can be shown to avoid this rule.

Upon this question of the duty of an agent to be loyal to his principal, it would be useless to add more authority. The law is all one way.

The next contention by the defendant in error in support of the ruling below is that the fifth count of the declaration shows no privity between the plaintiff and the defend-

ant that the transaction between Turner and defendant took place in January, 1906, and the plaintiff corporation was not incorporated until nearly six months afterwards; that the action of this case is based on an alleged tort practiced by Rannie on Turner and could not be assigned at common law and cannot be assigned in Florida. This contention ignores the allegation of the declaration that Turner negotiated with Rannie for the sale of certain timber lands to a corporation to be organized by Turner and his associates, which corporation was afterwards organized, and that to it the rights and liabilities of Turner were assigned; that the lands were conveyed to it by the owners; and that the plaintiff corporation, relying on the representations of Rannie that the price paid by it was the lowest price at which the lands could be bought, paid him the commissions of \$50,000. The count shows that the transaction inaugurated by Turner with Rannie was completed with the latter.

In the case of *Schofield Gear & Pulley Company v. Schofield*, 71 Conn. 1, 40 Atl. 1046, the defendant made false representations to individuals as to the value of a patent. These individuals organized the plaintiff corporation to take over the patent and work it, and this was carried out; the corporation paying the defendant \$5,000 for the patent. It was also alleged that the false representations were made to the directors of the corporation after its organization. The action was brought to recover the \$5,000 and other damages. It was held that proof of either set of false representations—those made to the individuals or those made to the directors—would sustain the action. In a very lucid opinion the court demonstrates that it is immaterial whether the false representations were made to the promoters of the corporation before it was formed, or to the directors after it was formed, since the corporation was formed for the purpose of acting on those representations. So in the instant case the count alleges that the defendant, Rannie, negotiated with Turner for the sale of certain timber lands to a corporation to be organized by Turner and his associates. These negotiations resulted in the lands being conveyed to the corporation and the commissions being paid by it to Rannie. To the like effect, see *Iowa Economic Heater Co. v. American Economic Heater Co.* (C. C.) 32 Fed. 735, and *In re Canadian Oil Works Corporation* (Hays Case) L. R. 10 Chan. App. Cas. 593.

It seems to us that the fifth count of the declaration substantially charges that the defendant undertook to obtain from the owners of the land a contract embracing terms demanded by Turner, that he represented to Turner the land could not be bought for a less price than that which he named, when in fact that price, unknown to Turner or the plaintiff, covered commissions which Rannie was to receive from the owners, and which on the completion of the transaction were

actually paid by the owners to Rannie, that Rannie was trusted by Turner and by the plaintiff, that his conduct was inconsistent with that open fair course of dealing which the law requires of an agent, and that the fifth count substantially states a cause of action, and was not demurrable.

What we have said of the fifth count applies also to the first, second, and third counts. The fourth count is abandoned by the plaintiff in error.

We think the court below erred in sustaining the demurrers to these counts, and, therefore, said judgment is reversed, and the case remanded.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

HILLER et al. v. WALTER RAY & CO.
(Supreme Court of Florida, Division A. May 9, 1910. Rehearing Denied June 9, 1910.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 62*) — MINING LEASE—CONSTRUCTION.

Where, upon consideration of all the terms of a contract and its subject-matter and object, its manifest purpose is to give "the exclusive privilege" "for the purpose only of digging, mining, and preparing for shipment and shipping phosphate rock," on described lands, of the specified "quantity and quality contained in said lands," in return for which a royalty of 75 cents per ton is to be paid, such contract is not one for a general or ordinary use and occupation of the lands, but the right given is special and precisely limited.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 62.*]

2. MINES AND MINERALS (§ 68*) — MINING CONTRACT—CONSTRUCTION.

Where the lessors of land for the specific purpose of taking phosphate rock of a specified character and volume therefrom do not covenant that the rock actually exists in the land, and the lessees do not covenant to actually find the rock in the land, but the contract contemplates the existence of the rock and a search for it by the lessees, there is an implied obligation upon the lessees to make due and reasonable effort to find the rock in the land.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 68.*]

3. MINES AND MINERALS (§ 68*) — MINING CONTRACT—CONSTRUCTION.

What is due and reasonable effort to find rock of a specified quality and quantity in lands leased for the express purpose of taking such rock from the land depends upon the fair and just requirements of the enterprise to be determined as a fact by the application of practical knowledge and experience.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 68.*]

4. MINES AND MINERALS (§ 70*) — MINING CONTRACT—RIGHTS OF LESSOR.

Where the purpose of a contract is the mining of phosphate rock of a specified character, a failure upon proper endeavor to find the rock

is a good defense in an action for royalties, in the absence of agreements to the contrary.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

5. MINES AND MINERALS (§ 70*) — MINING CONTRACT—CONSTRUCTION.

Where a lease of land for mining purposes contemplates the existence of the rock to be mined, a provision for a minimum royalty in gross "whether the mining is carried on or not" relates to a failure to mine, not to a failure to find the required rock.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

6. MINES AND MINERALS (§ 70*) — MINING CONTRACT — ACTION FOR ROYALTIES—DEFENSES.

In a lease of land for mining purposes, the failure to find the specified rock and the character of the search made for it, being more within the knowledge of the lessees, are matters of defense in an action for royalties.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

7. WITNESSES (§ 150*)—COMPETENCY.

Under section 1505 of the General Statutes of 1906, a plaintiff in an action is incompetent to testify "in regard to any transaction or communication between such witness" and a member of the partnership of which the defendant is the "assignee" where the action is against the assignee.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 653-657; Dec. Dig. § 150.*]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by Walter Ray & Co. against Edward Hiller and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Cooper & Cooper and Wm. Hocker, for plaintiffs in error. H. L. Anderson and H. M. Hampton, for defendant in error.

WHITFIELD, C. J. On September 27, 1901, Walter Ray and Daniel A. Clark, partners as Walter Ray & Co., referred to as lessors, entered into a contract with Herbert A. Ford and Edward Hiller, partners as Ford & Hiller, referred to as lessees, wherein it was agreed "that for and in consideration of the covenants and agreements herein contained, and the agreement to pay rent or royalties hereinafter referred to, the said lessors do hereby grant and lease unto the lessees all those certain" described lands containing 11,900 acres, more or less, "for the purposes only of digging, mining, and preparing for shipment and shipping phosphate rock, hereinafter described, as to quantity and quality contained in said lands, and the carrying on of the business of mining said phosphate rock, reserving the timber and turpentine privileges and the full right to use the said lands for said purposes, except as hereinafter stated. The term of this lease is for a period of ten years from date hereof," with stated provisions for a renewal. " * * * The lessees hereby agree to pay to the lessors as royalty or rent for the exclusive privilege of mining said lands, which

exclusive privilege is hereby granted, the sum of 75 cents per ton * * * for each ton of phosphate rock they may mine on said lands during the term of this lease of the quality hereinafter designated; and they agree specially that the minimum amount of said rock to be mined each year shall not be less than six thousand six hundred and sixty-six (6,666) tons for each year of the lease period, or to pay the lessors or their assigns the sum of five thousand dollars per year in installments as hereinafter set forth, whether the mining is carried on or not. And it is agreed in the event the lessees shall mine a less quantity than the minimum of 6,666 tons during any year they may within the next succeeding year make up the deficit of the preceding year. The lessees having paid on the delivery of this contract the sum of fifteen thousand (\$15,000.00) dollars as an advance on said royalty or rent, it is agreed that the lessees shall have the right to mine a sufficient quantity of rock to reimburse them for said advances before any other royalty or rent shall become due and payable. After the reimbursement of the said advances so made by the lessees on account of royalties or rent, the royalties on rock mined and shipped shall be paid as near to the time of shipment as car numbers and weights can be had. * * * Merchantable rock within the terms of this lease shall mean all rock containing seventy-six per cent. (76%) of bone phosphate of lime and not exceeding three per cent. (3%) of iron and alumina. * * * When a mine is opened on a deposit of rock of the quality herein required to be mined, and upon which said mining is begun, said deposit shall be completely mined out and exhausted before the lessees herein shall have the right to abandon the same or remove the plant therefrom. And the lessors hereby agree to erect and maintain a plant and carry on mining operations on each pocket of rock of the quality herein required to be mined which shall contain at least ten thousand (10,000) tons, unless such pocket can be mined and transported by dummy line to another plant. The lessees agree to mine all pockets of rock of the quality herein described containing three thousand (3,000) tons that are within one-half mile of any plant. The lessees shall not be required to mine any deposit of rock where the matrix does not yield ten per cent. (10%) of rock required to be mined herein, and they shall mine to a depth below the water level where the water can be controlled by a six-inch pump. * * * The lessees shall have the right to possession of said lands for the purpose of carrying on mining operations with the right of ingress and egress and the right to construct railways and tramways over the surface of the lands as they may desire for the purpose of mining and shipping phosphate rock and whatever appertains to the mining business." The contract also gave a lien to the lessors on "any phosphate plants, tools,

implements, machinery, materials, and property erected or used upon the premises, and upon all rock mined therefrom from the time said rock is taken from the ground until the royalty on the same has been paid," but such lien is not to abridge the right "to distrain for rent under the laws of the state of Florida, relating to landlord and tenant," and that in "default in the payment of rentals or any part thereof, at the time same may become due and payable, the lessors, at their option, may terminate this contract, and shall thereupon be entitled to re-enter by giving sixty (60) days prior written notice to lessees of their intention to so terminate the same, provided, the lessees shall have fifteen (15) days after notice by the lessors of such arrears to pay the same. * * * This lease is not assignable by the lessees without the consent in writing of the lessors, * * * but either lessee may assign his or their interest herein to the other lessee." It is perhaps not necessary to state other provisions of the contract.

The lessees, Ford & Hiller, with the consent of the lessors, assigned the contract to the Dutton Phosphate Company, a copartnership composed of H. F. Dutton, C. W. Chase, W. G. Robinson, and J. G. Nichols, and this partnership with the consent of the lessors assigned the contract to the Dutton Phosphate Company, a corporation. On August 3, 1907, Walter Ray & Co. filed a declaration against the Dutton Phosphate Company, a corporation, and afterwards joined as a defendant Edward Hiller as surviving partner of the firm of Ford & Hiller, Ford having died, for the recovery of \$5,000 for each of two years from September 27, 1904, as "minimum rent or royalty" under the contract. Judgment was obtained by the plaintiffs, and the defendants took writ of error.

The declaration sets out the contract, and alleges that the Dutton Phosphate Company, a corporation, entered upon said lands under the contract assigned to it about May 1, 1903, "and accepted said lease, and thereby bound itself to perform the covenants thereof, in the manner and to the same extent as the said Ford & Hiller were bound to perform the same, and became liable to the plaintiffs for the payment of all sums of money due or to become due under said contract."

Assuming for the purposes of this case that the litigation is between the proper parties, the meaning and effect of the contract will be considered so as to determine the propriety of rulings upon the pleas. See *Tiffany on Landlord and Tenant*, 881; *Sutliff v. Atwood*, 15 Ohio St. 186, text 194.

Upon a consideration of all the terms of the contract and its subject-matter and object, the manifest purpose of the contract was, as stated therein, to give "the exclusive privilege" "for the purposes only of digging, mining, and preparing for shipment and shipping phosphate rock" of the specified "quan-

tity and quality contained in said lands," in return for which a royalty of 75 cents per ton was to be paid. The contract is not one for a general or ordinary use and occupation of the lands, but the right given is special and precisely limited.

The subject-matter of the contract as expressed therein was phosphate rock of the specified "quantity and quality contained in said lands," the existence of the rock being thereby assumed. Upon this assumption \$15,000 of the amount to become due in return for the stated rights granted in the lands was paid in advance to be reimbursed "before any other royalty or rent shall become due and payable."

There is no covenant by the lessors that the required rock actually existed in the lands, but the contract clearly contemplated its existence and a search by the lessees to ascertain the location and extent of the specified deposits assumed to be in the lands. There is no covenant by the lessees to actually find the designated rock in the lands, but by necessary implication and intendment the obligation devolved upon the lessees to make due and reasonable effort to find upon or in the land rock of the quantity and quality specified. If found, the lessees specially agreed that "the minimum amount of said rock to be mined each year shall not be less than six thousand six hundred and sixty-six (6,666) tons for each year of the lease period, or to pay the lessors or their assigns the sum of five thousand dollars per year, * * * whether the mining is carried on or not." If upon due and reasonable effort being made the rock is not found, the purpose of the contract falls in whole or in part according as rock of the specified quantity and quality is not found. See *Brick Co. v. Pond*, 38 Ohio St. 65; *Venedocia Oil & Gas Co. v. Robinson*, 71 Ohio St. 302, 73 N. E. 222, 104 Am. St. Rep. 773, 2 Am. & Eng. Ann. Cas. 444, and notes.

What is due and reasonable effort depends upon the fair and just requirements of the enterprise to be determined as a fact by the application of practical knowledge and experience.

The purpose of the contract being the mining of phosphate rock of a specified character, a failure upon proper endeavor to find the rock as required would be a good defense to an action for royalties.

The alternative obligation to pay "five thousand dollars per year * * * whether the mining is carried on or not" is based upon the assumption that rock of the specified "quantity and quality (was) contained in said lands." The contingency sought to be provided against was the failure to mine, not the failure to find the rock to mine, for the contract assumed and contemplated the existence of the rock as its subject-matter.

There was no maximum limit to the right as to the amount of rock that could be mined if found, and the minimum of 6,666 tons per

year was fixed to stimulate the mining operations so as to yield the stated average minimum in royalties. The only possession of the lands accorded to the lessees under the contract was the right to mine phosphate rock of a specified character, and of ingress and egress and other rights incidental to the mining and marketing enterprise. The contract does not require the lessors to point out or to discover to the lessees the rock to be mined, nor does it require the lessees to notify the lessors of the failure to find rock.

While the necessarily implied duty of the lessees to duly search for rock on the land continued till all the lands were properly examined, the purpose of the contract being the mining of rock, not merely the search for rock, royalties are to be paid only upon rock mined, or that should have been mined because it was found or could have been found by due search. The minimum annual payments provided for depended upon the existence of rock that could be found by due and reasonable effort. The absence of or the failure to find the specified rock and the character of the search made for it, being under the operations and circumstances contemplated by the contract more within the knowledge of the lessees, are matters of defense in an action for royalties. See *Cook v. Andrews*, 36 Ohio St. 174.

If some rock was mined, but after due and reasonable search no more rock is found than is required to reimburse in royalties the \$15,000 advanced by the lessees, the lessors cannot recover, for the contract clearly contemplated the existence of sufficient rock the royalties upon which would reimburse the lessees for the \$15,000 advanced. The contract also assumed and contemplated the existence of rock to be mined after the prepaid royalties had been reimbursed, and that at least 6,666 tons would be found and mined each year during the contract period.

The contract provided for the re-entry of the lessors upon failure to make the agreed payment, and this was the express remedy of the lessors against laches of the lessees in making payment whether caused by failure to properly search for the required rock or otherwise.

This court sustained as a good defense a plea that there was not upon the land phosphate rock of the quality and in the quantities and locations mentioned in the contract, and also two pleas that there was not upon the lands rock of the quality and in the quantities and locations mentioned in the contract, and that defendants notified the plaintiffs thereof and of the surrender of the contract, and also a plea of payment. But the court sustained a demurrer to a plea that the defendants "diligently looked and prospected and examined for the phosphate rock of the quality and in the quantities and locations in said lease or contract and in said counts mentioned, and did use and exercise reasonable and due diligence therein in so doing, but failed and

were unable to find phosphate rock of the quality and in the quantities and locations in said lease or contract mentioned on or in said lands or any part thereof," coupled with an averment that the lessors did not point out, show, or indicate to the lessees the required rock on said lands. This plea was not bad on demurrer in the view that the defendants are obligated only to make due and reasonable search for the required rock.

The court also sustained a demurrer to a plea that the lessees having paid \$15,000 in advance to be reimbursed from royalties upon rock mined there was not sufficient rock of the quality and in the quantities and locations mentioned in the contract to reimburse defendants for the advance payment. If there was not on the lands sufficient rock of the specified character to reimburse in royalties the advance payment, the defendants are not liable for the claim here asserted and the demurrer to the plea should have been overruled.

This discussion indicates the proper issues for another trial.

Under section 1505 of the General Statutes, the plaintiff Ray was incompetent to testify "in regard to any transaction or communication between such witness" and a member of the partnership of which the defendant is the "assignee" in this action against such assignee.

The judgment is reversed and the cause remanded.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, P. J., and PARKHILL and HOCKER, JJ., concur in the opinion.

NIMOCKS v. McGEHEE. (No. 14,387.)
(Supreme Court of Mississippi. June 20, 1910.)

1. REPLEVIN (§ 5*)—RIGHT OF ACTION.

Where judgment on which execution issued is void, so that the levy thereunder is also void, the execution defendant may maintain replevin for the goods seized.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 5.*]

2. JUSTICES OF THE PEACE (§ 57*)—DISQUALIFICATION—RELATIONSHIP TO PARTY.

Under Const. 1890, § 165, prohibiting any judge from presiding where either of the parties are connected with him by affinity or consanguinity, except by consent, a justice of the peace was disqualified from hearing a cause to which a corporation of which his first cousin was director and president, as well as a stockholder, was a party.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 190-203; Dec. Dig. § 57.*]

3. JUSTICES OF THE PEACE (§ 60*)—DISQUALIFICATION—RELATIONSHIP—WAIVER.

The disqualification of a justice of the peace to hear a cause because of his relationship to one of the parties, under Const. 1890, § 165, was impliedly waived by failure to object to his

disqualification at trial, even though the other party did not then know thereof.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 218-221; Dec. Dig. § 60.*]

Appeal from Circuit Court, Pearl River County; W. H. Cook, Judge.

R. F. Nimocks brought replevin for a county warrant against J. S. McGehee, a constable. Judgment was rendered by the circuit court in favor of defendant, from which the plaintiff prosecutes this appeal. Affirmed.

Rouse Bros. & Smith, a mercantile corporation under the laws of this state, recovered judgment by default in a justice of the peace court against the appellant, Nimocks. S. C. Smith was the justice of the peace before whom the judgment was recovered. He is a first cousin of H. S. Smith, a stockholder in and a director and president of Rouse Bros. & Smith. The appellant was county health officer of Pearl River county, and for his services in that capacity the board of supervisors issued him a county warrant for something over \$60, which warrant was in the hands of the clerk of the board ready for delivery, when the constable, McGehee, the appellee, having in his hands an execution on the judgment mentioned, levied the same on the warrant in the hands of the clerk. Thereupon the appellant sued out a writ of replevin against the constable for the warrant, which was tried in the justice's court and appealed to the circuit court, which rendered judgment in favor of the constable, McGehee. Appellant contends that the judgment against him in favor of Rouse Bros. & Smith is void, because of the relationship of the justice of the peace who rendered the judgment to H. S. Smith, who was a stockholder in, and director and president of, the corporation, and, being void, he had the right to take the warrant from the possession of the constable by replevin.

Huddleston & Tally, for appellant.

ANDERSON, J. (after stating the facts as above). Where a judgment on which execution is issued is void, the defendant in execution may maintain replevin for the goods seized thereunder. The judgment being void, the levy of the execution thereunder is void, and the defendant may treat the whole as a nullity, and pursue replevin for his property seized under such judgment and execution. Breckenridge v. Johnson, 57 Miss. 371; 34 Cyc. 1369.

Section 165 of the Constitution of 1890 provides: "No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same, *except by the consent of the judge and of the parties.*" Is the judgment void? The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

justice of the peace who rendered it was disqualified under this constitutional provision. As stockholder in, and director and president of, the corporation, Smith was for all practical purposes a party to the suit. Besides his pecuniary interest as stockholder, he was the managing head of the corporation. If objection had been made on this ground, at the proper time, during the pendency of the suit, he should not have tried the case.

This proceeding, however, is a collateral attack of that judgment, by which it is sought to treat it as a nullity. Appellant, not having made objection to the justice of the peace, on account of his disqualification during the pendency of the suit on which the judgment was rendered, is deemed to have waived such disqualification, even though unknown to him at the time. At his peril he was required to exercise the necessary diligence to ascertain such disqualification, and, not having done so, he is precluded from attacking the judgment collaterally on that ground. Under the Constitution the disqualification may be waived, and such waiver may be express or implied, and under the facts of this case it is implied. If judgments were open to collateral attack on this ground, the evil results would be at once apparent. The authorities on this subject are in conflict, which will be found collated in 23 Cyc. pp. 596, 597, 598, and 599.

Affirmed.

DURHAM v. STATE. (No. 14,611.)

(Supreme Court of Mississippi. June 20, 1910.)

1. CONTEMPT (§ 53*)—CRIMINAL CONTEMPT—PROCEEDINGS.

Before a court can punish for constructive contempt, the offense must be judicially stated, so that, where accused was charged by information with attempting to bribe a witness, the proper course was taken by citing him, and having him answer the charge, and investigating it by taking the testimony of witnesses offered by the state and accused upon the denial of the allegations of the information.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 140-142; Dec. Dig. § 53.*]

2. CONTEMPT (§ 37*)—CRIMINAL CONTEMPT—PROSECUTION—EXISTENCE OF REMEDIES.

The existence of other remedies does not prevent the punishment of an act as for criminal contempt, so that the fact that certain acts were misdemeanors would not prevent one committing them from being punished for criminal contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 116; Dec. Dig. § 37.*]

3. CONTEMPT (§ 66*)—APPEAL—PRESUMPTIONS—ACTION OF TRIAL COURT.

The court being the trier of facts in criminal contempt proceedings, it is presumed that he followed the evidence in finding facts showing guilt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 233; Dec. Dig. § 66.*]

Appeal from Circuit Court, Lamar County; W. H. Cook, Judge.

W. L. Durham was convicted of criminal contempt of court, and he appeals. Modified and affirmed.

Scott & Parker and Flowers, Fletcher & Whitfield, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

McLAIN, C. At the January term, 1910, of the circuit court of Lamar county, the appellant was tried, convicted, and sentenced to pay a fine of \$100 and 90 days' imprisonment in the county jail for a contempt of court, from which judgment and sentence he prosecutes this appeal.

This case was based on an information filed in said court by the district attorney, alleging, among other things, that appellant approached Hope Rogers, who had been before the grand jury as a witness, and attempted to bribe and induce Rogers to disclose to him the secrets of the grand jury proceedings, by trying to persuade him to inform him what he (Rogers) had testified to, and whether or not he had testified against him touching certain matters, and also that appellant had endeavored to bribe or hire the said witness, Hope Rogers, to leave the jurisdiction of the court, so that he would not be, and could not be, a witness against appellant. Appellant was duly cited to appear and answer this charge. He did so, and made answer under oath, denying the allegations in the information filed against him. The court then proceeded to investigate the charge by taking the testimony of all witnesses offered by the state and the appellant. This was the correct course to take. *O'Flynn v. State*, 89 Miss. 850, 43 South. 82.

Any act calculated to impede, embarrass, defeat, or obstruct the administration of courts of justice, if committed without and beyond its actual presence, is a constructive contempt, and the court has an inherent right to punish such acts; but, before the court can inflict punishment, the offense must be judicially established. The court in this case examined all witnesses touching this matter, including the testimony of appellant. From an inspection of the record it clearly appears from the testimony of Rogers, that appellant used his best efforts to induce Rogers to inform him (appellant) if he had given testimony before the grand jury against him. He seems to have been apprehensive that he would be indicted by the grand jury, upon the testimony of Rogers, for selling liquor, and he was very anxious to know if Rogers had testified against him. It appears, further, that appellant tried, before and after an indictment had been returned against him by the grand jury, to persuade and induce Rogers, by the promise of financial aid, to leave the jurisdiction of the court, so that he could not be present to testify against him. All of this was denied by appellant.

It is contended that, as the alleged acts of appellant were misdemeanors punishable under our statute, contempt proceedings were improper. We do not concur in this view. The existence of other remedies for an act amounting to a contempt does not take away the power of the court to punish that act for contempt.

It is further contended that the evidence was not sufficient to convict defendant. It is true there is a conflict in the testimony; but, taking the record upon the whole, we think it shows a case of constructive contempt. The court was the trier of the facts, and it is presumed he had no desire to reach any result in it, except that to which the evidence conducted his mind. He heard the witnesses testify, and was in a position to determine their credibility, and to give such weight to the testimony of each as in his judgment it was entitled to.

We do not feel warranted in disturbing the judgment as rendered by the court, except to modify the same, so as to make it conform to section 999 of the Code of 1906, by striking out the words "ninety days," and substituting in lieu of same "thirty days." Section 39, Code 1906.

The judgment, as modified, is affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court.

Affirmed.

MCKENZIE v. FELLOWS. (No. 14,454.)

(Supreme Court of Mississippi. June 20, 1910.)

**MECHANIC'S LIENS (§ 268*)—PURCHASE PEND-
ING SUIT—MECHANIC'S LIEN PROCEEDINGS—
BONA FIDE PURCHASERS.**

Code 1906, § 3058, provides that mechanic's liens will take effect as to purchasers for value only from the time of commencing suit to enforce the lien; section 3148 requires one beginning a suit to enforce a lien upon realty, unless the claim be founded upon a recorded instrument or a judgment, etc., to file with the clerk of the chancery court where the real estate is situated a notice containing the names of all the parties to the suit, a description of the real estate, and a statement of the nature of the lien, which notice shall be recorded by the clerk in the lis pendens record; and section 3151 provides that, where one fails to have such notice entered in the lis pendens record, the suit shall not affect the rights of bona fide purchasers unless they have actual notice thereof. *Held*, construing section 3058 with the other sections, that the lis pendens notice required thereby must be given in mechanic's lien proceedings against realty in order to affect bona fide purchasers of such realty without notice.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 493; Dec. Dig. § 268.*]

Appeal from Chancery Court, Jones County; Sam Whitman, Jr., Chancellor.

Suit by Mrs. H. C. Fellows against A. McKenzie. From a decree overruling a demur-

rer to the bill, defendant appeals. Affirmed and remanded.

R. E. Halsell, for appellant. Henry Hilbun and Shannon & Street, for appellee.

SMITH, J. Appellee filed a bill in the court below to cancel a certain deed made to appellant to the land in controversy under a sale by virtue of a special execution issued upon a judgment rendered in a mechanic's lien proceeding. In February, 1906, appellant instituted a proceeding against J. D. Stewart, the then owner of the property, to enforce a mechanic's lien on the property. The contract under which the lien arose was a verbal one, and of course was not recorded. No lis pendens notice was filed in the office of the chancery clerk, as required by section 3148 of the Code of 1906. After many continuances this cause resulted in a judgment by default against the said Stewart on the 27th of October, 1906, and the property in controversy was ordered to be sold to satisfy said lien. On August 31, 1907, execution was issued on this judgment, and on the 7th day of October thereafter appellant became the purchaser of the property at execution sale. Shortly thereafter appellee filed her bill in the court below, alleging that she was the owner of said land, and on the 4th day of September, 1906, the said Stewart conveyed same to one Frank Gardner, who on December 26, 1906, conveyed same to appellee; that appellee was a bona fide purchaser thereof for value, without notice of the pendency of the suit above referred to, or of the judgment rendered therein; and that she learned of same for the first time after the execution sale had been made. She prayed for the cancellation of the deed as a cloud upon her title. To this bill a demurrer was interposed by appellant, which demurrer was overruled, and an appeal granted to this court, to settle the principles of the cause.

Section 3058 of the Code, after creating the mechanic's and materialman's lien, provides that same "shall take effect as to purchasers or incumbrancers for a valuable consideration, without notice thereof, only from the time of commencing suit to enforce the lien," etc. Sections 3148 and 3151 of the Code deal with the same general subject-matter as section 3058—that is, liens to be enforced by suit—and are as follows:

"3148. When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of

all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record, and note on it and in the record the hour and day of filing and recording."

"§151. If a person beginning any such suit, by declaration, bill, or cross-complaint affecting, or if an officer levying any process upon real estate, shall fail to have the required notice entered in the lis pendens record, such suit or levy shall not affect the rights of bona fide purchasers or incumbrancers of such real estate, unless they have actual notice of the suit or levy."

Section 3058 must therefore be construed in connection with these two latter sections, and it therefore necessarily follows that, when a mechanic's lien is sought to be enforced against real estate, the lis pendens notice therein provided for must be given in order to affect bona fide purchasers for value without notice.

The chancellor was correct in overruling the demurrer. The decree of the court below is affirmed, and the cause remanded, with leave to appellant to file his answer within 30 days after mandate filed in court below.

WATKINS MACHINE & FOUNDRY CO. v. CINCINNATI RUBBER MFG. CO.
(No. 14,398.)

(Supreme Court of Mississippi. June 20, 1910.)
CORPORATIONS (§ 507*)—SERVICE ON CORPORATION—RETURN.

Under Code 1906, § 3932, providing that process may be served upon certain designated officers of a corporation, a return of summons, reciting that it was served on a named person, but without stating his connection with the corporation, was insufficient, since the court could not go outside the record to ascertain such person's connection with defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1996; Dec. Dig. § 507.*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action by the Cincinnati Rubber Manufacturing Company against the Watkins Machine & Foundry Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee, Cincinnati Rubber Manufacturing Company, sued appellant, Watkins Machine & Foundry Company, in the circuit court of Forrest county, on an account for goods, wares, and merchandise, sold appellant by appellee, and recovered a judgment by default at the return term of the court on a summons returned as follows: "I have this day executed the within writ personally by delivering to the within named R. L. Bennett, for Watkins Machine & Foundry Co., a true copy of this writ. This 20th day of October, 1909. J. C. Magruder, Sheriff."

The Watkins Machine & Foundry Company is a Mississippi corporation. There is nothing in the record to show what connection, if any, R. L. Bennett had with the Watkins Machine & Foundry Company—whether he was president, director, agent, employé, or what. From that judgment the Watkins Machine & Foundry Company prosecutes this appeal, assigning as error the rendition of the judgment on the return of the summons above set out.

Sullivan & Tally, for appellant. McWillie & Thompson, for appellee.

ANDERSON, J. (after stating the facts as above). The judgment of the court below was erroneous. Section 3932, Code 1906, prescribes the manner in which process shall be served on a corporation defendant, which may be in one of several ways, namely: "On the president or other head of the corporation, upon the cashier, secretary, treasurer, clerk or agent of the corporation, or upon any one of the directors of such corporation," etc. It is true the judgment recites that the defendant had been duly and legally served with process; and it is insisted that the presumption will be indulged in, from this recital in the judgment, that the court satisfied itself in some legal way that Bennett was one of the officers or agents of the company on whom process could be served under the statute. This contention is not sound. The judgment is based on the facts as they appear in the record. There was no authority of law for the court to go outside of the record to ascertain Bennett's connection with the corporation. There was no issue before the court on which testimony could be taken to so ascertain. The finding in the judgment that the process was legally served was an erroneous conception of the law by the court, based on the record as made.

This is not a collateral attack on this judgment. It is a direct attack by appeal, which is the proper manner to avail of irregularities and errors like the one here complained of. *A. & V. Ry. Co. v. Bolding*, 69 Miss. 255, 18 South, 844, 80 Am. St. Rep. 541.

Reversed and remanded.

JONES COUNTY v. GRISSON et al.
(No. 14,230.)

(Supreme Court of Mississippi. June 20, 1910.)
SCHOOLS AND SCHOOL DISTRICTS (§ 29*)—ORGANIZATION—STATUTES.

Code 1906, § 4530, authorizing the creation by the county school board of a separate school district out of any unincorporated district, interpreted in connection with sections 4510, 4533, and 4534, giving to each county a school board with authority to create districts, and allowing the creation of separate school districts out of any part of a county or counties adjoining a municipality which is a separate school district,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gives to each county the right to act for itself in the creation of a separate district of unincorporated territory, and a separate school district of unincorporated territory cannot be created, unless it is wholly within one county, except territory in different counties adjoining a municipality which is a separate school district may be included in such district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 51; Dec. Dig. § 29.*]

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Mandamus by W. M. Grisson and others against Jones County, to compel defendant to levy a special tax for the support and maintenance of a rural separate school district. From an order granting the writ, defendant appeals. Reversed, and petition dismissed.

This is an appeal by Jones county from an order of the circuit court granting a writ of mandamus, prayed for in the original petition of the appellees, directing the board of supervisors to levy a special tax for the support and maintenance of a rural separate school district located partly in Smith county and partly in Jones county. The agreed statement of facts shows that the petitioners who filed the petition with the board of supervisors of Smith county constitute a majority of the taxpayers residing in that part of Smith county embraced in the separate school district attempted to be created, but that those petitioners who petitioned the board of supervisors of Jones county did not constitute a majority of the taxpayers in that part of Jones county embraced in said separate school district, but that, taken as a whole, a majority of the taxpayers living in the territory embraced in the proposed district have petitioned the two boards to make the levy. The board of supervisors of Jones county refused to make the levy as prayed in the petition, and certain patrons of the school filed a petition for a writ of mandamus, which was granted by the court.

Deavours & Shands, for appellant. R. E. Halsell, for appellees.

MAYES, C. J. Section 4530 of the Code of 1906 authorizes a separate school district to be created out of "any unincorporated district of not less than sixteen square miles, by the county school board, on a petition of the majority of the qualified electors therein." This section, interpreted in the light of the other sections dealing with this subject, leaves no doubt in our minds but that each county must act for itself, and no separate school district of any unincorporated territory can be created, unless it is wholly within the county and contain not less than 16 square miles. The only exception to this is found in section 4533 of the Code. This last section (that is, 4533) allows separate school districts to be created out of "any

part of a county or counties adjoining a municipality which is a separate school district," to be included in such district, when a petition is filed for this purpose.

As illustrative of the correctness of this view, by section 4510 each county is given a school board, and by section 4530 the county school board is the authority vested with the power to create the district. Section 4534 requires the board of supervisors of unincorporated separate districts to levy a tax to pay for fuel, other necessities, etc. The whole scheme of the statute shows that, whenever unincorporated territory is sought to be made a special school district, counties must act singly. Endless confusion and disagreement would be the result of a different view of this statute, as the law now stands. The statute is the entire source of power, and the statute neither expressly nor impliedly gives the power here sought to be exercised.

Reversed, and petition dismissed.

HILL v. STATE. (No. 14,360.)

(Supreme Court of Mississippi. June 20, 1910.)

HOMICIDE (§ 119*)—JUSTIFICATION—SELF-DEFENSE—APPREHENSION OF DANGER—"GREAT BODILY HARM."

The rule in homicide cases, that "great bodily harm," in contemplation of law, does not mean such harm as may be inflicted by mere blows with the hands or feet, is subject to the modification that, where deceased was a much larger and stronger man than defendant, so that defendant was liable to receive great bodily injuries at his hands, defendant was justified in using a deadly weapon to protect himself, though deceased was wholly unarmed.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 172-174; Dec. Dig. § 119.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3162.]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Ned Hill was convicted of manslaughter, and he appeals. Reversed.

See, also, 49 South. 145.

Holmes & Holmes, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

MCLAIN, C. At the October term, 1909, of the circuit court of Yazoo county, the appellant, Ned Hill, was tried, convicted, and sentenced to the state penitentiary for a term of two years for manslaughter, from which judgment and sentence he prosecutes this appeal.

This case was before us at the March term, 1909, of this court, and in reversing it the court said, speaking through Judge Whitfield: "The testimony in this case shows that the deceased, Sam Green, was physically twice as stout and strong a man as the appellant, and that he was also a man of vin-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dictive and violent character. It is also shown that he had made a wholly unwarranted attack upon the appellant the evening before the killing, and that he was the aggressor in the difficulty in which he was killed. The testimony further shows that the appellant was a small man, incapable of coping with deceased physically, and that the appellant was a man of good reputation, and was endeavoring all the time to avoid a difficulty with the deceased. In this state of the evidence, the court gave, for the state, instruction No. 4, which is as follows: "The court instructs the jury that the words 'great bodily harm,' in contemplation of law, do not mean such bodily harm as might have been inflicted by mere blows with the hands or feet—and, having given this instruction for the state, refused the two following instructions for the defendant, which were asked with a view to cure the error in the fourth instruction for the state on the testimony in the record: 'The court instructs the jury that if the evidence shows that the deceased was physically capable of inflicting great and serious bodily harm upon the defendant with his feet or hands, and that the defendant had reason to believe and did believe that he was then and there in danger of such harm at the hands of the deceased, and fired the fatal shot to protect himself from such harm, then it is immaterial, and makes no difference, whether the deceased was armed or not at the time of the killing.' 'The court instructs the jury that if the deceased was a much larger and stronger man than the defendant, so much so that the defendant was wholly and absolutely incapable of combating with him in a physical combat, and was liable to receive serious and great bodily injuries at the hands of the deceased in the event that they became engaged in such a combat, then the defendant was justified in using a deadly weapon to protect himself from an unjustifiable and deadly attack of the deceased, even though the deceased was wholly unarmed, and the defendant was in no danger from the deceased, except such as might be inflicted by the deceased with his hands or feet.'"

The court held that instruction No. 4 was erroneous as applied to the facts in this case, and the court held, further, that in this case the evidence shows plainly such disparity in physical strength and power, and the giving of the fourth instruction, coupled with the refusal of the two instructions set out above, refused to the defendant, constituted fatal error. *Hill v. State*, 49 South. 145. The record before us now is the same record that was presented on the first trial, barring instruction No. 4, which was not asked by the state in this trial. Under the principles of the law as announced in our former opinion of this case, it was manifest error in the trial court in refusing the two instructions,

above set out, asked for defendant on the trial of this case.

The case is reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court.

Reversed.

HUGHES v. STATE. (No. 14,588.)

(Supreme Court of Mississippi. June 20, 1910.)

INTOXICATING LIQUORS (§ 25*) — STATUTORY PROVISIONS.

The Legislature having by Acts 1908, cc. 113, 114, 115, revised the law relating to the sale of intoxicating liquor, and for the first time enacted a state-wide prohibition law, and by express provision in each of such chapters repealed all laws or parts of laws in conflict therewith, and having, by chapter 115, amended Code 1906, § 1793, so as to omit therefrom the saving clause as to local acts, it was clearly not its intention to continue local acts in force, but, on the contrary, it was intended that the whole state should be governed by the same law as to the sale of intoxicating liquor; and hence Act Feb. 12, 1884 (Laws 1884, c. 182), as far as it deals with the sale of the liquor in the city of Corinth and within five miles of the courthouse of Alcorn county, was repealed by the acts of 1908 with which it conflicts in prohibiting altogether the sale of alcohol by druggists and the sale of wine for sacramental purposes permitted by the acts of 1908 under certain restrictions, and in providing a materially different punishment in degree.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 31; Dec. Dig. § 25.*]

Mayes, C. J., dissenting.

Appeal from Circuit Court, Alcorn County; Jno. H. Mitchell, Judge.

Jim Hughes was convicted of selling intoxicating liquors in violation of law, and he appeals. Reversed.

W. J. Lamb, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

SMITH, J. Appellant appeals to this court from a conviction in the court below under an affidavit charging that he (appellant) did in Alcorn county, Miss., in the city of Corinth, and within five miles of the courthouse of Alcorn county, sell intoxicating liquors in violation of the act of the Legislature approved February 12, 1884 (Acts 1884, c. 182). This statute made it "unlawful for any person to make, sell, or give away in said city of Corinth, or within five miles of the courthouse of said county of Alcorn, any spirituous, vinous, malt, or intoxicating liquors of any kind, or mixtures thereof," and provides a punishment therefor different from that imposed by the general prohibition law enacted by the Legislature of 1908 (Acts 1908, c. 113). This affidavit does not charge, and was not intended to charge, a violation of the general law, but charged, and was intended to charge, only a violation of the act of 1884. After a verdict, appellant filed a motion in arrest of judgment on the ground that the affidavit

charged him with the commission of no offense, in that it charged him with violating a statute which had been repealed. This motion was overruled, and sentence imposed.

When the act of 1884, a local act dealing only with a portion of Alcorn county, was enacted, there was no general law in our statute books prohibiting the sale of intoxicating liquor. This act was one of the many local acts passed at various times prohibiting the sale of intoxicating liquor in certain localities. Until the passage of the acts of 1908 we had no general law prohibiting the sale of intoxicating liquors throughout the state—no state-wide prohibition. Consequently every revision of the general law dealing with such sales contained a saving clause to the effect that "the local laws now in force prohibiting the sale or barter or giving away of liquors, bitters or drinks, shall remain in force until amended or repealed." In the Code of 1906 this saving clause is contained in section 1793. This saving clause was enacted, of course, to prevent the repeal, by implication, of the local laws. In 1908 the Legislature revised the law relating to the sale of intoxicating liquor by enacting chapters 113, 114, and 115 of the Acts of that Session, and for the first time enacted a state-wide prohibition law. Each of these acts—that is, chapters 113, 114, and 115, Acts of 1908—by express provision repeals all laws or parts of laws in conflict therewith; and chapter 115 amends section 1793 of the Code, so as to omit therefrom the saving clause relative to local acts, so that it is clear that it was not the intention of the Legislature to continue the local acts in force, but, on the contrary, that every portion of the state should be governed by the same law in so far as the sale of intoxicating liquor is concerned.

Omitting any discussion of that portion thereof dealing with the giving away of intoxicating liquors, because the same is not here involved, the act of 1884 conflicts with the acts of 1908 in at least three particulars, in its provisions relative to the sale of liquor. It prohibits altogether the sale of alcohol by druggists and the sale of wine for sacramental purposes, while the latter permits both under certain restrictions, and the punishment provided by it is materially different, not in kind, but in degree, from the punishment provided by the latter. It follows, therefore, that the act of 1884, in so far as it deals with the sale of intoxicating liquor, was repealed by the acts of 1908.

There were quite a number of local acts of this character passed at various times prior to 1908, all different from the acts of 1908, and most of them different from each other. Were same to remain in force, the law governing the sale of intoxicating liquor, instead of being uniform throughout the state, would be one thing in one locality and another thing in another locality.

Since the affidavit charged appellant with

violating a statute which had been repealed, it charged him with the commission of no offense, and the motion in arrest of judgment should have been sustained.

Reversed and remanded.

MAYES, C. J. (dissenting). I do not think the conclusions reached by the court are correct in any view. If the act of 1884 is not repealed, the affidavit is in the very language of that act; if the act of 1884 is repealed, which I deny, the charge in the affidavit is substantially correct, and no demurrer was filed thereto before the jury was impaneled, as is required by section 1426, Code of 1906. The affidavit charges "that Jim Hughes, on the 16th day of December, 1909, did, in Alcorn county, Mississippi, and in the city of Corinth, and within five miles of the courthouse of Alcorn county, sell intoxicating liquors in violation of the acts of the Legislature approved February 12, 1884, and against the peace and dignity of the state of Mississippi."

This case was tried before the mayor of Corinth, acting as ex officio justice of the peace. There was a conviction, and an appeal to the circuit court of Alcorn county. On the trial in the circuit court, no objection was raised to the sufficiency of the affidavit; but appellant entered a plea of not guilty, and the case proceeded to trial on its merits, resulting in another conviction. After conviction in circuit court, and before sentence, a motion was made in arrest of judgment on the ground, first, that no crime was charged in the affidavit; second, that the affidavit was not based on any law then in force; third, that the affidavit under which defendant was convicted was a nullity, because the act of February 12, 1884, is repealed by the general law. This motion was overruled, followed by the court sentencing appellant to pay a fine of \$100 and imprisonment in the county jail for three months. The motion subsequently made for a new trial was overruled, and hence this appeal, presenting the questions outlined in the motion in arrest of judgment.

By chapter 115, § 1, of the Acts of 1908, amending section 1746, it is now unlawful for any person to sell, or barter, or give away, for the purpose of inducing trade, *any intoxicating liquor anywhere in the state*. The essential charge made in the affidavit is *the sale of intoxicating liquor in the city of Corinth, in Alcorn county, in the state of Mississippi*, and if such sale was in fact made at that place the general law of the state was violated, whether the sale was made "within five miles of the courthouse of Alcorn county," or not, and whether such sale violated the act of February 12, 1884, or not. At the date of the alleged sale there was not any place in the state's domain where the thing that the affidavit charges was done might be lawfully done. It was unnecessary, therefore, to put into the af-

affidavit either that the unlawful sale was within five miles of the courthouse, or that it was in violation of the act of 1884, since by the general law of the land the sale of intoxicating liquors was everywhere unlawful. These allegations as to what law is violated, and as to its being done in five miles of the courthouse, were useless and unnecessary, and the merest surplusage.

This affidavit can never be said to be more than formally defective, and if there is any defect in the affidavit it is one which appears on the face of it. In such case, the imperative language of section 1428 says that such defect shall be taken advantage of "before the jury shall be impaneled and not afterwards," and this court said in the case of *Hays v. State*, 50 South. 557, that this statute applies, "even though the matter complained of be jurisdictional in its nature; * * * that the defendant is not cut off from raising jurisdictional questions, but the statute limits the time in which same may be raised." The integrity of this statute ought to be preserved. It is a statute that is wholesome in its effect. It prevents sharp practice. It saves expense to the state, and compels good faith to be maintained in all criminal proceedings. It says to the defendant that you shall have advantage of all technical law, and you shall have your charge of crime made more specific before trial, or a new charge made if you desire it, if the charge already made is vague in any of its particulars; but you must request this at the proper time and while it is within the power of the state to save expense and delay by having a proper charge made. It says to the defendant that he cannot take his chance on acquittal by going to trial on the merits, and, when convicted, then, for the first time, raise the question of the sufficiency of the charges.

But, again, it is my judgment that the act of 1884 is just as valid and enforceable now as it was the day it was passed, and that it has never been repealed or suspended by any subsequent law. When the Code of 1906 was adopted, by express provision of section 1793 all local laws prohibiting the sale, barter, or giving away of intoxicating liquors were continued in force "until amended or repealed." The act of 1884 was in full force then, and expressly so continued by that section. For the first time in the history of the state, state-wide prohibition was accomplished by the act of 1908. Before that time it was lawful to sell intoxicating liquors in certain localities in the state; but the adoption of chapter 115 of the Acts of 1908 made it unlawful to sell intoxicating liquors everywhere in the state. That was the real purpose of the act. The act of 1908 does not purport to repeal any liquor laws, except such as are "in conflict with, or repugnant to the act," and the act of 1884 is neither. The two acts

are perfectly consistent. They are both directed toward breaking up the sale of intoxicating liquors. But, while these acts are consistent, they do not afford the same protection to the communities over which both acts operate. The act of 1884, affecting Corinth alone, secures Corinth not only against any "sale or barter" of intoxicating liquors, but it also prohibits even the "giving away" of intoxicating liquors within five miles of the courthouse. There is nothing in the act of 1908 prohibiting the "giving away" of intoxicating liquors anywhere in the state, unless the "giving away" is done to *induce trade*. These acts are not repugnant or conflicting; but the city of Corinth obtains greater protection from the evil flowing from the sale of intoxicating liquors than the state in general, in that not only can it not be sold there, but it cannot be given away. Colleges, universities, churches, charitable institutions, and such like, given special protection from both the sale and giving away of liquors, and having special local laws on this subject, in my judgment, are still protected under these local acts, and may prosecute for a violation of same whenever it occurs.

MERCHANTS' & PLANTERS' BANK v. CASTON. (No. 14,371.)

(Supreme Court of Mississippi. June 27, 1910.
Suggestion of Error Overruled
July 4, 1910.)

USURY (§ 49*)—COMPUTING INTEREST ON PRINCIPAL AND INTEREST.

A note, with interest added in the face of the note at 10 per cent. per annum from date until due, and providing for interest on this amount at 10 per cent. per annum from maturity until paid, is not usurious.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 103-106; Dec. Dig. § 49.*]

Appeal from Chancery Court, Covington County; T. A. Wood, Chancellor.

Action between the Merchants' & Planters' Bank and E. G. Caston. From a judgment holding that a note was usurious, an appeal is taken. Reversed and remanded.

McWille & Thompson, for appellant. McIntosh Bros., for appellee.

ANDERSON, J. The only question in this case is whether this contract is usurious: Note for \$1,000 loan, dated January 22, 1907, due July 22, 1907 (six months after date), with interest added in the face of the note at 10 per cent. per annum from date until due, making the note for \$1,050, and providing for interest on this amount at 10 per cent. per annum from maturity until paid. Under the authority of *Palm v. Fancher*, 93 Miss. 785, 48 South. 818, we hold that it is not. *Carter v. Holloway*, 28 South. 941, was necessarily overruled by *Palm v. Fancher*, supra.

Reversed and remanded.

McINNIS v. STATE. (No. 14,350.)

(Supreme Court of Mississippi. June 20, 1910.)

1. **EMBEZZLEMENT (§ 1*)—STATUTORY OFFENSE.**
Embezzlement is a statutory and not a common-law crime.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. **STATUTES (§ 239*)—CRIMINAL STATUTES—CONSTRUCTION.**

A criminal statute in derogation of the common law must be strictly construed in favor of accused.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 320; Dec. Dig. § 239.*]

3. **CRIMINAL LAW (§ 13*)—STATUTES—CONSTRUCTION.**

A criminal statute must be construed against the making of two separate and distinct offenses of the same act, so that double punishment would result, unless such double punishment is clearly within the language and intentment of the statute.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.*]

4. **CRIMINAL LAW (§ 200*)—STATUTES—CONSTRUCTION.**

Code 1906, § 1141, making it an offense for any officer, state or county, to unlawfully convert to his own use any money coming to his hands by virtue of his office, or to fail, when lawfully required, to turn over money according to his legal obligations, creates but the one offense of unlawfully misappropriating funds, and such offense may be shown either by an unlawful conversion thereof, or by an unlawful failure to turn over the same when required by law so to do; and a tax collector, convicted of embezzlement for failing to pay over funds at the end of his term, as required by law, may not be prosecuted for converting to his own use such funds.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 347, 386-409; Dec. Dig. § 200.*]

Smith, J., dissenting.

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

At the November term, 1909, of the circuit court of Simpson county, D. C. McInnis, ex-sheriff and tax collector of that county, was tried and convicted of embezzling public funds coming into his hands as such officer and sentenced to the penitentiary for a term of seven years, from which judgment he appeals to this court. Reversed and accused discharged.

The governing facts in the record are as follows: At the May term, 1908, the appellant was indicted in two counts as follows:

First Count. "That D. C. McInnis on and from the first Monday of January, 1904, until the 6th day of January, 1908, was the legally qualified and acting sheriff and tax collector of Simpson county, Mississippi, and as said tax collector had and received, during the time intervening between the 1st day of October, 1907, and the 6th day of January, 1908, sixty-two thousand and seven hundred and twenty-nine and $\frac{49}{100}$ dollars (\$62,729.46), being moneys respectively of Simpson county and of the state; that the term of office of the said D. C. McInnis ex-

pired on the 6th day of January, 1908, and that it then and there became his (the defendant's) duty to pay over to the county treasurer of Simpson county and to the State Treasurer all moneys then and there being in his possession as tax collector aforesaid, as each the said county and state should be entitled thereto of said moneys; that on the said 6th day of January, 1908, Geo. R. Edwards legally qualified and entered upon the duties of State Treasurer of the state of Mississippi, and it then and there became and was the duty of the said D. C. McInnis to pay over to the said State Treasurer all money in his (defendant's) possession belonging to the state, which said sum due the state should under the laws have been paid not later than the 16th day of January, 1908, said sum of money aggregating \$20,155.00; but that defendant on said 16th day of January, 1908, and on divers days before and after said date, disregarding his duty to pay over and deliver said sum of \$20,155.00 to said G. R. Edwards, State Treasurer, did then and there in the county aforesaid willfully and fraudulently and feloniously defraud the state of the sum of approximately ten thousand dollars by willfully and feloniously omitting to comply with his duty to deliver and pay over, on the expiration of his term of office as said tax collector, to said G. R. Edwards, State Treasurer, a portion of said money to the state which he had received as tax collector of Simpson county, Mississippi, and which remained in his hands on the 6th day of January, 1908, amounting to approximately ten thousand dollars."

Second Count. "And the grand jurors aforesaid upon their oaths aforesaid do further present and charge that D. C. McInnis, being sheriff and tax collector of Simpson county, Mississippi, for the term of four years beginning the first Monday of January, 1904, and ending on the 6th day of January, 1908, during that time of said term intervening between the 1st day of October, 1907, and the said 6th day of January, 1908, received as tax collector aforesaid the sum of sixty-two thousand seven hundred twenty-nine and $\frac{49}{100}$ dollars (\$62,729.46), of moneys belonging to said Simpson county and to said state aforesaid, and that on divers days between the dates last aforementioned in the county aforesaid did willfully, fraudulently, and feloniously embezzle and convert to his own use a portion of said sum of moneys intrusted to him and received into his hands as said tax collector, amounting to nine thousand three hundred ninety-nine dollars (\$9,399.00), against the peace and dignity of the state of Mississippi."

At the May term, 1909, appellant, after some kind of arrangement with the state as to the punishment, first entered a plea of guilty as to both counts, withdrew it, and

then pleaded guilty as to the first count of the indictment, and was sentenced to imprisonment in the county jail for one year and payment of costs, and the indictment ordered to the files of the court. In October, 1909, the judge ordered the indictment withdrawn from the files, redocketed, witnesses subpoenaed, and defendant (who was in jail serving the sentence theretofore imposed) re-arrested, the case to stand for trial at the November term, 1909, which order was complied with, and a trial had on the second count of the indictment, resulting in a conviction and sentence of seven years in the penitentiary. Before going into the trial the appellant interposed a plea of *autrefois convict*, which, leaving off the indictment (copied into the plea), is as follows:

"Comes the said D. C. McInnis, in his own proper person, into court here, and, having heard the indictment read, says: That the state of Mississippi ought not further to prosecute the said indictment against him, the said D. C. McInnis, in respect to the offense in said indictment mentioned and purported to be charged, because he says that heretofore, to wit, on the 2d day of June, 1908, at a circuit court begun and holden in the town of Mendenhall, in the county of Simpson, state of Mississippi, the grand jurors selected, impaneled, and sworn in and for said county of Simpson, in the name and by the authority of the state of Mississippi, upon their oaths, presented an indictment against him, the said D. C. McInnis, which said indictment is in words and figures following, to wit: * * * To which indictment the said McInnis pleaded not guilty, and the said state of Mississippi joined issue on said plea. That afterward, to wit, on the — day of May, 1909, in said circuit court, with full and complete jurisdiction to try said defendant on said charge, a jury was duly and regularly impaneled and sworn to try said issue joined as aforesaid, and the cause proceeded to trial, and several witnesses were offered by the counsel prosecuting for the state, who gave evidence to establish defendant's guilt of the charge contained in the said indictment hereinbefore set out, which is the same indictment upon which this defendant is now about to be put upon his trial, and that after several witnesses were examined for the state this defendant was advised by his attorneys that if he should withdraw his plea of not guilty theretofore entered and plead guilty to the first count to said indictment herein set out, that the other charges against this defendant should and would be passed to the files, and defendant would be sentenced by the court to serve a twelve-month term in the county jail of said county, and said defendant being so advised, and believing that such course would satisfy the state's prosecution against him on all the charges it held against him, he consented and withdrew his plea of

not guilty, and entered a plea of guilty to the first count in said indictment, answering, in response to the court's inquiry if that was his plea, to wit: 'Yes, sir; under the conditions as I understand them.' Reference to the file of court papers in said cause and the minutes of the court in said proceeding is hereby made and prayed to be taken and considered in connection herewith as a part hereof, and, if proper or required, that a complete transcript of all the pleadings, proceedings, orders, and the stenographer's notes be filed and considered in connection herewith as a part hereof as if fully copied herein. That judgment of conviction of this defendant on said charge was accordingly entered on the minutes of said court, which said judgment still remains in full force and effect and is final, and this defendant is now serving his one-year term in the county jail of said county in satisfaction of said judgment and sentence.

"Said defendant further shows: That he, the said D. C. McInnis, is the same D. C. McInnis so indicted and convicted; that is, that he is one and the same person, and not another and different person. That the offense of which defendant was so convicted as aforesaid is the same offense as charged in the indictment upon which he is now being sought to be tried, and that every fact or question or issue material to the determination of the guilt or innocence of this defendant of the charge on which he was convicted is identical with the facts and questions and issues material to the determination of the charge for which he is now about to be put upon his trial, and the indictment upon which this defendant was tried and convicted as aforesaid is the identical indictment upon which he is now being sought to be tried, and the said former and present prosecutions rest upon the facts adjudicated in the said former conviction. All of which matters and things, the said McInnis is ready to verify. Wherefore he prays the judgment of this court if the state of Mississippi ought further to prosecute the said indictment against him, the said D. C. McInnis, in respect of the said offense for which he has been duly and lawfully convicted, and for which his offense he is now paying the penalty with his liberty in the jail of said county; and he further prays that he may be dismissed and discharged from the said indictment, and from any further prosecution thereunder."

On motion this plea was stricken out as frivolous; the appellant moved to quash the indictment, offering proof to support such motion, which was denied by the court; then a demurrer to the indictment was filed, and stricken from the files; then motion for bill of particulars, which was overruled; then motion for change of venue, and evidence to support same, which was denied; then the disqualification of the judge was suggested

by appellant's attorneys, and thereupon he adjudged them in contempt of court, and struck the suggestion from the files; and then the witnesses were introduced and gave their testimony, and after being instructed by the court, and the case argued, the jury returned a verdict of guilty.

The first count of the indictment, to which the appellant pleaded guilty, charges that between the 1st of October, 1907, and the 6th of January, 1908, the end of his term, there came into his hands funds belonging to state and county to the amount of \$62,729.46; that of this amount he was required at the end of his term to pay over to the State Treasurer \$20,155 of which amount he failed to so pay over approximately \$10,000. The second count charges receipt of the same amount of money by the appellant between the 1st of October, 1907, and the 6th of January, 1908, \$62,729.46, belonging to the state and county, of which he converted to his own use \$9,399. The testimony indisputably shows that the funds embezzled under the second count of the indictment were a part and parcel of the funds appellant failed to turn over under this first count, to which he plead guilty, thereby establishing the facts set up in the plea of *autrefois convict*.

May & Sanders and R. N. Miller, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

ANDERSON, J. (after stating the facts as above). Under the facts of this case it becomes necessary to consider one question alone, which goes to the root of the whole matter, and that is whether the plea of *autrefois convict* presents a good defense. The indictment was drawn under section 1141, Code 1906 (section 1063, Code 1892; section 2787, Code 1880), which provides: "If any state officer or any county officer * * * shall unlawfully convert to his own use any money or other valuable thing which comes to his hands or possession by virtue of his office or employment, or shall not, when lawfully required to turn over such money or deliver such thing, immediately do so according to his legal obligation, he shall, on conviction, be imprisoned in the penitentiary not more than twenty years, or be fined not more than one thousand dollars, or imprisoned in the county jail not more than one year."

This statute is an exact transcript of section 1063, Code 1892, and substantially the same as section 2787, Code 1880, except the substitution of the disjunctive "or" for the conjunctive "and" between the words "employment" and "shall," and the punishment is increased. It is contended on behalf of the state that the statute makes two separate and distinct offenses of the unlawful appropriation of the funds, namely, the unlawful conversion, and the unlawful failure to turn over and deliver; while for the appellant it is claimed that both clauses of the statute

define only one offense, embezzlement, which may be charged and proven in either one of the ways laid down, the unlawful appropriation, or the unlawful failure to turn over. In construing the statute, it should be borne in mind that embezzlement is a statutory crime. No such offense was known to the common law. 1 Bishop Crim. Law (8th Ed.) § 567; *Hemingway v. State*, 68 Miss. 371, 8 South. 317.

In the latter case, referring to section 2787, Code 1880, the court held that it was the "creation of an offense, prior to the adoption of that Code, unknown to our jurisprudence." Under well-known rules of construction, a criminal statute is strictly construed in favor of the defendant, and so when in derogation of the common law, and against the making of two separate and distinct offenses of the same act—double punishment, which must be clearly within the language and intentment of the statute. Of the purpose of this statute, the court uses the following language in the *Hemingway Case*, *supra*: "It is at once a collection law and a penal statute. Its terms show unmistakably that it was designed to prevent *unlawful* (not fraudulent and felonious) conversions by officers, trustees, agents, attorneys, bankers, and others, and to coerce the paying over immediately, when required to do so, according to the legal obligation of the offender. It was intended to punish the *unlawful* (not fraudulent and felonious) conversion and *not* paying over immediately when required to do so. There must be both an *unlawful* conversion *and*, joined or added thereto, a failure immediately to pay over the thing converted when required. Where there has been an unlawful conversion, under this section, and an immediate restoration when required, the offense does not exist. It is a conversion without willful and felonious intent which is created an offense—a merely *unlawful* conversion and a refusal or failure to restore which this section defines and punishes."

Evidently the purpose of the Legislature in substituting, in section 1063, Code 1892, and section 1141, Code 1906, the disjunctive "or" between the first and second clauses of the statute, instead of "and," was to make it easier to prove the unlawful conversion, so that it could be proven either under the first clause, by showing an unlawful appropriation, or under the second clause, by showing an unlawful failure to turn over. The statute is designed for the security of the funds in the hands of the fiduciary. That was the end sought to be accomplished. The object was to punish for an unlawful appropriation to his own use, and this may be done by showing either an unlawful conversion or an unlawful failure to turn over when required by law so to do. Both are denounced by the statute as one embezzlement, which may be charged and proven in either one of two ways. When it is charged and proven, and there is a conviction under one clause of the

statute, the defendant cannot be convicted under the other clause for embezzlement of the same funds, or any part thereof. There is nothing in the statute which indicates a design to create two offenses and inflict double punishment. In *State v. Gillis*, 75 Miss. 331, 24 South. 25, this language is used: "Under section 1063 of the Code of 1892, the use of the word 'or,' instead of 'and,' makes either of these things a felony." However, that statement was dictum. In construing the indictment in that case, the court held that its purpose was to charge an unlawful conversion by the defendant, by charging failure to pay over the funds as required by the decree of the court, thus indicating that there was only one crime which could be alleged and proven under either clause of the statute.

In view of the facts of this case, and the holding that the statute makes only one offense of the unlawful misappropriation of the same fund, under the authority of *State v. Caston*, 50 South. 569, the case is reversed, and appellant discharged from further prosecution.

SMITH, J., dissents.

WILLIAMS v. STATE. (No. 14,558.)
(Supreme Court of Mississippi. June 27, 1910.)
Appeal from Circuit Court, Calhoun County;
G. A. McLean, Judge.

Jessie Williams was convicted of murder, and she appeals. Reversed and remanded.

J. J. Adams and J. H. Ford, for appellant.
Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. At the September term, 1900, of the circuit court of Calhoun county, the appellant, Jessie Williams, was tried, convicted, and sentenced to the state penitentiary for life, upon a charge of murder, from which judgment and sentence she prosecutes this appeal.

In this case the defendant was convicted upon circumstantial evidence. The defendant may be guilty; but after a careful study of the testimony, and testing the same by the legal rules governing the sufficiency of circumstantial evidence to warrant a conviction, we do not think the evidence was sufficient to support the verdict of guilty.

The case is reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court.

VARNADO et al. v. PULLEM & LAKE.
(No. 14,472.)
(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Circuit Court, Hinds County;
W. H. Potter, Judge.

Action between O. D. Varnado and another and Pullem & Lake. From the judgment, Varnado and another appeal. Affirmed.

Howie & Howie, for appellants. Watkins & Watkins, for appellees.

PER CURIAM. Affirmed.

KYLE v. KYLE et al. (No. 13,979.)
(Supreme Court of Mississippi. June 27, 1910.)
Appeal from Chancery Court, Tunica County;
Percy Bell, Chancellor.

Action between Julia A. Kyle and Rufus O. Kyle, Jr., and another. From the judgment, Julia A. Kyle appeals. Affirmed.

Calvin Perkins and McWille & Thompson, for appellant. St. John Waddell, for appellees.

PER CURIAM. Affirmed.

SOUTHERN RY. CO. IN MISSISSIPPI v. MORGAN. (No. 14,469.)

(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Circuit Court, Montgomery County;
G. A. McLean, Judge.

Action between the Southern Railway Company in Mississippi and J. D. Morgan. From the judgment, the Railway Company appeals. Affirmed.

Catchings & Catchings, for appellant. Dunn & Thompson and Flowers, Fletcher & Whitfield, for appellee.

PER CURIAM. Affirmed.

YODER et al. v. SCHNEIDER. (No. 14,312.)

(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Circuit Court, Monroe County;
J. H. Mitchell, Judge.

Action between Eli Yoder and others and A. Schneider. From the judgment, Yoder and others appeal. Affirmed.

Leftwich & Tubb, for appellants. L. P. Haley, for appellee.

PER CURIAM. Affirmed.

LAMB FISH LUMBER CO. v. BROWN,
Sheriff. (No. 14,593.)

(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Chancery Court, Tallahatchie County;
M. E. Denton, Chancellor.

Action between the Lamb Fish Lumber Company and P. H. Brown, Sheriff. From the judgment, the Lumber Company appeals. Affirmed.

Dinkins & Caldwell, for appellant. Lomax & Tyson, for appellee.

PER CURIAM. Affirmed.

SMITH v. STATE. (No. 14,514.)

(Supreme Court of Mississippi. June 20, 1910.)

Appeal from Circuit Court, Harrison County;
T. H. Barrett, Judge.

Wallace Smith was convicted of assault with intent to kill, and appeals. Affirmed.

Jeff D. McLendon and T. M. Evans, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

BARBER v. PARKER et al. (No. 14,102.)
(Supreme Court of Mississippi. June 20, 1910.)
Suggestion of Error Overruled July 4, 1910.)

Appeal from Circuit Court, Harrison County;
W. H. Hardy, Judge.

Action between E. M. Barber and John M. Parker and others. From the judgment, Barber brings error. Affirmed.

E. M. Barber and L. H. Doty, for appellant.
Alexander & Alexander, for appellees.

PER CURIAM. Affirmed.

GOAD v. STATE. (No. 14,591.)
(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Circuit Court, Yalobusha County;
Sam C. Cook, Judge.

Bill Goad was convicted of cruelty to animals, and appeals. Affirmed.

Creekmore & Stone, for appellant. Jas. B. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**STATE BANK OF McHENRY v. FIRST
NAT. BANK OF GULFPORT et al.**
(No. 14,114.)

(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Chancery Court, Harrison County;
T. A. Wood, Chancellor.

Action between the State Bank of McHenry and the First National Bank of Gulfport and others. From the judgment, the State Bank of McHenry appeals. Affirmed.

May & Sanders and Hanun Gardner, for appellant. V. A. Griffith, for appellees.

PER CURIAM. Affirmed.

NORVELL v. DYESS. (No. 14,257.)
(Supreme Court of Mississippi. June 27, 1910.)

Appeal from Circuit Court, Jones County;
R. L. Bullard, Judge.

Action between B. M. Norvell and Frank Dyess. From the judgment, Norvell appeals. Affirmed.

Deavours & Shands, for appellant. R. E. Hallsell and Flowers, Fletcher & Whitfield, for appellee.

PER CURIAM. Affirmed.

STATE ex rel. REYNOLDS v. WEAVER,
Judge.

(Supreme Court of Alabama. May 19, 1910.)

**BAIL (§ 44*)—CRIMINAL PROSECUTIONS—
PENDING APPEAL.**

Under Gen. Acts Sp. Sess. 1909, p. 62, conferring the right to bail pending appeal, except to those under sentence of death or under sentence for terms longer than 5 years, one convicted of murder in the second degree and sentenced to imprisonment for 15 years is not entitled to bail pending his appeal.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 145; Dec. Dig. § 44.*]

Petition for mandamus by the State, on the relation of William P. Reynolds, against Samuel L. Weaver, Judge, to compel defendant to permit relator to give bail. Denied.

Allen & Bell, for petitioner. Alexander M. Garber, Atty. Gen., for respondent.

McCLELLAN, J. The evident intent in the enactment of the amendatory act approved August 24, 1909 (Gen. Acts Sp. Sess. 1909, p. 62), was to confer the right to bail pending appeal upon all save two classes of defendants, viz., those under sentence of death and those under sentence for terms longer than 5 years. The petitioner's conviction was of murder in the second degree, and he was sentenced to imprisonment for a term of 15 years. He is not among those entitled to bail under the act cited, and hence his prayer for mandamus to effect his bail pending appeal must be denied.

Mandamus denied.

**DOWDELL, C. J., and SIMPSON and
MAYFIELD, JJ.,** concur.

LOWMAN v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

**1. JURY (§ 83*)—CHALLENGE FOR CAUSE—
WITNESS FOR PARTY.**

Under Code 1907, § 7276, subd. 10, providing as one of the causes for which a juror may be challenged "that he is a witness for the other party," the discharge of a witness after he had been summoned as a juror did not render him competent to serve, as against an objection by the opposite party.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 402; Dec. Dig. § 83.*]

2. WITNESSES (§ 287*)—REDIRECT EXAMINATION—SCOPE.

In a prosecution for homicide, the court did not err in permitting the state to ask a witness on redirect examination why he went to defendant's wife to get a statement from her, nor in overruling an objection to the answer that he went to her to ascertain whether witness' son or witness was right as to what defendant said his wife told him about E. going into the house, in explanation of the witness' interest in going to defendant's wife to get her statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

3. CRIMINAL LAW (§ 1170½*)—APPEAL—EVIDENCE—PREJUDICE.

Accused was not prejudiced by the court permitting the state to ask him as a witness whether he had testified in the federal court, nor by his answer that he had at one time; it not appearing what the testimony was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

4. CRIMINAL LAW (§ 418*)—EVIDENCE—DECLARATIONS.

In a prosecution for homicide, evidence of a declaration of C. in defendant's presence that they were going to whip deceased, the witness

having testified that both defendant and C. made the declaration, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 968-972; Dec. Dig. § 418.*]

5. HOMICIDE (§ 338*)—APPEAL—EVIDENCE.

In a prosecution for homicide, accused was not prejudiced by a witness' answer to a question whether deceased was in the habit of cursing or swearing, viz., "Not to my knowledge."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 700-713; Dec. Dig. § 338.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

George Lowman was convicted of manslaughter in the first degree, and he appeals. Affirmed.

See, also, 161 Ala. 47, 50 South. 43.

Bilbro & Moody, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was placed on trial for the crime of murder in the second degree and convicted of manslaughter in the first degree.

One Bailey, who had been a witness for the defendant, but was discharged after he had been summoned as a juror, was challenged for cause by the state and the cause sustained. There was no error in this. While subdivision 10 of section 7276 of the Code 1907 mentions as one of the causes "that he is a witness for the other party," yet it would be defeating the purpose of the statute to permit a party to render his witness competent as a juror against the objection of the state by discharging him as a witness after he had been summoned as a juror. It has frequently been held that one who has been summoned as a witness for the other party may be challenged for cause. *Baldwin v. State*, 111 Ala. 11, 20 South. 528; *Com-mander v. State*, 60 Ala. 1.

On the authority of *Johnson v. State*, 102 Ala. 1, 16 South. 99, the court did not err in permitting the state to ask the witness George White on redirect examination why he went to the defendant's wife to get a statement from her, nor in overruling the objection to the answer, to wit, "I went to her to ascertain whether my son or I was right as to what defendant said his wife had told him about Ellis going into the house." The court's remark that the testimony was admitted in explanation of the interest of the witness in going to defendant's wife to get her statement brought the testimony within the exception noted in said case.

There was no reversible error in overruling objections to the question to the defendant as to where Andy Cunningham was, or to the answer thereto. The court is satisfied that no injury resulted to the defendant by permitting the question to the defendant as to whether he had testified in the federal court and his answer that he had at one time; it not appearing what the testimony was. Code 1907, § 6264.

There was no error in admitting the declaration of Cunningham, made in the presence of the defendant, that they were going to whip the deceased. The witness stated that both the defendant and said Cunningham made the declaration. It tended to show with what purpose the defendant sought the deceased and had a bearing on the question as to who was the aggressor.

The answer of the witness Bradley White as to whether or not the deceased was in the habit of cursing or swearing, to wit, "Not to my knowledge," did not result in any injury to the defendant. If he had doubted whether the witness knew what the habit of the deceased was, he could have questioned him as to his knowledge.

The judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

J. C. MCGREW & SONS v. EARNEST et al. (Supreme Court of Alabama. June 14, 1910.)

1. PARTNERSHIP (§ 219*)—ACTION—PLEADING—PROCESS.

Where, in an action against a firm, the bill failed to aver who composed it, or to give the Christian names of the partners, but summons was served on one of the alleged members of the firm, such service would be sufficient to sustain a decree pro confesso in case he failed to answer.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

2. MECHANICS' LIENS (§ 277*)—FORECLOSURE—ISSUES AND PROOF—VARIANCE.

A bill by subcontractors to foreclose a mechanic's lien alleged a contract between the owner and C. and K. as original contractors to build a house, and that one of the original contractors, K., employed complainants as materialmen and mechanics to work on the house. The proof showed that the contract was made between the owner and a lumber company, which was a corporation, and also that K. was not one of the original contractors, but a mechanic employed by C. to do the work, and that he in turn employed complainants to work for him. *Held*, that there was a fatal variance both as to the making of the original contract and as to complainants' employment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546-554; Dec. Dig. § 277.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by J. C. McGrew & Sons against Letitia Earnest and others. Judgment for defendants other than Crotwell & Kent, and plaintiffs appeal. Affirmed.

Estes, Jones & Welch, for appellants. Ben G. Perry, for appellees.

MAYFIELD, J. Appellants sought in this their bill to have declared and enforced a mechanic's lien upon a house of Mrs. Earnest. Crotwell & Kent were made respondents to the bill as contractors, and they were sought

to be held liable to complainants for \$160, balance due under contract between them and complainants as for the building of the house in question.

The bill alleges that Mrs. Earnest is the owner of the house in question; that Crotwell & Kent are the contractors, and that complainants are the mechanics employed by the contractors to paint, paper and decorate the house; and that the balance due of \$160 is for this work and material done and furnished by them as such mechanics and materialmen, and that they have a lien by virtue of the statute as for any unpaid balance due from the owner to the original contractors. The bill also alleges the giving of proper notice of their claim to the owner, and the proper filing of the statements thereof in the probate office to effectuate their lien. Demurrers were interposed by Mrs. Earnest to the bill, and the same were overruled. The bill was then answered by her and one J. I. Crotwell, each answering separately and each denying the material allegations of the bill. A decree pro confesso was taken against Crotwell & Kent, and a motion was made by complainants to strike the answer of J. I. Crotwell, on the ground that he was an interloper and a stranger to the suit. This motion was overruled; and the ruling thereon is made one of the assignments of error. The bill fails to aver who compose the firm of Crotwell & Kent, or whether it is a partnership or a corporation, or to give the Christian names of Crotwell and Kent.

The record shows that the summons was served upon J. I. Crotwell, the same person who answered, so we cannot know, upon this state of the record, that he had no right to answer. In fact upon this condition of the record a decree pro confesso might have been rendered which would be binding upon him if he had failed to answer. The cause was heard on bill, answer, and proof, and a final decree rendered dismissing the bill; and it is the correctness of this decree that appellants next assail.

It is contended by appellants that the bill was sufficient to support the relief prayed, and that it was fully supported by the proof, and that a decree should have been rendered in their behalf accordingly. The bill was sufficient and was well filed; but we agree with the chancellor that the proof failed. There was a material variance between the allegations and the proof. The bill alleged a contract between Mrs. Earnest, the owner, and Crotwell & Kent, as original contractors to build the house; while the proof (as we find it from the record) shows the contract to have been between Mrs. Earnest and Crotwell Bros. Lumber Company, a corporation. The bill alleges that one of the original contractors, Kent, employed complainants as materialmen and mechanics to work on the house. The proof shows that Kent was not

one of the original contractors, but was a mechanic himself, employed by one Crotwell to do the work, and that he in turn employed complainants to do the work for him. This also was a material variance.

It is true, as contended by appellants, that there was some evidence tending to show a partnership existing between Crotwell and Kent, but none of this was binding upon Mrs. Earnest, nor do we think it was shown sufficiently to bind Crotwell in this proceeding. It might bind Kent, but not the others.

It therefore follows that the chancellor rendered the only decree that could have been rendered under the proof shown by this record.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

BRANDON v. PROGRESS DISTILLING CO.
(Supreme Court of Alabama. June 9, 1910.)

1. JUSTICES OF THE PEACE (§ 174*)—APPEAL—TRIAL IN CIRCUIT COURT.

Where trial was had in a justice court upon a complaint claiming \$100, and judgment rendered for that amount, and, on appeal to the circuit court, the complaint was amended so as to claim more than \$100, which complaint was stricken on motion and the complaint again amended so as to claim the amount originally claimed in the justice court, for which amount judgment was rendered, the final result attained was correct, and no prejudicial error intervened.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 674; Dec. Dig. § 174.*]

2. EVIDENCE (§ 472*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

While a witness may state his judgment as to the existence vel non of facts, where the facts stated are collective facts and the judgment is based on knowledge of the constituent elements, a witness may not state his conclusion as to the very fact in issue between the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

On the issue whether a third person was a member of a firm a witness may not state his judgment that the third person was a partner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2177; Dec. Dig. § 471.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where the facts standing alone were insufficient to show that a third person was a partner in a firm, the error in permitting a witness to state his judgment that the third person was a partner was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

5. PARTNERSHIP (§ 217*)—ACTIONS AGAINST PARTNER—EVIDENCE—ADMISSIBILITY.

In an action against one on the theory that he was a member of a firm indebted to plaintiff, unpaid checks payable to plaintiff, drawn by a member of the firm to cover the balance due plaintiff, were admissible to es-

tablish the firm's indebtedness, which fact plaintiff to recover must prove.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 423; Dec. Dig. § 217.*]

6. EVIDENCE (§ 355*)—MEMORANDUM—ADMISSIBILITY.

An unsworn memorandum, not coupld in evidence with any admission express or implied on the part of defendant or any alleged partner that a firm was indebted on account of the particular items set out in the memorandum, is inadmissible to show the firm's indebtedness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1484-1491; Dec. Dig. § 355.*]

7. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Under the statute requiring the Supreme Court to review judgments on the facts and render proper judgments, the Supreme Court will presume that the admission of illegal evidence in a case tried by the court without a jury operated to the injury of the defeated party, unless the remaining evidence is without conflict and is sufficient to support the judgment, and where the evidence is conflicting and the court cannot determine on which side it preponderates the error in admitting evidence necessitates a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by the Progress Distilling Company against D. S. Brandon. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

David A. Grayson, for appellant. S. S. Pleasants, for appellee.

SAYRE, J. Donegan & Lacy had purchased whisky from the Progress Distilling Company. Suit for the purchase price was brought against Brandon on the theory that he was a member of the firm. This the appellant denied, claiming that he had been involved in the affairs of the partnership as a creditor only, and that his activity about the business constituted nothing more than an effort to collect certain money for which he had become liable as a surety, but not as a partner. This issue was tried by the court without a jury, and the chief contention here relates to the correctness of the conclusion reached in the trial court. We, however, have reached the conclusion that the case ought to be reversed on other grounds, and have pretermitted a decision on the question of fact.

There was certainly no error in the trial court's dispositions of questions of pleading. The suit had been commenced before a justice of the peace. The plaintiff there claimed the sum of \$100, and had judgment for that amount. In the circuit court, on appeal, the plaintiff filed a complaint claiming an amount in excess of \$100. By a motion to dismiss the cause, and by a plea in abatement, defendant advanced the proposition that the court was without jurisdiction, for the rea-

son that the amount in controversy exceeded the jurisdiction of the court in which the cause originated, there having been no express remittitur of the amount claimed in excess of \$100. The court overruled the motion to dismiss and struck the plea from the file. Defendant then moved to strike the complaint, which motion being granted, plaintiff amended its complaint by so framing it as to claim the sum of \$100, with interest, and for that amount, with interest, judgment was rendered. In the result of all this there was no error. *R. & D. R. R. Co. v. Hutto*, 102 Ala. 575, 14 South. 875.

At more than one point during his examination as a witness Donegan, husband of the Donegan of Donegan & Lacy, was permitted by the court, over defendant's objection, to state his judgment that defendant was a member of the partnership. There have been cases decided here in which it was held that a witness may state his judgment as to the existence vel non of facts where the facts stated were collective facts and the judgment of them was based upon knowledge of all the constituent elements. Sometimes it is impracticable to lay before the jury all the details upon which the collective fact is based. *E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 South. 813; *McVay v. State*, 100 Ala. 110, 14 South. 862. It has been said that the soundness of the conclusion in such a case is to be tested on cross-examination. But it has never been held that a witness may usurp the function of the jury—or the court, when it passes on the facts—by stating his conclusion as to the very fact in issue between the parties. The rulings have been to the contrary. *L. & N. R. R. Co. v. Landers*, 135 Ala. 504, 33 South. 482; *Moore v. Monroe Refrigerator Co.*, 128 Ala. 621, 29 South. 447. The error here involved was not relieved of injurious consequence by the fact that elsewhere in his testimony the witness detailed some facts which may have tended to show that defendant was a partner in the firm of Donegan & Lacy, but which, standing alone, were wholly inadequate to sustain that conclusion.

It was shown that checks, payable to plaintiff, had been drawn by Donegan & Lacy to cover a balance due by them to plaintiff, and that these checks had not been paid. The checks, properly identified, were received in evidence. There was no error here. It was necessary that plaintiff should establish the indebtedness of Donegan & Lacy as well as defendant's membership in that firm. The drawing of the checks by a person who was confessedly a member of the firm constituted an admission of indebtedness. Not so, however, with the account admitted in evidence. That was nothing more than an unsworn memorandum, and was not coupld in evidence with any admission, express or implied, on the part of defendant or any other member

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the alleged partnership, that the firm was indebted on account of the particular items set out in the memorandum, and its admission was error.

In the construction of statutes which require this court to review the conclusions and judgments of trial courts upon the facts and render such judgment as may seem right, we have settled down to the holding that where a cause is tried by the court without a jury, the admission of illegal evidence raises a presumption of injury and requires a reversal, unless the remaining evidence is without conflict and is sufficient to support the judgment. In this case all things were in dispute. The evidence was in conflict, and it is hard to say, on consideration of the report of it in the record, on which side it preponderates. We cannot know how far the trial court was influenced in the findings of fact by the evidence erroneously admitted. The judgment, we think, ought to be reversed, and the cause remanded for another trial. *Bank of Talladega v. Chaffin*, 118 Ala. 246, 24 South. 80; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Miller v. Mayer*, 124 Ala. 434, 26 South. 892.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

HARTSELLE et al. v. BIBB.

(Supreme Court of Alabama. June 2, 1910.)

EXECUTION (§ 37*)—CHattel MORTGAGES—LEVIABLE INTEREST.

A chattel mortgagee who interposes his claim to the chattels levied on under an execution under a judgment against the mortgagor may leave the chattels in possession of the mortgagor after the law day of the mortgage, and recover possession when he chooses to do so, without creating a leivable interest in the mortgagor based on the usufruct of the property, and the mortgagee's only responsibility is that the property shall be forthcoming at the end of the suit according to his forthcoming bond.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 96; Dec. Dig. § 37.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Proceedings by way of execution by J. A. Hartselle and another against J. W. Bibb, in which J. W. Wilhite appeared as claimant to the property levied on as mortgagee. From a judgment for claimant, plaintiffs appeal. Affirmed.

Tidwell & Sample, for appellants. Wert & Lynne, for appellee.

SAYRE, J. Plaintiffs in error procured an execution to be levied upon two mules for the satisfaction of a judgment which they had recovered against Bibb. The mules were in the possession of the defendant. The officer indorsed his return upon the execution

as follows: "Executed by levying on one black mare mule and one black horse mule, and one set of harness, as the property of defendant John W. Bibb, this June 15, 1908. This levy was made subject to mortgage or lien of J. W. Wilhite on the above-described property, and only the title and interest of defendant is levied upon." Wilhite interposed his claim under the statute, claiming under a mortgage past due, and took the property upon the approval of a forthcoming bond which he tendered. He then returned the animals to Bibb, who was his tenant, cultivating a crop upon his land. On the trial it was adjudged that the mules were the property of the claimant. The value of the animals was assessed, as was the balance due on the mortgage debt. It was further adjudged that the claimant have and recover of the plaintiffs the amount of the mortgage debt upon plaintiffs taking charge of the property. No objection is taken to the frame of the judgment. It is accepted as a proper disposition of the issues formed under section 6048 of the Code of 1907, as determined by the jury.

Plaintiffs in execution offered to show the value of the use or hire of the animals from the date of the levy to the time of the trial. The insistence is that from the fact that the mortgagor was left in possession of the property after the law day of the mortgage and possession was restored to him by the mortgagee upon the execution of the forthcoming bond, the jury might infer that the parties to the mortgage had agreed upon a postponement of the law day, in which event the levy of execution effected a lien upon the usufruct of the property from the date of the levy until the arrival of the deferred law day, as well as upon the equity of redemption. *Harbinson v. Harrell*, 19 Ala. 753, is relied upon. But that case does not sustain the contention. There an execution against the mortgagor was levied upon slaves subject to a mortgage not yet due. After the levy the mortgagee, in advance of the law day and with the consent of the mortgagor, converted the slaves into money. On an accounting between the parties in interest the court held that the mortgagee must account to the execution creditors for the value of the hire of the slaves from the date of the sale to the law day of the mortgage. But there was no reduction of the mortgage debt. On the contrary, the mortgagee was held to be entitled to satisfaction of his debt in full, and was held to account for the balance or surplus only. In the case at bar the mortgagee's indefinite indulgence of the mortgagor by leaving the property with him after the law day, which at best was all the evidence relied on by appellant tended to show, did not destroy the former's right to possession whenever he chose to assert it, nor did it create a leivable interest in the mortgagor. *Fields v.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Williams, 91 Ala. 502, 8 South. 808; Jordan v. Wells, 104 Ala. 383, 16 South. 23. The only possible purpose of the evidence offered in the case at hand was to reduce the mortgagor's indebtedness to the mortgagee by the value of the use or hire of the animals pending the suit, and thus relieve pro tanto the equity of redemption acquired by the levy of the execution and the proceedings had for the trial of the right of property under the statute. Plaintiff acquired no interest in the property except by the levy of execution. Thereupon the claimant had the right under the statute, whether his mortgage debt was then due or not, to interpose his claim and acquire possession of the property for the protection of his lien or title. This right he exercised. But his possession pending the trial of the right of property, thus acquired, must be considered as the possession of the law. *McLemore v. Benhow*, 19 Ala. 76; *Rapier v. Gulf City Paper Co.*, 64 Ala. 343. The claimant mortgagee was not responsible for the usufruct of the property pending such possession. His only responsibility was that the property should be forthcoming at the end of the suit according to the terms of his bond. This responsibility was neither extended nor limited by the committal of the property to the mortgagor as his bailee pending the suit. The execution creditor had under the judgment rendered all he was entitled to take by virtue of his levy. There was, consequently, no error in excluding the evidence, nor in refusing the general charge requested by the plaintiff in execution.

Affirmed.

DOWDELL, C. J., and SIMPSON, J., concur. McCLELLAN, J., concurs in the conclusion.

GAINES v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

RAPE (§ 48*)—PROSECUTION—ADMISSION OF EVIDENCE—COMPLAINTS BY PROSECUTRIX.

While testimony of complaints by females of having been ravished is admissible in evidence in a prosecution for the offense in corroboration of prosecutrix's testimony, especially when they are part of the *res gestæ*, such evidence is limited to the fact that the complaint was made, and details thereof are not admissible even to identify the person charged, so that testimony by prosecutrix's sister on direct examination that prosecutrix told her of accused's going to bed with her and ravishing her, and of her resistance, was not admissible; neither the witness nor prosecutrix having been impeached.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67-69; Dec. Dig. § 48.*]

Appeal from Circuit Court, Cleburne County; John Pelham, Judge.

Columbus Gaines, alias, etc., was convicted of rape, and he appeals. Reversed and remanded.

Knox, Acker, Dixon & Blackmon, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. Defendant was indicted for rape upon Fannie Turner, who testified that the crime was committed in the house of the defendant, about midnight, when defendant crept into the bed with prosecutrix and ravished her; that she was sleeping in a bed by herself, but in the same room with defendant and his wife, who was Fannie's sister. Fannie further testified that she fought defendant and cried, and called to her sister, but that her sister did not answer; that defendant remained in bed with her about 10 minutes, and then went back to bed with his wife; that she, Fannie, soon went to sleep, and slept till the next morning, when she got up and went home, which was about a quarter of a mile from defendant's home; that about 10 o'clock that day she told her sister, Ethel, about defendant's ravishing her. The state, over the objections and exceptions of defendant, was allowed to prove by Ethel, on her direct examination, the details of the crime as told to her by Fannie—of the defendant's going to bed with her and ravishing her, and of her fighting him and not consenting to the intercourse. This was clearly reversible error. There was no attempt to impeach the prosecutrix nor the witness Ethel; hence there was no occasion to corroborate the testimony of either, by such hearsay testimony. It is true that complaints by women and girls of having been ravished are admissible in evidence, especially so when they are a part of the *res gestæ*; but they are received in corroboration of the testimony of the prosecutrix only as proof of the fact that such complaints were made. The details or particulars of the complaint cannot be shown in the first instance by the state. Minute circumstances of the event are not admissible. Proof by third parties as to complaints by the prosecutrix is limited to the fact of the complaints only. Indeed, the prosecutrix will not be allowed to detail what she has told third parties as to what occurred at the time or place of the crime. Of course, she may testify to such occurrences as independent facts and as a part of the *res gestæ*, but she will not be permitted to testify as to what she related to third parties concerning the details of the occurrences. In such cases she is not allowed to testify that she told a third person the name of the person who had ravished her. It was held error to allow a witness to state that the prosecutrix told witness that the defendant had raped her. It was also held error, by this court, to allow a witness to testify that the prosecutrix told her what the defendant had done to her. Such corroboration can never be extended so as to go into the details of the occurrence—not even

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter, Indexes

so much as to identify the person accused. The following authorities are conclusive upon this proposition: Posey v. State, 143 Ala. 54, 38 South. 1019; Oakley v. State, 135 Ala. 15, 33 South. 23; Id., 135 Ala. 29, 33 South. 603; Bray v. State, 131 Ala. 46, 31 South. 107; Barnett v. State, 83 Ala. 43, 3 South. 612; Griffin v. State, 76 Ala. 31; Lacy v. State, 45 Ala. 80; Scott v. State, 48 Ala. 420.

For this error, the judgment of conviction must be reversed and the cause remanded. Reversed and remanded.

SIMPSON, McCLELLAN, and EVANS, JJ., concur.

PERRYMAN & CO. v. FARMERS' UNION GINNING & MFG. CO.

(Supreme Court of Alabama. May 17, 1910.)

1. CORPORATIONS (§ 518*) — CONTRACTS—VALIDITY—BURDEN OF PROOF.

Where a business contract, purporting on its face to be executed in the name of a business corporation, is signed by the proper officers of the corporation, the want of authority of the officers to bind the corporation is defensive matter which must be alleged and proved, unless the want of authority is affirmatively shown on the face of the complaint in an action on the contract, or unless it is a matter of judicial knowledge that such corporation has no power to make such a contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2028; Dec. Dig. § 518.*]

2. CORPORATIONS (§ 426*) — CONTRACTS — VALIDITY.

Where the purchasing officers of a corporation had in the first instance the right to make a contract for the purchase of property on behalf of the corporation, and they made a contract for the purchase of property and affirmed it, the fact that all the directors did not expressly authorize the purchase, and that they after the purchase disapproved it, did not affect the validity of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1704; Dec. Dig. § 426.*]

3. CORPORATIONS (§ 426*) — CONTRACTS — VALIDITY.

Where the purchase of property by the president of a corporation was made subject to the approval of the corporation, and the purchase was subsequently approved by the corporation by officers having authority so to do, the directors could not by subsequently withdrawing the authority from the officers relieve the corporation from liability, and disaffirm the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1704; Dec. Dig. § 426.*]

4. CORPORATIONS (§ 432*) — CONTRACTS — VALIDITY—BURDEN OF PROOF.

Where the complaint in an action against a corporation on a contract, executed in its name by its officers, set out the contract and letters between the parties showing a binding contract on the corporation, provided the officers thereof, acting for it, had authority to bind the corporation, the want of authority must be shown by special pleas, and the burden of proving the same was on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1730; Dec. Dig. § 432.*]

Appeal from Geneva County Court; P. N. Hickman, Judge.

Action by Perryman & Co. against the Farmers' Union Ginning & Manufacturing Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. R. Chapman, for appellant. W. O. Mulkey, for appellee.

MAYFIELD, J. This action is assumpsit. The complaint declared upon the common counts, and specially upon a breach of a contract to purchase "one No. 6 Cotton Seed Huller." The breach of the contract alleged was in the failure of the defendant to receive and to pay for the huller, as contracted. The court sustained demurrers to counts 2 and 3, upon the ground that these counts did not show affirmatively that the defendant corporation ever approved the order or contract for the purchase of the huller. After demurrers were sustained to counts 2 and 3 as above stated, count 4 was added; which count was like counts 2 and 3, but contained the additional allegation that the defendant corporation approved said order, and directed the shipping out of the machine so purchased. The demurrer was overruled as to this count, and the case was tried upon the general issue as to this special count and the common counts. The plaintiff proved the contract of sale, which was in writing and signed by one Holman, president of the corporation, and also proved that, subsequent to the making of the contract of purchase, the defendant by letter ordered the machine purchased shipped out, and that it was so shipped out in pursuance of this order, and that the defendant refused to receive it or to pay for it on its arrival at its destination; hence this suit.

It appears from the plaintiff's evidence that the directors of the defendant corporation, after the purchase and after the machine was ordered to be shipped to the purchaser, met and disapproved the purchase and order which had been theretofore made by its president, secretary, treasurer, and some other director. The defendant offered no evidence, and on its written request the court gave the affirmative charge in its favor. It is insisted that the court erred in sustaining demurrers to counts 2 and 3, and in giving the affirmative charge for the defendant.

The court was clearly in error in both instances. Neither of the counts was subject to the demurrer interposed. If the contract of purchase was unauthorized by the directors of the corporation—that is, if the president and secretary and treasurer of the corporation had no authority to bind the corporation in the premises—this was defensive matter which ought to have been set up and proved by the defendant. The con-

tracts and orders sued on purported on their faces to be executed in the name of the corporation, and were signed by the proper officers of the corporation. If the contract was ultra vires, or if the officers had no authority to bind the corporation in the premises, this was matter for special pleas, and not ground of demurrer. There was no proof to show that these particular purchasing officers of the corporation did not have authority to act for and bind the corporation in the premises. The most that is shown is that all the directors did not expressly authorize the particular purchase or order, and that they did, in meeting, after the purchase and order were made, disapprove and attempt to disaffirm. This they could not do, so as to bind the plaintiff, if the purchasing officers had in the first instance the right to make the contract and the right to approve and affirm it; and they did so affirm it, and order the goods shipped, before the directors met and disaffirmed the sale. While the purchase or order given by the president for the company was originally made subject to the approval of the defendant corporation, it was subsequently approved by it, if the officers of the corporation had the authority to approve it and thus to bind the company—and there is no proof they did not, at that time, have such authority. And if they had it, the directors could not, by subsequently withdrawing such authority from such officers, relieve the corporation and disaffirm and annul a contract which they had properly made, and which did bind the corporation at the time it was made.

The evidence as to the authority of these officers—the president, secretary, treasurer, and general manager—to bind the corporation was not so conclusive as to warrant the court in giving the affirmative charge for the defendant. The contract sued on was in writing, and properly signed by the corporation, and contained an express stipulation that the order was not subject to countermand, though it was subject to the approval of the corporation; and the counts alleged, and the proof tended to show, that it was so approved, and that the property was to be shipped in pursuance of the original contract of purchase. The counts did not contain conclusions as to these matters. They set out the contract and letters in full, which clearly showed a binding contract upon the corporation, provided the officers of the corporation, acting for it, had the authority to bind the corporation in the premises. If they had no such authority this was a matter to be shown by special pleas, and as to which the burden of proof was on the defendant.

This court, quoting from the text-books, has announced the following propositions of law which are applicable to this case: “* * * ‘In the ordinary dealings of trading corporations, and within the scope and purview of their chartered powers, the same intendments and implications arise, as would spring out

of similar acts or conduct of natural persons.’ Tenn. R. T. Co. v. Kavanaugh, 93 Ala. 329, 9 South. 396; Ga. Pac. R. Co. v. Propst, 83 Ala. 518, 3 South. 764. Morawetz lays down the principle that a corporation has implied authority to conduct its business on liberal principles, and may generally do what an intelligent man would do, under similar circumstances. 1 Morawetz on Corporations, § 365; 1 Am. & Eng. Encyc. of Law, 360. While, therefore, the officers of a corporation are not free from all obedience to form, so as to be independent of the governing body, and cannot perform acts which are ultra vires, and while there are many things which, if they do, will not be recognized as binding on their principals, yet, while they act in the line of the business of their companies, without express authority, but manifestly for their interests, it will require but little to show the approval or ratification of the companies.” 2 Mor. on Corp. § 675; Bibb v. Hall & Farley, 101 Ala. 93, 94, 14 South. 98.

Again, in the case of Arrington v. S. & M. Ry. Co., 95 Ala. 434, 11 South. 7, the authority of a corporation to make a certain contract sued upon, was the question for consideration, and upon this theory a demurrer was interposed and sustained to the complaint; and the court, speaking through Stone, C. J., said: “If the demurrer was sustained on the idea that the complaint failed to aver that the construction of the branch road had been ordered first by a resolution of the board of directors and then by a majority in value of the stockholders, this was an error. That prerequisite, it omitted, was defensive matter. Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.”

The Supreme Court of the United States in the case of Bank of U. S. v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552, speaking to the same subject, announced the same propositions as follows: “Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. * * * If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. * * * In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty.”

The case probably nearest in point is that of Allen v. West Point M. & M. Co., 132 Ala. 294, 295, 31 South. 462. That was an action

on a note purporting on its face to be executed by the corporation, as did the contract sued on in this case. The court, in that case, speaking of the authority of officers of the corporation—the president, and the secretary and treasurer—to make the note, used the following language: "The note does not disclose on its face that it is ultra vires and a nudum pactum, but appears to be properly executed as a binding obligation of the company. It is well settled that capacity to make contracts necessary and proper to enable a corporation to accomplish the purposes of its creation, is an incidental corporate power. 'There is no presumption of illegality, or abuse or excess of power attaching to its contracts. Prima facie they are valid, and the burden of showing the invalidity rests on those impeaching them.' Ala. G. L. Ins. Co. v. The C. A. & M. Ass'n, 54 Ala. 75; Boulware v. Davis, 90 Ala. 207 [8 South. 84, 9 L. R. A. 601]; 4 Am. & Eng. Ency. Law (1st Ed.) 222." In other words, the law is that the power of a given business corporation to make an ordinary business contract sued on is defensive matter, unless the want of such power is affirmatively shown on the face of the complaint, declaration, or bill of complaint, or it is a matter of judicial knowledge that such corporation has no such power.

Likewise, the capacity or authority of the officers to execute contracts in behalf of an ordinary business corporation, in an action upon contract purporting to be executed in the name of such corporation, by such officers, is defensive matter, and must be raised by special plea, unless the lack of such authority or power is affirmatively shown on the face of the complaint, declaration, or bill or unless it be matter of judicial knowledge that such officers have no such capacity or authority to bind the corporation.

The effect of all the rulings of the trial court was to reverse the order of pleadings, and to place the burden of proof as to the disputed question upon the wrong party.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

STAPLES v. STEED.

(Supreme Court of Alabama. May 12, 1910.)

1. PLEADING (§ 106*)—PLEA IN ABATEMENT—RESIDENCE OF DEFENDANT.

Code 1907, § 6110, provides that actions on contracts shall be brought in the county of the residence of defendant, and that all personal actions, if defendant has a residence within the state, may be brought in the county of his residence, or the county in which the act complained of occurred. Held that, in an action for negligence against a resident, a plea in abatement that at the time of the commencement of

the suit, defendant was not a resident of C. county in which the action was brought, but a resident of another county where he then resided, was bad on demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 106.*]

2. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—GENERAL DEMURRER TO PLEA.

Where a plea was incapable of amendment so as to make it good, the technical error involved in sustaining a general demurrer thereto was unavailable for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

3. PHYSICIANS AND SURGEONS (§ 15*)—VETERINARIAN—NEGLIGENCE.

Where a veterinary, preparatory to cauterizing a spavin, so negligently threw the animal as to rupture its diaphragm, from which it shortly thereafter died, the throwing of the animal constituted a part of the treatment, so as to entitle plaintiff to recover for negligence and unskillfulness in performing it.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 15.*]

4. EVIDENCE (§ 472*)—NONEXPERTS—OPINION.

A nonexpert, who had often seen horses hobbled and thrown in a way to prevent injury, and whose observation had covered 12 or 13 years, was entitled to testify as to the proper way to throw a horse so as not to injure it, but could not testify that a method used was negligent; that being for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Action by C. L. Steed against W. D. Staples for damages resulting from the killing of a horse. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The case made by the pleading and proof is sufficiently stated in the opinion. The plea referred to is as follows: "That at the time of the commencement of this suit he was not a resident citizen of Clay county, Alabama, but that defendant was at such time a resident citizen in the city of Anniston, county of Calhoun, state of Alabama, at which place defendant had a permanent residence and resides there at this time." This plea was sworn to, and sought to abate the action. The demurrers filed to this plea are as follows: "(1) For that same is no defense to this cause of action, in that the same is in tort, and said plea is no answer. (2) For that this is not an action ex contractu but is an action in tort and said plea is no defense." The other facts are sufficiently stated in the opinion.

Riddle, Ellis & Kelley for appellant. Whatley & Cornelius for appellee.

SAYRE, J. The plea of defendant's non-residence was without merit. Code 1907, § 6110; Hoge v. Herzberg, 141 Ala. 439, 37 South. 591. The demurrer was probably general; but if so the plea was incapable of amendment so as to make it good and the

technical error involved in sustaining a general demurrer cannot avail for a reversal. *Ryall v. Allen*, 143 Ala. 222, 38 South. 851.

Appellee's complaint was that the defendant, a veterinary surgeon, had so negligently or unskillfully treated his horse for a spavin that the horse died as a result. The complaint was in tort. There seems little doubt on the evidence that the mere application of the cautery to the spavin did not account for the death of the animal a few hours thereafter, but that its death resulted from a rupture of the diaphragm caused either by violently throwing the horse to the ground, preparatory to the application of the treatment, or by its struggle to free itself from the bonds which held its feet together during the operation. Appellant thinks that, such being the case, plaintiff could not recover as for negligent or unskillful treatment. But to bind and throw the animal was a part of the treatment undertaken on the advice and under the direction of defendant, and is necessarily resorted to in cases where the animal is unruly or violent, as the jury might have inferred was the case here. We do not doubt that the complaint authorized a recovery on proof of negligence or unskillfulness in causing the animal to be thrown so as to produce its death in a way which ought to have been anticipated as a probable result. Such result does sometimes follow, it seems, where there has been no lack of care and skill. But in this case there was evidence which may well have afforded inference that the place selected for throwing the horse—being on the side of a hill, whereas a level spot was available—was so unsuited to the purpose as to cause the horse to be thrown with unusual and unnecessary violence, thereby causing its injury and death. Whether, therefore, the death of the animal resulted from negligence, or was an accident, inevitable because not to be foreseen in the exercise of due care and skill, was a question which the court properly submitted to the decision of the jury.

J. M. Worthy, testifying as a witness for the plaintiff, deposed that he had often seen horses hobbled and thrown in a way to prevent injury, that his observation covered 12 or 13 years in Texas and Alabama, and that he knew how to hobble and throw a horse so as not to injure it. He had seen veterinarians hobble and throw horses, and himself had done so many times. On this qualification this witness was allowed to give his opinion as to the proper way in which to hobble and throw a horse. We have held that throwing the horse was a part of the operation of firing the spavin. But it was not necessary that this witness should qualify as a veterinary surgeon before being permitted to state his opinion as to the proper method of hobbling and throwing horses in general. A witness may have expert knowl-

edge of some of the more ordinary affairs of life. The opinions of mechanics and artisans are received as evidence when they have gained by experience an acquaintance with the subject not common to others. The opinions of those skilled in agriculture are received as to proper modes of cultivation and cognate problems. It is a common practice to allow stock dealers and graziers to testify as experts concerning the management of stock and matters peculiarly within their knowledge. *Jones on Ev.* §§ 380, 381. The opinion of this witness as to the proper way in which to perform the mechanical part of the operation was properly received; its weight being left to the jury. But the witness was allowed to go further. He was allowed, in effect, to testify that the operation involved in the case on trial was negligently performed. This was error. It was not for the witness to usurp the province of the jury by drawing that conclusion of fact upon which the issue of the case depended. *L. & N. v. Landers*, 135 Ala. 504, 33 South. 482.

For this error the judgment must be reversed.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

BROWN v. POWERS et al.

(Supreme Court of Alabama. June 2, 1910.)

1. QUIETING TITLE (§ 23*)—POSSESSION—NECESSITY.

To maintain a bill under the statute to quiet title, complainant must have the peaceable possession of the land, actual or constructive.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 55; Dec. Dig. § 23.*]

2. DEEDS (§ 111*)—CONSTRUCTION—EXTENT OF POSSESSION.

A deed cannot extend possession to lands not described therein.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 316; Dec. Dig. § 111.*]

3. EVIDENCE (§ 390*)—PAROL EVIDENCE—DESCRIPTION OF LAND.

Where a contract to purchase land was reduced to writing and executed by a deed which described the land, complainant in a suit to quiet title could not show by parol, over 20 years thereafter, that he contracted for and bought other land than that described.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1723; Dec. Dig. § 390.*]

4. QUIETING TITLE (§ 52*)—SURVEY OF LAND AFTER DECREE—NOTICE.

Where a survey was not for the purpose of providing evidence, under Code 1907, § 6023, providing that a survey made by the county surveyor is presumptive evidence of the facts stated, if the opposite party has notice, but was merely to correctly locate the subject of the decree upon report to the court, complainant in a suit to quiet title could have objected to and contested it; hence the action of the chancellor in ordering a survey, after decree, without notice to complainant, was not error.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 52.*]

5. COSTS (§ 61*) — APPORTIONMENT — DISCRETION OF COURT—QUIETING TITLE.

Where the chancery court awarded the complainant in a suit to quiet title relief only as to a small portion of the land, it properly, in its discretion, divided the costs between the parties.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 272; Dec. Dig. § 61.*]

6. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

Any error in overruling a demurrer to a cross-bill was harmless, where complainant got the relief to which he was entitled, regardless of the cross-bill, and could have had no further relief, had there been no cross-bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4100; Dec. Dig. § 1040.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit to quiet title by Samuel Brown against Lula G. Powers and others. From a decree granting part of the relief demanded, complainant appeals. Affirmed.

D. B. Cobbs, for appellant. Webb, McAlpine & Brown, for appellees.

ANDERSON, J. As has been repeatedly held by this court, in order for the complainant to maintain a bill under the statute to quiet title, he must have the peaceable possession of the land, actual or constructive. *Burroughs v. Pate*, 51 South. 978, and cases cited. The complainant proved actual possession as to a small portion of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 14, the 40 described in the bill of complaint, and as to which he was granted relief. As to the other portion of said 40, he showed neither actual nor constructive possession, and was not entitled to relief as to same. The deed offered by the complainant could not operate to extend his possession to lands not embraced therein. The deed did not purport to convey the land in question, but related to a different 40, and could not extend the complainant's possession to lands not described in said deed. *Black v. Tenn. Co.*, 93 Ala. 111, 9 South. 537; *Smith v. Keyser*, 115 Ala. 455, 22 South. 149.

Notwithstanding this controversy may be between an heir of the vendor and the vendee as to the land embraced in the complainant's deed, it does not present a case for the application of the holding in the case of *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454, 39 Am. St. Rep. 45. The contract of purchase here was reduced to writing and consummated by the execution of a deed which described the land conveyed, and we do not think the complainant could be permitted to show, by parol, over 20 years after the deed was executed, that he contracted for and bought a different 40 acres of land. If the deed misdescribed the land, it should have been corrected in an appropriate proceeding, and not by parol at this late day in the present proceeding. The objections to evidence insisted

upon were either free from error or without injury to the appellant.

The only objection urged against the action of the chancellor in ordering a survey after decree was that the complainant did not have notice. The survey in question was not for the purpose of providing evidence under section 6023 of the Code of 1907, but was to correctly locate the subject of the decree, was reported to the court, and the complainant could have objected to and contested same.

The chancery court properly awarded the complainant relief only as to a small portion of the land, and had the discretion to divide the cost between the parties, and which we think was properly exercised. *McDaniel v. Tenn. Co.*, 153 Ala. 493, 45 South. 159.

Whether the demurrer to the cross-bill was or was not properly overruled, it was of no injury to the complainant. He got the relief to which he was entitled, regardless of the cross-bill, and could not have gotten relief to the other land, had there been no cross-bill.

The decree of the chancery court is affirmed.

Affirmed.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

SOUTHERN RY. CO. v. LEE.

(Supreme Court of Alabama. May 19, 1910.)

1. CARRIERS (§ 284*)—CARRIAGE OF PASSENGERS—PROTECTION OF PASSENGERS.

It is the duty of a carrier's employes to prevent, as far as possible, use by passengers of profane and insulting language in the presence of a female passenger.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 284.*]

2. CARRIERS (§ 284*)—CARRIAGE OF PASSENGERS.

Though a rule of a railroad or a state law prohibited colored passengers from riding in the same coach with white passengers, this did not justify the carrier's employes in permitting other passengers to use profane and indecent language in their effort to compel a colored servant accompanying a white passenger to leave the coach.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 284.*]

3. PLEADING (§ 399*) — ISSUES, PROOF, AND VARIANCE.

If there is an entire lack of proof as to any material averment of the complaint, necessary to a recovery, the general charge should be given, on proper request, in favor of defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1339-1342; Dec. Dig. § 399.*]

4. PLEADING (§ 374*) — ISSUES, PROOF, AND VARIANCE.

Where a single count contains several distinct independent averments, each presenting a substantial cause of action, proof of either cause will authorize a recovery; but, where all of the averments combined make up the averment of one cause of action, it is necessary to prove each averment.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 374.*]

5. PLEADING (§ 389*)—ISSUES, PROOF, AND VARIANCE.

Exact correspondence of allegation and proof is not required; it sufficing that one substantially corresponds with the other.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1309; Dec. Dig. § 389.*]

6. CARRIERS (§ 315*)—INJURY TO PASSENGER—PLEADING—ISSUES, PROOF, AND VARIANCE.

In a female passenger's action against a railroad for damages through defendant's employes permitting other passengers to use offensive language, in an effort to compel plaintiff's colored servant to leave the car, an allegation that plaintiff's condition was so feeble as to be open to ordinary observation only affected the gravity of defendant's negligence, and failure to prove the same was not fatal to the action.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 315.*]

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Action by Lillian C. Lee against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The substance of the complaint is sufficiently set out in the opinion. The third plea interposed by defendant is as follows: "For further answer to plaintiff's complaint, and each count thereof, severally and separately, this defendant says: *Actio non*; for it says that, at the time of the alleged grievances and happenings on said train, the plaintiff was riding, and had with her on the first-class coach reserved for white passengers a negro boy or young man; that the other passengers on said train objected to the said negro riding in the coach so reserved for white passengers, as they had a right to do, and on account of plaintiff's wrongful failure or refusal to have the said negro moved out of said coach and into the coach or compartment reserved for colored passengers, the said white passengers indulged in conduct and language to induce the said negro to get out of said car and go into the car for colored people. And defendant avers that by reason of the breach of her duty as a passenger by plaintiff, in bringing or keeping the said negro in said car, the said language and conduct was indulged in by said alleged male passengers." Plea 5 alleges the same state of facts, with the additional allegation that under and by virtue of the laws of Tennessee it is provided in substance and legal effect that negroes and white passengers shall ride in separate coaches and compartments, and not in the same compartments or coaches.

Pettus, Jeffries, Pettus & Fuller, for appellant. Daniel Partridge, Jr., and N. D. Godbold, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant, on the contract between the appellee, as a passenger, and the appellant. The case was sub-

mitted to the jury on the first and second counts of the amended complaint. The first count sets out the contract, by which the defendant undertook to carry the plaintiff from Pine Hill, in Wilcox county, Ala., to Lenoir, in North Carolina, and return, and alleges that, on the return trip, at a point between Knoxville and Chattanooga, in the state of Tennessee, the servants or agents of the defendant failed "to use ordinary diligence to preserve order among certain male passengers who were then and there engaged in disorderly conduct on said train, but, to the contrary, did negligently allow or permit said male passengers * * * to engage in disorderly conduct, to use obscene, indecent, threatening, profane, and insulting language in the presence and hearing of plaintiff and in close proximity to her"; that said conduct was known to said servants, or by the use of proper care could have been ascertained and prevented; that plaintiff is a woman and was in a weak and debilitated condition, which was known to said servants, or could have been seen by them by the use of ordinary powers of observation; that said language and conduct was reasonably calculated to, and did, greatly terrify, alarm, frighten, and injure plaintiff, and as a proximate consequence thereof she suffered a complete physical collapse, fainted, etc., and suffered serious consequences, which are set out. The gravamen of the second count is that the car was greatly crowded, that it was impossible for the servants and agents, by reason of the inadequate number of the same, to perform the duties of caring for and protecting the passengers, and to meet the needs of ordinary conditions of travel; but it goes on to allege that said servants, by the use of due diligence, could have learned of the disorderly conduct, etc., and prevented the injury, but that defendant failed or neglected to provide an adequate number of servants to meet the needs of ordinary conditions of travel.

There was no error in sustaining the demurrer to plea 3 interposed by the defendant. Said plea does not allege or show that there was any law or rule prohibiting colored passengers from riding on the same coach with white passengers, and, if there was such a law or rule, that would not justify the employes of defendant, in charge of said coach, to permit passengers to use profane, obscene, and indecent language in the presence of female passengers. That is not the way to enforce such a rule,

There was no error in sustaining the demurrer to plea 5. While it is sometimes stated that a carrier is not liable for mere rudeness of one passenger, to another, which does not amount to a breach of the peace, and the illustrations generally given are such as rudeness, by passengers, in passing out of a car

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by pushing others, etc. (2 Hutchinson on Carriers [3d Ed.] § 983, and notes), yet liability for the mere rudeness of a passenger, and liability for the negligence of the servants of the carrier, in permitting the continuance of said rudeness, are two entirely different propositions. The laws of the different states, and the respect which public opinion demands for females in this country, show that it is an offense, sometimes punishable criminally, for a man to use profane, indecent, obscene, and insulting language in the presence of females, and it is the duty of the carrier, as far as possible, to prevent such offenses. Even if it was mere rudeness on the part of those who used the language, yet, if the servants of the defendant allowed or permitted the continuance of such language in the presence of the female, it was a breach of the obligations of its contract. 2 Hutchinson on Carriers (3d Ed.) §§ 982, 984; 6 Cyc. pp. 602, 603, and notes; Houston, etc., R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124. If said law was operative as to plaintiff, or to said negro boy, the proper remedy would be for the parties objecting to appeal to the conductor, or other servant of the defendant, to have the negro removed, and when they undertook to enforce it, by the use of offensive, profane, and indecent epithets, it was the duty of the servants of the defendant to use their authority to prevent them from using such language in the presence of the female passenger, and, if it could not be prevented in any other way, to eject them from the coach. If the flagman could not prevent it, it was his duty to call the conductor at once.

The case of N. O. & N. E. R. Co. v. Jopes, 142 U. S. 18, 25, 12 Sup. Ct. 109, 35 L. Ed. 919, has no application to this case. In that case it was affirmed only that a conductor has a right to act in self-defense against a passenger, and it affirms the right and duty of the employés in charge of the train to eject a passenger who uses grossly indecent language. Even if the plaintiff had, as claimed, violated her contract by bringing the negro into the coach (which has not been shown), that would not deprive her of the right of protection. It is not shown that she even refused to comply with any lawful request or demand for the removal of the negro.

It is next insisted by the appellant that, inasmuch as both counts of the complaint aver that the plaintiff was in a weak and debilitated condition, which fact was known, or could have been discovered by the use of ordinary diligence on the part of appellant's employés, and there is a failure of proof as to this material averment, the defendant was entitled to the general affirmative charge.

There is no dispute about the proposition that, if there is an entire lack of proof as to any material averment of the complaint necessary to a recovery, the general charge

should be given, on proper request, in favor of the defendant. This is true in some instances, where the matter alleged, though unnecessary, becomes a part of the description of the contract, or other material matter. Pharr & Beck v. Bachelor, 3 Ala. 244, 245; Gilmer v. Wallace, 75 Ala. 220.

It has also been stated that where a single count contains several distinct, independent averments, each presenting a substantive cause of action, proof of either cause will authorize a recovery; but, where all of the averments combined make up the averment of one cause of action, it is necessary to prove each averment. Birmingham Railway & Electric Co. v. Baylor, 101 Ala. 488, 493, 496, 13 South. 706. That was a negligence case, and the court held that the description of the negligence complained of involved that of the person in charge of the switch, in failing to properly fasten it, and also that of the person in charge of the train, in failing to properly supply it with necessary equipment, etc., and that both should be proved. The court also held that mere redundancy would be rejected as surplusage.

In a case of suit for damages on a special contract, it was held that, although it was alleged in the complaint that the plaintiff had at all times been ready and willing to perform the services required of him, while the evidence showed that he had engaged in other business, the fact of such employment went only to the amount of damages, and the failure to prove the averment was not fatal to a recovery. Morris Mining Co. v. Knox, 96 Ala. 320, 322, 11 South. 207.

This court has also said that: "An exact correspondence of allegation and proof is not required. It is enough that the one substantially corresponds with the other." Wilson v. Smith, 111 Ala. 171, 176, 20 South. 134, 136.

In the case of L. & N. R. Co. v. Johnston, 79 Ala. 436, the complaint is not set out in *hæc verba*, but it is stated that the gravamen of the action was that the defendant "willfully refused to stop" the train, and carried the plaintiff several hundred yards beyond, where she was compelled to alight, without her consent, etc., and this court, in addition to saying that, if the failure to stop was merely negligent and not wilful, the plaintiff could not recover, said, also, that "it would constitute a variance, if the evidence showed that the plaintiff not merely submitted, but consented to get off the train." The report of this case is not full, but it is evident that the court was not directing its attention to a case in which the first allegation, to wit, that he "willfully refused to stop," was proved, while the last one, to wit, that she was compelled to alight, was not. The court was merely discussing the difference between the allegation and the proof in each branch of the case.

In the later case of Alabama Great Southern Railroad Co. v. Heddleston, 82 Ala. 219,

222, 3 South. 53, 55, where the complaint alleged first the misdirection of the ticket agent in putting him on a train which did not stop at his desired destination, and then stated also facts tending to show a wrongful ejection from the train, which last allegation was not proved, this court said: "A full answer to this is that the complaint sets forth and counts on both causes of action. When such is the case, it does not prevent a recovery. The plaintiff succeeds to the extent the proof sustains his allegations, and only fails to the extent his proof fails."

In *Encyclopædia of Pleading & Practice*, vol. 22, these rules are laid down: (1) As a general rule, if part only of the allegations be proved, it is sufficient if what is proved affords ground for maintaining the action (page 567); and (2) that the rule applies only to allegations that are material to the action, or to those immaterial allegations which are so interwoven with those that are material as to make the latter depend upon them." (Pages 533-535.)

In the present case the cause of action is complete without the last allegation referred to. The only office of that allegation would be to add to the gravity of the negligence, and perhaps increase the amount of the damages.

We hold, then, that even though the last allegation was not proved, to wit, that the condition of the plaintiff was so feeble as to be open to ordinary observations, yet the cause of action was made out, and the jury were the judges of the amount of damages for the negligence proved.

The judgment of the court is affirmed.
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

TOWNSEND et al. v. MILES et al.

(Supreme Court of Alabama. June 1, 1910.)

1. COURTS (§ 485*)—TRANSFER OF CAUSES—REMOVAL FROM PROBATE TO CHANCERY COURT—GROUNDS.

Where an administratrix had filed her accounts for a settlement, and the time had been set for the hearing, and a bill had been filed against her, setting up the necessity of a discovery as an independent equity, it was sufficient ground for removing the estate into the chancery court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1293; Dec. Dig. § 485.*]

2. DISCOVERY (§ 19*)—BILL—SUFFICIENCY.

A bill alleging that the plaintiffs were the heirs of a deceased person, and that defendant intentionally left their names out of her petition for letters testamentary, and that she filed her account for final settlement, but had not charged herself with certain property, and that in order to obtain a full and fair accounting it was indispensably necessary for plaintiffs to have a full discovery from defendant of all the property or assets of every kind which were of

the estate of deceased, etc., sufficiently alleged the necessity of a discovery to warrant transfer of the cause from the probate court to the chancery court.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 20, 21; Dec. Dig. § 19.*]

3. DISCOVERY (§ 13*)—WHEN GRANTED.

While a discovery may be denied where it is sought for the purpose of having access to books in the possession and control of complainant himself, with the duty resting upon him of producing the account, it will be granted where the complainants make charges of certain irregularities on information and belief, and there is nothing to show that without discovery they could make legal and accurate proof of the facts alleged.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 14; Dec. Dig. § 13.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by J. Hudson Miles and others against Margaret R. Townsend, as administratrix of the estate of Susan C. Owen, deceased, and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Ward & Rudolph, for appellants. Sam Will John, for appellees.

SIMPSON, J. This bill was filed by appellees, stating that they are nephews and nieces of the decedent, Susan C. Owen, being the children of a deceased sister; that Margaret Townsend, who has taken out letters of administration on the estate of said Susan C. Owen, is a sister of intestate; that said Margaret Townsend, in making her petition for letters, intentionally left out the names of complainants among the heirs of said estate; that in her inventory she had omitted several sums for which she is accountable, among which are a large amount of household and kitchen furniture and an amount of \$500 due by said Margaret to said intestate; that said Margaret Townsend claims to have set aside, or to hold, for a religious association called "Russell's Millenium Dawn," a large sum of money, to wit, \$1,000; that said Margaret Townsend, as administratrix, has filed her account for a final settlement, but had not charged herself with any of the personal property before described; that in order to obtain a full and fair accounting, and their just share, one-third, of the estate of their said aunt, deceased, "it is indispensably necessary for them to have a full discovery from the defendant Margaret R. Townsend of all the property or assets of every kind which were of the estate of Susan C. Owen, deceased; and that the facts as above set forth cannot be otherwise proved than by answer of the defendant, which discovery she is capable of making." The appeal is from the decree overruling demurrers to the bill.

The contention of the appellants is that, as the bill shows that the administratrix had filed her account for a settlement and the time had been set for hearing the same, no independent equity is shown for the removal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the probate to the chancery court. There is no controversy in regard to this principle; but the bill sets up an independent equity, to wit, the necessity for a discovery, which is sufficient ground for removing the estate into the chancery court. *Horton v. Moseley*, 17 Ala. 794, 796; *Willson et al. v. Crook et al.*, Adm'rs, 17 Ala. 59; *Hunley et al. v. Hunley*, 15 Ala. 91, 98, 99, and cases cited. The allegations in regard to the necessity of discovery are sufficient. *Continental Life Ins. Co. v. Webb*, Adm'r, 54 Ala. 689, 697; *Shackelford v. Bankhead*, 72 Ala. 477, 479; *Handley v. Heflin*, 84 Ala. 600, 602, 4 South. 725; *Pollak v. H. B. Clafin Co.*, 138 Ala. 645, 650, 35 South. 645; 1 *Pomeroy*, Eq. Jur. (3d Ed.) p. 245, § 191.

The only answer made by the appellants to this point is that the bill shows that complainants had knowledge of all the matters as to which discovery is sought. This is not a sufficient reason for denying the discovery. While it may be that a discovery will be denied where it is sought for the purpose of having access to books which are in the possession and control of the complainant himself, with the duty resting upon him of producing the account (*Kane v. Schuykill Fire Ins. Co.*, 199 Pa. 205, 48 Atl. 989, 990), yet that is not this case, where the complainants make charges of certain irregularities on information and belief, and there is nothing to show that complainants could make legal and accurate proof of the facts alleged. The bill states that it is indispensably necessary to have a full discovery, and that the facts cannot be otherwise proved.

The decree of the court is affirmed.
Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

JOHNSON v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

1. LARCENY (§ 55*)—LARCENY OF MONEY—EVIDENCE—SUFFICIENCY.

Where, on a trial for the larceny of money, the evidence showed the larceny of a \$20 gold piece, a \$10 gold piece, a \$10 bill, several silver dollars, and silver specie, but did not show that the money was money of the United States or of any other sovereign, the jury were justified, if not required, to find that the money was money of the United States, as alleged in the indictment.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 55.*]

2. WORDS AND PHRASES—"MONEY."

"Money," in its strict technical sense, is coined metal, gold or silver, on which the government stamp has been impressed to indicate its value; but in its more popular sense any currency token, bank notes, or other circulating medium in general use as the representative of value is money, and the word designates the

whole volume of the medium of exchange, regardless of its character or denomination.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, pp. 4554-4565.]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Cleve Johnson was convicted of larceny, and he appeals. Affirmed.

S. W. Frierson, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted for the larceny of one \$20 gold piece, one \$10 gold piece, one \$10 bill, 4 silver dollars, and 90 cents in silver specie, which denominations are otherwise unknown to the grand jury, all money of the United States, and the property of Charlie Cowan, of the value of \$44.90. The evidence conclusively showed that money of the denominations and value alleged was stolen from Charlie Cowan, and it tended to show that the defendant was the thief; in fact, he admitted getting a part of the money of Cowan alleged to have been stolen. No witness, however, testified that the money stolen, or that found in the possession of the defendant claimed to have been stolen, was money of the United States of America; but it was certainly open to the jury to infer, from all the evidence, that it was such. We do not think that there was such an entire failure of proof as to this description of this money as would warrant the giving of the affirmative charge for the defendant.

There is no question of variance in the case. There was no proof to show that it was the money of any other sovereign or government than that of the United States. It is simply a question of sufficiency of proof as to the averment. Money is defined as follows: "Money, in its strict, technical sense, is coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value; in its more popular sense, any currency token, bank notes, or other circulating medium in general use as the representative of value; a generic term, covering everything which by consent is made to represent property, and passes as such currently from hand to hand. The word designates the whole volume of the medium of exchange, regardless of its character or denomination." *State v. Downs*, 148 Ind. 324, 47 N. E. 870, 671; *Hopson v. Fountain*, 5 Humph. (Tenn.) 140; *Graham v. State*, 5 Humph. (Tenn.) 40, 41; *State v. Hill*, 47 Neb. 456, 66 N. W. 541, 559; *United States v. Lucius Beebe & Sons*, 122 Fed. 762, 767, 58 C. C. A. 562. This court has held that the generic term "money" is understood to include notes as well as the authorized coin of the country, since the introduction and free use of bank and treasury notes as a circulating medium and standard of value. *Noble v. State*, 59 Ala. 73. This court has also

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

decided that, when a decree provides for the payment of money, that term imports a constitutional currency. *Shackleford v. Cunningham*, 41 Ala. 203.

It was therefore open for the jury to infer that the money stolen was lawful money of the United States of America, if it was not their duty so to do; it not appearing that it was the money of any other sovereign or government than that of the United States of America, and the proof being abundantly sufficient in all other respects to support a conviction.

The court properly refused to give the affirmative charge for the defendant, or to direct a verdict in his favor. This being the only exception or question reserved or presented for review on appeal, the judgment must be affirmed.

Affirmed.

ANDERSON, SAYRE, and EVANS, JJ., concur.

ALBRITTON et al. v. LOTT-BLACKSHER COMMISSION CO.

(Supreme Court of Alabama. May 17, 1910.)

1. MORTGAGES (§ 468*)—FORECLOSURE—RECEIVERS.

Where a mortgagor is insolvent and the property insufficient to pay the mortgage, or the rents are in danger of being wholly lost, a receiver may be appointed to intercept them.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

2. MORTGAGES (§ 410*)—FORECLOSURE—RECEIVERS.

Where real property was of insufficient value to pay the mortgages against it, and the mortgagor was insolvent, the complainant, the holder of junior mortgages on the property, though in possession, was entitled to institute foreclosure proceedings and obtain a receiver, notwithstanding it could retain possession by accepting an option renewing its possessory agreement for another year, and binding itself to extend its mortgages for that time, and to pay interest, taxes, etc., which it was under no obligation to do.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1178-1180; Dec. Dig. § 410.*]

3. RECEIVERS (§ 8*)—APPEAL AND ERROR (§ 955*)—APPOINTMENT—DISCRETION.

The appointment of a receiver is a matter of sound judicial discretion, revisable by the Supreme Court.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 14; Dec. Dig. § 8; * *Appeal and Error*, Cent. Dig. § 3822; Dec. Dig. § 955.*]

4. RECEIVERS (§ 35*)—APPOINTMENT WITHOUT NOTICE.

A receiver may be appointed without notice in cases of great emergency.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 54-60; Dec. Dig. § 35.*]

5. RECEIVERS (§ 57*)—FAILURE TO CONTEST—WAIVER.

Mere failure to appear and contest the appointment of a receiver does not preclude the party from asserting the invalidity of the appointment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 96; Dec. Dig. § 57.*]

Appeal from Chancery Court, Wilcox County; Thomas H. Smith, Chancellor.

Bill by the Lott-Blacksher Commission Company against George Lee Albritton and others. Decree for complainant, and defendants appeal. Affirmed.

Daniel Partridge and N. D. Godbold, for appellants. Stevens & Lyons, for appellee.

SIMPSON, J. The original bill in this case was filed by the appellee on December 29, 1909, seeking to have second and third mortgages belonging to complainant foreclosed, and to have a receiver appointed to rent out and work the farm lands covered by the mortgages. It is alleged that the mortgagor is insolvent, and the property worth greatly less than the amount of the mortgages; that the first mortgage, held by the Union Central Life Insurance Company, secures a principal of \$15,000, due January 1, 1911, and a note for interest, due March 1, 1910, for \$1,200; that said note for interest will probably not be paid, thereby rendering the entire mortgage due; that, while the negro tenants on the place would like to remain, yet they are entirely dependent on advances, and no one would be willing to advance to them in the face of the uncertainty, on account of the probability of foreclosure of the first mortgage, or the foreclosure under this bill; that the land cannot be otherwise rented, and, unless a receiver is appointed, the result will be that the rents for 1910 will be wholly lost; also, that there is a large amount of live stock and farming utensils on the place held by the tenants, but covered by mortgages for more than its value, which have been assigned to complainant; that, if the complainant should advertise to foreclose his mortgages, the tenants would probably be scattered and the place disorganized before any one would be in position to make contracts for the ensuing year; that complainant is willing to redeem from the first mortgage whenever the holder is disposed to allow it. The bill also suggests the name of one of its employees who is a capable and fit person to be appointed as receiver, and who agrees to serve without compensation, and complainant offers to make all necessary advances to the tenants and to be responsible for any losses which may result from the operation of the farm.

"Exhibit C" to the bill is an agreement, signed by appellant, dated December 3, 1908, in which the debts due by the several mortgages are acknowledged, and it is acknowledged that appellant is not able to pay the same, or to prevent foreclosure; that complainant has at the instance and request of appellant expended \$2,620 in purchasing one of the mortgages held by him. In said agreement it is stated that complainant agrees to extend the mortgage to the city National Bank maturing November 15, 1908 (the one purchased by complainant), for one year, and

to pay the next installment of interest on the first mortgage, and the taxes for the year 1908, and to operate and handle the farm for the year 1909, giving appellant credit, on said mortgages, for the net profits, in consideration of which the property is turned over to complainant, and the chattel mortgages, etc., transferred and assigned to it. Said agreement also gives complainant the option to continue said agreement for the year 1910, but states distinctly that it is only an option, to be accepted or not, as complainant may choose.

The appellant quotes authorities to the effect that, as a general rule, the object in appointing a receiver in foreclosure proceedings is "to preserve the corpus of the estate from deterioration, or to sequester the rents and profits to make good an anticipated deficiency" (27 Cyc. 1622), and claims that there must be some "threatened act, productive of destruction," etc., and that, as the tenants are not making any threat, no ground is shown for the appointment of a receiver. It is a proposition clearly recognized that in foreclosure proceedings, if the mortgagor is insolvent and the property insufficient to satisfy the mortgage, a receiver may be appointed to intercept the rents, and it necessarily follows that, if there is such a state of affairs as that the rents will be wholly lost unless the court takes charge of the property, a proper case for a receiver is made out. *Smith on Receiverships*, § 174, p. 287 et seq., and notes, also section 179, p. 300, and notes; *Scott v. Ware*, 65 Ala. 174, 184; *Ashurst v. Lehman, Durr & Co.*, 86 Ala. 370, 5 South. 731; *Jackson et al. v. Hooper & Nolen*, 107 Ala. 634, 18 South. 254; *Ala. Nat. Bank v. Mary Lee C. & R. Co.*, 108 Ala. 288, 293, 19 South. 404.

It is next insisted that the complainant was not entitled to the appointment of a receiver, because the complainant was already in possession of the property, with the right to continue in possession. According to the agreement, its possessory interest was about to expire, and while it could, by accepting the option, renew the agreement for another year, thus binding itself to extend the mortgages for another year, and binding itself to pay interest, taxes, etc., only to be, at the end of the year, in the same condition as it was at the time of the filing of the bill, with the same problems confronting it, there was no obligation on complainant to extend the time of payment any longer. It certainly had the right to proceed to foreclose its mortgages, and, as ancillary thereto, if there was danger of losing the rents of 1910, complainant was entitled to the aid of the court in taking steps to preserve them. The farming year had closed, another was about to begin, the petition for the appointment of the receiver was not made until after the year had expired, and it is reasonable to suppose that, with the prospect or certainty of a foreclosure, with no one to advance to the tenants

or to make any contract for the year, the labor would have been disorganized, and the opportunity for renting the lands gone, before the foreclosure proceedings had terminated. It is true that the complainant could have taken the responsibility and risk of advancing to the tenants, etc., which might have worked off all right, if it also advanced the money again to pay the interest note on the first mortgage, and finally became the purchaser of the property, but, if some one else should be the purchaser, it might be in danger of losing all that it advanced.

It is not correct either to say that the court was without authority to appoint a receiver, because no answer had been filed to the bill. The statement in the case of *Jordan v. Jordan*, 121 Ala. 421, 25 South. 856, is that: "A receiver should not be appointed except upon a bill or petition filed praying it and after answer thereto, 'unless the necessity be of the most stringent character.'" It is also stated in that case that "there is no averment in the bill of any facts for the necessity of the appointment of a receiver and certainly there is nothing in the agreement between the parties which can be construed into a consent by them to his appointment." From the statement of the case, it appears that there was no petition or request for the appointment of a receiver, but the chancellor appointed him *ex mero motu*, not to preserve the property, but merely to execute the decree. "It is said that 'in modern practice an order for a receiver may be obtained on motion grounded on affidavit, before answer, whenever justice appears to require it,'" etc. *Weis v. Goetter, Well & Co.*, 72 Ala. 259, 260. "Such is the variety, more or less defined, in the countless cases arising out of human transactions in which redress may be sought in a court of equity, that they cannot be so classified as to be subject to rules, which shall precisely prescribe for each when and when not the power in question should be exerted." *Briarfield Iron Works Co. v. Foster*, 54 Ala. 634.

The appointment of a receiver is a matter of sound judicial discretion, revisable by the appellate court, and, of course, must be exercised with care. Our statutes and decisions authorize the appointment to be made even without notice in cases of great emergency. *Miller v. Lehman, Durr & Co.*, 87 Ala. 517, 519, 6 South. 361; *Ashurst v. Lehman, Durr & Co.*, supra; *Warren & Co. v. Pitts et al.*, 114 Ala. 65, 68, 21 South. 494; *Smith on Receivers*, § 5, p. 10. It is true that it is stated in some of the cases cited and in others that there must be a reasonable probability of the complainant's final success, in order to justify the appointment of a receiver. In the present case the facts are stated clearly—the insolvency, the insufficiency of the property, the circumstances that indicate that it is necessary to have the receiver, in order to preserve the rents of 1910. The respondent in the agreement

(Exhibit C) acknowledges all the material facts in the bill in regard to the mortgages, shows that he is not able to meet them or to pay the interest on the first mortgage. After the filing of the bill, the petition was filed, and notice issued to the respondent of the application, and he did not appear to offer any opposition to it. It is true that the mere failure to appear and contest does not preclude a party from asserting the invalidity of the appointment. The agreement (Exhibit C) did not postpone the law day of the mortgages except as to the bank mortgages which expired November 15, 1908, and it was extended one year, which time was out when the bill was filed. The cases to which appellant refers, in which it is said that a receiver should not be appointed because the mortgagor was not in possession, were cases in which third parties had come into possession of the premises.

The expenses of the receivership are eliminated by the agreement of the complainant, and the respondent cannot be in any worse condition than he would be if the complainant should take possession under his mortgages. It is better for all parties that the property be in the hands of an officer of the court; and on the whole we think that the chancellor in the exercise of a wise discretion properly appointed the receiver.

The decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

HOME TELEPHONE CO. v. ROBERTSON. (Supreme Court of Alabama. May 19, 1910.)

1. APPEAL AND ERROR (§ 1003*)—REVIEW—VERDICT.

Mere preponderance of the evidence against a verdict does not authorize its disturbance on appeal; but the preponderance must be so decided as to clearly convince the court that it is wrong and unjust.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3933-3943; Dec. Dig. § 1003.*]

2. PRINCIPAL AND AGENT (§ 24*)—AGENCY—EVIDENCE—QUESTION FOR JURY.

Evidence in trespass, though consisting chiefly of facts and circumstances, against denials, held sufficient to go to the jury on the question of the persons committing the trespass being representatives of defendant telephone company, rather than of an independent building company.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 24.*]

Appeal from Circuit Court, Baldwin County; Samuel B. Browne, Judge.

Action by J. Bestor Robertson against the Home Telephone Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Pillans, Hanaw & Pillans, for appellant. R. H. & R. M. Smith and Frank S. Stone, for appellee.

McCLELLAN, J. Action is trespass to realty. Aside from a ruling in respect of the admission of evidence, to be later considered, the only error urged by counsel for appellant is predicated upon the refusal of the court to grant a new trial on the ground that the verdict did not have sufficient support in the evidence in the vital particular that persons for whose conduct appellant was responsible cut the trees on plaintiff's lands in Baldwin county. The trespass is not denied. The only, sole, controverted issue is: Did the appellant's representatives commit the wrong?

Before a reversal of the trial court for refusal to grant a new trial, on the ground indicated above, is entered, this court must find that, after allowing all reasonable presumptions of the correctness of the verdict, "the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust." Cobb v. Malone, 92 Ala. 630, 635, 9 South. 738, 740. As is evident from the doctrine of Cobb v. Malone, mere preponderance of the evidence against the verdict will not suffice; much less the fact (if so) that the verdict does not accord with the conclusion this court would attain, were it its duty to consider and find on the evidence in the case. It is apparent that on the issue stated the evidence was in hopeless conflict. It was, then, a matter for jury decision. Even according to the evidence of defendant (appellant) on the issue its full measure of probative force, a concession of favor to appellant the strict application of the rule of Cobb v. Malone does not allow, we do not think the court below mistook its duty in denying the new trial on the ground mentioned.

It is impossible to note in this opinion all the facts and circumstances tending to justify the verdict against the assertion that it is, on the evidence, wrong and unjust. The appellant accepted from plaintiff the grant of a right of way for the telephone line from the construction of which the trespass complained of resulted. It was open to the jury to find that the party (Nixon) taking this grant did so for the appellant, even though to so find required the disbelief of other testimony denying that fact. It was also open to the jury to reasonably find that in the first actual clearing for the line Davis and his assistants were working for the appellant, and so notwithstanding Davis and others expressly deny that fact. Facts and circumstances, as is often the case, may reasonably overcome, in commanding credence, express denial. Such may have reasonably been, in this instance, the jury's view and conclusion. This plaintiff had accorded the way to the appellant, and not to the Central Construction Company, which, appellant contends, committed the trespass. After the injury was done, the written (in letter form) complaint of plaintiff, charging appellant with responsibility there-

for, was received and recognized by the appellant, and its written and verbal response thereto (aside from the later denials of its attorneys) did not suggest, much less assert, that the Central Company alone was accountable. This is a fact of great potency as a matter of evidence. It is hard to conceive that a corporation or an individual, wholly without responsibility for an act, would withhold, when charged unequivocally, affirmation of its innocence, and, on the contrary, then proceed to negotiations looking to settlement at the least cost. Obviously, such conduct, such an attitude, unless explained, did not consist with the theory that the appellant's representatives did not commit the trespass. The jury might have well found that the explanation was not afforded by the evidence in this case. The executive officer of the Central Company was an important officer of the appellant. The business office of this executive officer was at the place of business of the appellant. The appellant was then, and since, it appears, actively engaged in operating a telephone system in this state. The Central Company was a foreign corporation, the sole purpose of which was to construct telephone lines. It moved away, it must be inferred from the evidence, when the line was built and tested. Such a business may, of course, be entirely independent of the operating company. But that status is reflected on by the course pursued. The right of way was taken in the name of the appellant, by one, it might have been found by the jury, representing himself as appellant's agent; but this procedure is said to have resulted from the idea that the grants were so taken in anticipation, expectation, of a sale of the line, when completed, to appellant.

This fact at least suggests the unusual. It may not commend itself to the judgment as consisting with the engagement of an independent builder. That such a builder would construct with the fundamental right, that of way, in a merely expected purchaser, does appear unusual. And when this consideration is viewed along with the further fact that the executive officer of the Central Company is also an important officer of the appellant, and in connection with the *delayed* denial of responsibility, though invited by a demand based on a charged accountability, and in further connection with statements of some of those engaged in the work, if those tendencies of the evidence were credited as they might reasonably have been, we feel no hesitancy in affirming the court's action in denying the new trial as upon the ground now pressed.

There was no prejudicial error, if error at all, in allowing the question quoted in the first assignment. If it had reference to a line other than that in the construction of which the trees were cut, it was clearly without prejudice. If it had reference to the line here involved, it was a circumstance admis-

sible on the chief issue as explanatory of appellant's relation thereto.

The judgment is affirmed.
Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur

LOUISVILLE & N. R. CO. v. McCOOL.
(Supreme Court of Alabama. May 19, 1910.)

1. APPEAL AND ERROR (§ 680*)—REVIEW—INSUFFICIENT TRANSCRIPT.

Rulings on demurrers cannot be reviewed where the demurrers do not appear in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2880-2882; Dec. Dig. § 680.*]

2. PLEADING (§ 204*)—DEMURRER—PORTION OF COUNT.

Demurrer does not lie to a part of a count or plea except in suits on bonds assigning special breaches.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 489, 490; Dec. Dig. § 204.*]

3. CARRIERS (§ 94*)—DELIVERY OF GOODS—PLEADING—EVIDENCE.

In detinue against a carrier for freight, brought by the consignee, if, when the consignee demanded the freight, he had no bill of lading and refused to pay the invoice price of the freight or show his ownership, it was a defense, and could be shown under the general issue.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.*]

4. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—SUSTAINING DEMURRER.

Any error in sustaining a demurrer to a special plea is harmless where the matter pleaded can be shown under the general issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Appeal from City Court of Montgomery;
W. H. Thomas, Judge.

Action by J. M. McCool against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The action was detinue for certain articles shipped over the Louisville & Nashville line, and alleged to be in their freight depot at Montgomery. Plea 2 is as follows: "The defendant avers that it was, on, to wit, October 16, 1908, a common carrier; that it received on October 10, 1908, at its office in the city of Montgomery the property sued for and consigned to plaintiff; that on, to wit, October 15, 1908, plaintiff called, through his agent, at the warehouse of defendant in the city of Montgomery and demanded the property sued for; that on this occasion plaintiff had no bill of lading; that defendant demand a bill of lading from plaintiff before delivering the property sued for; that plaintiff refused to show a bill of lading for the property sued for; that defendant thereupon offered to deliver property to plaintiff upon plaintiff's paying the invoice price of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property sued for, and that plaintiff refused to do this; that defendant thereupon offered to deliver the property sued for to plaintiff, upon plaintiff's offering satisfactory evidence of ownership in plaintiff."

The demurrers were as follows: "(1) Now comes the plaintiff and demurs to that portion of the defendant's second plea wherein this plea says 'defendant demanded the bill of lading from plaintiff before delivery of the property sued for; that plaintiff refused to show the bill of lading for the property sued for'—and assigns as his ground of demurrer that there was no legal obligation resting on plaintiff to show any bill of lading for the goods sued for. (2) Plaintiff demurs to that portion of the defendant's second plea reading as follows: 'That the defendant offered to deliver the property to plaintiff upon plaintiff paying the invoice price of the property sued for, and that plaintiff refused to do this'—and assigns as his ground of demurrer that there was no legal obligation resting upon the plaintiff to pay the defendant the invoice price of the property sued for. The only duty resting on plaintiff was to pay on demand the amount of freight due according to the legal classifications and rates, or to show that the freight had been prepaid. This duty being done, the duty of the defendant was to deliver the property in controversy to the plaintiff." These demurrers were filed March 31, 1909. Other demurrers were as follows: "(1) Said plea is no answer to plaintiff's complaint. (2) It does not state whether plaintiff offered satisfactory evidence or not." Other demurrers filed to the plea as a whole raise the same question as those set out in demurrers numbered 1 and 2 above.

Goodwyn & McIntyre, for appellant. Warren S. Reese, for appellee.

MCCLELLAN, J. Detinue by appellee for chattels in possession of the appellant as a common carrier and consigned to appellee. The appeal is on the record, only; and the assignments of error insisted on in brief for appellant relate, alone, to rulings sustaining demurrers to pleas 2, 3, and 4.

There are no demurrers assailing pleas 3 and 4, set out in the transcript. Hence, assignments predicated on those rulings cannot be reviewed. 1 May. Dig. p. 181, subhead 945. We are, hence, remitted to a consideration of the propriety of the action of the court in sustaining demurrers to plea 2. This plea, as well as the demurrers thereto, will be set out in the report of the appeal.

The demurrers, evidently written on separate papers, were filed on the same day. Taking them in the order in which they appear in the transcript, the first two assail, quoted in their caption, parts only of the plea. Demurrer does not lie to a part of a count or plea, except in suits on bonds as-

signing special breaches. *Hester v. Ballard*, 96 Ala. 410, 11 South. 427; *A. G. S. R. R. Co. v. Tapia*, 94 Ala. 228, 10 South. 236; *Corpening Co. v. Worthington & Co.*, 99 Ala. 541, 12 South. 426—among others.

If the matter alleged in plea 2 would bar the plaintiff's right to recover, it is evident that such matter could have been shown under the general issue pleaded in the cause. Under such circumstances, no prejudicial error, to defendant, resulted from the sustaining of demurrer to special plea 2. *N. C. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 South. 589; *Bennett v. Brooks*, 146 Ala. 490, 41 South. 149; *Tallasse Falls Co. v. Moore*, 158 Ala. 356, 48 South. 593; *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 South. 1019; *Southern Railway Co. v. Wilson*, 138 Ala. 510, 522, 35 South. 561.

The judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

AUSTIN et al. v. BEALL.

(Supreme Court of Alabama. May 19, 1910.)

1. ASSUMPSIT, ACTION OF (§ 5*) — COMMON COUNTS—BREACH OF IMPLIED WARRANTY.

The common counts cannot be properly applied to an action for breach of an implied warranty.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. §§ 14-26; Dec. Dig. § 5.*]

2. SALES (§ 418*)—BREACH—ACTION FOR—EVIDENCE.

Where a contract contemplated the delivery of lumber "f. o. b. cars" at the place of shipment, and not at the point of destination, the freight charge on the car was outside the contract and could not have been within the contemplation of the parties as an element of damages for breach of the contract; hence evidence of what the freight charges were or what freight charges were paid was inadmissible, in an action for breach of the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174, 1187; Dec. Dig. § 418.*]

3. PARTNERSHIP (§ 216*) — DESCRIPTION OF PARTIES—PARTNERSHIP.

Where an action was brought against two persons, it was not necessary to so describe the defendants as partners in order to admit evidence of their joint liability as the legal result of their association as partners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 416-418; Dec. Dig. § 216.*]

4. PLEADING (§ 392*)—PROOF—VARIANCE.

Where it was alleged that a contract was made with plaintiff by the defendants, and the proof showed that the contract was made by a partnership of which defendants were members, there was no variance.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1312-1319; Dec. Dig. § 392.*]

5. SALES (§ 279*)—CONTRACT—CONSTRUCTION.

Where a contract for the sale of lumber stipulated for "count and inspection guaranteed" at point of destination, the written report of "count and inspection" made at destination was not admissible to show the true character,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount, and quality of the lumber; the whole effect of the stipulation being to assure conformity of the subject of sale to the order and bills rendered the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783-792; Dec. Dig. § 279.*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by W. W. Beall against J. W. Austin and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The first three counts are the common counts. The fifth count claimed damages for the breach of warranty in the sale of a car of lumber by defendants to plaintiff on February 1, 1904, which the defendants warranted to be free from sap and through shake, when in fact a large quantity of lumber, to wit, 13,500 feet, contained sap or through shake. The fourth count was as follows: "Plaintiff claims \$187.70 damages from the defendants, for that, whereas, heretofore, to wit, on the 1st day of February, 1904, the defendants agreed and contracted with the plaintiff to saw for and ship on plaintiff's order one car of long leaf yellow pine lumber, free from sap and through shake, at the price of \$8 per M. feet f. o. b. cars, count and inspection guaranteed. Plaintiff avers that the expression 'count and inspection guaranteed,' when used in this connection, was understood by defendants to mean, and did mean, the defendants' guaranty of quantity of the lumber and the grade of the same at point of destination; that is, at point to which shipped. And plaintiff avers that he paid the defendants \$115.87 for said lumber, relying upon their guaranty as herein alleged; that said lumber was shipped by plaintiff, and at point to which shipped did not come up to guaranty as herein alleged, in that it was not free from sap and through shake, and that thereupon, with the consent and at the direction of the defendants, he disposed of said lumber to best advantage, and the proceeds of such distribution failed to pay the freight on the shipment by \$55, which amount as shipper plaintiff was bound to pay and did pay; that said \$115.87, paid defendants as averred, was the price of said lumber according to agreement herein set out, and that defendants failed and refused to pay said \$170.87."

W. O. Mulkey, for appellants. C. D. Carmichael, for appellee.

MCCLELLAN, J. The plaintiff (appellee) must trace his right to recover in this action through a breach, by defendants (appellants), of an implied warranty, in respect to quantity and quality, of a car of lumber bought and sold, respectively, by the parties. To such a purpose the common counts cannot be properly applied. 4 Cyc. pp. 326-328, and authorities collated in notes thereon.

Accordingly, the several affirmative char-

ges, as to the common counts, requested by and refused to defendants, should have been given. Their refusal was error.

The measure of plaintiff's damages, if otherwise entitled to recover, is that stated in Penn & Co. v. Smith et al., 104 Ala. 445, 449, 18 South. 88. The standard of recoverable damage set down in that decision necessarily excludes freight charges as elements of the recovery.

The contract between the parties contemplated the delivery of the lumber "f. o. b. cars" in this state, and not at the point of destination, remote from the place of shipment. Hence the freight charges on the car was a matter dehors the engagement between these parties and could not have been within their contemplation as an element of damages for a breach thereof. It follows that evidence of what the freight charges on the car were, or what freight charges on the car were paid, was erroneously admitted over defendants' objection thereto.

Under a phase of the evidence for the defendants it was open to the jury to find that the plaintiff supervised the loading of the car, and that it was loaded with the character and quality of lumber he directed. This evidence was disputed by the plaintiff on his examination and also by the evidence of those inspecting the car at destination. Of course, if plaintiff supervised the loading, and if the car was loaded with the character and quality of lumber he directed, the plaintiff could not, for obvious reasons, recover. But, on the contrary, if, as he testified, he did not so assume direction of the loading, but, a fortiori, complained of the character and quality of the lumber then being put in the car, the defendants could, of course, take nothing as the result of their contention in this regard before stated.

The action is against J. W. and B. J. Austin. There is no description of them as constituting a partnership known and called the "Monarch Lumber Company," the concern with which plaintiff contracted. It was not necessary to so describe the parties defendant in order to properly admit evidence of their joint liability as the legal result of their association as partners. *Jemison v. Dearing*, 41 Ala. 283; *McCulloch v. Judd*, 20 Ala. 703; 15 Ency. Pl. & Pr. pp. 920, 921. The special counts aver that the contract was made with plaintiff, by the defendants. The proof shows that the contract was made by the Monarch Lumber Company, and counsel seem to be in accord that the named company was a partnership of which defendants were members. It is contended that a variance resulted. On the state of the complaint in this case no variance was wrought. 15 Ency. Pl. & Pr. pp. 925-927; *Clark v. Jones*, 87 Ala. 474, 482, 6 South. 362.

Under the interpretation put upon the stipulation, "count and inspection guaranteed"

(at point of destination), in *Byrd v. Beall*, 150 Ala. 122, 43 South. 749, 124 Am. St. Rep. 60, it necessarily results that the written report or memorandum of "count and inspection" made at destination was not admissible in evidence to show the true character, amount, and quality of the lumber contained in the car. It was held, and well held, we think, in *Byrd v. Beall*, that the whole effect of the stipulation guaranteeing count and inspection was to assure conformity of the subject of sale to the order and bills therefor rendered the purchaser.

Errors prejudicial to appellants intervened on the trial, so the judgment must be reversed, and the cause will be remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

RICHARDSON v. OLATHE MILLING & ELEVATOR CO.

(Supreme Court of Alabama. June 2, 1910.)

1. BROKERS (§ 54*)—COMMISSION—RIGHT.

While a broker who finds a customer ready, able, and willing to purchase at the seller's price is entitled to commissions, yet if the prospective customer's order is revocable at pleasure, his revocation thereof is conclusive evidence that he is not willing to purchase, so that where plaintiff, who was authorized to take orders for the sale of flour for defendant mill, took two orders for a certain kind of flour which the prospective purchaser canceled when defendant explained to him the quality of the flour, plaintiff was not entitled to commissions, defendant not being at fault for truthfully stating the quality of the flour.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-77; Dec. Dig. § 54.*]

2. BROKERS (§ 63*)—COMMISSION—DEFAULT OF SELLER—REFUSAL TO DELIVER.

If the seller refuses to deliver goods sold for him by a broker, or improperly prevents the consummation of the sale, he is liable to the broker for commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94; Dec. Dig. § 63.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by Earl O. Richardson against the Olathe Milling & Elevator Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernest Lacy, for appellant. A. F. Flite and Sterling A. Wood, for appellee.

SIMPSON, J. The suit is by the appellant against the appellee, to recover commissions claimed to be due the plaintiff for services in selling a certain quantity of flour. The evidence is without conflict that plaintiff was authorized to take orders from merchants for flour to be furnished by the defendant; that plaintiff did take orders from two mercantile firms for a quantity of flour at prices which

had been fixed by defendant; that the defendant, thinking from the size of the orders that said merchants had not understood the quality of the flour, wrote to them explaining that it was an inferior quality of flour, and they countermanded the orders.

It is true, as contended by the appellant, that when a broker has found a customer ready, able, and willing to purchase at the price fixed by the seller, he has earned his commissions; yet it is also true that when the result of the broker's labors is a mere order for goods, which is revocable at the pleasure of the party making the order (*McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 742; *Gould v. Cates Chair Co.*, 147 Ala. 633, 634, 41 South. 675), a revocation of said order is conclusive evidence that the purchaser is not willing to purchase the goods.

The seller, in this case, did not refuse to fill the order, but merely made a candid and honest statement of the quality of the flour, leaving the purchasers the option either to reaffirm the order, to change it to a better quality, or to revoke the order.

It is true also that if the seller refuses to deliver the property, or by any improper action on his part prevents the consummation of the purchase, he would be liable for the commissions, but we cannot consider the action of the seller in this case as improper. To hold otherwise would be to place a man in fault for telling the truth.

The court properly gave the general charge in favor of the defendant, and the judgment of the court is affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

HAMPTON v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. INFANTS (§ 68*)—CRIMINAL PROSECUTIONS—JUVENILE DELINQUENTS—STATUTES.

Since Code 1907, § 6450, as amended by Acts Sp. Sess. 1909, p. 117, applies only to children under 14 charged with misdemeanors or the violation of city ordinances, it did not authorize the trial as a juvenile delinquent of a child under 14 charged with burglary committed prior to the amendment, but not brought to trial until after the amendment took effect.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 174; Dec. Dig. § 68.*]

2. CRIMINAL LAW (§ 527*)—EVIDENCE—CONFESSIONS—CHILDREN—STATUTES.

Code 1907, § 6464, declares that the declarations or admissions of a child under 14, when questioned or accused, or any statement made by any person, officer, or the court, shall not be competent against the child in any court or proceeding whatsoever, and shall be inadmissible against it. Held that, though such section was in a chapter entitled, "Children, Juvenile Delinquents," it was general in its application, and precluded the admission of con-

fessions made by a child under 14 in a prosecution against him for burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1200; Dec. Dig. § 527.*]

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Monroe Hampton was convicted of burglary, and he appeals. Reversed and remanded.

Paul Hodges, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant, a boy 12 years of age, was indicted and convicted of the crime of burglary. When the defendant was arraigned, his attorney called the attention of the court to the fact that the boy was only 12 years of age; that at the time of the alleged burglary (in June, 1909) he was only 11 years of age; and that under the provisions of the Code, at the time of the supposed burglary, he was not subject to trial by the court, but should be treated as a delinquent child, under the law in regard to juvenile delinquents. The court overruled the motion, and required the defendant to plead.

In this there was no error. While section 6450, as it stood at that time, applied to all juvenile delinquents, yet on the 25th day of August, 1909, said section was amended so as to apply only to children under 14 years of age, charged with the commission of a misdemeanor or violation of a city ordinance. Acts Sp. Sess. 1909, p. 117.

As the juvenile delinquent act at the time of the trial did not apply to the crime of burglary, there was no error in the action of the court. Ex parte Perryman, 156 Ala. 625, 46 South. 866.

During the trial a witness made statements of a confession made by the defendant, which defendant's counsel moved the court to exclude, which motion the court overruled.

Section 6464 of the Code provides that: "The statements, declarations, confessions, or admissions of any kind, made by a child under fourteen years of age, to any person, officer of the court; or the manner or demeanor or silence of such child, when questioned or accused, or any statement made by any person, officer or the court, shall never be legal or competent evidence against the child in any court or proceedings whatever, nor shall the same ever be admitted by any court in any proceeding against the child."

While it is true that this section is in the chapter headed "Children, Juvenile Delinquents," and while the first section of that chapter (section 6450) defines who are juvenile delinquents, yet it cannot be said that all of the sections of that chapter apply only to children who have committed misdemeanors and are declared to be juvenile delinquents.

This section is general and applies to state-

ments, etc., by any child under 14, and it shows that it refers to "any court or proceedings."

There is no reason why a child should not be allowed to inculcate himself as to a misdemeanor, and yet be permitted, by his statements, to fix upon himself the graver crime, a felony.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

KIRKBRIDE et al. v. KELLY et al.

(Supreme Court of Alabama. June 9, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 335*)—LANDS—SALE TO PAY DEBTS—BILL—PARTIES.

The administrator and an heir cannot be joined as complainants in a bill against the other heirs to sell lands of the intestate to pay debts; the interest of the administrator and the heir being antagonistic.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1379-1385; Dec. Dig. § 335.*]

2. EXECUTORS AND ADMINISTRATORS (§ 332*)—LANDS—SALE TO PAY DEBTS.

An administrator's right to maintain a bill to sell lands of the intestate to pay debts is wholly statutory, and can be maintained by the administrator alone, in the manner and on the conditions prescribed.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 332.*]

3. EXECUTORS AND ADMINISTRATORS (§ 328*)—SALE OF LAND TO PAY DEBTS—AUTHORITY OF HEIR.

An heir cannot maintain a bill for the sale of the intestate's real estate to pay debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1345-1349; Dec. Dig. § 328.*]

4. EXECUTORS AND ADMINISTRATORS (§§ 137, 151*)—PERSONAL REPRESENTATIVE—SALE OF REAL ESTATE.

An intestate's personal representative can do nothing, save as authorized by statute, to divest or incumber the title to the intestate's real estate which descended to the heir or devisee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 557-559, 614-620; Dec. Dig. §§ 137, 151.*]

5. COURTS (§ 475*)—CONCURRENT JURISDICTION—ATTACHMENT.

Where the probate court has first acquired jurisdiction of the administration of an estate, it cannot be deprived thereof by the chancery court except on some special equitable ground disclosed in the bill of an administrator seeking to remove the administration to the chancery court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1232; Dec. Dig. § 475.*]

6. COURTS (§ 487*)—ADMINISTRATION OF ESTATE—REMOVAL TO CHANCERY COURT.

The right of an heir, legatee, or distributee to have the administration of the estate removed to the chancery court without assigning any reasons therefor does not extend to the adminis-

trator, and is not conferred by the fact that the administrator in such an attempt joins with him one of the heirs as a complainant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1308; Dec. Dig. § 487.*]

Dowdell, C. J., dissenting.

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Bill by E. B. Kirkbride, as administrator of the estate of Mary Ann Kelly, deceased, and another, against William T. Kelly and others. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

Sullivan & Stallworth and Boyles & Kohn, for appellants. Roach & Chamberlain, for appellees.

MAYFIELD, J. Appellants—one, the administrator of the estate of Mary Ann Kelly, the other, an heir of said decedent—file this bill in equity against the other heirs and a mortgagee of the land in question, to remove the administration of the estate from the probate court to the chancery court, and to sell the lands of such estate for the payment of the debts of the decedent, and to charge the interest of one of the heirs, Peter Kelly, with his indebtedness due the estate. Peter Kelly demurred to the bill as amended, on the grounds: (1) That there was a misjoinder of complaints; (2) that no facts were alleged to show a necessity for the removal of the administration into the chancery court; (3) that no necessity is shown to sell the lands to pay debts; and (4) that it is shown that it is not necessary to sell all the lands to pay debts. Some of these grounds are set up in varying forms. The court sustained the demurrer, and from that decree this appeal is prosecuted.

The first ground of demurrer was unquestionably well taken. The interest of an administrator and that of an heir, in a proceeding to sell the lands of the intestate to pay debts, are so antagonistic that they cannot be joined as complaints in a bill against the other heirs. The administrator may maintain a bill to sell the lands for such purposes, but he can do so only because the statute authorizes it, and he alone must do so, in the manner and only on the conditions mentioned in the statute. The statute does not authorize the heir to maintain such bill, nor to join with the personal representative in such proceedings.

The following propositions important to the questions raised on this appeal, have been frequently decided by this court, and they are cited by counsel for appellee in this case:

"Land descends to the heirs, and, every step that the personal representative takes in regard to it, he interferes with their rights; all the power the statutes give him over the land is in the interest of the creditor, and is in antagonism to the rights of the heirs at

law." *Chandler v. Wynne*, 85 Ala. 309, 4 South. 653.

"Between an administrator or an executor, and the heir or devisee, no relation of privity exists, and the real assets cannot be bound by any admission or acknowledgment made by the personal representative." *Teague v. Corbitt*, 57 Ala. 543.

"Real estate, though made subject to debts by our statutes, in the absence of testamentary direction, stands on a very different footing from personal property. The title is never in abeyance, but, on the death of the ancestor, descends instantly to the heir or devisee; true, the personal representative may demand and hold possession, and exercise the statutory power of renting, and even selling it for the payment of debts, but it is a mere power—a bare authority—and must be executed as the statute directs." *Chighizola v. Le Baron*, 21 Ala. 406; *Martin v. Williams*, 18 Ala. 190.

"Until exercised, or steps taken looking to its exercise, the right of the heir is not interrupted." *Masterson v. Girard*, 10 Ala. 60; *Branch Bank v. Fry*, 23 Ala. 770; *Leavens v. Butler*, 8 Port. 380; *Anderson v. McGowan*, 42 Ala. 280; 1 Brick. Dig. 939, § 351.

From these premises, it results that the personal representative can do nothing save as the statute gives him authority to divest or incumber the title to the realty which descends to the heir or devisee. *Steel et al. v. Steel's Adm'r*, 64 Ala. 455, 38 Am. Rep. 15.

There is no statute authorizing the heir to invoke the jurisdiction of a court to sell the lands of an estate for the payment of debts, and so Ruby Kelly should not be joined as complainant in the bill praying for the sale of the lands for the payment of debts. Ruby Kelly has no right to have the lands sold for the payment of the debts of the deceased, and therefore, one of the complainants having no right to recover, the other complainants cannot recover.

The second, third, and fourth grounds of demurrer are practically based on the same idea; that is, that no special equity jurisdiction is shown authorizing the chancery court to entertain this suit. It is shown in the bill that the administration of this estate is pending in the probate court. The probate court having first acquired jurisdiction of the subject-matter and of the parties, it cannot be deprived of that jurisdiction by the chancery court, except on some special equitable ground, and this equitable ground must be one shown by the administrator in his bill, and the administrator shows no such ground in this bill.

The appellants insist that a distributee of an estate, or an heir or legatee, may, without assigning any reasons therefor, have the administration of the estate removed to the chancery court. While this is true of a bill filed by the heirs or distributees, it is cer-

tainly not a right which the administrator can take advantage of, but is a right on the part of the heirs or distributees which ordinarily is against the interest of the administrator, and usually exercised by an heir when he is dissatisfied with the administrator's conduct of the administration in the probate court. The fact alone, that the administrator joins one of the heirs with him, does not give to the administrator any special equitable ground for removing the administration into the chancery court.

The averments of the bill must be good as to both of the complaints, or the bill is demurrable.

It follows that the decree of the chancellor must be affirmed.

Affirmed.

SIMPSON, ANDERSON, SAYRE, and EVANS, JJ., concur. DOWDELL, C. J., dissents.

PHILLIPS v. BRADSHAW.

(Supreme Court of Alabama. May 12, 1910.)

1. LIBEL AND SLANDER (§ 7*)—WORDS ACTIONABLE PER SE.

Words imputing larceny are actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 45; Dec. Dig. § 7.*]

2. LIBEL AND SLANDER (§ 101*)—WORDS IMPUTING CRIME—PRESUMPTION OF MALICE.

Unless words imputing a crime are privileged, they are presumed to be false and malicious, and no other evidence of malice is necessary.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 101.*]

3. LIBEL AND SLANDER (§ 103*)—WORDS IMPUTING CRIME—EVIDENCE OF GOOD CHARACTER—ADMISSIBILITY.

The gist of an action for words imputing larceny being a false and malicious injury to plaintiff's character, plaintiff, in addition to the presumption in his favor, may show his good character and the falsity of the charge as proving malice in fact, and affecting the measure of recovery.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 281, 302; Dec. Dig. § 103.*]

4. LIBEL AND SLANDER (§ 103*)—ACTION FOR SLANDER—EVIDENCE.

In a slander case based on a charge of larceny of cotton from a plantation, managed by plaintiff under a contract with a company to which he had sold it, and of which defendant was president, he was permitted without objection to testify that he never stole cotton from any one, and that at the date of the contract the company became indebted to him, thereunder, in a large sum for advances made by him to wage hands on the plantation and for cultivating the crop up to that date; the court admitting evidence of advances after the date of the contract, but not evidence of advances before such date, and there being no objection to this limitation. When he was thereafter asked whether some of the indebtedness, to which he had deposited, was not for money furnished share crop-

pers, objection thereto was sustained. *Held*, that this last ruling was not a departure from the previous ruling; the distinction asserted by the question, if any, not affecting the truth of the charge against plaintiff alleged to have been made by defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 281; Dec. Dig. § 103.*]

5. EVIDENCE (§ 425*)—PAROL EVIDENCE AFFECTING WRITING.

In such action, a question was asked of plaintiff as to whether there was any agreement between him and another as president of the company about the indebtedness which had accrued on the farm, at the time of sale. *Held*, that, if plaintiff's appropriation of the cotton was honestly made in reliance on an agreement between him and the president, he could prove an agreement which authorized the appropriation to show his intent, and thereby the falsity of the alleged slander, and the president's knowledge thereof, without infringing on the rule that, as between the parties in any proceeding to enforce the contract, the writing became the sole memorial of all prior and contemporary agreements not merely collateral thereto, and so an objection to the question that it sought to vary by parol the terms of the written contract was untenable, and there would have been no error had the court overruled it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1862; Dec. Dig. § 425.*]

6. APPEAL AND ERROR (§ 926*)—REVIEW—EXCLUSION OF EVIDENCE.

Error in excluding evidence will not be imputed if the ruling can be sustained on any ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3667; Dec. Dig. § 926.*]

7. APPEAL AND ERROR (§ 926*)—REVIEW—ERROR NOT APPARENT.

Where neither an overruled question to a party as to a certain agreement nor the record disclose the nature or relevancy to any issue of any agreement proposed to be shown, error cannot be imputed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3735, 3737; Dec. Dig. § 926.*]

8. LIBEL AND SLANDER (§ 123*)—ACTION FOR SLANDER—GENERAL CHARGE FOR PLAINTIFF.

In an action for slander in charging plaintiff with larceny of cotton, defendant, while confessing the conversation on which it was based, testified that he said plaintiff had taken the cotton and sold it and appropriated the proceeds, and so far as the company was concerned he might as well as have stolen it. *Held*, that his version so far differed from plaintiff's witness, who testified that he said plaintiff stole the cotton from the company, that a variance between pleading and proof would have resulted from the jury's unqualified acceptance of his testimony, and a general charge for plaintiff was properly refused.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 356; Dec. Dig. § 123.*]

9. LIBEL AND SLANDER (§ 41*)—PRIVILEGED COMMUNICATIONS.

Communications by an employer to a superintendent as to the protection and care of property committed to him are confidential, and, if made without express malice, are not actionable, though unjust and expressed in terms supporting an action under other circumstances.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.*]

10. LIBEL AND SLANDER (§ 41*)—PRIVILEGED COMMUNICATIONS.

Such communications are conditionally privileged, the law withdrawing the legal inference of malice and giving protection on condition that actual or express malice, as distinguished from malice implied by law where a wrongful act is intentionally done, be not shown.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 41.*]

11. LIBEL AND SLANDER (§ 50½*)—PRIVILEGED COMMUNICATIONS.

A privilege is not defeated by the mere fact that the statement is made in the presence of others than the parties immediately interested, or by the fact that the communications are intemperate.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50½.*]

12. LIBEL AND SLANDER (§ 41*)—PRIVILEGED COMMUNICATIONS.

In determining whether a communication is privileged, the question is whether it is made in good faith in discharge of some legal or moral duty, or in the fair and honest prosecution of rights, or protection of interests, on one hand, or inspired by ill will, on the other.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 41.*]

13. LIBEL AND SLANDER (§ 123*)—PRIVILEGED COMMUNICATIONS.

Such a question is for the decision of the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. § 123.*]

14. LIBEL AND SLANDER (§ 109*)—ACTUAL MALICE—DETERMINATION—PRIVILEGED COMMUNICATIONS.

If a communication wherein an alleged slander was repeated was privileged, it should not be weighed against defendant as going to show actual malice in the communication on which suit was based.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 306; Dec. Dig. § 109.*]

15. LIBEL AND SLANDER (§ 124*)—ACTION FOR SLANDER—INSTRUCTIONS—PRIVILEGED COMMUNICATIONS.

In a slander case based on the charge of larceny of cotton from a plantation managed by plaintiff under a contract with a company to which he had sold it, the court charged that if, on an occasion previous to that laid in the complaint, defendant stated to a witness that plaintiff had stolen cotton belonging to the company or had diverted to his own use, or words to that effect, as testified to by a witness, and at the time had a right to believe the witness was superintendent of the farm, and the words were spoken in what defendant honestly conceived to be in discharge of his duties to the interest of the company, defendant's utterances on that occasion were privileged communications, from which the law withdraws an inference of malice, and that they were not malicious and could not be considered as evidence of malice in the utterances charged in the complaint. *Held*, that the privileged character of the communications was asserted with proper hypothesis.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 367; Dec. Dig. § 124.*]

16. LIBEL AND SLANDER (§ 124*)—ACTION FOR SLANDER—INSTRUCTIONS—PRIVILEGED COMMUNICATIONS.

In a slander case, the court charged, as to a communication made by defendant, as president of a company, to a witness as to plaintiff having stolen or taken the company's cotton,

that if defendant at the time had a right to believe the witness was superintendent of the company's farm, and the words were spoken with a view to protect its interests against plaintiff, his statement was a privileged communication, though he may have entertained improper or even unjust suspicion of plaintiff's honesty. *Held*, that publication in such case may have been malicious, though made to protect the company's interests, and that if both motives concurred there was no privilege, and the privileged character of the communication was not asserted with proper hypothesis.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 367; Dec. Dig. § 124.*]

17. TRIAL (§ 252*)—INSTRUCTIONS—CHARGE NOT SUPPORTED BY EVIDENCE.

A charge not supported by evidence should be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 696; Dec. Dig. § 252.*]

18. LIBEL AND SLANDER (§ 34*)—PRIVILEGED COMMUNICATIONS.

No privilege attaches to mere gossip.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.*]

19. LIBEL AND SLANDER (§ 19*)—VARIANCE—PROOF—INTERPRETATION OF LANGUAGE USED.

Language on which a case of slander is based must be accepted as ordinarily interpreted by laymen, and, if to the ordinary apprehension it charged larceny, it will not be held to constitute a charge of embezzlement, and so establish a variance, for the reason only that as a technical charge of larceny the language was defective, or that a charge of embezzlement would have been more appropriate.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.*]

20. LIBEL AND SLANDER (§ 4*)—EVIDENCE OF MALICE.

The fact that one making a slanderous statement knew it was untrue is conclusive evidence of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.*]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by L. W. Phillips against Caldwell Bradshaw for slander. From a judgment for defendant, plaintiff appeals. Reversed.

Mrs. Christlieb testified in substance that somewhere between the 1st and 15th day of April, 1908, Caldwell Bradshaw came into the lobby of the Colonial Hotel in Birmingham, Ala., and stated to her that the plaintiff stole 15 bales of cotton from the Birmingham Industrial Company's farm before Bradshaw could get over to Columbus, Ga. On cross-examination she testified as to certain matters connected with the hotel and about her dissatisfaction therewith, and that Bradshaw replied that he had been worse treated than she had, as he had traded the hotel for the plantation, and that Phillips had stolen or taken 15 bales of cotton from the plantation. Bradshaw's version of the conversation is as follows: That Dr. Phillips had taken 15 bales of the company's cotton out of the state of Alabama, and into Columbus, Ga., and had there sold it, and appropriated the proceeds to his own use, and that, so far as the com-

pany's interest is concerned, he might as well have stolen it. What is said in reference to the declarations made by Prince sufficiently appears in the opinion.

The following charges were given at the instance of the defendant:

"(A) I charge you, gentlemen of the jury, that if you believe the evidence of W. S. Prince that defendant, on November 30, 1907, an occasion previous to that laid in the complaint in this charge, stated to the said Prince that the plaintiff had stolen 15 bales of cotton belonging to the Birmingham Industrial Company, or had converted it to his own use, or words to that effect, as testified by W. S. Prince, and you further believe from the evidence that the defendant had the right to believe at that time that W. S. Prince was the superintendent of the farm, and that the words were spoken by the defendant in what he honestly conceived to be in the discharge of his duties to the interest of the Birmingham Industrial Company, that the utterances of the defendant on that occasion to the said W. S. Prince were privileged communications, from which the law withdraws an inference of malice, and the same are not malicious, nor can you consider them as evidence of malice in the utterances charged in the complaint in this cause.

"(B) I charge you, gentlemen of the jury, that if you believe the evidence of W. S. Prince that the defendant on November 30, 1907, an occasion previous to that mentioned in the complaint, told said Prince that the plaintiff had stolen 15 bales of the Birmingham Industrial Company's cotton, or had taken 15 bales of the company's cotton to Columbus, Ga., and sold the same, and converted the proceeds to his own use, and you believe from the evidence that the defendant had the right at the time to believe that the said Prince was the superintendent of the Birmingham Industrial Company's farm, and that the words were spoken with a view to the protection of the company's interests against the plaintiff, then I charge you that such statement by the defendant was a privileged communication, even though the defendant may have entertained improper or even unjust suspicion of the honesty of the plaintiff.

"(C) I charge you, gentlemen of the jury, that if you believe from the evidence that the language imputed to the defendant by the plaintiff in this action was used in good faith, in answer to an inquiry from one having an interest in the information sought, the communication is at law a privileged communication, and you cannot impute malice to the defendant, unless you believe further from the evidence that the defendant made the statement imputed to him without knowledge on his part of facts sufficient to reasonably induce a fair-minded man to believe that plaintiff had been guilty of converting to his own use part of the cotton crop grown by the share croppers, as defined in the contract

in evidence in this cause, which was deliverable to the Birmingham Industrial Company.

"(D) I charge you, gentlemen of the jury, that an embezzlement can be only of personal property of another in the possession of the embezzler, and that larceny can be only of personal property in the possession, actual or constructive, of the owner of the thing stolen, and if an accusation of theft be made in connection with words, language, or statements which show the things alleged to have been stolen were at the time of the imputed theft in the possession of the accused, the accusation must be understood to impute embezzlement, and not larceny, and will not support an action of slander imputing a charge of larceny."

Charge 8 refused to the plaintiff was as follows:

"The court charges the jury that if they believe from the evidence that the defendant made the statement as charged in the complaint, and that when he made such statement the defendant knew it was untrue, then that would be conclusive evidence of malice on the part of the defendant."

W. T. Stewart, Bowman, Harsh & Beddow, and W. K. Terry, for appellant. A. Latady and J. M. Caldwell, for appellee.

SAYRE, J. Appellant sued appellee for slander. The complaint was that defendant had falsely and maliciously, in the presence of divers persons at the Colonial Hotel in the city of Birmingham, on April 4, 1908, charged the plaintiff with the larceny of 15 bales of cotton. The plea was not guilty. Plaintiff had sold and conveyed a plantation in Russell county to the Birmingham Industrial Company on June 12, 1907. Three days later the parties to the conveyance, the industrial company acting through Bradshaw, its president, had entered into a contract in writing, under which plaintiff had entered upon the management of the plantation for the industrial company for the then current year. The alleged slanderous words were spoken concerning transactions of plaintiff in that management. For his part, plaintiff showed publication of the slanderous matter by utterance of the words charged in the presence of one Mrs. Christlieb and another at the time and place laid in the complaint, and, as showing malice in fact, the utterance of words of similar import on other occasions and in the presence of other persons. Plaintiff claimed, as we gather from the record, that the industrial company was indebted to him in a considerable sum under their contract, and that he had appropriated the cotton in pursuance of his rights thereunder. The contract was in evidence. To further sustain his contention, plaintiff offered to show that there had been an agreement between himself and the defendant, as president of the industrial company, about the indebtedness, apart from the writing, and, anyhow, that some of it had accrued for money

furnished by him for making crops on the land cultivated by share croppers. The words imputed to defendant in the complaint, and by plaintiff's witness, imported the commission of a crime by plaintiff, and were actionable per se. Unless they appeared to have been used on an occasion which rendered them privileged, the presumption is that they were false and malicious, and no other evidence of malice was necessary. Townshend on Slan. & Lib. § 388. But the gist of the action was a false and malicious injury to plaintiff's character, and, in addition to the presumption in his favor, the plaintiff might show his good character and the falsity of the charge made against him as proving malice in fact and as affecting the measure of recovery. However, the plaintiff did not offer to go into the question of his character until it had been attacked by the defendant, and was permitted without objection to testify that he had never stolen cotton from the industrial company or any one. Plaintiff also testified, without let or hindrance, that at the date of the contract the industrial company became indebted to him, thereunder, in a large sum for advances made by him to the wage hands on the plantation and for cultivating the crop up to that date. In the course of the examination the court ruled that evidence of advances made after the date of the contract would be admitted, but otherwise as to advances made theretofore. To this limitation no objection was taken. Subsequently the witness was asked how the indebtedness, to which he had already deposed, came due to him; whether some of it was not for money furnished to share croppers. The court sustained an objection to this question, and that ruling is made the subject of the first assignment of error. We do not understand that this ruling was a departure from the ruling previously made, or that counsel so understood it. The question asked seemed to assert some distinction between the right of plaintiff in dealing with cotton raised by wage hands and that raised by share croppers. But we discover no distinction which in itself would affect the truth of the charge alleged to have been made by defendant against plaintiff. In either case the rights of plaintiff were substantially the same.

Plaintiff was asked by his counsel: "Was there any agreement between you and Bradshaw, as president of the industrial company, about the indebtedness which had accrued on the farm, at the time of the sale?" An objection that this question sought to vary by parol the terms of a written contract was sustained. If plaintiff's appropriation of the cotton was honestly made in reliance upon an agreement made between him and Bradshaw, plaintiff had the right to make proof of an agreement which authorized the appropriation for the purpose of showing his intent, and thereby the falsity of the alleged slander, and, further, Bradshaw's

knowledge of its falsity; and this, without impinging upon the rule that, as between the parties in any proceeding to enforce the contract, the writing became the sole memorial of all prior and contemporary agreements not merely collateral thereto. Walker v. State, 117 Ala. 42, 23 South. 149. It may be conceded, therefore, that the objection urged to the question was untenable, and that there would have been no error had the court ruled otherwise. But error will not be imputed if the action may be sustained on any ground; and we think it may. Neither the question, nor the record allunde, discloses the nature or relevancy of any agreement, proposed to be shown, to any issue in the cause, and so we are left to speculate whether, if plaintiff had been allowed to answer, anything of consequence to the plaintiff would have appeared. Herein the case differed from Walker v. State, supra.

When Bradshaw came to testify with reference to the occasion of the publication charged in the complaint, while confessing a conversation with Mrs. Christlieb and the use of words not complimentary to plaintiff, his version so far differed from hers that a variance between pleading and proof would have resulted from the jury's unqualified acceptance of his testimony. Williams v. Bryant, 4 Ala. 44; Easley v. Moss, 9 Ala. 286. In this state of the evidence, the general charge for the plaintiff was properly refused.

Prince, by agreement superintendent in charge of the plantation, his salary being paid in equal proportions by plaintiff and the industrial company, testified that Bradshaw had repeated the alleged slander to him in the presence of two or three white men and a number of negroes. Bradshaw at the time was on the plantation looking after the interest of the industrial company. Communications by an employer to his superintendent, having reference to the protection and care of the property committed to him, are to be considered as confidential, and, if made without express malice, are not actionable, though unjust and expressed in terms which would support an action under other circumstances. Easley v. Moss, supra. They are conditionally privileged, the law withdrawing the legal inference of malice, and giving protection upon condition that actual or express malice, as contradistinguished from that malice which is implied by law where a wrongful act is intentionally done, be not shown. Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49. It is said in Newell on Slander & Libel, p. 509, that the privilege is lost if the extent of the publication be excessive, or the language used go beyond the demands of duty or interest. But the privilege is not defeated by the mere fact that the statement is made in the presence of others than the parties immediately interested, nor that they are intemperate. Brow v. Hathaway, 13 Allen

(Mass.) 242. The question is whether the communication is made in good faith in the discharge of some legal or moral duty, or in the fair and honest prosecution of rights or the protection of interests, on one hand, or inspired by ill will, on the other, and that is a question for the decision of the jury. If the communication to Prince was privileged under the rule laid down, it should not have been weighed against defendant as going to show actual malice in the communication to Mrs. Christlieb. In charge A the privileged character was asserted with proper hypothesis. Not so in charge B. The publication to Prince may have been malicious, though made with a view to the protection of the company's interest. Both motives may have concurred. If so, there was no privilege.

Charge C should have been refused. The evidence does not show that the defendant made the statement to Mrs. Christlieb in answer to an inquiry, or that the latter had any interest of legal recognition in the subject-matter of the conversation, or that the interest of Bradshaw or the industrial company could have been served, or that defendant supposed they could have been served, by the statement made. No privilege attaches to mere gossip. Newell, p. 524.

We cannot accede to the proposition of charge D. The language used must be accepted as ordinarily interpreted by laymen. If to the ordinary apprehension it charged larceny, it will not be held to constitute a charge of embezzlement, and so a variance established, for the reason only that as a technical charge of larceny the language was defective, or that a charge of embezzlement would have been more appropriate. Courts will understand language, in whatever form it is used, as all mankind understand it. This is said apart from the question of variance involved.

Charge 8 correctly stated the law. We suppose it may have been refused on the theory that the language attributed to defendant was used on an occasion of privilege. But, as we have seen, no element of privilege entered into that occasion.

For the errors indicated, the judgment must be reversed, and the cause remanded for another trial.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(128 La.)

No. 18,219.

LEWIS et al. v. McCLELLAN DOCK CO.
(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 635*)—DISMISSAL.

Where the state asserts a claim for taxes, with privilege over the seizing creditor, on the

proceeds of property sold by the sheriff, such claim being for less than \$2,000, and the transcript of appeal fails to identify the property sold with that upon which the taxes are claimed, fails to show that the property last mentioned is not still in the possession of the tax debtor, and fails to disclose any contestation with regard to the constitutionality or legality of the tax, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by J. S. Lewis and others against the McLellan Dock Company. The sheriff having seized and sold defendant's property, plaintiffs took rules praying that the State Tax Collector and the City of New Orleans be ordered to show cause why it should not be decreed that the state and city had no claims on the proceeds of the sale for taxes. There was a judgment making absolute the rules, and decreeing that the state and city had no claim for taxes, and the State Tax Collector appeals. Dismissed.

Harry P. Sneed, for appellant. Dinkelspiel, Hart & Davey and M. S. Mahoney, for appellees.

Statement of the Case.

MONROE, J. The record in this case shows that on November 22, 1909, plaintiff took two rules, alleging in the one that the state tax collector had notified the sheriff of a claim for state taxes, for 1908 and 1909, "on the property herein sold"; in the other that the city of New Orleans had served a similar notice with respect to a claim for taxes of 1909; further alleging "that said property owes no taxes," and that the claims are "on other property, and therefore there is no privilege ranking that of plaintiff"; and praying that the state tax collector and the city of New Orleans be ordered to show cause why it should not be decreed "that the state and city have no claims on the proceeds of sale herein, for taxes."

Answers were filed on behalf of both the state and the city, and the rules were tried and submitted on December 10, 1909. On February 11, 1910, counsel for the state tax collector filed a rule alleging that the sheriff "has seized * * * all the property of the defendant, McLellan Dock Company; * * * that said company is indebted unto mover for taxes, penalties, and attorney's fees, for the year 1908, in the sum of \$189.28," and praying that he be ordered to show cause why said amount should not be paid. To which rule plaintiffs pleaded a general denial.

On March 7, 1910, there was judgment, making absolute the two rules taken by plaintiffs, and decreeing that the state and city have no claim against the fund in the hands of the sheriff. Counsel for the state tax collector has appealed. In lieu of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

usual certificate by the clerk as to the completeness of the transcript, we find the following:

"Agreement as to Making of Transcript.

* * * * *

"It is agreed between counsel for appellant and appellees herein that the transcript of appeal in this case shall consist of only the following documents:

"(1) Rules herein taken by each party and answers thereto.

"(2) Copies of assessment rolls herein filed, same to go up in the originals.

"(3) Tax bills herein filed, same to go up in the originals.

"(4) Note of evidence.

"(5) Judgment of the civil district court on said rules."

And then follow the signatures of the counsel.

It does not appear from the note of evidence that any offer was made on behalf of the state, and nothing was offered on behalf of plaintiffs in the rules, except "a document, which the sheriff received from the state tax collector, marked 'A,' which is not among those included in the transcript. We find in the record a copy of the assessment roll for the "Thirteenth assessment district, Fifth municipal district," for the year 1909, upon which the McLellan Dock Company appears to be assessed, for that year (under the caption "Cash Value of Stock, or Interest, in all Steamboats, Steamships, Ships, and All Other Craft, in or out of the State"), on iron sectional dock, \$7,500; and on marine dock, \$15,000.

We also find two bills against the McLellan Dock Company for state taxes—one, of \$51.85, for the tax of 1908, on marine dry dock; and the other, for \$189.28, for the tax of 1909, on iron sectional dock and marine dock.

Opinion.

Counsel for appellant says that the jurisdiction of this court is invoked under that clause of article 85 of the Constitution which confers jurisdiction "in all cases in which the constitutionality or the legality of any tax * * * shall be in contestation," etc., but we are unable to discover, from the transcript, that any such contestation is here presented. The allegations of the rules that have been made absolute are "that said property" (that is to say, the property sold by the sheriff, and on the proceeds of which the state appears to be claiming a privilege) "owes no taxes," and "that the claim of the state is on other property" (that is to say, on property other than that the proceeds of which are in controversy); and it nowhere appears that the property which the sheriff sold, and the proceeds of which he is holding, was an iron sectional dock, or a marine dry dock, nor does it appear that the property seized by the sheriff, whatever it may have been, was all the property that the

company owned. For aught that does appear, the iron sectional dock and the marine dock may be still in the possession of the company.

The jurisdiction invoked is not, therefore, disclosed, and the appeal is accordingly dismissed.

(128 La.)

No. 18,205.

ADELINE SUGAR FACTORY CO., Limited,
v. THERIOT.

In re ADELINE SUGAR FACTORY CO.,
Limited.

(Supreme Court of Louisiana. June 6, 1910.)

(*Syllabus by Editorial Staff.*)

SEQUESTRATION (§ 5*)—GROUNDS.

A plaintiff, claiming the ownership and possession of chattels, may maintain sequestration against a defendant, on proof that defendant denies plaintiff's ownership, coupled with defendant's present opportunity to dispose of the chattels.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from Court of Appeal, Parish of St Mary.

Action by the Adeline Sugar Factory Company against Louis Theriot. There was a judgment of the Court of Appeal, affirming a judgment dissolving a sequestration, with damages, and plaintiff applies for certiorari or writ of review. Reversed.

Borah & Himel, for appellant. W. C. Baker, for appellee.

PROVOSTY, J. Defendant was a tenant on plaintiff's plantation for the year 1909. Plaintiff had sold six mules to defendant, and defendant had sold them back to plaintiff, and then plaintiff had leased them to defendant for the year 1909. After the expiration (or judicial dissolution) of the land lease, and after the expiration of the mules lease, plaintiff demanded the return of the mules, and, on defendant's refusal to return them, sued out a sequestration. Defendant pleaded that he had never sold back the mules to plaintiff, and had never rented them from plaintiff, and that the documents showing these transactions were false; and he so testified. The documents were shown to have been duly executed by defendant. The sequestration was dissolved, with damages; and the Court of Appeal affirmed the judgment, for the reason that plaintiff had not shown any grounds for its alleged fear that defendant would conceal, part with, or dispose of the mules during the pendency of the suit.

We think that, in the light of our jurisprudence, a distinction must be made between cases involving ownership and possession and those involving merely a privilege, with respect to the degree of proof required for maintaining a sequestration. In cases involving

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ownership and possession, the fear of the plaintiff must be considered to be justified by the mere fact of the denial of his ownership, coupled with the present opportunity of the defendant to dispose of the property. *Boatner v. Wade*, 14 La. Ann. 695; *Lannes v. Courge*, 31 La. Ann. 74; *Yun Loy Co. v. Rosser*, 52 La. Ann. 1728, 28 South. 251. In cases involving merely a privilege, some further proof is required. *Vives v. Robertson*, 52 La. Ann. 11, 26 South. 756.

The case at bar falls within the first of these classes; hence the sequestration should have been maintained.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal and of the district court herein be set aside, in so far as they dissolve the sequestration and condemn plaintiff to pay damages, and that the sequestration herein be maintained at the cost of defendant, and that the judgment be in all other respects affirmed; defendant to pay the costs of this suit.

(126 La.)

No. 18,242.

ADLER v. ADLER et al.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. ABSENTEES (§ 5*)—INSANE PERSONS (§ 94*)—CURATOR AD HOC—APPOINTMENT.

In a suit to rescind a sale for nonpayment of the price, an absent defendant, whether sane or insane, is properly represented by a curator ad hoc. In such a case an interdicted person residing in the state, who is not represented by a curator, may be cited through a curator ad hoc.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 3-11; Dec. Dig. § 5; Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

2. VENDOR AND PURCHASER (§ 105*)—DISSOLUTION OF SALE—CHARGES AGAINST PURCHASER.

Where a sale of real estate is judicially dissolved for nonpayment of the price, the property returns to the vendor free from all mortgages and charges created by the purchaser, or resulting by operation of law from his possession as owner, such as legal and judicial mortgages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 183-187; Dec. Dig. § 105.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by William Adler against Julius Adler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

William C. McLeod, curator ad hoc, for appellants Adler. Gustave Lemle, W. Catesby Jones, and Arthur A. Moreno, for appellee.

LAND, J. This is a suit to rescind a sale of real estate on the ground of nonpayment of the purchase price. The facts are not dis-

puted, and it is conceded that, as between William Adler and Julius Adler, the former is entitled to judgment as prayed for in his petition. At the date of the sale, Julius Adler, the purchaser, was the tutor of his four minor brothers and sisters, and the recorded legal mortgage in their favor attached to the property. All of said minors have since attained the age of majority, and two of them, defendants herein, have consented to the cancellation of the legal mortgage in their favor. The two ladies were mentally incapable of managing their own affairs, but neither had a curator. The court first appointed a curator ad hoc to represent both of them. Later the court appointed a special curator ad hoc to represent one of the ladies, alleged to be a nonresident and non compos mentis, but not legally interdicted.

The curator answered substantially as follows:

That the two parties were not unable to manage their own affairs, and therefore could not be represented by a curator ad hoc.

That, if they were incapable of managing their own affairs as alleged, they should be interdicted, and a curator appointed to represent them.

That the legal mortgage of the said parties cannot be canceled by the rescission of the sale.

There was judgment in favor of the plaintiff, dissolving the sale, and ordering the cancellation of the legal mortgage. The curator has appealed.

The evidence shows that the original domicile of the two ladies was in the city of New Orleans; that they were both mentally incapable of managing their own affairs; that one of them was absent from the state when the suit was filed; that the other had been interdicted in New York; that neither was represented in this state by a curator or any other person.

Article 195 of the Code of Practice reads as follows:

"195. If the minors, the interdicted or absent persons, against whom the suit is brought, had no tutor or curator, and the plaintiff has had a special tutor or curator appointed to defend them in the suit, the service must be made on the curator in person or at his domicile."

This article places interdicted persons on the same plane as minors and absent persons, who, when not represented in the state, may be sued through curators ad hoc appointed by the court. Code Proc. arts. 116, 964. Hence both defendants, one an absentee and the other an interdict, were properly represented by a curator ad hoc.

The case of the absent sister, reputed to be insane, is covered by *Hansell v. Hansell*, 44 La. Ann. 548, 10 South. 941. The other sister was judicially treated as an interdict in the partition of her parent's estate.

That the judicial dissolution of a sale of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

real estate for nonpayment of the price frees the property from all mortgages and charges created by the purchaser, or resulting from his possession as owner, and the operation of law, is too well settled for dispute. See *Chretien v. Richardson*, 6 La. Ann. 3, and authorities there cited. In *Hamilton v. Bank*, 39 La. Ann. 932, 3 South. 128, cited by the curator ad hoc, this doctrine was recognized, but was held not applicable to a holder of a note given for the purchase price, who had not acquired or been subrogated to the right of the original vendor to dissolve the sale.

In the case at bar the property is not worth the amount of the purchase price, and the defendants have no real interest in contesting the demand for the dissolution of the sale.

Judgment affirmed.

(126 La.)

No. 17,950.

Succession of HANNA.

(Supreme Court of Louisiana. June 6, 1910.
On Application for Rehearing, June 28,
1910.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 276*) — COMMUNITY PROPERTY — SURVIVING HUSBAND — COLLATION OF ADVANCES.

The surviving husband in community administering the intestate succession of the deceased wife, and claiming the legal usufruct of her interest in the community property, nor can demand of one of the children of the marriage a collation of advances made to him during the existence of the community, nor can such administrator provoke a settlement of accounts between the children of the marriage by charging some of them with advances received during the life of the wife and mother. Such an accounting can be had only in partition proceedings between the forced heirs of the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 276.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the matter of the succession of Elizabeth Hanna, née Spires. To the homologation of the account of the administrator, Ida Driscoll filed an opposition and appeals. Accounting amended, and judgment reversed to conform to decree.

— Dinkelspiel, Hart & Davey, for appellant.
E. A. O'Sullivan, for appellee.

LAND, J. Mrs. Elizabeth Hanna, wife of John H. Hanna, died in December, 1901. Her succession was not opened, but the surviving husband, with the consent of the six children of the marriage, retained possession of all the community property as surviving husband and usufructuary. All the heirs of the deceased wife were of age. The value of the community property approximated \$400,000. On May 30, 1905, John H. Hanna

made affidavit before a notary public, reciting his marriage, the birth of his six children, the death of his wife, the subsequent death of one of his married daughters, leaving a minor son, who had been afterwards duly emancipated by judgment of the court, and that at the date of the death of the wife certain stocks standing in his name were community property, the naked ownership of one-half of which became vested in his six children, affiant having the usufruct thereof, to wit: (Here follows a list of stocks in sundry banks and other corporations, including) "336 shares St. Charles R. R. Co. (since liquidated)." On the same day the six heirs appeared before the same notary and executed a general and special power of attorney appointing their father as their agent, empowering him among other things to sell and transfer, manage, control, and dispose of all or any shares of stock owned by them.

In November, 1908, Charles H. Hanna, one of the sons, died leaving as his sole heir Cleo Hanna, a minor of six years, represented by his mother, Mrs. Ida Kuntz, as tutrix.

In February, 1909, John H. Hanna filed a petition praying to be appointed administrator of his wife's succession, basing his application on the allegation that said minor was interested in the estate of the decedent. An inventory was taken, and the applicant was duly appointed and qualified as administrator, without opposition from any of the heirs. The inventory showed community property appraised at \$398,651.67, inclusive of real estate valued at \$15,000. On the fourth day after his appointment the administrator filed an account, showing community assets as per inventory, and charging himself with one-half of the total appraisement, \$196,825.83½. Per contra, the administrator claimed credit for expenses of last illness, funeral charges, commissions, law charges, etc., leaving a balance of \$177,651.67 to the credit of the estate which the accountant retains as usufructuary. The accountant then proceeds to state that each of the six heirs inherit \$29,608.61, and that Charles H. Hanna had received \$15,477.17, one-half of which, or \$7,738.58, must be deducted from the share of the minor heir, leaving a balance of \$21,870.03 inherited by said minor.

The mother of the minor, as tutrix, and as executrix of her husband's estate, opposed the homologation of the account on various grounds, among others that a large portion of the assets of the community had been omitted from the inventory; that the debit items were not due and owing; that some were prescribed, and others not chargeable to the succession; that no advances as charges were made to Charles A. Hanna, deceased; that the other children had received large advances from the mother's estate

which should be charged to them; that in attempting to administer upon this succession John H. Hanna has waived his rights as usufructuary, and should be ordered to liquidate and settle without further delay, wherefore the opponent prayed that her opposition be sustained in each of the particulars set forth, and the account be amended as to assets and liabilities accordingly.

The cause was tried, and judgment was rendered, settling the collations due by the minor and by two of the other heirs, fixing the balances due to them, respectively, by John H. Hanna, correcting the account in a few unimportant particulars, and recognizing John H. Hanna as the surviving spouse of the late Mrs. Elizabeth Spires, and that as such he have the usufruct of the residuum amounting to \$196,825.83. The opponent has appealed.

In this court the opponent contends, first, that of the 336 shares of St. Charles Street Railroad Company only 168 shares were placed on the inventory. While this apparent contradiction is not explained in the testimony of Mr. John H. Hanna, it appears on the face of the papers that the stock inventoried is preferred stock, while the stock in the affidavit is described as 336 shares "(since liquidated)." It is reasonable to presume that the ordinary stock was converted into preferred stock. No attempt was made to impeach the testimony of Mr. Hanna that the 168 shares represented all of the stock of that kind owned by the community at the date of the death of his wife. If the statement of Mr. Hanna was not substantially true, it may be presumed that he would have been confronted with the stock book of the railroad corporation.

The second complaint is as to the valuation of the furniture which was regularly inventoried and appraised. The furniture was old, and the mere fact that Mr. Hanna had carried insurance for \$9,000 on the contents of his house both before and after the death of his wife does not suffice to prove that the furniture in question was not properly appraised. Mr. Hanna was not accounting as usufructuary, but as administrator.

The third complaint, which is well founded, is that the administrator was not charged with office furniture appraised at \$10 on the inventory.

The last complaint relates to advances and collations charged against the minor.

The succession of the wife owed no debts or charges that could not have been paid at once out of the cash on hand, and all the heirs were majors. There was no necessity for an administration, and as a matter of fact the surviving husband retained the possession and management of all the community property as owner and usufructuary with the consent of all the heirs, who gave him full power to dispose of their respective interests in the property. But, as the appointment of administrator was made after due

notice and without opposition, the capacity of the administrator to act as such cannot be collaterally attacked. Considered as administrator, it goes without saying that the accountant is without power to compel the heirs to collate or to account for advances made to them by the decedent. These are matters that can be properly considered only in partition proceedings between the heirs of the wife. Collation is demandable only among forced heirs. It cannot be demanded by any other kind of heir or legatees or creditors of the succession. Civ. Code, arts. 1235, 1236; Succession of Ball, 42 La. Ann. 204, 7 South. 567. Collation is an incident to a partition among forced heirs, and a partition cannot be had until the administration is closed and the heirs sent into possession.

It follows that all that portion of the account relating to advances to the minor and the proportionate share of each heir should be stricken out. The only questions properly before the court are what assets have been received by the administrator, and what are the lawful debts of the succession paid and to be paid. The inventory correctly represents the assets. In appellant's brief we find no complaint as to the allowance of the debts and charges appearing on the account. The residuum will remain in the hands of John H. Hanna as usufructuary, to be accounted for at the termination of the usufruct.

It is therefore ordered that the account filed by John H. Hanna as administrator be amended by adding to the total assets the sum of \$10 for office movables, and by making the necessary corrections to correspond with said increase of assets, and by striking out all that portion of said account following the word "Balance," and the figures "\$177,651.67," on the same line; and it is further ordered that as thus amended said account be approved, homologated, and made the judgment of the court, and that the administrator pay the debts and charges as set forth in said account, and upon producing proper vouchers and receipts therefor that he be discharged from his trust and his bond canceled; and it is further ordered and decreed that the said John H. Hanna be recognized as the surviving husband in community of Mrs. Elizabeth Hanna, deceased, and as such entitled to the legal usufruct of her interest in all the property belonging to the community at the date of her death. It is further ordered that the opposition be maintained to the extent above set forth, and that the costs of the opposition be paid by the succession, and, finally, that the judgment below be amended and reversed so as to conform to this decree.

On Application for Rehearing.

PER CURIAM. By reason of the written agreement and consent of all the parties to this appeal, filed June 20, 1910, it is ordered that a rehearing be granted; and that

the decree herein rendered on June 6, 1910, be set aside, and that this appeal be dismissed at the cost of the appellants.

(126 La.)

No. 17,872.

MAILEY v. HELM et al.

(Supreme Court of Louisiana. April 11, 1910.
On Application for Rehearing, June 28,
1910.)

(Syllabus by the Court.)

1. DISCOVERY (§ 79*) — INTERROGATORIES TO PARTY—ANSWERS AS EVIDENCE—EFFECT ON COPARTIES.

The answers to interrogatories on facts and articles made by a mother, a codefendant in a suit to recover property belonging to the community, is binding on her to the extent of her interest in the property, but is without power to affect the interest of her minor children therein, as her interest is distinct from theirs.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 100; Dec. Dig. § 79.*]

2. DISCOVERY (§ 79*) — INTERROGATORIES TO PARTY—ANSWERS AS EVIDENCE—EFFECT ON COPARTY.

The answers of the mother, whose interest is distinct, cannot shift the burden of proof to the minors, her codefendants, so as to place on them the onus of proving that their title, which on its face is a sale, is not a deed of sale, but merely a mortgage.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 100; Dec. Dig. § 79.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by James Mailey against Mrs. Annie E. Helm and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

McCloskey & Benedict, for appellant. Buck, Walshe & Buck, for appellee Security Building & Loan Ass'n. Walter Adolph, under-tutor ad hoc, and John W. Duffy, tutor ad hoc, for minor appellees.

BREAUX, C. J. The plaintiff sued the defendant to have it decreed that an act, which on its face is a sale, is not a sale, but a mortgage, secured to the Homestead Association.

Plaintiff asks to be recognized as the owner of property described in his petition, subject to the legal rights of the security and loan association, made one of the defendants, to have his name substituted to that of the original debtor without changing whatever rights the association has.

Plaintiff alleged that the sale by the Homestead Association to Mrs. Annie E. Helm was not a real sale; that it was never intended to vest the title in her; that she never went into possession or exercised the least right of an owner over the property; and that she has always recognized him as the owner.

Petitioner recognizes the right of the building and loan association to the amount stated in his petition and the mortgage by which

the same is secured in favor of the association.

Plaintiff avers that the husband of defendant departed this life leaving defendant widow and four minor children. The community lately existing between husband and wife is on the face of the record the owner of the property.

Plaintiff avers that a sale to a building and homestead association, as in this case, and a resale contemporaneously made, as in this case, is a mortgage, and that, therefore, the community before mentioned has never had any right or title to the property, that the minors are unrepresented, and that the interest of the mother is distinct and different from the interest of the minors, and it is necessary that a special tutor ad hoc and a special undertutor be appointed to represent the minors in the suit.

Plaintiff propounded interrogatories on facts and articles to defendant, Mrs. Mailey, widow of Helm.

They were answered, and sustain the allegation of plaintiff that her husband never owned the property nor the community existing to the time of his death.

The court rendered judgment in favor of plaintiff and against defendant, recognizing James Mailey to be the owner in indivision of one-half of the property, and rejected the demand as against the minors.

The Security Building & Loan Association, one of the defendants and appellees, alleged in answering the appeal: That there is error in the judgment appealed from in so far as there is judgment in favor of plaintiff against it, the association.

That whatever rights plaintiff may have are amply protected by a judgment against the other defendant. That this defendant association is a third person, who has dealt in good faith with the record owner of the property and obtained a vendor's lien.

An answer to the appeal and motion to amend the judgment, by the Building & Homestead Association, made one of the defendants to the case, was filed on the 1st day of March, 1910.

The case was in this court on the 14th day of February, 1910, assigned for trial on the 5th day of March of that year.

The application for the amendment was not timely filed.

Moreover, it does not appear wherein this defendant and appellee, the Homestead Association, so far as relates to the security it claims, is prejudiced. The motion of appellee to amend the judgment is therefore overruled.

How far the act was a mortgage?

It may be. As between plaintiff and the Homestead Association, the act of apparent transfer was in reality a mortgage. But this extends no further.

If the association for any reason chooses to transfer the property to third persons, they are protected, and cannot be divested except in manner required.

For the purpose of the loan and in order that the lending association may have a vendor's lien, the owner appears as the transferor as in case of a sale.

In this instance plaintiff sold the property as his own to the Homestead Association. Immediately thereafter the Homestead Association sold the property to Mrs. Annie Elizabeth Malley, the wife at that time of Charles M. Helm, and now his widow.

The title passed out of plaintiff to an extent sufficient to authorize the Homestead Association to sell it and give title as vendor.

It is stated in the brief of the learned counsel for plaintiff and appellant that the property was not the wife's paraphernal property—I. e., it is not individually hers—that it was taken into the community (if it fell anywhere it fell into the community).

The contention of plaintiff is that the children did not inherit it from the father, as he did not have any interest.

The evidence of that contention begins and ends with the answers of Mrs. Helm to the interrogatories which bind her only. It does not affect whatever rights her children may have. Their rights cannot be affected or prejudiced thereby.

Plaintiff's contention is that the burden of proof has shifted to the minors, that they must prove that the property was sold and that it was not a mortgage; in other words, that it is for them to go beyond the expression of the act, and so doing show that the declarations of the act are true. We do not agree with that view.

We can only say in answer: The title is in their names. They cannot be divested of whatever rights they may have by a ruling which would have the effect of shifting the burden of proof on them, and compelling them to prove that the declarations of plaintiff of the Homestead Association in the deeds are true; in other words, that a sale had been made, and not a mortgage, although there is not a word about a mortgage in either of the deeds.

To particularize further:

The plaintiff in the deed to the Homestead Association declared that he sold the property; that the sale was made in consideration of a stated sum paid by the building association.

It is as absolute in declaration as a sale can be.

The Homestead Association had an absolute right to sell the property.

Positive, direct, and clear are the declarations contained in the deed by the Homestead Association to Mrs. Helm.

These deeds are taken as written and the declarations are construed as expressed.

It results that the half of the property as to its title must remain where the parties who have full right placed it by their own declarations.

It will not be taken away from the effect of these declarations by construing that the burden of proof has shifted, and that it devolves upon the minors to prove that it was, as it purports, a sale and that it was not a mortgage.

But we will not close the question by an absolute judgment in view of the facts and circumstances of the case.

For reasons stated, the judgment of the district court is affirmed at appellant's cost.

On Application for Rehearing.

PER CURIAM. Petition of plaintiff for amendment of decree.

In the court below the judgment rendered absolutely rejected the demand of the plaintiff against the defendant minors. Our opinion ends with the statement that "we will not close the question by an absolute judgment in view of the facts and circumstances of the case"; but through an oversight we affirmed the judgment. We now correct the mistake by amending and recasting our decree herein so as to read as follows, to wit:

It is therefore ordered that the judgment appealed from be amended by rejecting the demand of the plaintiff against the defendant minors as in case of nonsuit; and it is further ordered that said minors pay costs of appeal.

(126 La.)

No. 18,074.

WEBRE v. CHASTANT.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

CORPORATIONS (§ 228*)—INSOLVENCY—SUBSCRIPTION STOCK—LIABILITY OF STOCKHOLDER.

The receiver is attempting under the authority of the court by which he was appointed to marshal the assets of the corporation in order to pay therefrom a balance in excess of \$40,000 which is due to the creditors. Conspicuous among those assets is defendant's unpaid stock subscription. Even if we should assume that he could originally have discharged his obligation (quoad the creditors) with respect thereto by surrendering valueless stock in other corporations, he has not done that, and he is properly condemned to pay his subscription in cash.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878; Dec. Dig. § 228.*]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Edward C. Webre, receiver of the National Manufacturing & Package Company, Limited, against Albert Chastant. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Paul L. Fourchy, for appellant. Gilbert L. Dupré, Jr., and Edward Rightor, for appellee.

Statement of the Case.

MONROE, J. Plaintiff, being the receiver of the National Manufacturing & Package Company, Limited, brings this suit to recover \$2,500 as defendant's subscription for 25 shares of the stock of that company. Defendant interposed certain exceptions, pleaded the general issue, and then undertook to prove that the subscription had been paid. It was admitted on the trial that defendant subscribed in the usual form for 25 shares of the stock in question, the par value of which is \$100; that the company was duly incorporated by notarial act of date January 6, 1906; that plaintiff was appointed receiver in August, 1906, and filed an account, which showed that after the disbursement of all funds collected there remained a balance of over \$40,000 due to creditors; that plaintiff was authorized by the district court to sue the subscribers for the balances due on their stock subscriptions; that this is the only suit brought by him on that account. It was further admitted that on July 11, 1906, the Directors of the National, etc., Company passed a resolution to the effect that the business and property of the Donaldsonville Cooperage Company, Limited, and the Steib-Viosca Company, Limited, made the stock of those companies worth \$112.50; that the National, etc., Company should purchase said business and property, and that the shares of those companies should be taken at said valuation in payment of subscriptions to its (the National, etc., Company's) stock.

Beyond these admissions, it appears from the evidence that the purpose in organizing the National, etc., Company was to absorb the two other companies mentioned, the parties to the transaction being practically the same; that the secretary of said two companies called on defendant, and solicited his subscription to the stock of the National, etc., Company, telling him that his stock in said two other companies would be taken in payment at a valuation of \$112.50. Defendant himself says in his testimony:

"Mr. Viosca asked me if I wanted to take any stock. I told him I did not want any. He says, 'Well, never mind, you can put your name on the list. It is simply to show that you have subscribed to the stock.' Well, I told him, if this is the case, I will sign it."

And, in fact, he signed a subscription list which on its face calls for cash. It appears that defendant was at that time the owner of 15 shares of the stock of the Donaldsonville, etc., Company and 5 shares of the stock of the Steib-Viosca Company; that both stocks were valueless; that a good many of the stockholders in the two companies, however, surrendered their stock and received stock in the National, etc., Company in exchange, in some instances paying differences

in cash; that the defendant did not surrender his stock in said two companies and paid nothing in cash on his subscription to the stock of the National, etc., Company.

Defendant testifies that he was ready to exchange the old stock for the new, and some effort was made to show that he offered to make the exchange, but the effort, we think, was unsuccessful, there having been no reason suggested why the offer should not have been accepted, if seriously made. Upon the facts stated there was judgment in the district court in favor of plaintiff, from which defendant prosecutes this devolutive appeal.

Opinion.

The receiver is attempting, under the authority of the court by which he was appointed, to marshal the assets of the corporation in order to pay therefrom a balance in excess of \$40,000 which is due to the creditors. Conspicuous among these assets is defendant's unpaid stock subscription, amounting to \$2,500. Even if we should assume that he could originally have discharged his obligation (quoad the creditors) with respect thereto by surrendering valueless stock in other companies, he has not done that. He is therefore properly condemned. Const. art. 266; Dilzell, etc., Co. v. Lehmann, 120 La. 284 et seq., 45 South. 138; Handley v. Stutz, 139 U. S. 417, 428, 11 Sup. Ct. 530, 35 L. Ed. 227; Veeder v. Mudgett, 95 N. Y. 295; Marshall on Corporations, § 264 (pages 681, 682, 683, 684), section 281 (page 717 et seq.); Cook on Stock & Stockholders (2d Ed.) §§ 52, 83.

Judgment affirmed.

(126 La.)

No. 18,215.

FLOURNOY, Tax Collector, v. WALKER.

In re J. P. FLOURNOY, Tax Collector.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by Editorial Staff.)

1. HAWKERS AND PEDDLERS (§ 3*)—LICENSES —"PEDDLER."

Any person who peddles is a "peddler" within Act No. 295 of 1908, requiring a license for hawkers and peddlers, without reference to the kind of merchandise purchased and sold.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

2. HAWKERS AND PEDDLERS (§ 2*)—STATUTES § 163*)—AMENDMENT—RE-ENACTMENT—LAW.

Act No. 295 of 1908, regulating and licensing hawkers and peddlers, being declared both in its title and body to be an act to amend and re-enact Act No. 49 of 1904, that act is continued in force only as amended and re-enacted and not as it formerly stood, so that an exception contained therein of persons selling and distributing eggs and poultry from the category of taxpaying peddlers, not continued in act 1908, was repealed.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Dec. Dig. § 2; Statutes, Dec. Dig. § 166.*]

3. STATUTES (§ 81*)—GENERAL LICENSE LAW—SPECIAL LAW.

Act No. 295 of 1908, regulating and licensing hawkers and peddlers, being an amendment of Act No. 49 of 1904, which was itself an amendment of General License Law (Act No. 171 of 1898) § 12, was a new section 12 of such law, and was not a special law.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 81.*]

4. LICENSES (§ 7*)—STATUTES—UNIFORMITY.

Act No. 295 of 1908, licensing hawkers and peddlers, and imposing a license tax graduated according to whether the peddling is done on foot, horseback, in one or two horse vehicles, or by means of water craft, was not invalid for nonuniformity.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

5. CONSTITUTIONAL LAW (§ 68*)—PROVINCE OF COURTS—LICENSE TAX—AMOUNT.

The amount of a license tax to be imposed on hawkers and peddlers is for the determination of the Legislature, and not for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125-127; Dec. Dig. § 68.*]

Application by J. P. Flournoy, tax collector, for writs of certiorari and prohibition to review an order denying an application for judgment for license tax, sought to be recovered from W. W. Walker.

Reversed and judgment granted.

John R. Land and J. B. Files, for plaintiff.
Cal D. Hicks, for respondent.

PROVOSTY, J. The questions presented in this case are, first, whether defendant is a peddler, within the meaning of Act No. 295 of 1908; and, second, whether the part of said act imposing a license tax on peddlers is not unconstitutional, as being violative of article 48 of the Constitution, by which the Legislature is forbidden to pass any special law regulating trade; and of article 225, requiring taxation to be uniform; and of article 229, requiring licenses to be graduated.

Defendant goes about the country with a two-horse wagon buying eggs and chickens, and, when he has gathered a sufficient number, drives into Shreveport, and sells them from door to door. His counsel calls him a "vendor of eggs and poultry, or chicken peddler." The argument is that, according to all the definitions, a peddler is a vendor of "goods, wares, and merchandise," and that eggs and chickens cannot be so classified. Without going into any learned disquisition upon the subject, we will say that any person who peddles is a peddler, and that the license law makes no distinction between chicken and other kinds of peddlers, but requires that peddlers (i. e., all peddlers) shall pay a license.

The more serious contention of the learned counsel (and it is the one upon which the learned trial judge rested his decision) is that the provision of Act No. 49 of 1904 which excepts "persons selling and distributing eggs

and poultry" from the category of taxpaying peddlers is still in force.

We think not. Act No. 295 of 1908 is declared both in its title and in its body, to be an act to amend and re-enact Act No. 49 of 1904, and therefore said Act No. 49, of 1904 is now in force only as amended and re-enacted, and not as it formerly stood (26 A. & E. E. 735); and as thus amended and re-enacted it does not contain the said exception.

The constitutional objections are without merit. Said act 295, imposing a license upon peddlers, being an amendment of Act No. 49 of 1904, which itself was an amendment of section 12 of the general license law, is simply section 12 of the general license law (Act No. 171 of 1898), and the general license law is as far from being a special law as any law could possibly be; and, if it is at all a regulation of trade, it is so only to the extent and in the sense that every license law is such. The license is uniform, since it is imposed upon all peddlers alike, without distinction; and it is graduated, since its amount is different accordingly as the peddling is done on foot, or horseback, in a one-horse or in a two-horse vehicle or by means of a water craft, and since graduation is not required to be according to volume of business, but may be by any mode the Legislature may see fit, as has been several times decided by this court.

The license of \$100 does indeed seem to be heavy; but that is manifestly a consideration addressing itself to the Legislature, and not to the courts.

The judgment appealed from is set aside; and, proceeding to render such judgment as should have been rendered below, it is now ordered, adjudged, and decreed that there be judgment in favor of the state of Louisiana against W. W. Walker for the sum of \$120, whereof \$100 is for a license tax as peddler for the year 1910; \$10 for the fee of the sheriff, and \$10 as the fee of the district attorney in these proceedings; and that the said W. W. Walker pay the costs of this suit.

(126 La.)

No. 18,124.

HARTIGAN v. WEAVER.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. PUBLIC LANDS (§ 58*)—SWAMP LANDS—GRANTS TO STATE.

The swamp land acts of Congress of 1849 and 1850 (9 Stat. 352, c. 87; 9 Stat. 519, c. 84) convey grants of land in present, and as soon as land inured to the state government as swamp land the title referred back to the date of the grant in 1849 and 1850.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 181; Dec. Dig. § 58.*]

2. PUBLIC LANDS (§ 61*)—SWAMP LANDS—CONVEYANCE BY STATE TO LEVEE BOARD.

The law requires that the president of the levee board shall have the conveyance recorded

in the recorder's office of the parish in which the land is located, and when said conveyance is recorded the title to the land passes to the levee board. The land was vested in the levee board, which had authority to buy and sell property and to make and execute all contracts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 192; Dec. Dig. § 61.*]

3. PUBLIC LANDS (§ 61*) — STATE LANDS — SALE BY LEVEE BOARD.

Act No. 215 of 1908, relating to the sale of land by levee boards, cannot affect contracts previously entered into by these boards. *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 192; Dec. Dig. § 61.*]

Appeal from Twenty-Ninth Judicial District Court, Parish of Plaquemines; R. Emmett Hingle, Judge.

Action by Michael J. Hartigan against Joseph Dell Weaver. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred C. Marx, for appellant. John Dymond, Jr., for appellee.

BREAUX, C. J. Plaintiff brought this suit to compel the defendant's acceptance of a title to land and payment of the sum of \$2,100, the price.

The defendant agreed to buy the land from the plaintiff on the 12th day of October, 1909.

His attorney found that the title is not good; that it was suggestive of litigation.

He rejected plaintiff's title and refused to complete the purchase.

The land is within the area of St. Bernard parish, in township 14, S., range 13 S., Eastern district, east of Mississippi, and is fully described in plaintiff's petition.

It is sea marsh of no great value.

Plaintiff acquired the land from John F. Miller on June 23, 1909.

The latter acquired it from the board of commissioners for the Lake Borgne Basin levee district, in April, 1909.

The right bought by Miller was founded on a pre-existing contract, executed between him and the board of commissioners for the Lake Borgne Basin levee district.

Plaintiff's contention is that there was a complete written agreement whereby Miller acquired a vested right to the land.

The board of commissioners acquired it from the state of Louisiana on April 22, 1909, in accordance with provisions of section 11 of Act No. 14 of 1892, by deed of the Register of the State Land Office and the Auditor, duly registered in the conveyance office of St. Bernard.

The state acquired it from the United States on April 15, 1909, in accordance with the provisions of the swamp land grant act of 1849 and 1850, 9 Stat. 519, c. 84. The list 113 was duly approved.

The United States acquired these lands from the territory of Orleans on February

20, 1811, by the provisions of the enabling act of Congress of the United States, authorizing the citizens inhabiting the territory of Orleans to adopt a Constitution and create the state of Louisiana, whereby all of the waste and unappropriated lands became the property of the United States.

This land was acquired from the government of France by the treaty of April 30, 1803.

We will not go further and specifically state that it passed from France to Spain in accordance with the treaty made between these two countries in 1763, and from the latter to the former by another treaty, to say nothing of the right springing out of discovery and of settlement, which time has made forever unalterable.

The plaintiff recites fully all the particulars and incidents connected with and growing out of his title.

The defendant admits the agreement to purchase from plaintiff the land described in plaintiff's petition.

He attacks the title on the ground that at the sale by the board of commissioners, as above stated, the land belonged to the general government; that, while it is true that they had been selected, the selection had not been approved by the Interior Department, as required.

Further defendant urged that under the terms of the act of the Legislature creating the board of commissioners of the Lake Borgne Basin levee district, the land did not rest in the board until the deed signed by the Auditor and the Register was duly recorded; that the lands were not owned by the state.

Defendant alleges that in 1908 Act No. 215 was adopted, ordering the sale of all state lands, and lands of the levee boards at public auction.

That, notwithstanding the good faith of all parties connected with these sales, they were ultra vires acts, which vested no title.

The facts are that the board of commissioners granted a written option to Mr. Albert Estopinal, who wished to purchase the land.

He subsequently transferred his option to John F. Miller.

In December, 1903, the levee board adopted a resolution recognizing the transfer from Estopinal to Miller, and transferred this option to Miller on terms and conditions stated in the agreement.

Miller had accepted this option and complied with the terms and conditions. He paid the cash required, had surveys made, and paid out moneys for the board in accordance with the agreement in question, in order to obtain approval of the general government of the selection which had been made of the land.

The levee board could not have done this,

for the good reason that it had no funds to expend for the purpose.

The contention of plaintiff is that Miller, by executing the agreement as just stated, acquired a right to the land.

The lands were embraced in the option and agreement of December, 1903, between the levee board and John F. Miller, and became Miller's in fee simple by sale, before referred to, made to him by the board in 1909.

These lands at said date had been selected by the federal government under the provisions of the swamp land grant acts of Congress of 1849 and 1850.

The first objection of defendant is that the option or promise of sale was given at a time when the land title was not in the levee board. It was owned by the federal government, it is contended. They had been selected by the state, but the selection had not been approved at the date of the promise to sell, and that, in consequence, the board's actions are ultra vires.

We can only say: Lands granted under the swamp land acts are granted in present, subject, it is true, to the approval of the Secretary of the Interior.

It was the land of the state.

The point presented is whether it was a grant in present?

We decide that it was, and that is the extent of our decision. It was not land of the United States from the date of the grant, except to the extent necessary for it to pass absolutely under the control and dominion of the grantee.

The title remained in the government in a sense, subject to the laws of the state, as soon as it inured to the state by selection as swamp land.

When it passed from the United States to the state government, it became subject to the laws of the latter, and the title relates back to the date of the grant in 1849 and 1850.

This brings us to defendant's ground of objection that the title to the land under the statute did not pass to the board of commissioners for the levee district until the deed signed by the Auditor of the State and by the Register of the State Land Office was recorded in the conveyance records of the parish where the land was situated.

The mandate of the lawmaker and the authority vested in the board are that the president shall have the conveyance properly recorded in the recorder's office of the respective parishes in which the land is located, and when said conveyances are so recorded the title to said land passes to the levee board.

When the land was sold by the levee board in 1909, the law had been complied with. Acts in due form, properly signed by the Auditor and the Register of the Land Office, had been duly recorded in the office of the clerk of the parish.

The board had given an option or promise of sale to plaintiffs' ancestor in title. He had paid the amount required to make good this option. The board subsequently consented, as before stated, to the transfer of this option by Estopinal to plaintiff.

The land was vested in the board.

The board had authority to buy and sell property, to make and execute all contracts. Section 7, p. 21, Act No. 14 of 1892.

The defendant's contention further is that the General Assembly at its session in 1908 enacted Act No. 215 of the statutes of that year.

The act provides for the sale of all lands owned by the state or by any of the levee boards at public auction, after due advertisement.

There had been a prior contract made, and under it the purchaser had acquired a right, to which the board gave its recognition by its own act.

The new method of disposing of the public lands of the state, under said Act No. 215, did not divest the right acquired under the option.

A similar question was decided by the Supreme Court of the United States. *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363.

The land commissioners, in the cited case above, had enforced a similar contract, which the parties attacked on grounds similar to those here.

The court accepted the construction placed upon, the act by the land commissioners.

The cited act above, No. 215 of 1908, has application to future sales, and to lands not subject to contract as this was. It was a subsisting valid contract.

The other questions raised by defendant are covered by our decision. There is no necessity of deciding every proposition submitted, as they are met by the conclusion at which we have arrived.

The law and the evidence being in favor of plaintiffs, the judgment appealed from is affirmed.

(126 La.)

No. 18,053.

HELMAS et ux. v. PAILET.

HEALY v. SAME.

(Supreme Court of Louisiana. Feb. 14, 1910.
On the Merits, June 6, 1910.)

(Syllabus by the Court.)

1. TIME (§ 10*)—SUSPENSIVE APPEAL—TIME OF TAKING—EXCLUDING SUNDAYS.

A suspensive appeal must be taken within 10 days, excluding Sundays, and as the appeal in this case was within that period it was timely, and the motion to dismiss must be overruled.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 48; Dec. Dig. § 10.*]

2. LANDLORD AND TENANT (§ 132*)—REPAIR OF PREMISES—RIGHTS OF TENANT.

Plaintiffs seek to recover damages for inconvenience and loss, resulting, as they allege,

from the unauthorized invasion, for the purpose of making alterations and repairs, of premises occupied by them as tenants.

Held, that they were subjected to some inconvenience, but to no loss; that the inconvenience resulted from a misapprehension for which they were as much to blame as defendant; and that the jury and the judge a quo did substantial justice in rejecting their demands.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 468; Dec. Dig. § 132.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Actions by Gustave Helmas and wife against Elias Pallet, and by Elizabeth Healy against Elias Pallet. The actions were consolidated; verdicts for defendant, and plaintiffs appeal. Affirmed.

Ryan Gantreaux & Abrsa, for appellants.
A. D. Danziger, for appellee.

On Motion to Dismiss the Appeal.

BREAUX, C. J. Plaintiffs brought this suit for trespass and they claimed damages in the sum of \$5,000.

The case was tried by jury, and verdict was found in favor of defendant.

On this verdict, judgment was rendered on the 15th day of December, 1909, and signed on the 17th of the same month.

The plaintiffs applied for an appeal.

The order granting them an appeal, suspensive and devolutive, was signed on the 22d day of December, 1909.

The appeal was made returnable on the 10th day of January, 1910.

On that day, the transcript was filed.

The defendant and appellee moves to dismiss the appeal on the ground alleged: That as the judgment was rendered in favor of defendant and signed on the respective dates before mentioned, and as the bond of appeal was not filed until December 29, 1909, the appeal should be dismissed.

Considering the motion to dismiss the suspensive appeal.

Suspensive appeals may be taken within 10 days after the judgment has been signed, excluding Sundays. Code Prac. art. 575.

Deducting December 19th and 26th (Sundays) two days, the time for a suspensive appeal had not elapsed.

If the appeal were dismissed because not timely taken for a suspensive appeal, the success of the mover would amount really to nothing.

Beyond question the plaintiffs were within time to take a devolutive appeal.

The bond was furnished in the amount required by the judge a quo.

The appeal is good as devolutive if filed after the 10 days. *Reed v. His Creditors*, 37 La. Ann. 907; *Successions of Keller*, 30 La. Ann. 579, 2 South. 553; *Chaffe v. Carroll*, 34 La. Ann. 122; *Dwight v. Barrow*, 25 La. Ann. 424.

The appeal was timely taken for a suspensive appeal.

Motion to dismiss the appeal is therefore overruled.

On the Merits.

MONROE, J. Plaintiffs prosecute this appeal from a verdict and judgment rejecting their claims, against defendant, for damages.

The case presented by the transcript is as follows:

About the middle of May, 1908, defendant bought, or agreed to buy, a double cottage house, one side of which was occupied by plaintiff, Helmas, with his family, as a tenant, by the month, at \$8, and the other side by the plaintiff, Mrs. Healy, with her family, also as a tenant, by the month, at \$7. The price of the property was \$3,400, and, as plaintiff was buying as an investment he was desirous of putting the premises in better condition in order to get a better return. The cottage, as originally constructed, stood back from the street, with a gallery in front, and was three rooms deep on each side, after which there was an open space, and, then, a two-story back building, with a cistern, on each side, in the space mentioned, a fence dividing the two back yards, and a narrow alley leading from the front along either side of the main building into the respective yards. At some later period, there had been built a room, extending across the front of the house, from the gallery to the property line, with a shed over the banquette, and the front gallery had been inclosed and partitioned, making a little room for each tenement, the other room mentioned not being included in the lease of said tenements, but being called an "office," and (recently) leased to another party, some of whose effects were still there.

On Sunday, May 17th, defendant visited the premises, accompanied by his architect and his contractor, and they testify to a conversation between defendant and plaintiffs, in which the daughter and wife of Helmas and defendant's companions are said to have taken part, and the substance of which was that defendant wanted to make some general repairs, which were likely to subject the tenants to inconvenience, and was willing, if they would consent, that they should occupy the premises, rent free, while the work was going on; to which, according to the witnesses mentioned, the tenants yielded a willing consent. Plaintiffs deny that there was any such conversation, and yet, here and there, we find admissions, inconsistent with such denial, and we conclude that defendant notified plaintiffs that he wished to make repairs, and understood that they were willing that he should exercise his pleasure in the matter, though they, probably, did not anticipate that he intended to make the al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

terations which he had in view and which, on Thursday, May 21st, were begun. On that day, Helmas, who was a cooper, had gone to his work, and Mrs. Healy, who is a colored nurse, had also gone out, when Bichow, a carpenter employed by defendant's contractor, appeared on the scene, and informed Mrs. Helmas that he had come to work, and that the plan of operations included the demolition of the office and the conversion of part of the space occupied by it, together with that occupied by the gallery rooms, into two rooms (one for each tenement), with a gallery in front. He says, in his testimony, that Mrs. Helmas made no objection, but that she and her daughter did what they could to facilitate him, Mrs. Helmas, herself, with his assistance, moving out of her front gallery room (which she used as a reception, or sitting, room) some little furniture, and the daughter going off to find the key of the office, which was thought to be in the possession of the former tenant. Mrs. Helmas, on the other hand, says that she was surprised and shocked, and that she objected that the work ought not to be begun in the absence of her husband, but she admits, though with the greatest reluctance, that she did move or assist in moving her furniture. During that day (Thursday) the work of demolition of the office, and, in part, of the gallery rooms, progressed considerably, and, in the evening, when the plaintiffs returned, they found the disorder which necessarily resulted. Helmas says that he made an effort to see his attorneys, but was unsuccessful, and so the work went on, during the next day, Friday (when the cisterns were moved to positions in the rear of the back building) and Saturday and Monday, upon which last mentioned day (in the evening, as we understand) defendant received a note from plaintiff's (Helmas') counsel, advising him that plaintiff (Helmas) objected to the work, and warning him that "any further encroachment on his rights" would be resisted in a lawful manner. On Tuesday morning, therefore, defendant stopped the work, with the exception, perhaps, of the laying of some brick footings on the space which had been occupied by the office and which was not under lease to the plaintiffs, and he says that he would not have begun it if he had not supposed that the tenants had consented. Bichow, also, testifies that he would not have begun or continued the work if there had been any objection, and, plaintiff, Helmas admits that he never spoke to any of the workmen or intimidated to them that what they were doing was objectionable to him, nor did the other plaintiff, Mrs. Healy. The Helmas family, it may be remarked, left the premises on June 4th, and Mrs. Healy, a few days later, having received notices to vacate. Some 19 witnesses were examined,

and we have considered their testimony carefully. Plaintiffs were, no doubt, subjected to some inconvenience, but to no loss, and the inconvenience resulted from a misapprehension for which they were as much to blame as defendant.

We are, therefore, of opinion that the jury and the judge a quo did substantial justice in rejecting their demands. The verdict and judgment appealed from are, accordingly, affirmed.

(126 La.)

No. 18,099.

WILLIAMS et al. v. UNION FERRY CO.
(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

FERRIES (§ 33*)—INJURY TO PASSENGER—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

The plaintiffs' mother in attempting to board a ferry boat fell into the Mississippi river and was drowned. They sue the ferry company for damages as having caused her death by leaving open a gate at the end of a gangway leading to the boat, thereby misleading her into the belief that she (the boat) was safely moored to the wharf, and impliedly inviting plaintiffs' mother to go on, when in fact the ferry had swung out into the stream.

The jury before which the case came rendered a verdict in favor of defendant, and plaintiffs have appealed. The judgment appealed from is affirmed. The death of the woman was due to her own rashness and negligence.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. § 92; Dec. Dig. § 33.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Marie Williams and others against the Union Ferry Company. Judgment for defendant and plaintiffs appeal. Affirmed.

Geo. W. Flynn and M. D. Dimitry, for appellants. Frank E. Rainold, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiffs are the heirs of Marie Williams, and seek to recover from the defendant company \$30,000 and interest as damages for her death which they claim was the result of its fault. They alleged that the Union Ferry Company, a corporation duly organized, having a domicile and doing business in the city of New Orleans, is justly and truly indebted unto petitioners in the full sum of \$30,000 for this, to wit:

That the said Union Ferry Company owns, conducts, and operates what is known as the "Third District Ferry" of the city of New Orleans, and that said defendant company did own and conduct and operate on the night of February 4, 1909, the said ferry boats, landing, and the approaches used in connection therewith, and particularly the ferry boat *Hattie*, and the landing pontoon bridge and the approaches at the head of Oliver street, in the Fifth district of the city of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

New Orleans, or what is commonly known as Algiers, receiving passengers at that point, accepting ferriage, and agreeing to transport and deliver them without injury to the head of Barracks street in the Third district of this city; that on the night above set forth petitioners' mother, the late widow, Mana Williams, while returning home in the third district of this city after having attended church in Algiers, was drowned; that her death was due to the gross carelessness, negligence, and want of skill of the defendant company and its employes; that after having paid her fare in the ferry house of the Algiers landing she descended the walk or approach to a floating pontoon or landing, which landing is inclosed in a fence constructed and maintained by the defendant company for the purpose of protecting its patrons, in which said fence is placed a gate, and when said gate is open it indicates that it is safe for passengers to embark on the ferry from the pontoon or landing; the open gate further shows that the ferry is properly landed, and that it is without danger for passengers to board same; that on the night above set forth when petitioners' mother had reached the aforescribed pontoon, finding the ferry at the landing and the gate on the pontoon opened, inviting her to embark on the ferry Hattie, giving her assurance of her safety to do so, and indicating that it was without danger; that on the evening of the accident it was very inclement, and the rain was pouring down in torrents, requiring of the defendant company an exercise of unusual care and caution in the handling and conduct of its ferry and landing, all of which it failed to do, not even carrying out its own regulations for the safety of its patrons as it was customary to do, but with utter disregard of its duty, and through gross and criminal negligence of its servants and employes in charge of the ferry and landing, the said defendant allowed the forepart of the bow of the ferry to swing out, thereby opening a space between the landing and the ferry itself, and when petitioners' mother attempted to board she was precipitated into the river; that acting under the invitation of the opened gate, giving her assurance of her safety to board the ferry, she attempted to step on the said ferry boat, when she walked into the intervening space, and was as already stated precipitated into the river; that the bow of the said ferry continued to swing out further, and after a short interval the signal was given to go ahead, the rear line was unloosed, and the ferry proceeded on its trip across the river regardless of the fact that petitioners' mother was floating on the top of the water, her skirt acting as a float, and that she remained in that position for a period of some 10 minutes; that the drowning woman called and begged for assistance at the top of her voice, and although the defendant's employes stood directly on

the edge of the ferry, and within hearing distance of the drowning woman, he made no effort to render any assistance of any kind whatsoever, not even throwing to her the rope that he had in his hand at the time; that certain passengers, Paul Vidivovich and L. Christinsen by name, seeing the terrible position of the woman, jumped back from the ferry to the landing or pontoon, and made every effort to rescue her from her perilous position, and would have probably succeeded in doing so had it not been for the fact that after petitioners' mother had fallen overboard the ferry was signaled to go ahead and did go ahead, creating an eddy or current, which carried her out in the river and beyond the reach of the passengers, who jumped back on the landing, and who were making every effort to rescue her; that the company's employe was within a few feet of the engine room, and could have easily called to or signaled the engineer to stop the boat, but due to his unskillfulness, gross and criminal negligence, and want of care, he made no effort either to stop the ferry or to aid and assist the passengers that were attempting to rescue her, although the passengers who had jumped from the ferry to the pontoon were begging and insisting on the company's employes and servants to throw out a rope or float of some kind to aid and assist the drowning woman; that the death of petitioners' mother was due entirely to the gross negligence, carelessness, and want of skill of the defendant company and its servants in allowing the gate to remain open after the ferry had partly left the landing, and also to the fact that the employe whose duty it was to close the gate was absent from his post and failed to perform his duties; that the said employe, Leon le Opeo by name, stated shortly after the accident to the passengers and police that he had forgotten to close the gate, and admitted his gross and criminal negligence, want of care, and disregard of the safety of human life; that petitioners' mother's death was also due to gross negligence, want of care and caution, on the part of the defendant in allowing a simple-minded youth, whose name is presently unknown to petitioners, too young and inexperienced to operate its ferry in the absence of its regular employe who failed to perform his duties; that petitioners' mother's death was not only due to the fact that defendant's servants failed to close the gate on the pontoon, the same being open, and inviting her to board the ferry, but also in allowing incompetent, unskilled, unreliable, and too youthful employes to perform the duties of those regularly assigned for this work; that the defendant company could have prevented the injury and death of petitioners' mother by closing the gate, and subsequently thereto, by an average care and diligence, when she had fallen in the river, and which it is its duty so to do. Petitioners claim \$5,000

for the suffering of their mother, and \$25,000 for petitioners' loss of her comfort, society, and motherly affection; that previous to the negligent drowning of petitioners' mother she was in good health, and had the usual life expectancy. Your further named petitioner, Eloise Williams, wife of Optilus Sanders, asks that she be authorized to file this suit and to stand in judgment herein.

In view of the premises petitioners pray that the said Union Ferry Company, through its proper officer, be cited to appear and answer this petition, and, after due proceedings had, be condemned to pay petitioners the full sum of \$30,000, with interest from date of judgment, and for costs and for all general relief. Your fourthly named petitioner prays that she be authorized to file this suit and to stand in judgment herein.

Defendant answered. After pleading a general denial it averred that if plaintiffs' mother met her death as alleged she did so through no fault of respondent, its servants, agents, or employes, but that she met her death by drowning through her own fault, carelessness, and negligence in attempting to board the ferry boat, which was then under way and moving, at a time and place and in the manner and under circumstances when it was imprudent for her to do so.

Further answering, respondent averred that if it be shown that respondent was in any way negligent, and that the drowned woman was plaintiffs' mother, her actions contributed to the cause of her death and bar any recovery against respondent. In view of the premises respondent prays to be hence dismissed, with costs.

The case was tried before a jury, which returned a verdict in favor of the defendant. Judgment was rendered accordingly, and plaintiffs have appealed.

Opinion.

The plaintiffs invoke in this case the application of the rule announced in 19 Cyc. p. 511, and *Dougherty v. N. Y. Central* (Sup.) 86 N. Y. Supp. 746, that, where a company operating a ferry boat moors its boat and keeps open the gate it thereby invites a passenger and gives assurance that it is safe to do so.

They also urge that a passenger is justified in assuming that, when the guard rails are taken down or the place opened for passengers to pass off, the boat will remain securely fastened; he may also assume that the landing place is in a safe condition, and need not examine particularly to see if there is a vacant place between the bridge and the boat. 19 Cyc. 508; *Spiro v. Long Island Co.*, 21 Misc. Rep. 633, 47 N. Y. Supp. 1093; *St. John v. MacDonald*, 14 Can. Sup. Ct. R. 1; *Palmer v. N. J. R. Co.*, 33 N. J. Law, 90.

They maintain that, reduced to its simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest dili-

gence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance and the circumstances of the cases will permit. *Le Blanc v. Sweet*, 107 La. 368, 31 South. 766, 90 Am. St. Rep. 303; 5 Am. & Eng. Ency. of Law (2d Ed.) p. 538; *Lehman v. R. R. Co.*, 37 La. Ann. 707; *Turner v. R. R. Co.*, 37 La. Ann. 648, 53 Am. Rep. 514.

They refer the court to *Patton v. Pickles*, 50 La. Ann. 857, 24 South. 290; *Julien v. Wade Hampton*, 27 La. Ann. 377; *Railroad Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787; *Ency. Plead. & Prac.* 399; *Alken v. So. Pac. Co.*, 104 La. 161, 29 South. 1.

The evidence shows that on February 14, 1909, at 8 o'clock in the evening the steam ferry boat *Hattie*, belonging to and operated by the defendant company was at her landing in Algiers, moored fore and aft receiving passengers for the last trip which she was to make for the day, to the foot of Barracks street in the city proper.

The evening was dark, and the rain was falling. The usual hour for leaving having been reached, the boat gave its customary signals to warn all would-be passengers. The steam whistle had been blown, and the boat's bell rung. The boat was lying as usual at the pontoon wharf with her head downstream, because of the strong eddy existing at that point. The customary signals of departure had also been given to the boats' employes. The front line was thrown off from the carlil by a deck hand. The boat got under way. The bow was swung into the stream away from the pontoon until the boat was at an angle from the pontoon of about 70 degrees with the pontoon landing and the bank of the river, the bow being about 75 feet out in the stream.

The boat had backed up with her engines, and the stern line had been somewhat slackened to aid in making the swing. The stern end of the boat was about 3 feet from the pontoon.

It was usual after the signals for departure had been given for the clerk of the boat before leaving to shut a gate, separating the gangway down which passengers had to pass from the ferry house to the pontoon below, and, having done so, to immediately throw a bar across the opening in the boat's rails, by means of which entrance to it was effected.

On this particular evening the gate having been injured in some manner it was not shut, but the entrance on the boat was closed as usual by a bar. The departure of the boat on this particular evening conformed in every respect to the usual method of departure, with the simple exception that the gate at the end of the gangway was left open.

While things were in this situation, the plaintiffs' mother, returning from church in Algiers to the main city, entered the ferry house, paid her fare and passed down the gangway. She ran down the gangway through

the open gate onto the pontoon bridge. She did not attempt to reach the boat by moving forward on the pontoon directly opposite. Instead of doing this she turned to the left when she had passed the gate, and ran towards the stern of the boat, the latter being still a few feet from the pontoon. When she entered the ferry house she realized that she was late, and hoped by hurrying forward to be able to get on board the boat. When she reached the gate she saw that it was impossible to do so at the usual place for entering upon it, as the boat at that point was far off in the stream. The lamps along the gangway and the electric lights upon the boat disclosed the exact situation.

She assumed the risk of jumping onto the boat at its stern end where the intervening space between it and the pontoon was shorter, and in the attempt fell into the river and was drowned.

Accidents of this kind to passengers when reaching ferries after the boat has left its moorings are not unusual, but it cannot be reasonably claimed that the ferry company should be held responsible for the results of the public's own recklessness or want of ordinary prudence.

We can readily conceive of a case where it should be responsible for leaving open a gate at the end of a gangway down which passengers have to pass to enter a boat. It should be, where the attendant circumstances are such as to lull the approaching passengers into false security and mislead them by the reasonable belief that the boat was still tied to her usual landing place. The testimony in this case does not show facts of that character; on the contrary, it discloses a state of affairs which would make injuries that a person has received himself from his own rash conduct, to be suffered and paid for not by himself but by another person, who had not in any way brought them about.

The defendant should have closed the gate leading out from the gangway on the pontoon before the boat swung into the stream, but that fact was not the proximate cause of the woman's death. That was due to her want of ordinary caution and prudence in regard to her own safety. For the result of her dangerous attempt to jump upon the boat at an unusual, unwarranted, and unauthorized place, her heirs must legally bear the consequences. *Tatum v. Dock Island R. Co.*, 124 La. 921, 50 South. 796; *Taylor v. Palmer & Co.*, 124 La. 531, 50 South. 522; *Railroad Co. v. Jones*, 95 U. S. 441, 24 L. Ed. 506; *Summers v. R. R. Co.*, 34 La. Ann. 144, 44 Am. Rep. 419; *Childs v. R. Co.*, 33 La. Ann. 156; *Wood, Railway Law*, 1155; *Knight v. R. R. Co.*, 23 La. Ann. 462; *Phillips v. Railroad*, 49 N. Y. 177; *Railroad v. Scates*, 90 Ill. 586.

The judgment appealed from is not erroneous. It is hereby affirmed.

(126 La.)

No. 18,107.

REEMS v. NEW ORLEANS G. N. R. CO.
(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 316*)—INJURY TO PASSENGER—
NEGLIGENCE—REBUTTAL.

Where a passenger was injured without his fault by the derailment of a railroad train, the defendant must show, to rebut the presumption of negligence, that the accident resulted from circumstances against which human care and foresight could not guard. In the absence of evidence showing the particular cause of the derailment of a railroad train, the court is unable to say that it was the result of an accident which could not have been foreseen or prevented by the railroad company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1288; Dec. Dig. § 316.*]

2. NEW TRIAL (§ 162*)—AMOUNT OF RECOVERY—
EXCESSIVENESS—REMISSION OF EXCESS.

Where an award of damages is excessive in the opinion of the trial judge, he should compel a remittitur or grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

(Additional Syllabus by Editorial Staff.)

3. DAMAGES (§ 132*)—EXCESSIVENESS—
PERSONAL INJURIES.

Plaintiff, injured on a train, did not know that he was hurt until after he reached his home. He had fever, and called in a physician, who found that the ligament connecting the coccyx with the sacrum had been ruptured, and tried palliative treatment for about a month; but, plaintiff growing no better, the coccyx was removed, and plaintiff was ill altogether about two months, suffering considerable pain and inconvenience and incurring an actual expense of \$750 for medical attention, nursing, and medicines, no other pecuniary loss being shown. Held, that a recovery of \$4,500 was excessive and should be reduced to \$2,500.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 372; Dec. Dig. § 132.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Philip F. Reems against the New Orleans Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Farrar, Jonas, Goldsborough & Goldberg, for appellant. Buck, Walshe & Buck, for appellee.

LAND, J. This is a suit for damages for personal injuries sustained by the plaintiff while a passenger on one of defendant's trains.

Defendant appeals from a verdict and judgment in favor of the plaintiff in the sum of \$4,500, with interest and costs.

That the plaintiff, a passenger, was injured by the derailment of defendant's train, is clearly shown by the evidence.

The real defense is that the accident happened without the fault or negligence of the defendant.

The evidence shows that, while the train was running at the rate of 30 miles per hour,

the truck of the tender left the rails. The tender and the first coach were wrecked, and the track at the place of the accident was torn and damaged.

The burden of proof is on the carrier to show why the contract of safe carriage was not fulfilled. *Spurlock v. Traction Co.*, 118 La. 4, 42 South. 575; *Le Blanc v. Sweet*, 107 La. Ann. 355, 31 South. 766, 90 Am. St. Rep. 303.

In *Patton v. Pickles*, 50 La. Ann. 865, 24 South. 290, this court affirmed the doctrine that, in a case like this, the defendant is bound to show that the inexecution of the contract resulted from accidental and uncontrollable events. Civ. Code, § 2754. *Thompson on Carriers of Passengers*, p. 210, expresses the common-law rule as follows:

"In other words he must show, in order to rebut the presumption, that the accident resulted from circumstances against which human care and foresight could not guard."

The evidence adduced by the defendant fails to show the cause of the accident, and, in the absence of such explanation, the court is unable to say that the accident resulted from circumstances against which human care and foresight could not guard. Trucks do not leave the rails without some physical cause, such as defects in the trucks, or in the track, or some fault in the operation of the train.

A number of other passengers were injured in the same wreck, and one of them testified, without objection, that defendant had settled with him for his injuries, and had attempted to make a like settlement with the plaintiff.

The remaining question is as to the quantum of damages, which the defendant contends is manifestly excessive. The trial judge concurred in this view, and should have granted a new trial or compelled the plaintiff to enter a remittitur of the excess. After a careful review of the evidence, we agree with our learned Brother that the award is excessive, considering the nature of the injury and its consequences.

Plaintiff did not know that he was hurt until after he reached his home. He had fever, and called in a physician, who on examination found that the ligament connecting the coccyx with the sacrum had been ruptured. The physician tried palliative treatment for about a month; but, the patient growing no better, the coccyx was removed by a surgical operation. Plaintiff was ill altogether about two months, and doubtless suffered considerable pain and inconvenience.

The plaintiff incurred an actual expense of \$750 for medical attention, nursing, medicines, etc. No other pecuniary loss is shown. There remains \$3,750 for the injury, with its attendant pain and suffering. This amount is out of proportion in comparison with the

usual awards for the loss of an arm, or leg, or other severe bodily injury, which in this jurisdiction seldom exceeds \$6,000 or \$7,000.

We think that a verdict for \$2,500, inclusive of the expenses, would have been amply remunerative in a case of this kind.

It is therefore ordered that the verdict and judgment appealed from be amended by reducing the amount thereof from \$4,500 to \$2,500, and that as thus amended said verdict and judgment be affirmed; plaintiff and appellee to pay costs of appeal.

(126 La.)

No. 18,239.

CITY OF NEW ORLEANS v. VILLERE.

In re VILLERE.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 20, 1910.)

(Syllabus by the Court.)

FOOD (§ 14*)—SALE OF ADULTERATED MILK—PROSECUTION—BURDEN OF PROOF—"POSSESSION FOR SALE."

In a prosecution for having in possession for sale adulterated milk under section 4 of Ordinance 6596, C. S., as amended by Ordinance 15,549, C. S., the burden is on the prosecution to prove possession for the purpose of sale to consumers in the customary manner of the trade. The mere receipt by a dairy company at a railroad depot of one or two cans of milk below the legal standard out of a shipment of 26 cans does not make out a case of "possession for sale" within the purview of the city ordinance, especially where the evidence shows that the dairy company does not sell to consumers milk below the legal standard, but uses the same for the manufacture of butter, cheese, and other by-products.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10-13; Dec. Dig. § 14.*]

George A. Villere was convicted of having in his possession for sale adulterated milk, in violation of an ordinance of the city of New Orleans, and applies for certiorari and prohibition. Conviction annulled, and relator discharged.

Chandler C. Luzenberg, for relator. W. L. Hughes and Joseph E. Generelly, for Board of Health of City of New Orleans.

LAND, J. Relator was convicted and fined in the recorder's court of having in his possession for sale adulterated milk, or milk below the standard defined by City Ordinance 15,549, C. S., adopted September 5, 1899. On appeal the sentence was affirmed by the criminal district court of the parish of Orleans. Whereupon the relator applied to the Supreme Court for writs of certiorari and prohibition. The case is before us on the answer of the respondent judge and the record in the court below.

The ordinance fixes the standard of normal or pure milk, and provides that all milk falling below the prescribed test, or any milk from which the cream has been removed, or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

to which water, foreign fats, coloring matter, or any other foreign or extraneous substance has been added, shall be considered as adulterated. The third section provides that every person who sells milk shall be obliged to furnish to any sanitary officer or inspector of the board of health on application therefor a sample of the milk sold by said vendor from the can or other vessel from which it is sold to the public.

Section 4 of the ordinance reads as follows:

"Sec. 4. Whoever shall have in his possession for sale or whoever shall sell any adulterated milk as defined by this ordinance, or who shall refuse to furnish the sample as provided in the preceding section, shall be fined not more than twenty-five dollars or sentenced to not more than thirty days imprisonment in the parish prison in default of the payment of the fine."

Relator was the president of the Cloverland Dairy Company, and in such capacity received at a railroad depot a shipment of 26 sealed 10-gallon cans of milk from farmers under contract to supply the dairy company. On the arrival of the cans, they were inspected at the depot, and one or two of them were found to contain milk below the standard fixed by the ordinance.

The undisputed evidence is to the effect that each can of milk consigned to the dairy company was paid for on the basis of quality, and was tested at the dairy plant immediately on arrival for the double purpose of fixing the price and ascertaining whether the milk was below the standard fixed by the city ordinance. The can of milk did not become the property of the dairy company until it was so tested, and the price fixed according to its quality. When the test showed that the milk was below the legal standard, the dairy company either raised it to the standard by the addition of cream, or used it for the purpose of making butter, cheese, or cream cheese. The milk intended for sale was always bottled.

The question to be determined is whether the relator had the can of adulterated milk "in his possession for sale" in the sense of section 4 of the ordinance. Section 3 provides for the taking of a sample of milk "from the can or other vessel from which it is sold to the public."

The next section penalizes the possession for sale or the sale of adulterated milk. The purpose of the ordinance is to protect the consumers of milk sold in the usual manner for table and other uses. The "possession" referred to in section 4 is that which accompanies the customary sale of milk for consumption. The object of the ordinance is the protection of the public health. The mere possession of milk below the standard fixed by the ordinance is innocuous, and does not come within the purview of section 4, unless such possession is for the purpose of sale for consumption. If the dairyman in making his

rounds carries with him adulterated milk, or if the dealer exposes such milk for sale, it may be presumed that his possession is for the purpose of sale. If the mere fact that dairyman has adulterated milk in his possession creates a presumption that he intends to sell the same in contravention of law, then a dairyman may be convicted on evidence that he had drawn from one of his Holstein cows milk below the legal standard, or, as in the instant case, on evidence that he had received a consignment of milk, some of which was below such standard. Such a construction would, moreover, penalize the use of milk below the standard for the legitimate purpose of making butter, cheese, or other by-products.

We do not believe that such a rigid construction of the ordinance is justified by either the letter or spirit of the ordinance, or from consideration of public health or policy.

It is therefore ordered that the sentences below be annulled and set aside, and that the relator be discharged without day and his bonds canceled.

BREAUX, C. J. (concurring in the decree). I cannot agree with the opinion, although I concur in the decree. In my opinion dairies can be penalized for using milk below the standard for any purpose. It follows that I do not agree with the following: "Such a construction would, moreover, penalize the use of milk below the standard for the legitimate purpose of making butter, cheese or cream cheese"—not a direct issue here. I therefore concur in the decree.

(128 La.)

No. 18,246.

LE BLUE v. SMITH et ux.

In re LE BLUE.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1085*)—DISTRICT COURTS—SUPERVISION OVER JUSTICE COURTS.

The district courts have, to a certain extent, supervision over justice of the peace courts, to see that the laws are properly administered; and where the district court declares that there has been committed an irregularity, the judgment of the district court will not be changed, unless there is manifest error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1085.*]

(Additional Syllabus by Editorial Staff.)

2. JUSTICES OF THE PEACE (§ 94*)—PROCEEDINGS IN CIVIL CASES—WAIVER OF DEFECT OF CITATION.

A paper in question in a justice's court, that "I, A. W. Smith," answers in his own name, and merely refers to his wife, the other defendant, and in effect denies that the amount is due, purporting to be signed by the wife only, is not an answer, waiving a defect of citation.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 84.*]

Action by Jules Le Blue against A. W. Smith and wife. A justice's judgment for plaintiff was reversed by the district court, and plaintiff applies for certiorari and mandamus. Petition dismissed.

J. N. Ogden and Percy T. Ogden, for applicant. Smith & Carmouche, for respondents.

BREAUX, C. J. This action was brought in the magistrate's court of one of the wards of the parish of Acadia.

The amount claimed was \$48.15.

The plaintiff at the same time obtained a writ of attachment, and seized about 40 barrels of corn and a buggy.

The objection to the proceedings originally was that the return on the citation does not show upon whom the alleged service was made—whether upon the husband or upon the wife.

It reads as follows, after giving title:

"This action was served by me on the sixth day of October, 1909, by serving a copy of the same on the within named of said citation."

Whether served upon the husband or the wife, the return does not show.

The justice of the peace made note of the proceedings, in which he states that defendant A. W. Smith offered himself as a witness in his own behalf, and at the same time tendered a series of exceptions, separately; that they were dilatory, and not timely filed. For that reason they were overruled.

The justice of the peace rendered judgment against the defendant for \$48.15, and recognized the regularity of the attachment.

An appeal to the district court was taken from this judgment.

The judge of the district court reversed and annulled the judgment of the magistrate's court.

A writ of certiorari issued from this court.

In answer to the preliminary writ from this court, the judge of the district court informs us that the case was an appeal from the justice court, and for that reason there was no note of evidence taken or testimony of witnesses written in either court; and the further statement is made by him that the defendants' attorneys asked for copies of certain affidavits for an attachment taken in the justice court, which were not furnished to them; that they sent exceptions to the justice of the peace to be filed, which he failed to file.

The fact regarding the affidavit is referred to as proving that the magistrate knew that defendant had employed counsel.

The Original Exceptions.

They allege want of service, misjoinder, grounds to dissolve the attachment, and, in the alternative, the defendant answered plaintiff's demand.

The magistrate, in his statement of the case for the appeal, said that the exceptions

were filed too late; that is, after the trial had been opened on the 28th day of October, 1909.

The district judge in his return further states that, although the magistrate represents that the reference to the exceptions made by him in the statement for the appeal to this court was as of date the 19th day of October, 1909, it was evidently received by him on the 9th day of that month.

The magistrate found as a fact, as stated in his note of the case, that the property belonged to the wife.

It remains that the exception, although received in due time, as stated by the district judge, was ignored by the magistrate, and instead he chose to take up and consider as an answer a paper which was not an answer.

This asserted answer, dated October 19, 1909, is inartistically written:

"I, A. W. Smith," answers in his own name, and merely refers to his wife, the other defendant, and he in effect denies that the amount is due.

The answer is signed by the wife—that is, it purports to be her signature—and not by the husband. It is nondescript paper. It is not admissible even as a paper filed in a magistrate's court.

At that time, according to the district judge, who has heard all the testimony, the magistrate had exceptions in his possession and a complete answer.

The ground urged by plaintiff, based on defendants' dilatoriness, or the dilatoriness of their counsel in filing their exception, is not evident.

The complaint of plaintiff, the applicant here, is:

"That said cause was fixed for trial in the district court of Acadia parish for the 22d day of March, 1910, and that on said day of the trial defendants, through counsel, renewed their exceptions of want of citation and misjoinder of parties, which exceptions were filed in the court below after the answer had been filed and after the plaintiff's case had been closed, and while the defendant A. W. Smith was on the stand, testifying as a witness in his own behalf, he for the first time offered to file these exceptions."

We will in the first place state that the duty of the magistrate is clearly laid down.

In his record the magistrate—

"shall state the answer of the defendant if he appears, and his nonappearance if he makes default." Code Prac. art. 1074.

This was not done by him.

There is only one inference to be arrived at from the record. The magistrate withheld the exceptions and answers of the defendant. The attorneys for defendants were not at the trial. They forwarded exceptions and answered to the magistrate, who only brought them forth when they were too late to be of any use. He did not take them up, as he should have done, and decide them. He instead, for some reason, considered as an answer the pencil-written answer of Smith, the husband, one of the defendants.

It was really not an answer. In the body, Smith averred that it was his answer.

The illy prepared paper has a signature purporting to be the signature of Mrs. Smith.

The language denotes that it is the answer of Smith exclusively, and not that of Mrs. Smith.

It was not an answer. It did not cure the want or absolute defect of citation and the return.

The judge of the district court, in the district court, dismissed the suit on the ground that no service appeared to have been made.

We are unable to say, with the papers before us, that he erred.

It is true that the magistrate states that plaintiff and the defendants were present at the trial.

There is some doubt about the presence of Mrs. Smith.

In any event, he should have called upon Smith and wife, if both were present, for their answers. This was not done. The magistrate places reliance on a paper as being an answer which was not an answer.

We are not impressed by the proceedings before the magistrate's court, and for that reason withhold our sanction.

The judge of the district court, in expressive language, has chosen to condemn these proceedings.

The magistrates' courts are to an extent under his supervision. A part of his function consists in seeing that their administration of the laws is proper. When he declares that there has been an irregularity committed in a magistrate's court to a greater extent than we have chosen to state, we are of opinion that he should not reverse his judgment.

For reasons assigned, it is ordered, adjudged, and decreed that the rule is discharged, and the demand and petition of applicant dismissed.

(126 La.)

No. 18,309.

LOUISIANA OYSTER & FISH CO., Limited,
v. POLICE JURY, PARISH OF
ASSUMPTION, et al.

In re LOUISIANA OYSTER & FISH CO.,
Limited.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by Editorial Staff.)

INJUNCTION (§ 105*)—GROUNDS—RESTRAINING CRIMINAL PROCEEDINGS—VESTED RIGHTS.

Where relator had no vested or proprietary right to take fish from the waters of the lakes and bayous of a parish by reason of a license issued by the fish and game commissioners, an injunction will not lie to restrain the district attorney and police jury of the parish from enforcing a parish ordinance making it an offense to fish with a seine of more than 50 feet in the lakes and bayous of the parish, on the theory that the ordinance was invalid.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 105.*]

Action by the Louisiana Oyster & Fish Company, Limited, against the Police Jury, Parish of Assumption, and others, for injunction. On denial of the writ plaintiff applies for writs of mandamus and certiorari. Denied.

John Dymond, Jr., and G. S. Guion, for applicant. Respondent Judge, pro se.

PROVOSTY, J. The relator is engaged in the business of catching fish for market. Relator alleges that it has over \$5,000 invested in the business, in powerboats and seining outfits; that it has contracts for the future delivery of fish to be caught; that it has many men employed; that it has obtained licenses from the commissioners for the protection of birds, game, and fish to fish in all the waters of the state during the year 1910; that for these licenses it has paid \$135; that the value of its property right in said business and licenses exceeds \$7,500; that, although the supervision and control of fishing in the fresh waters of the state for commercial purposes is vested by Act No. 278 of 1908 in the said commissioners for the protection of birds, game, and fish, the police jury of the parish of Assumption has passed an ordinance making it an offense to fish with a seine of more than 50 feet in the lakes and bayous of the parish; that the district attorney has caused the arrest of the employees of relator for violation of said ordinance, and will continue to do unless restrained by injunction; that, as the result of said criminal proceedings, relator has already suffered loss of \$3,000 from its inability to carry out its contracts, loss of profits, and demoralization among its employees; that the said Act No. 278 of 1908 has entirely superseded Act No. 60 of 1896 under the pretended authority of which the police jury has adopted said ordinance; and that said ordinance is, in consequence, null and void. Relator prays that the police jury and the district attorney be enjoined from carrying out the said ordinance.

The respondent judge refused to grant the injunction. Whereupon the relator filed in this court the present application for a writ of mandamus to compel the granting of the writ. In answer to the rule to show cause why the writ of mandamus should not be issued, the learned respondent judge assigns the following reasons:

"Into this honorable court now comes respondent in the above entitled and numbered cause, and for answer to the application of relators for writs of certiorari and mandamus avers:

"That relators did apply to him for a preliminary order of injunction on or about the 11th day of May, 1910, whereby relators sought to prohibit and enjoin the police jury of the parish of Assumption and the district attorney of the Twenty-Seventh judicial district, acting in and for the parish of Assumption, from enforcing certain ordinances of said police jury and from prosecuting certain persons from violation of said ordinances, and that on or about the 13th day of May, in the exercise of the legal

discretion vested in him, your respondent refused to sign or grant said order for the following reasons:

"That this government is based on three co-ordinate branches or departments, which, in order to subserve the ends for which they were instituted, must be entirely separate, free, and independent of one another, and, therefore, the judicial department should not, except for most weighty or grave reasons, interfere in the administration of the legislative or executive branches. In the case at bar, the judicial is asked to deny to the executive the right to appear in a court of justice to prosecute violations of a law enacted by the legislative department. The question primarily presented is not whether that law is good or bad or constitutional, but whether the executive or co-ordinate branch should be deprived of its inherent right to demand the enforcement of this law in the ordinary course of judicial proceedings—the court is asked to say to the executive, 'you cannot appeal to the forum which the Constitution has designated to enforce this law, but you must come here, a different forum, and show that this law was properly enacted and is constitutional; in the meanwhile, and pending this issue, you will have to remain, quiescent and not interfere in its violation.' That is the sole question which relator's demand presents for determination.

"The question is not a new one. It has frequently been passed upon. In the case of *Le-court v. Gaster*, 49 La. Ann. 487 [21 South. 646], this honorable court said: 'An injunction will not issue to restrain the execution of a criminal statute.' In *Boin v. Town of Jennings* 107 La. 410 [31 South. 866], a recent case, your honors say: 'The question of the legality and constitutionality of a municipal ordinance, in the nature of a police regulation enforceable by fine and imprisonment, should be left to the court in and to the occasion upon which the attempt is made to enforce it; the remedy by appeal to this court being in such case open to the party as against whom the attempt is made. An injunction to restrain the enforcement of such an ordinance will not lie.' See, also [*Levy v. Shreveport*] 27 La. Ann. 620; [*Mathews v. Town of Farmerville*] 121 La. 313 [46 South. 339]; [*State ex rel. Walker v. Judge*] 39 La. Ann. 135 [1 South. 437]; 22 Cyc. 902. That the ordinance sought to be enjoined is a police regulation enforceable by fine and imprisonment cannot be gainsaid. The power to protect and regulate game and fish is within the police power of the state, and ordinances framed thereunder are police regulations. 19 Cyc. 1006; *Black's Constitutional Law*, § 154; [*In re Schwartz*] 119 La. 290 [44 South. 20, 121 Am. St. Rep. 516].

"But, say relators, granting the correctness of the foregoing principles which are imbedded in the jurisprudence, that same jurisprudence has for good reasons made an exception thereto. When a municipality enacts an ordinance which is illegal, and the enforcement of which will have the effect of depriving a person of property rights or vested rights, the execution thereof may be enjoined by a court of equity because the person has no other adequate remedy. These ordinances are illegal, and, unless the police jury of Assumption and the district attorney are prohibited from enforcing them, we have no adequate remedy, and we are being deprived of a property right which we swear is worth \$7,500. They cite [*Baseball & Amusement Co. v. New Orleans*] 118 La. 232 [42 South. 784; *L'Hote v. New Orleans*] 51 La. Ann. 93 [24 South. 608, 44 L. R. A. 90].

"Now it must be borne in mind that no person has the inherent right to fish in the public waters of the state. These waters are public domain, and no person, regardless of any license or permission, can lawfully claim either an ex-

clusive or a natural or a proprietary right to fish in these waters as long as the ownership is vested in the state. A person may under legal regulations obtain the privilege of fishing, but the permission of exercising this privilege cannot form the basis of a contract. Relators aver that they have paid \$45 for each of several licenses. It would not, in my opinion, matter if they had paid \$4,500, for the reason that section 10 of Act No. 121 of 1906, under which they claim the license, to have issued, does not authorize the sale of a license, but only authorizes the issuance of a free, written permission, which is bound to be revocable and cannot be the basis of a contract vesting property rights in the relators.

"The state may become bound by a contract, in the same manner that ordinary persons may become bound, when it has received a consideration or benefits proportioned to those it confers; but a fishing permit which, under the very terms of the law, may be given without any right on the part of the state agency to charge for the same, can certainly not be assimilated to an agreement conferring vested rights or creating an estoppel en pais.

"A license or permit granted under a police regulation is not a contract, and it cannot give rise to vested or proprietary rights. [*State v. Isabel*] 40 La. Ann. 340 [4 South. 1; *State v. New Orleans Debenture Redemption Co.*] 51 La. Ann. 1840 [26 South. 586; *State v. Kohnke*] 109 La. 842 [33 South. 793]; *Cooley's Constitutional Limitations* (8th Ed.) pp. 341-741; [*State v. Bott*] 31 La. Ann. 664 [33 Am. Rep. 224]; 25 Cyc. 625; [*Voight v. Excise Commissioners of Newark*, 59 N. J. Law, 358, 36 Atl. 686] 37 L. R. A. 292; [*Levy v. Kansas City*, 74 Kan. 861] 86 Pac. 149.

"A license cannot operate as a bar against decreeing the illegality of the charter of a corporation. [*State v. New Orleans Debenture Redemption Co.*] 51 La. Ann. 1840 [26 South. 586]. The state is not precluded from revoking a statute relating to a public subject within the domain of the general legislative power and involving public rights and the public welfare. No contract rights can arise in such case. [*State v. Kohnke*] 109 La. 842 [33 South. 793].

"An injunction will only lie against the enforcement of a municipal ordinance in the nature of a police regulation, where vested or proprietary rights may be divested as a result of the enforcement. [*Baseball & Amusement Co. v. New Orleans*] 118 La. 232 [42 South. 784; *L'Hote v. New Orleans*] 51 La. Ann. 93 [24 South. 608, 44 L. R. A. 90].

"In *Baseball & Amusement Co. v. New Orleans*, 118 La. 232 [42 South. 784], your honors quote approvingly from *High on Injunction* on this subject, and it is to be noted that the passage quoted specifically says: 'But in such case its (equity court) interference is founded solely upon the ground of injury to property and the necessity of preserving property rights; and, where such rights are not clearly involved, the relief will be denied.'

"It is my opinion that relators have no vested or property rights involved in this matter. True, they allege that they have, but that is a conclusion of law and fact with which I cannot agree, and, if they have no such right, then they do not come within the exception that police regulations may be enjoined when their enforcement results in the deprivation of rights of property.

"And, therefore, I do not believe that relators are entitled to test the legality of the ordinances adopted by the police jury of the parish of Assumption, in the manner proposed by them, for the reason that relators have no proprietary right to the fish in Lake Verret. The petition of relators does not show that Lake Verret in Assumption is the only body of water in which they can fish; nor that the property which they

bought as a fishing outfit was bought solely for the purpose of fishing in that particular body of water, and that it could not be used elsewhere; nor have the relators any exclusive right to fish in that lake, and it must be presumed that, pending the prosecutions of their employés, for violation of the parish ordinance, they can profitably pursue their business in other waters.

"I do not believe that prosecutions under the ordinances in question interfere with any vested or property rights of relators, and, if the ordinances are illegal and unconstitutional, the proper time and mode for testing this issue is when the accused are brought for trial in the court exercising criminal jurisdiction. For this reason I have refrained from discussing the legality of the ordinances under attack.

"I submit further that the order of injunction prayed for, being for causes enumerated in article 306, C. P., the granting of the same was a matter entirely within the legal discretion of respondent. [State v. Judge] 41 La. Ann. 951 [6 South. 721; State v. Somerville] 110 La. 956 [34 South. 953; Hanson v. Policy Jury] 116 La. 1080 [41 South. 321; Murat v. New Orleans] 119 La. 514 [44 South. 279]. Respondent further submits that the writs applied for should not issue unless this honorable court should come to the conclusion that relators had an absolute statutory right to the injunction prayed for ([Manion v. Board of Directors] 119 La. 880 [44 South. 515]); that a writ of mandamus should not be granted to compel respondent to perform a discretionary act ([State v. King] 43 La. Ann. 826 [9 South. 640; Citizens' Bank v. Webre] 44 La. Ann. 1081 [11 South. 706; State v. Rightor] 38 La. Ann. 916; [State v. St. Paul] 110 La. 722 [34 South. 750]); and that a writ of mandamus will only issue to compel the performance of a ministerial act ([State v. King] 43 La. Ann. 826 [9 South. 640]).

"The issues involved in relator's petition for injunction are of great importance to the people of the parish of Assumption and affect the interest of a large number of persons, besides the pecuniary interest of the relators. Appreciating the gravity and seriousness of this controversy, I gave the whole matter ample study and consideration and have sought, in the exercise of the discretion vested in me by law, to reach a conclusion sanctioned by the jurisprudence of Louisiana, and which will promote the orderly administration of justice. If I have erred in this conclusion, it was not from want of diligence, nor from lack of study and investigation, but purely from a misapplication of the law and jurisprudence on this subject.

"I respectfully submit the whole matter for your consideration, ready and willing to do whatever this honorable court in its wisdom may deem just and proper."

We do not understand the learned respondent judge as questioning here that equity may interfere in a proper case to protect property rights, against purely vexatious criminal proceedings, but as holding simply that relator does not present a case calling for the exercise of that extraordinary jurisdiction; it not appearing that relator has a proprietary right in the waters of the lakes and bayous of Assumption parish, or that relator's fishing outfit could not be utilized in other waters, and relator's contracts fulfilled in that way.

The rule to show cause herein is, therefore, recalled, and the application of the relator is dismissed, with costs.

(126 La.)

No. 18,222.

BELL et al. v. LAFOSSE et al.

In re LAFOSSE et al.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 25, 1910.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 388*)—
BONA FIDE PURCHASER.

The sale of property under an order of court by an administrator to a third person interposed for the administrator may be null as between the heirs of the late owner and the original vendee, but this nullity does not extend to subsequent purchasers in good faith and with no knowledge of the concealed defect in the title of the original vendee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

Action by William Bell and another against Joseph Lafosse and others. The Court of Appeal reversed a judgment of dismissal rendering judgment for plaintiffs, and defendants apply for certiorari or writ of review to the Court of Appeal. Judgment of the Court of Appeal reversed, judgment of the district court reinstated, and cause remanded.

Goudeau & Barbe, for plaintiffs. Thos. C. Plauche, for defendant Lafosse. Cline, Cline & Bell, for defendants Rowson and Haber.

BREAUX, C. J. Plaintiffs sued to annul a sale by the administrator of the estate of their father to Isaac Faucett.

The charge is: That Isaac Faucett is a party interposed and that the sale is a simulation.

That "Louis Doucet, as administrator of the succession of Chas. Bell, pretended at the succession sale of Chas. Bell, on the 14th day of May, 1893, to sell and adjudicate the above-described property to Isaac Faucett, for the previously agreed price of \$200, which Faucett never paid."

The admitted facts are: That the property was community property of the father and mother of plaintiffs.

That a money judgment had been obtained as stated in the Doucet's account as administrator.

That the property was sold in pursuance to an order of court, and that a month thereafter the purchaser at succession sale (Faucett, since deceased) sold the property to Louis Doucet for a stated consideration of \$200.

That Louis Doucet sold to Rowson and Haber in 1901. That they sold part of the land to Joseph Lafosse, and that all the vendees—i. e., Lafosse and Haber and Rowson—took possession of the property, and were from the first purchasers in good faith, and they had no knowledge of secret understandings between Doucet and Faucett, alleged interposed party.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Our learned brothers of the Court of Appeal made a summary of the facts which led them to this conclusion: That Faucett was an interposed party.

We accept as correct the summary and the conclusion of the court as to the fact just stated.

The district court, after a hearing of all the issues, sustained the defense on exception and dismissed the suit.

The Court of Appeal reversed the judgment of the district court; decided in favor of plaintiffs.

The case is before us on an application for a writ of certiorari.

The sale was made by the administrator to pay debts. The administrator had no interest of any kind in the property.

The sale may be null between the heirs of the late owner and the original vendee; but that nullity does not affect the title to the property acquired by third persons.

We have noted that these third persons admittedly were in good faith; that admission was by counsel for plaintiff, together with the additional admission that they (the present owners) had no knowledge of secret understanding between the administrator and the first vendee. That disposes of the question at issue against plaintiffs.

The purchasers have acquired a record title in due form; preceded by proceedings in due form. A purchaser in good faith in such a case acquires title.

The sale at public auction was not a nullity. The fraudulent acts of the administrator, of which the purchasers had no knowledge, do not affect defendants' rights.

That question has been decided in other cases in which an administrator had bought through a person interposed.

The sale was not considered null or void in so far as third persons were concerned.

The innocent third person was invariably protected in his title.

The effect of the sale as to him was to transfer the title, particularly after a number of years have elapsed, as in this case, and there is nothing to give ground for inquiring into the title.

The argument is pressed upon our attention by learned counsel for the plaintiff that the sale was *contra bonos mores*, a simulation, and as such void.

We are unable to take that view as relates to third persons. The laws of registry are imperative and govern.

The objection stated cannot obliterate their force and effect, even though wrongs have been committed between the legal representative of a succession and another who has participated with him in a fraud and simulation.

It is the misfortune of plaintiffs that the property of their father after his death fell into the hands of unscrupulous persons.

The court can give them no relief.

It must be borne in mind that the succession was represented by one who had authority to administer. Whatever fraud he has committed cannot be visited upon those who knew nothing about this fraud.

We excerpt the following from a decision by Chief Justice Marshall (*Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162):

"If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which according to every legal test are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law. He is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned."

The decision is pertinent and expressed in the usually clear language of Chief Justice Marshall.

In the *Aronstein Case*, 49 La. Ann. 1484, 22 South. 408, cited for plaintiffs, the court pertinently stated:

"A fortiori must the defendant be held as knowing absolutely the want of title in both vendor and vendee."

For reasons stated it is ordered, adjudged, and decreed that the judgment of the Court of Appeal is reversed, annulled, and avoided. It is further ordered, adjudged, and decreed that the judgment of the district court in this case be reinstated, and that it be made the judgment of the district court and of this court; that the case be remanded to the district court for execution of the judgment.

It is further ordered, adjudged, and decreed that the plaintiffs pay costs of all courts.

SUTHERLAND v. FEDERAL INS. CO.
(No. 14,413.)

(Supreme Court of Mississippi. June 20, 1910.
Suggestion of Error Overruled July 4, 1910.)

1. INSURANCE (§ 382*)—FIRE POLICY—VACANCY PERMIT—AGENT'S AGREEMENT TO RENEW.

Agreement of the agent of an insurance company to renew a vacancy permit binds the company, so that, it not having been renewed, and loss having occurred during the time for which it was to be renewed, and while the house was still vacant, recovery may be had on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1016; Dec. Dig. § 382.*]

2. INSURANCE (§ 375*)—AGENTS—TERMINATING AUTHORITY—KNOWLEDGE OF INSURED.

As respects a fire policy issued by agents of an insurance company, they remain its agents, with power to bind it as to a vacancy permit, notwithstanding revocation of their agency, unknown to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948-965; Dec. Dig. § 375.*]

3. INSURANCE (§ 375*)—AGENTS—TERMINATING AUTHORITY—KNOWLEDGE OF INSURED—CONSTRUCTIVE NOTICE.

Insured must have actual knowledge of the revocation of the authority of the agents who issued his policy, that their promise to him to renew a vacancy permit shall not bind him; constructive notice, from the permit delivered by them being signed by another as agent, not being enough.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948, 951, 959; Dec. Dig. § 375.*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action by D. J. Sutherland against the Federal Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

Appellant, Sutherland, through his agent, Epley, insured a dwelling owned by him in the Federal Insurance Company, the appellee, for \$2,000, which was destroyed by fire, and Sutherland sued the insurance company for the amount of the policy. At the conclusion of the testimony the court instructed the jury peremptorily to return a verdict for the insurance company, which was done, and judgment entered accordingly, from which this appeal is prosecuted.

The policy was issued February 13, 1907, for a term of three years. The fire occurred August 8, 1908. The policy contains the usual 10-day vacancy clause. At the time of the fire the dwelling had been vacant a little over 30 days. On July 6, 1908, McLeod & Gunter, the agents of the Federal Insurance Company, with whom the insurance was effected, gave a vacancy permit for 30 days, and agreed to renew every 30 days until notified to the contrary. The insurance company defends on the ground that the vacancy clause was violated; that McLeod & Gunter, at the time they gave the vacancy permit, and agreed to renew it every 30 days without further notice, were not, and had

long since ceased to be, the agents of the company, and without power to make such indorsements. On the other hand, it is contended for Sutherland that they were the agents of the company, with power to bind their principal, so far as this policy was concerned, until he had actual notice from the company to the contrary, which he did not have. The controlling facts in the record touching this, the only question in the case, are as follows:

At the time this insurance was effected, McLeod & Gunter were general fire insurance agents at Hattiesburg, and so continued up to the time of the fire. At the time this policy was issued they represented this company and others. On February 14, 1907, the Federal, for its own convenience, and without the knowledge or consent of Sutherland or his agent, Epley, who looked after his rents and insurance, reinsured this risk and others in the National, and immediately wrote their agents, McLeod & Gunter, at Hattiesburg, to that effect, using this language in the letter: "You will therefore, on receipt of this letter, immediately cease acceptances of all new business or renewals on our behalf; but such policies as have already been issued, where the date of commencement is subsequent to the present date, may stand undisturbed, provided same cover risks, acceptable to us. May I therefore ask you to kindly acknowledge receipt of this letter, and to return to us by early express your commission of authority and all unused policies on hand, in order to facilitate the closing of our agency affairs; also that you render your account current, with remittances to balance, promptly, in usual form. All losses occurring after noon February 14, 1910, should be reported to our reinsurer." On April 29, 1907, they wrote McLeod & Gunter again as follows: "We have forwarded to our reinsurer, the National Fire Insurance Company, of Hartford, Conn., all daily reports and reinsurance schedules of business written in the state of Mississippi, and would thank you in the future to refer direct to them all indorsements, cancellations, and losses."

Carroll & King, another insurance agency at Hattiesburg, represented the reinsurer, the National Insurance Company. On July 6, 1908, Epley, as agent for Sutherland, applied in the form of a letter to McLeod & Gunter, as the agents of the Federal Company, to correct the description of the property, which was discovered to be wrong, and for a vacancy permit for 30 days, to be renewed until further notified, of which letter the following is a copy: "July 6, 1908. McLeod Insurance Agency, City—Gentlemen: I understand the insurance policy which we gave you for Mr. D. J. Sutherland on the two-story house reads, 'Lot 6, Block 8,' which should read, 'Lot 7, Block 8.' Kind-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly change the policy so that it will read 'Lot 7, Block 8'; also send me slip for the policy; also inclose vacancy permit for 30 days, and continue vacancy permit until we notify you, and, if you receive no notice at the end of 30 days, continue permit." After writing this letter Epley saw McLeod, of McLeod & Gunter, who acknowledged its receipt, and stated that the indorsements he asked would be made, including the vacancy permit for 30 days, to be renewed from time to time as it expired, until further notice from Epley. A short time before the fire McLeod delivered to Epley a vacancy permit for 30 days, which was executed by Carroll & King, agents of the reinsurer, the National, as follows: "Indorsement—D. J. Sutherland. Permission is hereby granted for premises to remain vacant for a period of thirty (30) days from date of this indorsement. Attached to and forming part of policy No. 162699 of the Federal Insurance Co. The Federal Insurance Co., by the National Fire Ins. Co., Reinsurers, Carroll & King, Agents, per M. D. King. July 7, 1908."

There is nothing to show that the agent, Epley, read this indorsement, and Sutherland never saw it until after the fire, and neither of them knew anything about the reinsurance, that Carroll & King were the agents of the National, and that McLeod & Gunter were no longer the agents of the Federal. On the contrary, the latter, from the time the policy was issued, up to and after the fire, continued to hold themselves out as the agents of the Federal. After the 14th of February, 1907, they gave Sutherland a rebate on his policy, paying him the difference, some fifty odd dollars. Thirty or forty days before the fire, McLeod approached Sutherland to renew his policy, thinking it was for only a term of one year, and ascertained it was a three-year policy; and after the fire McLeod & Gunter, representing the Federal Company, undertook to have the loss adjusted, from time to time reporting progress. In fact, neither Sutherland nor his agent, Epley, knew any one else in the transaction except McLeod & Gunter, who held themselves out all the time as agents of this company.

R. S. Hall, J. C. Street, and Harris & Potter, for appellant. McLaurin, Brien & Armistead, for appellee.

ANDERSON, J. (after stating the facts as above). If McLeod & Gunter continued as the agents of the Federal Insurance Company up to the time of the fire, so far as the policy in question is concerned, their agreement to renew the vacancy permit was binding on the company, and the case stands as if renewed and in force when the fire occurred. "An insurance agent, clothed with authority to make contracts of insurance, or

to issue policies, stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made." *Rivara v. Insurance Co.*, 62 Miss. 720; *Fire Insurance Co. v. Stein*, 88 Miss. 490, 41 South. 66.

Were McLeod & Gunter agents, as to this policy? On this subject we adopt the rule laid down by the South Carolina court in *Wilson v. Commercial Union Insurance Co.*, 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700, in this language: "When the plaintiff proved, and the defendant admitted, that Jerome P. Chase & Sons were the agents of defendant, and as such dealt with the plaintiff in relation to the issuing of the policy, there was clearly established an agency by said firm with the defendant. Now, when did that agency cease, so far as the plaintiff was concerned? Was it in the power of the defendant to quietly and secretly withdraw its agency from Chase & Sons, so as to prejudice the rights of third parties to whom this revocation of agency was utterly unknown, and especially when the members of this firm of Chase & Sons still acted to the agent of plaintiff as if they were still clothed with this agency? We do not think so." See 22 Cyc. pp. 1428, 1429, and notes.

It is contended that the vacancy permit issued by Carroll & King, agents of the National Insurance Company, at the instance of McLeod & Gunter, and by the latter handed to Epley, the agent of Sutherland, a short time before the fire, was sufficient of itself to lead Epley to knowledge of the fact that McLeod & Gunter were no longer the agents of the Federal. We hold that it was not. It was not intended as such, but for an entirely different purpose. It was necessary, in order for the company to terminate the agency of McLeod & Gunter as to this policy, to give either Sutherland or his agent, Epley, actual notice to this effect; constructive notice being insufficient.

A peremptory instruction, if asked, should have been given for the appellant.

Reversed and remanded.

BISHOP v. STATE. (No. 14,563.)

(Supreme Court of Mississippi. July 4, 1910.)
HIGHWAYS (§ 151*)—JUSTICES OF THE PEACE
—JURISDICTION—DELINQUENT ROAD HANDS.

Under Code 1906, §§ 4423, 4424, providing that the road overseer shall report under oath and file with the justice of the peace a list containing the names of delinquent road hands, a justice of the peace was without jurisdiction to try a person whose name was not contained in an overseer's report, such report

being the charge against delinquent road hands, and no other affidavit is necessary.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 416; Dec. Dig. § 151.*]

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

A. Bishop was convicted in a justice of the peace court of being a delinquent road hand, and he appealed to the circuit court, where he was again convicted, and he appeals. Reversed and remanded.

R. E. Halsell, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

ANDERSON, J. Appellant, Bishop, was convicted in the circuit court for being a delinquent road hand, and appeals to this court.

There was a trial first before a justice of the peace, by whom the appellant was convicted, and appeal taken to the circuit court. There was no report made by the road overseer under oath and filed with the justice of the peace, containing a list of the delinquent road hands, as provided for in sections 4423 and 4424, Code 1906. Without such report, containing the name of appellant as a delinquent, the justice of the peace was without jurisdiction to try him. Such report is itself the charge against the delinquent road hands. No other affidavit is necessary. When that report is filed, warrant is issued for the delinquent, and the justice of the peace proceeds as in other criminal cases.

Reversed and remanded.

STEINBERGER v. WESTERN UNION TELEGRAPH CO. (No. 14,316.)

(Supreme Court of Mississippi. June 13, 1910. Suggestion of Error Overruled July 4, 1910.)

TELEGRAPHS AND TELEPHONES (§ 69*)—FAILURE TO DELIVER MESSAGE—DAMAGES.

Where a telegraph company failed to deliver a message and offered no excuse therefor, it was liable for punitive damages in an action by the addressee.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. § 69.*]

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

Action by Lorn Steinberger against the Western Union Telegraph Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Jas. A. Finley, for appellant. J. B. Harris and E. O. Sykes, Jr., for appellee

SMITH, J. Appellant instituted suit in the court below to recover of appellee punitive damages for its alleged wanton and willful negligence in failing to deliver a telegram. On Wednesday, the 4th day of November,

1908, a telegram was delivered to appellee at Eureka, Kan., for transmission to appellant at Tupelo, Miss. This telegram was never delivered, and so far as the evidence discloses no attempt was made by appellee so to do. At the close of the evidence a peremptory instruction was given on behalf of appellee, and there was a verdict and judgment accordingly.

The sole question presented to us on this record is whether the jury, under the evidence, would have been warranted in awarding appellant punitive damages. Since appellee not only violated its duty to appellant by not delivering the telegram, but offered no excuse at all therefor, the jury could hardly escape the conclusion that its conduct in the matter was so grossly careless as to indicate a total disregard of appellant's rights. In fact, they would have been warranted in believing that its failure to deliver was intentional; otherwise, some excuse would have been given therefor. Of course, appellee knew that such an act was wrongful. The imposition of punitive damages would therefore have been warranted, and the peremptory instruction ought not to have been granted.

Reversed and remanded.

STATE v. CLARK. (No. 14,626.)

(Supreme Court of Mississippi. July 4, 1910.)

1. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

Where a statute makes it a crime to do one thing or another, and a person by one act does both of them, he violates the statute but once; and an indictment thereunder may in a single count charge the defendant with doing both, employing the conjunction "and" where the statute has "or," and it will not be double, and will be established at the trial by a proof of either.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 350-380; Dec. Dig. § 125.*]

2. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

An indictment under Code 1906, § 1831, punishing the mingling of poison with any food, drink, or medicine, with intent to kill or injure any human being, alleging the mingling of carbolic acid with whisky with intent to "kill and injure" a certain person, is not demurrable as charging two distinct offenses, mingling poison with a drink with intent to kill and mingling poison with a drink with intent to injure.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 350-371; Dec. Dig. § 125.*]

3. POISONS (§ 9*) — MINGLING WITH FOOD, DRINK, OR MEDICINE—PROSECUTION THEREFOR—INDICTMENT.

It is unnecessary for an indictment under such statute to charge to whom the poison belonged, nor the food, drink, or medicine with which it is mingled, nor that it was in possession of the person for whom it was intended, nor that such person was about or intended to drink the same; the corpus delicti consisting of

the mingling of the poison with the food, drink, or medicine.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. § 9.*]

Appeal from Circuit Court, Holmes County; J. M. Cashin, Judge.

Isaiah Clark was indicted under Code 1906, § 1331, for mingling poison with whisky. A demurrer to the indictment being sustained, the State appeals. Reversed.

The indictment in this case, leaving off the formal parts, is in this language: "That Isaiah Clark, in the said county, on the 11th day of March, 1910, unlawfully, willfully, feloniously, and of his malice aforethought, did then and there mingle poison, to wit, carbolic acid, with a certain drink, whisky, with intent then and there unlawfully, willfully, feloniously, and of his malice aforethought to *kill and injure* one Mary Jane Clark, a human being." The appellant demurred to the indictment on two grounds: First, that it charged two distinct offenses, mingling poison with a drink with intent to *kill* and mingling poison with a drink with intent to *injure*; second, "the indictment does not show that said drink, to wit, whisky, was the drink of Mary Jane Clark, nor that it was intended that she should drink the same, nor that she was about to or intended to drink the same, nor that it was in her possession for any use whatsoever." The court below sustained the demurrer, and the state prosecutes this appeal.

Carl Fox, Asst. Atty. Gen., for the State. Tackett & Elmore, for appellee.

ANDERSON, J. (after stating the facts as above). The indictment is under section 1331, Code 1906, which is as follows: "Every person who shall mingle any poison with any food, drink, or medicine with intent to kill or injure any human being, or who shall willfully poison any well, spring, or reservoir of water, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both." Where a statute makes it a crime to do one thing or another, and a person by one act does both of the forbidden things, he violates the statute but once, and there is only one penalty; and an indictment under such a statute may in a single count charge the defendant with doing both of the forbidden things, "employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of either one of them." 1 Bishop, New Criminal Procedure (4th Ed.) §§ 436, 586; Bishop on Statutory Crimes (3d Ed.) § 244.

Under this statute it is not necessary for the indictment to charge to whom the poison belonged, nor the food, drink, or medicine with which it is mingled, nor that it was in

possession of the person for whom it was intended, nor that such person was about to or intended to drink the same. The corpus delicti consists in the mingling of the poison with the food, drink, or medicine. *Stanley v. State*, 82 Miss. 489, 34 South. 360. The indictment sufficiently charges the criminal purpose in mingling the poison and whisky. Reversed and remanded.

TOWN OF JONESTOWN v. GANONG.

(Supreme Court of Mississippi. June 13, 1910.)

1. MUNICIPAL CORPORATIONS (§ 1038*)—JUDGMENTS—ENFORCEMENT—POWER OF COURT.

Code 1906, § 3333, authorizing the mayor and board of aldermen to appropriate money and provide for the current expenses of the municipality, and providing that an indebtedness shall not be incurred or a warrant drawn on the treasurer in payment of any indebtedness in excess of the funds on hand, applies to voluntary municipal action, but does not limit the compulsory power of the court to make effective its judgment against a municipality, and the court may compel a municipality to pay a judgment against it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2211; Dec. Dig. § 1038.*]

2. JUDGMENT (§ 702*)—PERSONS BOUND—MUNICIPALITIES AND OFFICERS.

In mandamus to compel a town to pay a judgment which the petitioner had obtained against it, the officers of the town as such are parties, and the clerk thereof is a party, so that the judgment ordered in mandamus operates on him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1227; Dec. Dig. § 702.*]

On suggestion of error. Overruled, former order of the court (52 South. 579) remanding the case vacated, and judgment rendered.

MAYES, C. J. This case was most carefully considered by the court on its original hearing. A suggestion of error now filed challenges our attention a second time. We find no new argument in the suggestion of error. This case is somewhat novel in the jurisprudence of the state, but every question was given careful thought. The whole proposition involved may be summed up by this statement: That the real question is whether or not the courts of this state have the power to make effective their judgments, when the judgment is against a municipality. We answer this proposition in the affirmative.

Counsel filing the suggestion of error calls our attention to section 3333 of the Code of 1906 as a statutory inhibition on the power of the municipal authorities to draw a warrant in excess of the amount of funds on hand in the treasury at the time. This statute is a successful barrier to the municipal action, but does not affect the power of the court to make effective its judgment. The statute has no sort of application in this controversy. Let us consider it for a moment. It first provides that the mayor and board

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of aldermen shall have the power "to appropriate money and provide for the current expenses of the municipality." It then provides that "an indebtedness shall not be incurred nor a warrant be drawn on the treasurer in payment of any indebtedness to exceed the amount of funds on hand in the treasury at the time." This section applies to voluntary municipal action alone. Its design is to protect the municipality from the improvidence and extravagance of the municipal authorities, but it is no limitation on the compulsory power of the courts to make effective their judgments. In this case there is no attempt on the part of the municipal officers to provide for any current expenses, nor to incur an indebtedness or draw a warrant on the treasury, save as directed by the court's order to compel justice to be done. If the authorities of a municipality have no power to make a debt, the inhabitants will be protected from any unauthorized act in an excess of power; but when the debt is a binding obligation a municipality, like any other creditor, must pay the debt if it has the property so to do, although some inconvenience may be suffered thereby.

We thoroughly discussed all these questions in the original opinion. The municipal officers of the town of Jonestown, as such, are all parties to this proceeding. The statute makes them parties under the facts of this case, and there is nothing in the suggestion that the clerk is not a party, and therefore the judgment of the court cannot operate on him.

There is a motion in the cause for judgment here, and on reviewing the entire record we can see no reason why this motion should not be sustained. It is therefore ordered by the court that the suggestion of error be overruled; that the former order of the court remanding the case be vacated, and a judgment entered here in accordance with this opinion, after the clerk shall have calculated the amount due under the judgment; and the former order of the court reviewing the trial court be as was directed in the original opinion.

DODSON v. WESTERN UNION TELEGRAPH CO. (No. 14,053.)

(Supreme Court of Mississippi, June 13, 1910.
On Suggestion of Error, July 4, 1910.)

TELEGRAPHS AND TELEPHONES (§ 54*)—ERRORS OR DELAYS IN TRANSMITTING MESSAGES—CONTRACT EXEMPTION FROM LIABILITY—VALIDITY.

Code 1906, § 3127, provides that the limitation of actions prescribed by law shall not be changed by contract between parties, and any changes in such limitations made by any contract shall be absolutely void, and that the object of the statute was to make the period for various causes of action the same for all litigants. *Held* to invalidate the stipulation in a contract with a telegraph company exempting

it from liability for errors or delays where a claim is not presented in writing within 60 days after a message is filed for transmission.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cant. Dig. § 42; Dec. Dig. § 54.*]

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

Suit by J. J. Dodson against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed.

This is a suit by the appellant, J. J. Dodson, against the appellee, Western Union Telegraph Company, for damages for failure to deliver a telegram. The court below gave a peremptory instruction to the jury to find for the telegraph company, which was done, and judgment entered accordingly, from which this appeal is prosecuted. The telegram in question contained the usual printed stipulation as follows: "The company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages, beyond the amount of tolls paid thereon, *nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.*" Appellant did not present this claim in writing nor sue within 60 days after the message was filed for transmission, and for this reason the court below held that he was precluded from recovering.

R. N. & H. B. Miller, for appellant. J. B. Harris, for appellee.

ANDERSON, J. (after stating the facts as above). Section 3127, Code 1906, is as follows: "The limitation prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any changes in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants." For the first time, this statute appears in the Code of 1906. For the appellant, the contention is made that it condemns the stipulation in question; for the appellees, that it does not, because, on the authority of *So. Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385, such stipulation is no more than a condition precedent, with which the claimant must comply or lose his claim, and if he does comply he may sue within the time limited by the statute, and that it is not a limitation, but a reasonable regulation. This court does so hold in the *Hunnicutt* Case, and subsequent cases following it; but the supposed evil growing out of that doctrine is what the Legislature intended to remedy by the statute under consideration, which denounces as void such stipulations, having the effect to shorten the period of limitation of actions. The language of

the statute is broad. The period of limitation prescribed by law cannot be changed "by any contract whatsoever," nor "in any way whatsoever." All contracts which directly or indirectly have that effect are condemned. Were the stipulation in question valid, Dodson could have sued, without making claim in writing, at any time within 60 days after the failure to deliver the telegram; but suit after that would be barred. His right of action accrued at the instant of the breach of duty by the telegraph company, and continued for 60 days, and then cut off by the contract, but for which he would have had the period in which to sue prescribed by law.

Reversed and remanded.

On Suggestion of Error.

MAYES, C. J. On the original hearing of this case we held that section 3127, Code of 1906, abrogated any right that the telegraph company heretofore assumed to make as one of its stipulations that it would not be liable for damage in any case where claim therefor was not presented within 60 days after the message was filed with the company. Section 3127 prohibits changing "in any way whatsoever" the limitation prescribed in the chapter, and further provides that "*any change in such limitation made by any contract stipulation whatsoever shall be absolutely null and void.*" Under a statute so broad as this, concluding with the declaration that its purpose "is to make the period of limitation for the various causes of action the same for all litigants," it is difficult for us to perceive how its full scope and effect could be carried out unless it is made to comprehend this very case. In the Hunnicutt Case, 54 Miss. 566, 23 Am. Rep. 385, this court upheld this stipulation; but there was then no statute on the subject. The vast array of authorities cited in the brief of counsel have no application, in our judgment, because the statute under discussion strikes down all such decisions. The regulation of the company says you cannot sue unless your claim be presented within 60 days. This regulation, if given effect, may in some instances, and in this very case will, be a limitation in itself. If it is possible, therefore, under certain conditions, for the stipulation to become itself a limitation, how can it be soundly argued that such a stipulation does not change the limitation prescribed by the chapter "in any way whatsoever?" If it does this, or if the stipulation superimposes conditions with which there must be a compliance or rights will be barred from suit, it is amending the statute by the telegraph company saying that, notwithstanding same, a person shall be barred unless he comply with certain conditions imposed by it, and such conditions are void under the statute. Stipulations of the character under discussion are not viewed as con-

tracts in any true sense. They are regulations, and their validity depends, not upon their contracted obligations, but upon their reasonableness as regulations. Public service companies such as this could not refuse to serve any member of the public because such person refused to accede to such regulation as a contract. This is expressly held in the case of Kirby v. Western Union, 4 S. D. 105, 55 N. W. 759, 57 N. W. 199, 30 L. R. A. 612, 620, 621, 624, 46 Am. St. Rep. 765. Such companies as this are bound to serve the public, and for this reason the law has permitted protection to the public service companies by permitting them to make reasonable regulations. But the Legislature may declare what is and what is not a reasonable regulation, and not commit the whole matter to the discretion of the company. The attitude of a public service company toward the public is quite different from that of an insurance company. We do not say how this section may affect the right of an insurance company to place in its contract of insurance a requirement that proof of loss shall be made within a certain time. That question is not involved here at all.

Many states have statutes prohibiting these stipulations, and independently of statutes some courts have held these regulations void as against public policy. The construction of this court with reference to this statute is not unusual. In the case of Davis v. Western Union, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371, it is held that a stipulation, in a contract between a telegraph company and the sender of a message, that the company will not be liable for damages in any case if the claim is not presented in writing within 60 days after the message is filed, is void as against public policy. To the same effect is the case of Western Union v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361. In the case of Pacific Tel. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490, it was held that this same condition, providing that the company should not be liable for damage unless the claim was presented within 60 days, was unreasonable and without consideration, viewed as a contract, and void as an attempt on the part of the company to limit its liability for its negligence by enacting for itself a statute of limitations. The same thing is held in the case of Western Union v. Longwill, 5 N. M. 308, 21 Pac. 339. In short, it was within the power of the Legislature to prescribe that these stipulations should be abolished, and this we think section 3127 has done. The telegraph company can suffer no more inconvenience from the abolition of these stipulations in this state than they are now suffering in other states that have similar statutes.

The suggestion of error is overruled.

KNOX v. STATE. (No. 14,585.)

(Supreme Court of Mississippi. July 4, 1910.)

CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENCE OF WITNESSES.

Where an absent material witness for accused, put on trial two days after the indictment, had but recently left the county to reside in the county where the crime was committed, and he was temporarily absent, the refusal to grant a continuance, or to at least postpone the case to some future day of the term, was erroneous, whether the witness was at the time within the jurisdiction of the court or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

George Knox was convicted of crime, and he appeals. Reversed and remanded.

R. E. Jackson and R. S. Stewart, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. On Saturday, February 26, 1910, the defendant, Geo. Knox, was indicted for murder in the circuit court of Amite county, and on the following Monday, February 28, 1910, the case was called for trial, and the state announced ready for trial; but the defendant stated to the court that he was not ready for trial on account of the absence of Andy Wells, a material witness. He presented an application for a continuance on this ground, which application was in due form and supported by affidavit. The application alleged, among other things, that the witness was then within the jurisdiction of the court, and that he was informed that he was at Gulfport, Miss. The state contested the application on the theory that the witness was beyond the jurisdiction of the court. The evidence on this point was conflicting. The court overruled the motion for a continuance, and thereupon the defendant asked the court to continue the cause to a future day of the court, which was also overruled by the court, who forced the defendant to trial. The evidence taken on this application for a continuance further showed that this witness had but recently left the county, and that he resided in the state and in the county where the crime was committed, and that he was temporarily absent, and would return soon.

If the witness was within the jurisdiction of the court, this case should have been continued, or at least postponed to some future day of the term. *Montgomery v. State*, 85 Miss. 390, 37 South. 835. If the witness was beyond the jurisdiction of the court at the time the application was presented, then, under the facts of this particular case, a continuance should have been granted. In the case of *Cade v. State*, 50 South. 554, this

court said, speaking through Judge Mayes: "While the court will not ordinarily interfere with the discretion of the trial court in refusing to grant an application for a continuance because of the absence of a witness, when it appears that the witness is beyond the jurisdiction of the court, yet there are times when the trial court should allow a continuance, even when it appears that the absent witness cannot be reached with process at the time the application is made." For a full discussion of this question, we refer to the above-stated case.

In the light of all the facts of this case, we think the court erred in refusing the defendant's application for a continuance, and the case is reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court.

HURLEY et al. v. CITY OF CORINTH. (No. 14,458.)

(Supreme Court of Mississippi. June 27, 1910.)

1. INTOXICATING LIQUORS (§ 10*)—POWER OF CITY TO PROHIBIT STORAGE.

Acts 1908, c. 114, § 1797, and chapter 115, § 1746, make it a misdemeanor to have intoxicating liquors in possession or to keep the same for unlawful sale. Code 1906, § 3329, which was made a part of the charter of the city of Corinth by section 3441, provides that municipalities may pass ordinances prohibiting within their corporate limits the commission of any act which amounts to a misdemeanor under the laws of the state. *Held*, that an ordinance of the city of Corinth, making the storage or keeping of intoxicating liquors within the city for the purpose of sale within the city, or within or without the state, except that kept under the state law by druggists, is a valid ordinance so far as it prohibits storage for sale within the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

2. INTOXICATING LIQUORS (§ 140*)—OFFENSES—KEEPING FOR SALE.

An ordinance prohibiting storage of liquors for sale within the state is violated by the storing of liquors within the city, and the selling of the same on orders sent from outside the state to an agent in charge of the liquors, who on receipt of the orders and the price delivers the liquors to the carrier at such city, to be shipped to the consignees out of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 150; Dec. Dig. § 140.*]

3. INTOXICATING LIQUORS (§ 147*)—SALES WITHIN STATE.

Where liquor is stored within the state, and orders from outside the state are sent to the agent in charge of the liquor, accompanied by the price of the liquor, and on receipt thereof the agent delivers the liquor ordered to a common carrier, consigned to the persons who have ordered the liquor, such sales are made within the state, and violate statutes prohibiting sales within the state, as delivery to the carrier is delivery to the consignee.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.*]

4. PROHIBITION (§ 9*)—OFFICIAL PROCEEDINGS—PROSECUTIONS FOR ILLEGAL STORAGE OF LIQUOR.

The writ of prohibition may be resorted to in a proper case to prevent vexatious prosecutions under a void ordinance, but not to prevent prosecutions for the violation of a valid ordinance.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. § 9.*]

Appeal from Circuit Court, Alcorn County; Jno. H. Mitchell, Judge.

C. E. Hurley was convicted of violating an ordinance of the city of Corinth prohibiting the storage for sale of intoxicating liquors within the city limits, and he, together with the owners of the liquors, Potts & Perkins, sued out a writ of prohibition and certiorari to bring the case before the circuit court for review, and to have the ordinance adjudged void and further prosecution thereunder prohibited. The writ was granted, and later was dissolved, and an appeal taken. Affirmed.

The appellant Hurley was convicted for a violation of an ordinance of the city of Corinth prohibiting the storage for sale of intoxicating liquors within the corporate limits of the city. The ordinance in question provides that every 24 hours the liquors are so stored shall constitute a separate offense. Conceiving the ordinance to be void, the appellants Potts & Perkins, the owners, and Hurley, their agent, sued out a writ of prohibition and certiorari, by which it was sought to bring up before the circuit court for review the case in which he had already been convicted, and have that court adjudge the ordinance void, and prohibit further prosecutions thereunder. The writ was granted by the circuit judge, and later there was a trial, resulting in a dissolution of the writ of prohibition. From this judgment, this appeal is prosecuted by the appellants.

The appellants Potts & Perkins, who were liquor dealers in Cairo, Ill., established in Corinth a depot for the distribution of their liquors, claiming their purpose to be, not to sell the same in Mississippi, but to have them convenient for distribution to their customers in Tennessee and Alabama. They put in charge of their warehouse, to attend to the filling of orders and shipping such liquors, the appellant C. E. Hurley. After the establishment of this depot, and on November 4, 1909, the board of mayor and aldermen of the city of Corinth passed the following ordinance:

"An ordinance, prohibiting the storage of whisky or other intoxicating beverages in the city of Corinth for the purpose of sale.

"Be it ordained by the board of mayor and aldermen of the city of Corinth, Mississippi, in special called session assembled, November 4, 1909, that the storage or keep-

ing of any kind of intoxicating liquors or beverages in the city of Corinth for the purpose of sale in said city, or within or without the state of Mississippi, except that kept under the state laws by druggists, be and the same is hereby prohibited, and that the party who shall have charge and possession of said liquors or beverages so stored or kept, whether he be the owner of such liquors or beverages or the agent of the owner, shall, upon conviction, be fined in a sum not exceeding (\$50) or be imprisoned for 10 days, or shall be both fined and imprisoned.

"Be it further ordained that every twenty-four hours' continuance by any party to store or keep within the city of Corinth any intoxicating liquors or beverages for the purpose of sale in said city, or within or without the state of Mississippi, excepting the keeping and storing by druggists as above provided, shall constitute a new offense, and shall subject the party so keeping and storing such liquors or beverages, upon conviction, to the pains and penalties herein provided for, whether such party shall be the owner of such liquors or beverages, or the agent of the owner.

"Be it further ordained that this ordinance shall take effect from and after November 8, 1909."

On November 17, 1909, the appellant Hurley was arrested, tried, and convicted for a violation of this ordinance on the following affidavit: "Before me, J. P. Collier, mayor of the city of Corinth, in Alcorn county, in said state, and ex officio justice of the peace, H. B. Rowell makes oath that on the 17th day of November, 1909, C. E. Hurley did willfully and unlawfully have charge and possession of intoxicating liquors unlawfully stored and kept in the city of Corinth for the purpose of sale outside of the state of Mississippi, contrary to the ordinance in such case made and provided, and against the peace and dignity of the said city of Corinth."

Thereupon the appellants filed their petition for writs of prohibition and certiorari, which were granted, and afterwards on trial the writ of prohibition was dissolved. The trial was had on an agreed state of facts as follows: "It is agreed that the following statement of facts shall be submitted to Judge John H. Mitchell on the hearing of the motion filed by the city of Corinth to dissolve the writ of prohibition issued in this cause: C. E. Hurley, at the time of his arrest and conviction in the mayor's court was, and is now, in charge and possession of a quantity of intoxicating liquors stored in the city of Corinth, Miss., and is working on a monthly salary for Potts & Perkins, who are the owners of the liquors, and who are liquor dealers residing in Cairo, Ill. That Mr. Hurley received mail orders

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from parties who reside outside of the state of Mississippi, said orders being accompanied in every case with either P. O. money order, or express money order, or the cash, and fills said orders by taking a quantity of liquors from the stock stored in Corinth and delivering the same to the express company in Corinth for transportation to the purchaser. Sometimes the orders are mailed to Potts & Perkins, Corinth, Miss., and sometimes to O. E. Hurley, Corinth, Miss.; said liquors having formerly been shipped by Potts & Perkins to Corinth, Miss., to be stored here. That the object of defendants in storing their liquors in Corinth is to sell same to parties who live outside of the state of Mississippi, by shipping to them as above set out, and to be more convenient to their trade, and that, if testimony were taken in this case, all of the defendants would testify that it is not their intention to sell any liquor to any party living in Corinth, or in the state of Mississippi, nor do they sell any liquor to any party residing in this city or state. The question for the court to decide is whether the board of mayor and aldermen of the city of Corinth had the power to pass the ordinance in question. It is further agreed that the city of Corinth, prior to the adoption of said ordinance, passed an ordinance in accordance with section 8329 of the Code of 1906, and have acted under same in so far as powers conferred under said section allow it."

W. J. Lamb, for appellants. J. M. Boone and Conn & Warriner, for appellee.

ANDERSON, J. (after stating the facts as above). Conceding that the ordinance in question, so far as it attempts to prohibit the storage of intoxicating liquors within the municipal limits of the city of Corinth for sale without the state, is void (which we do not decide), and there is left an ordinance prohibiting such storage for sale within the state, which is separable from such objectionable clause and may stand alone. One is not dependent on the other. There is a complete and consistent ordinance, susceptible of being enforced, without the objectionable provision. Had the city the power to pass such an ordinance?

Corinth is not under the provisions of chapter 99, Code 1906, and amendments thereto. It has a separate charter of its own; but section 3329, Code 1906, is made part of its charter by section 3441 of the Code, and section 3329 provides that municipalities may pass ordinances prohibiting, within their corporate limits, the commission of any act which amounts to a misdemeanor

under the laws of the state. This is express authority for the ordinance in question; for section 1797, c. 114, and section 1746, c. 115, Acts 1906, denounce as a misdemeanor the having in possession, or keeping, for unlawful sale, intoxicating liquors, and that is exactly what the ordinance does, with reference to such liquors so kept within the corporate limits of the city.

Under our statute there can be no valid keeping for sale of intoxicating liquors, except by druggists, for limited purposes named in the law. The ordinance in question excepts from its provisions such druggists, and prohibits the storage of intoxicants for sale, etc., meaning for unlawful sale; for there can be no lawful keeping for sale for any other purpose. In other words, the ordinance prohibits storing or keeping intoxicating liquors within the limits of the city of Corinth, for unlawful sale, as do our statutes. The agreed facts show that appellants had their liquors stored in the city of Corinth for sale in violation of the laws of the state; that the only sales made from their warehouse were in violation of the laws of the state; that such sales were made within the state, and within the corporate limits of Corinth; that orders were received from persons outside of the state, addressed to Potts & Perkins, or to their agent, Hurley, at Corinth, accompanied with either express or post office money orders for the price, and on receipt of such orders the liquors were delivered to the carrier at Corinth and shipped to the consignees out of the state. Sales so made are sales within this state, and in violation of the statutes thereof. Delivery to the carrier was delivery to the consignee. *Pearson v. State*, 66 Miss. 510, 6 South. 243, 4 L. R. A. 835; *Anglin v. State*, 50 South. 492.

We decline to consider the questions whether the ordinance is valid, so far as it prohibits the storage of intoxicants for sale out of the state, and whether appellant was legally convicted for a violation of that provision; for they are not before the court. We have here a valid ordinance, and the agreed facts showing a continuous violation of same by the appellant, Hurley, and, further, that if the provision making storage for sale out of the state were valid, it is not being violated; for such agreed facts show that all sales were made within this state.

The writ of prohibition may be resorted to in a proper case to prevent vexatious prosecutions under a void ordinance, as held by this court in *Crittenden v. Booneville*, 92 Miss. 277, 45 South. 723; but this is not a case of that kind.

Affirmed.

**GRANT v. INDEPENDENT ORDER OF
SONS AND DAUGHTERS OF JA-
COB et al. (No. 14,193.)**

(Supreme Court of Mississippi. June 27, 1910.)

**1. APPEAL AND ERROR (§ 845*)—REVIEW—
CASE SUBMITTED ON AGREED FACTS.**

In reviewing a decree in a case submitted below on an agreed statement of facts, the Supreme Court can look only to the facts set out in such statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8344; Dec. Dig. § 845.*]

**2. INSURANCE (§ 122*)—LIFE INSURANCE—AS-
SIGNMENT—BENEFICIARY WITHOUT INSUR-
ABLE INTEREST—WAGERING POLICY.**

A life policy being valid in its inception, its subsequent assignment by a change of beneficiary to one without an insurable interest was valid, and the second policy issued in effecting the change cannot be held on these facts to be a wagering policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.*]

**3. INSURANCE (§ 693*)—FRATERNAL ORDER—
BY-LAWS—RETROACTIVE OPERATION.**

By-laws of a fraternal order can never be held retroactive, when any reasonable construction otherwise is possible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.*]

**4. INSURANCE (§ 693*)—FRATERNAL ORDER—
BY-LAWS—RETROACTIVE OPERATION.**

Though a new charter of a fraternal order provided for disposition of a benefit fund as the insured should direct under the laws of the order, and insured stipulated to abide by all by-laws then in force or thereafter to be adopted, by-laws thereafter adopted, prohibiting the naming of a beneficiary not having an insurable interest, were not retroactive, so as to invalidate a prior legal change in favor of such a beneficiary; provisions in the constitution that such by-laws should take effect and be in force on and after a specified subsequent date, and repealing all laws in conflict therewith, being clearly prospective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.*]

Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.

"To be officially reported."

Bill by Hammond Grant against the Independent Order of Sons and Daughters of Jacob and another. From a decree in favor of defendant Maggie Nicholson, complainant appeals. Affirmed.

Henry, Fox & Canizaro, for appellant. T. D. Marshall and T. G. Birchett, for appellee.

WHITFIELD, C. The original bill in this case was filed by Hammond Grant against the Independent Order of Sons and Daughters of Jacob, and Maggie Nicholson; the effort being on the part of Hammond Grant, the husband and only heir of the deceased, Maria Grant, to recover the proceeds of an insurance policy taken out by Maria Grant in this order for an amount not to exceed \$700. The order paid into court the sum of \$550, to be contested for by Maggie Nicholson and Hammond Grant, and it was there-

upon discharged. When the case came on to be tried, certain witnesses were introduced for the complainant and examined, but not cross-examined by the respondent. The chancellor stated that he thought the case turned upon a pure question of law, and thereupon by agreement of counsel on both sides no more witnesses were introduced, although the complainant had more witnesses and the defendant had witnesses also, and it was then and there agreed for the purpose of the trial that the following were the facts of the case, to wit: "That Hammond Grant had legally and lawfully married Maria Moore (at that time Maria Smith), the insured, in the year 1883; that he lived with her several years, and that he went to New Orleans on account of a jealous quarrel; that there was never any divorce had between him and Maria Moore, and that he never afterwards lived with her as her husband; that while complainant was in New Orleans Maria married Alex. Moore in the year 1899; that while married to said Moore, and while complainant was in New Orleans, the insured took out a policy in favor of Moore and Susie Bayle; that afterwards Maria separated from him (husband No. 2; that is, Moore), and she surrendered the policy made out in Moore's and Susie Bayle's favor, and another policy in favor of Maggie Nicholson, was taken out, which policy is marked 'Exhibit A' to answer; that the said Maggie Nicholson, from the time she was made beneficiary under the said policy and up to the time of the death of said insured, paid all dues and assessments under the said policy; that the constitution and by-laws under which said policy in favor of Maggie Nicholson was issued continued in force until October, 1906; that afterwards a new constitution and by-laws were promulgated and adopted on the 25th day of October, 1906, which constitution is here marked 'Exhibit 4'; that at the time the policy was taken out in favor of defendant there was no restriction in the by-laws then in force as to the choice of beneficiary, as it appears from by-laws of 1901, marked 'Exhibit 2,' but the following provisions in the new charter were then in force, to wit: 'Section 3, Charter 1902. To carry out its aims and objects, which are charitable and benevolent, the corporation shall have power to establish and maintain a benefit fund, to be paid at or upon the death of a member in good standing, who has taken the degrees provided by law, to his or her heirs at law, or disposed of as he or she under the laws of the order shall direct. And the amount to be paid on account of any one death shall be such part of a per capita assessment levied upon and collected from the members of the order as may be provided by law. But the amount so paid shall never exceed the sum of two thousand dollars.'

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is agreed that the defendant was not a member of the order, and had no actual notice of the amendment to the by-laws and constitution; that after the new constitution and by-laws had been adopted and were in force she continued to pay, and the order continued to receive from her, the dues on said policy. It is further agreed that the defendant Maggie Nicholson was no kin and no relation to the insured, Maria Moore, and that she was not dependent upon said insured or her estate." The learned court below, applying the law to this agreed statement of facts, found against the appellant, Hammond Grant, and dismissed his bill, and awarded the money paid in by the order to Maggie Nicholson. From this decree the appellant brings the case to this court.

The constitution and by-laws of the order are made exhibits to the pleadings. The appellant insists that the decree should be reversed for two reasons: First. Because the policy was a wagering policy, and therefore void as against public policy, though the bill makes no attack on the policy as a wagering contract. Second. Because the policy is governed, as it is insisted, by the following provision in the constitution and by-laws of the order, adopted in October, 1906, to wit: "Death benefits of the order shall be paid only on the death of such members of the order as at death hold a financial membership in the order and leave executed as required by the order on prescribed blanks of the order, and benefit certificate through a subordinate lodge or through a Royal House of King David; provided, however, one by financial membership and executed certificates of the order, both in a subordinate lodge and Royal House of King David, may have paid on his death a benefit of each of said divisions. *No one shall be a beneficiary of any Jacob benefit or benefit certificate except a husband, a wife, or some legal dependent or dependents of the member of his or her (that is, the member's) estate*"—on the notion that this provision is retroactive. The first thing to be observed is that we are bound clearly to look only to those facts which are set out in the agreed statement of facts. If counsel below have been so unfortunate as to omit out of this agreed statement facts which they desired considered by us, that is not a matter which we can help. Looking to this agreed statement of facts, and the pleadings, we find nothing which indicates that this policy was intended to be a wagering policy. The agreed statement of facts makes just this case, and nothing more, on this point: That the original policy was issued in November, 1883, payable to Alex. Moore and Susie Bayle, and that there was no restriction as to the beneficiary to be named in the constitution and laws of the order; that the second policy, payable to Maggie Nicholson, was issued in December, 1903; and that Maggie Nicholson was no kin to Maria Moore,

and no relation of hers, and was not dependent upon her or her estate. Maria Moore seems to have paid the assessments and dues until the second policy was issued, and Maggie Nicholson paid them from the time of the issuance of the second policy; but there is not a hint in the agreed statement of facts, or answer, of any fact which shows or tends to show any purpose or agreement to enter into a wagering policy. On the contrary, it is plainly manifest from the agreed statement of facts, taken in connection with the two policies themselves, that the original policy was valid in its inception, perfectly legal in all respects, and that the second policy, so called, was in legal effect, a mere assignment of the first. No change was made, except to name a new beneficiary. In other words, we have, looking to the facts of the two policies and to the agreed statement of facts, an original policy perfectly valid in its inception, afterwards assigned by a change of beneficiary to Maggie Nicholson, who had no insurable interest in the life of the insured. Now it is settled in this state by *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 62, "that it is lawful for one to insure his own life, and after he has done so the policy becomes his own, and there is no good reason why he may not sell or dispose of it, as he may of any other chose in action, if the policy was valid in its inception."

The learned counsel for appellee, in their able brief themselves cited first *Cooley's Briefs on Law of Insurance*, p. 262, which states as follows: "One of the most important questions in life insurance is whether a policy, valid in its inception, may, in the absence of statutory provisions, be assigned by the insured or the beneficiary to one having no insurable interest in the life of the insured. The authorities are in hopeless conflict on this point." And at page 258 it is said "that the weight of authority is that one may take out insurance on his own life for the benefit of one having no insurable interest in the life insured." And the same doctrine is declared in *Dolan v. Supreme Council Catholic Mutual Benefit Association*, decided by the Supreme Court of Michigan in 1908, reported in 152 Mich. 266, 116 N. W. 383, also cited by the learned counsel for appellee. We may just say, in passing, that this whole subject is reviewed in a most complete and masterly way in the learned note to *Metropolitan Life Insurance Co. v. Ellison*, 3 L. R. A. (N. S.) 935. The authorities on this subject are very exhaustively collected and most accurately discriminated. We have this matter settled for us by *Murphy v. Red*, and since there is no evidence in the case, in the agreed statement of facts, which must control, showing that the policy was a wagering policy as originally taken out, but, on the contrary, since it is shown that it was a valid policy in its inception, its assignment to

Maggie Nicholson was valid under our laws, although she had no insurable interest in the life of Maria Grant. We are of the opinion, therefore, that there is nothing in this contention on this record supporting the appellant's contention.

On the second proposition, the facts show the following state of case: The charter under which the original policy was issued contained the following provision: "To establish and maintain a benefit fund," etc., "to be paid at the death of each third degree member in good standing, to his or her family, or dispose of as he or she directs." It is obvious that this charter imposes no restrictions whatever as to who should be the beneficiary. This charter expired by limitation in October, 1902. The order received a new charter, and in lieu of the section above quoted from the old charter the new charter provided for a disposition of the benefit fund "as he or she should direct under the laws of the order." On the 1st of January, 1904, the original policy was surrendered to the order, and the policy in controversy here issued, which merely changed the beneficiary, making Maggie Nicholson the beneficiary. On the ——— day of October, 1906, a new constitution and by-laws were promulgated, and under them a new provision, hereinbefore fully quoted, was made, which provided that "no one shall be a beneficiary of any Jacob benefit except a husband, a wife, or some legal dependent of the member of his or her estate." The contention of the appellant is that the change made by the constitution of October, 1902, which contained the words "under the laws of the order as the laws of the order shall direct," prohibited the naming of Maggie Nicholson, and "that the provision of the constitution of 1906 was retroactive, and hence that Maggie Nicholson, not being a dependent, etc., could not take under this policy. We do not think either of these contentions is sound. The by-laws of 1906 are manifestly prospective. Such laws are never to be held retroactive where any reasonable construction otherwise is possible. We find in Exhibit 4, the constitution, etc., adopted in 1906, October 24 and 25, at page 63, the following: "These by-laws shall take effect and be in force on and after the 1st day of January, 1907. All laws now in force, which are in conflict with these laws, adopted this the 24th and 25th days of October, 1906, are hereby repealed." It is too plain for argument under this article that the provisions of the constitution of 1906 as to the point being discussed are clearly prospective. This is not changed by the fact that the assured stipulated to abide by all by-laws then in force or thereafter to be adopted. This last proposition is settled by the cases of *Ancient Order of United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 892, and *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. In the latter case, it is said by the court on

this point: "It was contended on the part of the order that the by-law changing the classes of persons who might be designated as beneficiaries was retroactive, and was intended to annul the appointment of beneficiaries previously made, who did not belong to the classes specified in it, and that a contract of a member was to comply with and be bound by laws of future enactment as if they already existed. But it is wholly prospective in its operation, affecting the power to appoint beneficiaries after it was passed. It applied to new members, of course, but only to such old members as changed their beneficiaries after its passage."

On this point it is said by Mr. Freeman, in the most valuable note to *Strauss v. Mutual Reserve Association*, 83 Am. St. Rep. 714, as follows: "Even where a benefit society has reserved the power to amend its by-laws, so as to affect the rights of pre-existing members, a new by-law or an amendment will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so; but such law will be construed as operating only on cases that come into existence after it was passed. *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; *Knights Templars*, etc., *Co. v. Jarman*, 104 Fed. 638 [44 C. C. A. 93]; *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890; *Lloyd v. Supreme Lodge*, 98 Fed. 66 [38 C. C. A. 654]; *Roberts v. Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57; *Spencer v. Grand Lodge*, 22 Misc. Rep. 147, 48 N. Y. Supp. 590; *Carnes v. Iowa*, etc., Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Roxbury Lodge v. Hocking*, 60 N. J. Law, 439, 38 Atl. 693, 64 Am. St. Rep. 596. Under this general rule for the construction of statutes, which is held applicable to the laws of a benefit society, or other private corporation, the effect of amendments to the by-laws of benefit societies has been materially limited, and the rights which pre-existing members supposed they had, have been preserved. Laws of this character are said to be held in such great disfavor, and to be so generally condemned, that courts will not give them a retroactive application, unless this intention is expressly declared, or necessarily implied. *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. The mere fact that a member agrees to comply with all laws of the order which may be subsequently enacted in no manner alters the rule that such laws should be given a prospective operation, in the absence of a clear intent that they should act retrospectively. *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890; *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. Unless there are imperative reasons which require a retroactive application of an amended by-law, it will not be given. *Knights Templars*, etc., *Co. v. Jarman*, 104 Fed. 638 [44 C. C. A. 93]."

In *Knights Templars*, etc., *v. Jarman*, 187

U. S. 205, 23 Sup. Ct. 111, 47 L. Ed. 139, it is said on this point: "Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act would bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred." In Cooley's Briefs on Insurance, vol. 1, p. 710, it is said: "But even under such an agreement [one to be bound by laws enacted in the future] it is obvious that the members will not be bound by such laws as indicate on their face that they apply only to certificates thereafter to be issued"—citing the case we have just above quoted from in 187 U. S. 205, 23 Sup. Ct. 111, 47 L. Ed. 139; and this is the principle which we think clearly applies here. It could not reasonably have been the purpose of the constitution and by-laws of 1906 to apply to a change of beneficiary in the case of certificates issued prior to the passage of said constitution and by-laws. And on page 705 of the same authority it is said: "The legislative acts of a mutual benefit association are presumed to be intended to operate prospectively only, and will not be given a retroactive operation, unless there are imperative reasons demanding such construction"—citing a number of authorities.

Nor does the provision of the constitution and laws of 1906 (page 41 of Exhibit 4) at all affect this construction. That provision, taken in connection with the other provisions of the constitution and by-laws of 1906, clearly shows that they are prospective wholly, and in no way affect the certificate issued to Maggie Nicholson before their passage. It becomes unnecessary, in view of the fact that we hold these provisions in the constitution of 1906 to be prospective only, to discuss the question whether, if they had been meant to be retroactive, they could be held to be reasonable and valid. On that point the following authorities may be profitably consulted: See, specially, *Dodwall v. Supreme Council*, etc., 196 N. Y. 405, 89 N. E. 1075, and *Wright v. Knights of Maccabees*, etc., 196 N. Y. 391, 89 N. E. 1078; *Modern Woodmen of America v. Wieland*, 109 Ill. App. 340; *Cooley's Briefs on Insurance*, 710 et seq., especially paragraph 1, page 711, and paragraph N, p. 715, and paragraph O, p. 719; *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; and most particularly see the very valuable note to *Strauss v. Mutual Reserve Association*, 83 Am. St. Rep. 706, and the main case to which the note is appended, and *Stewart v. Lee Mutual Fire Ins. Ass'n*, 64 Miss. 499, 1 South. 743, in harmony with the *Strauss Case* in 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Spencer v. Grand Lodge*, etc., 22 Misc. Rep.

147, 48 N. Y. Supp. 590, affirmed in 53 App. Div. 627, 65 N. Y. Supp. 1146. In the case of *Ward v. David and Jonathan Lodge*, 90 Miss. 116, 43 South. 302, no property right was affected by the amendment. In the case of *Dornes v. Supreme Lodge*, 75 Miss. 466, 473, 23 South. 191, it will be seen in the brief of the learned counsel for appellee that the deceased insured was not a member of the endowment rank when the suicide amendment was adopted, and did not make his first application for membership until February 8, 1894, more than one year after the adoption of the amendment. The fact that the amendment was the law of the order before he became a member of the endowment rank, makes a very different case from this one.

The constitution and by-laws of 1906 in this case affected only those members who became such after the adoption of said constitution and by-laws.

PER CURIAM. The above opinion is adopted as the opinion of the court; and, for the reasons therein stated, the decree is affirmed.

WESTERN UNION TELEGRAPH CO. v. MILLER. (No. 14,268.)

(Supreme Court of Mississippi. June 13, 1910. Suggestion of Error Overruled July 4, 1910.)

TELEGRAPHS AND TELEPHONES (§ 69*)—DELAY IN TRANSMISSION OF MESSAGE—PUNITIVE DAMAGES.

In an action for delay in the transmission of telegrams, where actual damages were not claimed, and the evidence showed that the delay was due to a strike, plaintiff was not entitled to recover, though defendant may have been negligent in failing to telephone the messages over long-distance telephones, or place a special delivery stamp thereon if sent by mail; the party not being entitled to punitive damages, in the absence of malice, fraud, oppression, or willful wrong, or such wanton, reckless, or grossly careless conduct as is equivalent thereto.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 71; Dec. Dig. § 69.*]

Appeal from Circuit Court, Newton County; J. R. Byrd, Judge.

Action by Mrs. J. H. Miller against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

J. B. Harris and R. S. Hall, for appellant. Jesse D. Jones and Flowers, Fletcher & Whitfield, for appellee.

SMITH, J. Appellee instituted suit in the court below to recover from appellant punitive damages for delay in the delivery of two telegrams, alleged to have been occasioned by the willful and wanton negligence of appellant. No actual damages were claimed.

From the judgment awarding the sum of \$1,000, this appeal is taken.

On the 30th day of September, 1907, appellee was living in Newton, Miss., and her mother was residing in Somerset, Ky., with Luther R. Robinson, her son and appellee's brother. On the morning of said day Robinson delivered the following telegram to appellant's agent at Somerset for transmission to appellee: "Mother is very sick. She wants you to come. Wire me when you start." Mrs. Robinson died about 3 o'clock the next morning, and about 9 a. m. of that day, October 1st, Robinson delivered another telegram to appellant's agent for transmission to appellee; the same being as follows: "Mama is dead. Come. Wire immediately." At this time, and for some time prior thereto and thereafter, there was a general strike on among appellant's employes, and it was having great difficulty in conducting its business. Robinson knew of this fact, but states that the operator advised him that he thought he would be able to get the message through. There are several relay stations between Somerset and Newton, one of which is Jackson, Miss. The first telegram was received at Jackson, Miss., at 4 p. m., September 30th, and the second at 12:53 p. m., October 1st. At this time, on account of the strike among the telegraph operators, most of the work of receiving and transmitting messages at Jackson was being done by the manager of that office, and these two messages were handled by him. On account of interference with its wires by its operators who were on strike, and by others not on strike but in sympathy therewith, the company had practically abandoned any attempt to use its wires on the Alabama & Vicksburg Railroad, on which Newton was situated, and was then forwarding its messages by mail. No attempt seems to have been made to forward these messages by wire, the testimony of appellant's manager relative thereto being as follows: "Before that I had tried so often on the Alabama & Vicksburg, and was disturbed so, and there was such language used, I gave it up altogether. The commercial wire stood open nearly every minute from the beginning of the strike until it closed. I tried on several occasions to see where the trouble was, and as fast as I would get it straightened out between two or three stations, and get the wire in good condition, the wire would be opened somewhere else on the line, and finally I gave it up as a bad job and quit trying. As to the railroad wires, the moment we broke in and signed our office call, the railroad operators recognized that we were the commercial office, and would start to interfering with the circuit, so the outcome of it was we could do nothing." Appellant sometimes used the wires of the railroad com-

pany in transmitting its messages. Upon receipt of these messages, one copy thereof was mailed to appellee, and one copy was mailed to appellant's agent at Newton. It does not appear from the evidence when these messages were deposited in the mail; but the first one was received by appellant at 8 o'clock on the morning of October 1st, and the second at 11 o'clock on the morning of October 2d; appellant's agent at Newton in each instance telephoning her the contents of his message before she obtained hers from the post office. When she received the last message, it was too late for her to attend her mother's funeral.

At the close of the evidence a peremptory instruction was requested by appellant, and refused. This instruction ought to have been given. There was no evidence from which the jury could have inferred that the delay in delivering the telegrams was characterized by malice, fraud, oppression, or willful wrong, evincing a disregard of the rights of others, or by such wanton, reckless, or grossly careless conduct as is equivalent thereto. A wrongful act, to which punitive damages are applicable, must not only be done with a knowledge of its wrongfulness, but must be characterized by one or more of the above elements. *Railroad v. Marlett*, 78 Miss. 872, 29 South. 62; *Cocke v. Telegraph Co.*, 84 Miss. 380, 36 South. 392. The delay in delivery was caused by the strike then on among the employes of appellant, and these telegrams were handled in the same manner that all other business of this character was then being necessarily handled by the appellant, including the mailing of the telegrams at Jackson.

It is said that the appellant could have telephoned the messages over the long-distance telephone, and that, if sent by mail, a special delivery stamp should have been placed on the envelope containing same. Granting that appellant was negligent in not using one or the other of these means in forwarding the telegrams, as to which we express no opinion, negligence alone, as hereinbefore stated, will not warrant the imposition of punitive damages. As was said by this court in *Telephone Co. v. Baker*, 85 Miss. 492, 37 South. 1013: "Every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, but not every legal wrong entitles the injured party to recover exemplary damages. Punitive damages are allowed, not solely nor chiefly for the benefit of the particular individual injured, but are awarded on the well-established principle of law that they may have a deterrent effect and protect the general public against a repetition of similar offenses."

Reversed and remanded.

ALABAMA & V. RY. CO. v. GROOME.

(No. 14,248.)

(Supreme Court of Mississippi. June 27, 1910.)

1. NEGLIGENCE (§ 121*)—EVIDENCE—BURDEN OF PROOF—"RES IPSA LOQUITUR."

The rationale of the doctrine of "res ipsa loquitur" is that, in some cases, the very nature of the accident, of itself and through the presumption it carries, supplies the requisite proof, and it applies when, under the circumstances, the accident presumably would not have happened if due care had been exercised.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

2. NEGLIGENCE (§ 121*)—EVIDENCE—BURDEN OF PROOF—RES IPSA LOQUITUR.

The essential import of the doctrine of res ipsa loquitur is that on the facts proved plaintiff has made out a prima facie case, without direct proof of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—PRESUMPTION OF NEGLIGENCE—RES IPSA LOQUITUR.

The maxim "res ipsa loquitur" applies as between master and servant, subject to such modification as necessarily results from the subsidiary rules governing the relationship, such as assumption of risk, the fellow servant rule, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§§ 103, 208*)—SAFE PLACE TO WORK—DELEGATION OF DUTY—ASSUMPTION OF RISK.

The duty to furnish a safe place to work cannot ordinarily be delegated to fellow servants, and the risk relative thereto is not ordinarily assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 175, 551; Dec. Dig. §§ 103, 208.*]

5. NEGLIGENCE (§ 136*)—QUESTIONS FOR JURY.

Whether the accident would have ordinarily happened, had due care been exercised, should generally be left to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. NEGLIGENCE (§ 121*)—PRESUMPTION FROM ACCIDENT—PRIMA FACIE CASE.

Where it is manifest that the accident would not have happened, had due care been exercised, negligence is presumed as matter of law, and proof of the accident is sufficient to make a prima facie case, and to require defendant to meet the case thus made.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

7. NEGLIGENCE (§ 121*)—BURDEN OF PROOF—EXTENT—EFFECT OF PROVING ACCIDENT.

Though proof of the accident is sufficient to make a prima facie case of negligence, the burden of proof is on plaintiff throughout the trial, and does not shift to defendant when plaintiff makes out such a case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

8. NEGLIGENCE (§ 138*)—ACTION FOR INJURIES—INSTRUCTIONS—BURDEN OF PROOF.

In an action for injury to a servant, wherein the maxim "res ipsa loquitur" applied, an instruction that the burden was on defendant to rebut the presumption of negligence in such case was intended only to mean that, when plaintiff by aid of such presumption made out a prima facie

case, it thereupon devolved on defendant to meet or rebut it by evidence showing reasonable care, and when taken in connection with other instructions, charging that the burden of proof was on plaintiff and that he must prove the material allegations of the declaration by a preponderance of the evidence, it could not have misled the jury as to which party had the burden of proof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 355; Dec. Dig. § 138.*]

9. EVIDENCE (§ 90*)—MEANING OF "BURDEN" AND "BURDEN OF PROOF."

The term "burden," or "burden of proof," is frequently used to signify the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 1, pp. 904-907; vol. 8, p. 7593.]

10. NEGLIGENCE (§ 121*)—RES IPSA LOQUITUR—WHEN DOCTRINE AVAILABLE.

The doctrine of res ipsa loquitur is available in a case wherein the declaration is for specific acts of negligence and no count charges negligence generally; but it is limited to a presumption of the negligence charged, which presumption defendant is called on to rebut by evidence of due care as to the matter complained of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

11. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION GIVEN.

Error in an instruction, in not limiting to specific acts of negligence charged the burden of meeting a prima facie case made by proof of the accident, is cured by another instruction not to consider any evidence on the subject of negligence except that specifically charged in the declaration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.*]

Appeal from Circuit Court, Warren County; Jno. N. Bush, Judge.

Action by D. H. Groome against the Alabama & Vicksburg Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

McWillie & Thompson and Hirsh, Dent & Landau, for appellant. S. S. Hudson, for appellee.

SMITH, J. Appellee, an employé of appellant, in the discharge of his duty as such, stepped off of a train of cars of appellant upon a platform extending over a ditch, and between a side and main track of the railroad. When he stepped upon the plank walk, it gave way with him, and threw him against the moving cars, resulting in the injury complained of. Appellant himself made no special examination of the cause of the giving way of the plank walk, but stated that it must have been rotten, or broken, or not nailed. One witness stated that the plank and sill, or sleeper, on which same rested, were not nailed, and that that was the cause of the giving way. Another witness testified that the platform did not exactly "cover the hole it was intended to cover," and that it was not much of a platform; that part of it rest-

ed on the ground, and part of it did not rest on anything. The bridge builder and inspector of appellant testifies that the platform was carefully constructed out of sound timber, well nailed down, and inspected daily, and that no defect was discoverable therein; that the giving way of the platform was caused by the breaking of one of the sills, a piece of 2x6 timber; that he did not make a "close examination, but it was a sound piece of timber—it had not been there very long." From a judgment awarding damages to appellee, this appeal is taken.

The allegation of negligence contained in the declaration is as follows: "Plaintiff stepped from the switchboard of defendant's engine to the plank walk of said trestle for the purpose of switching cars for the company at the point, and on account either of the rotten condition of the plank walk, or the fact that it was not nailed, which covered the trestle, same gave way," etc. "Therefore your plaintiff avers that on account of the willful, gross, and careless negligence of said company in failing to keep the trestle and ways and means and appliances thereto belonging in proper repair, and operating its trains at such rates of speed in said city," etc. One of the instructions granted appellee, the granting of which is assigned as error, is as follows: "The court instructs the jury, for plaintiff, that the law in this case presumes that plaintiff's injury resulted from a negligent failure of defendant company to furnish a safe and secure platform at the place where plaintiff was hurt. The burden is upon defendant to rebut this presumption by evidence that it exercised reasonable care to build and maintain said platform in a safe condition for the use of its employes. The jury is the sole judge of the weight of evidence; and if the jury do not believe, from the evidence, that defendant exercised reasonable care to maintain said platform in a safe and secure condition, then they will find verdict for plaintiff."

This instruction is based upon the maxim, "*Res ipsa loquitur*" (the thing speaks for itself). The rationale of this doctrine is that, in "some cases, the very nature of the accident, of itself and through the presumption it carries, supplies the requisite proof." It is applicable "where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised." Its essential import is that, on the facts proved, the plaintiff has made out a prima facie case, without direct proof of negligence." Labatt, Master and Servant, vol. 2, § 834. There seems to be considerable conflict, and some confusion, among the decisions of various courts relative to the application of this maxim as between master and servant. Without attempting to review the same, we deem it sufficient to say that we think the true rule is that the maxim does apply as between master and servant (Railroad v. Hicks, 91 Miss. 352, 46 South. 389), subject

to such modification as necessarily results from the subsidiary rules governing this relationship, such as assumption of risk, the fellow-servant rule, etc. In the case at bar none of these subsidiary rules interfere with the application of the maxim, for the reason that the accident was caused by a defect in the walk, or platform, furnished by the master to the servant upon which to work. The duties of the master relative to furnishing the servant a safe place in which to work cannot ordinarily be delegated to fellow servants, and the risk relative thereto is not such as is ordinarily assumed by the servant. See exhaustive review of authorities contained in notes to *Fitzgerald v. Southern Ry. Co.*, 6 L. R. A. (N. S.) 337, and *Byers v. Carnegie Steel Co.*, 16 L. R. A. (N. S.) 214.

The form of the instruction, however, has given us considerable difficulty. It presses the maxim to the full limit of its application, and in a large number of cases would probably constitute reversible error. Generally the fact as to whether the accident would have ordinarily happened, had due care been exercised by the defendant, should be left to the determination of the jury. In this case, however, that fact is manifest, and it was unnecessary to submit same to the jury. The presumption of negligence, therefore, arose as a matter of law, and was sufficient to make out a prima facie case for appellee, and to require appellant to meet the prima facie case thus made. *Potera v. City of Brookhaven*, 49 South. 617. The burden of proof, however, was on appellee throughout the trial, and never shifted to appellant, except in the sense that such burden is said to shift from the plaintiff to defendant when the former has made out a prima facie case. By this instruction the jury were charged that the burden is upon the defendant to rebut this presumption by evidence, etc.; and it is argued that thereby the burden of proof, with all which that term ordinarily implies, was shifted to the defendant. But, as we have just stated, when appellee, by the aid of the presumption of negligence arising under the maxim, had made out a prima facie case, it thereupon devolved upon defendant to meet, or rebut, this prima facie case by evidence that it exercised reasonable care. This was all that the instruction was intended to mean, and when taken in connection with other instructions, which charged the jury that the burden of proof was upon the appellee, and that he must prove the material allegations of the declaration by a preponderance of the evidence, it could not have misled the jury.

As was said by the California court in *Cody v. Market St. Ry. Co.*, 148 Cal. 93, 82 Pac. 667: "The term 'burden,' or 'burden of proof,' is frequently used to signify simply the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing

more." See, also, note to *Cleveland v. Hadley*, 16 L. R. A. (N. S.) 527, wherein the annotator, after an extensive review of the authorities, says, at page 531: "An instruction which merely informs the jury, in a case to which the doctrine of *res ipsa loquitur* is applicable, that the burden of proof is upon the defendant, without explaining or qualifying the phrase 'burden of proof,' is doubtless objectionable from a technical point of view; but the courts are loath to base a reversal upon it, unless it goes further and intimates that the burden is upon the defendant to disprove negligence by a preponderance of evidence." But it is said that when a plaintiff has sought by his declaration, as in the case at bar, to recover because of specific acts of negligence, and in no count has charged negligence generally, the doctrine of *res ipsa loquitur* cannot be availed of. It is true that a plaintiff must recover upon the case made by his declaration; but it does not follow therefrom that, when he alleges specific acts of negligence, the maxim has no application. In such case the maxim applies, and the presumption of negligence arises; but it is limited to a presumption of the negligence charged in the declaration, which presumption the defendant is called on to rebut by evidence that due care was exercised with reference to the matter complained of. *Palmer Brick Co. v. Chenail*, 119 Ga. 837, 47 S. E. 329.

The broad language of this instruction was necessarily limited, and any error therein cured, by instruction No. 4, granted appellant, which is as follows: "The court instructs the jury that they must not consider any evidence on the subject of any alleged negligence, except the negligence specifically charged in the declaration."

The court below committed no error with reference to the other matters complained of, and its judgment is therefore affirmed.

ROBINSON v. BOGGAN. (No. 12,714.)
(Supreme Court of Mississippi. June 1, 1907.
Suggestion of Error Overruled June 22, 1907.)

**1. FORCIBLE ENTRY AND DETAINER (§ 9*)—
GROUNDS OF ACTION.**

One cannot invoke the remedy of unlawful entry and detainer, unless he has been deprived of the possession of the land sought to be recovered by it.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 37; Dec. Dig. § 9.*]

**2. FORCIBLE ENTRY AND DETAINER (§ 17*)—
LIMITATIONS.**

A rightful owner of land, deprived of the possession thereof by another, cannot, under the express provisions of Code 1906, § 5039, maintain unlawful entry and detainer, unless the action is brought within a year after his deprivation of possession.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 33; Dec. Dig. § 17.*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Action of unlawful entry and detainer by C. W. Boggan against Charlie Robinson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

At the close of the testimony, defendant moved for a peremptory instruction in his favor on the ground that plaintiff had never shown, affirmatively, his right of possession, and that, even if he had ever acquired right of possession, it was more than one year before the bringing of this action of unlawful entry and detainer. The court overruled the motion.

Leftwich & Tubbs, for appellant. Geo. C. Paine, for appellee.

MAYES, J. We do not think, under the facts in this case, appellee has shown that the remedy by unlawful entry and detainer is an available one to him. Before this remedy can be invoked, it must be shown that the party seeking to invoke it has been deprived of the possession of the land sought to be recovered under it. The testimony leaves it very doubtful whether Boggan has ever had possession of this property in any way, and certain it is that appellee has never had such possession, within the meaning of section 5039 of the Code of 1906, as would entitle him to maintain this suit. The deprivation or withholding of possession, if it be conceded that Boggan is the rightful owner of the land, commenced many years before this suit was instituted, and, if the right to resort to this remedy ever existed, it was long prior to one year before the time when this suit was brought.

Reversed and remanded.

HINES et al. v. SHUMAKER. (No. 14,145.)
(Supreme Court of Mississippi. July 4, 1910.)

1. LIBEL AND SLANDER (§ 50½*)—PRIVILEGED COMMUNICATION.

Though the occasion of a libelous publication is privileged, the communication will not be privileged, if the defamatory matter therein exceeds the exigency of the occasion.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 50½.*]

**2. LIBEL AND SLANDER (§§ 6, 50½*)—LIBEL-
OUS PUBLICATION—PRIVILEGED OCCASION.**

Defendant H., the superintendent of agents of a local insurance company, having received information that plaintiff, the state representative of a foreign company, had been making statements derogatory to the local company, published a letter sent to all agents and subagents of the local company, without reference to whether any of the rumors alleged to have been circulated by plaintiff had come within their knowledge or had been circulated in their communities, charging plaintiff with being generally dishonest, lacking in brains, undiplomatic, and nonoptimistic, and as being a mean "knocker." Held, that the letter was libelous per se, and ex-

ceeded the privileged occasion, if one existed, and was therefore not privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 4; Dec. Dig. §§ 6, 50½.*]

3. LIBEL AND SLANDER (§ 123*)—DAMAGES.

The question of damages in an action for libel is peculiarly one for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 363, 364; Dec. Dig. § 123.*]

4. LIBEL AND SLANDER (§ 121*)—DAMAGES—EXCESSIVENESS.

Where defendant H., wrote a letter concerning plaintiff, and published the same throughout the state to agents and subagents of an insurance company, referring to plaintiff as brainless, without diplomacy, dishonest, and unoptimistic, and as being a "knocker" in the insurance business, in which plaintiff was engaged, a verdict for plaintiff for \$7,500, which the court cut down to \$3,000, was not excessive.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353, 354; Dec. Dig. § 121.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by J. M. Shumaker against W. W. Hines and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 50 South. 564.

V. Otis Robertson and Tim E. Cooper, for appellants. Flowers, Fletcher & Whitfield and May & Sanders, for appellee.

WILBOURN, Special Judge. J. M. Shumaker brought suit in the circuit court of Hinds county, Miss., against W. W. Hines and the Lamar Life Insurance Company for the publication of the following letter:

"The Lamar Life Insurance Company.

"Jackson, Miss., June 17, 1908.

"To our Representatives—Gentlemen: There are but two kinds of life insurance field men—those that are good, and those that are no good. The knocker is the most obnoxious type of the latter class. The hardest work a man ever undertakes in this world is to endeavor to lift himself up by trying to pull his brother down. A knocker is sometimes naturally born a knocker. Others are knockers because they can't make good in a square fight, and rather than quit honestly they gravitate to the mire and

"In the mud and scum of things
Something always, always sings."

"The knocker's tongue is always full of poison, and the meanest man on earth is the one who will wound a man's character with his tongue, and he is no whit less mean if he attempts to wound the character of the Lamar Life Insurance Company. Gentlemen, there is a big knocker abroad in the land. He is one J. M. Shumaker, reputed a general agent for Mississippi of the Germania Life Insurance Company of New York. His name may be a misnomer, but we haven't seen any proof on the subject. He clearly is

not a life insurance man. His company last year in the whole United States gained, according to the Spectator Co., only \$376,028 of insurance. The Lamar Life did three times better than that in only one state. Shumaker, in the state of Mississippi last year, with all of his subagents, which field force we can't see with the naked eye, wrote the great sum of \$134,000 of insurance, and while he was thus busy and 'knocking' his policy holders in Mississippi terminated for him \$301,785 of insurance.

"Shumaker is getting rich and is mad about it. His big Germania has a ratio of assets to liabilities of \$1.05, as compared to the Lamar's \$2.21. His company has been in business 48 years, and is not increasing its writings as fast as we, who are only two years old. He criticizes the Lamar upon every occasion, and starts absurd rumors wherever he goes. Of course, they are all silly.

"I write this merely to keep you posted about even small matters in the field. We don't write about Shumaker to give you something to knock him with. Let him alone. We wrote during the first ten days of June more business than he and his 'big' force did the whole of last year in Mississippi.

"A successful writer and a successful company are products of positive qualities. Positive qualities mean boosting, instead of knocking; hustling, instead of procrastinating; being keen, dignified, and informed. And it goes without saying that an indispensable condition for success in every career is contained in a single word—WORK. An insurance writer may be brainy, but he must work; honest, but he must work; diplomatic, but he must work; optimistic, but he must WORK. Shumaker isn't any of these things.

"So don't worry about him and his talk. Follow the old injunction, which says that, 'When a hog muddies a stream, step up the branch ahead of him to get your drink.'

"The Lamar Life is bigger, stronger, and better each succeeding day, and its stream is so wide that Shumaker muddying can't ripple far.

"How is the contest going? Why, there are about thirty agents making the best fight you ever saw, with nobody yet a winner.

"Hustle, boys, hustle. Boost, brothers, boost.

"With best wishes, I am very respectfully,

"[Signed] W. Warner Hines,

"WWH—CAH Superintendent of Agents."

At the conclusion of the testimony the court peremptorily instructed the jury to find for the plaintiff, but submitted the question as to the amount of damages, compensatory and punitive, to the jury under proper instructions. The jury returned a verdict in favor of plaintiff for \$7,500, but on motion

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for a new trial the court below required the plaintiff to remit all of the verdict except \$3,000, and awarded judgment for that amount.

It is conceded that the letter is libelous *per se*; but, so far as the Lamar Life Insurance Company is concerned, it is insisted that the communication is privileged, and that it was only published upon a privileged occasion, and to persons having a corresponding interest in the subject-matter of the communication. The court below was of the opinion that the publication of the letter to the stenographer, who made a typewritten copy of it from a pencil copy furnished her by Mr. Hines, and then made about 50 copies of the typewritten copy on the multigraph machine, was a publication outside the privilege so far as the Lamar Life Insurance Company is concerned; and, it not being disputed that Mr. Hines had mailed a copy of the letter to Mr. U. E. Cross, another outsider, with whom Hines was at the time negotiating about a private matter, the court granted the peremptory instruction.

We do not think it necessary in this case to pass at this time on the question as to the publication to the stenographer, but prefer to rest our conclusion upon another ground presently to be stated. The occasion upon which the letter was written and mailed to the representatives of the Lamar Life Insurance Company, as detailed by Mr. Hines and taken most strongly in favor of the appellants, was as follows: It was reported to Mr. Hines, who was the superintendent of agents of the Lamar Life Insurance Company, by several of its agents, that they had heard that the plaintiff, J. M. Shumaker, who was the superintendent of agents in Mississippi for the Germania Life Insurance Company, a competitor of the Lamar Life Insurance Company, was stating to people with whom he was endeavoring to write insurance, and to prospective policy holders of the Lamar Life Insurance Company, that the Lamar Life Insurance Company was young, was local, was weak, was liable to go to pieces at any time, was on its last legs, had spent a part of its capital stock, could not possibly last long, that its stock was below par, and that it had a mortal at the head of it. These statements were not made directly by Shumaker to agents of the Lamar Life Insurance Company, and the agents had no personal knowledge themselves as to whether or not the statements had actually been made by Shumaker. They simply knew that other parties said such statements were being made by Shumaker. Without taking the matter up with Shumaker at all, and without having any refutation of the charges or statements of Shumaker communicated to the persons to whom Shumaker had talked or published in the communities where it was stated Shumaker had started these rumors, the letter complained of was issued and mailed to all of the subagents of the Lamar

Life Insurance Company in all the different localities of the state of Mississippi where said subagents resided, without reference to whether or not any rumors had been circulated in these communities by Shumaker, and without reference to whether or not all of said agents had heard of said rumors.

Where the communication is upon a privileged occasion and is a privileged communication, the burden is upon the plaintiff, of course, to show actual malice in order to recover. But if the privilege of the communication is not conceded, and does not appear from the plaintiff's testimony, as is the case here, the burden is then upon the defendant, who relies upon the privilege, to establish it. *Abraham v. Baldwin*, 52 Fla. 151, 42 South. 591, 10 L. R. A. (N. S.) 1051. In *Odgers on Slander and Libel*, pp. 286, 287, it is stated as follows: "Not every communication made on a privileged occasion is privileged. The defendant may, in answer to an inquiry, launch out into matters which have no bearing on the question, or in writing to a person who has a joint interest with himself in one undertaking, he may wander off into other matters with which his correspondent is not concerned. The presence of such irrelevant matter does not, of course, affect the judge's ruling that the occasion was privileged. As a rule it will be merely evidence of malice to take the case out of the privilege. But there seems to be some cases where the communication is so wholly irrelevant and improper that the judge while ruling that the occasion was one which would have afforded protection to a proper letter, may yet declare that no privilege at all can attach to the letter which the defendant in fact wrote on that occasion." "The scope of the defamatory matter must not exceed the exigency of the occasion." *Cook on Defamation*, 35. "A communication made by a person is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. In such cases, however, it must appear that he was compelled to employ the words complained of. If he could have done all that his interest or duty demanded without libeling or slandering the plaintiff, the words are not privileged. It is very seldom necessary in self-defense to impute evil motives to others or to charge your adversary with dishonesty or fraud." *Newell on Slander and Libel* (2d Ed.) § 108. See, also, *Newell on Slander and Libel*, §§ 65 and 67. "In determining whether or not a communication is privileged, the nature of the subject, the right, duty, or interest of the parties in such subject, the time, place, and circumstances of the occasion, should all be considered." *Abraham v. Baldwin*, 52 Fla. 156, 42 South. 592, 10 L. R. A. (N. S.) 1051.

While not intending to hold that in every case the question as to whether or not the communication exceeds the privilege of the occasion is a question for the court, we have reached the conclusion that in this case, the

letter being plain and unambiguous in its terms, the question as to whether or not it is within the privilege is a question for the court, and that, conceding the facts as to the occasion of its publication to be as detailed by all the witnesses for appellant, the letter was not a privileged communication. We have carefully considered its language and the entire letter, and are constrained to hold that it makes the general and unqualified charge that Shumaker is not brainy, is not honest, is not optimistic, is not diplomatic, and that such charge in said letter, communicated to all the agents of the Lamar Life Insurance Company, without reference to whether or not they knew of Shumaker's criticisms, and without reference to whether or not said criticisms had been made in their communities, was in excess of the privilege of the occasion, and was not relevant to a proper refutation of the charges and criticisms that it had been reported to Hines Shumaker had made in certain localities. The letter goes beyond legitimate refutation, and broadly, generally, and unqualifiedly denounces Shumaker. A proper communication, and in strong language, to the agents who reported the rumors as to the criticisms of Shumaker, might have been sent to said agents, or published in the localities where the rumors were reported to have been circulated by Shumaker; but appellants were not warranted in going beyond that, and denouncing Shumaker as lacking in brains and as dishonest to the extent and in the manner that was done in this case. There must be some bounds within which the right to retort upon one's adversary should be prescribed, or else there would be no sacredness to character. It is not pleaded by the appellants that Shumaker was lacking in brains, and generally dishonest as matter of fact, nor was there any proof from which the jury would have been authorized in reaching such a conclusion. Appellant sought by their pleadings and proof to qualify the language of the letter, by pleading and endeavoring to prove that the letter did not charge, and was not intended to charge, generally, dishonesty to the plaintiff. But the question for the court to determine is, not what language the appellants meant to use, but what did they mean by the language actually employed? We think, therefore, that the court below did not err, for the reasons stated, in granting the peremptory instruction.

But one other question remains to be considered, and that is as to the amount of the damages. The question of damages is peculiarly one for the jury, and we do not think that in a case of this character the plaintiff is confined to recovery of mere pecuniary damage, but that it is rarely the case that the compensatory damages to which a plaintiff, who has been defamed, is entitled,

can be adequately measured by the extent of his pecuniary loss. It does not appear, under the very liberal and accurate instructions that were granted by the court below on the question of damages, nor from the proof and circumstances of the case, that the damages awarded were exemplary alone, nor that there were no actual damages in a truly legal sense, and we do not feel warranted in disturbing the judgment of the court below, in view of the remittitur required by the trial judge.

It follows, therefore, that the case must be affirmed.

HAROLD et al. v. STATE. (No. 14,519.)
(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Harrison County; T. H. Barnett, Judge.

"To be officially reported."

Will Harold and Dan Johnson were convicted of murder, and appeal. Reversed and remanded.

Parker & Batson, for appellants. Jas. R. McDowell, Asst. Atty. Gen., for the State.

McLAIN, C. The appellants were indicted in the circuit court of Harrison county for murder, and were convicted and sentenced to the penitentiary for life.

We have carefully considered the record in this case, and we are of the opinion that the evidence against these defendants, as disclosed by the record, was not sufficient to sustain the verdict of guilty.

The case is reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court.

TURNER v. STATE. (No. 14,517.)
(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Harrison County; T. H. Barnett, Judge.

Sarah Turner was convicted of manslaughter, and appeals. Affirmed.

W. G. Evans and T. A. Hardy, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

TOWN OF BOND v. GULFPORT SASH, DOOR & BLIND MFG. CO.
(No. 14,642.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between the Town of Bond and the Gulfport Sash, Door & Blind Manufacturing Company. From the judgment, the Town of Bond appeals. Affirmed.

See, also, 49 South. 260.

T. M. Evans and L. W. Saucier, for appellant. T. H. Barrett and J. S. Taylor, for appellee.

PER CURIAM. Affirmed.

ROSETTO v. CITY OF BAY SAINT LOUIS.
(No. 14,462.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Hancock County; W. H. Hardy, Judge.

Peter Rosetto was convicted of violating an ordinance of the city of Bay St. Louis, and appeals. Affirmed.

E. J. Gex, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for appellee.

PER CURIAM. Affirmed.

HARRIS v. STATE. (No. 14,659.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Pontotoc County; Jno. H. Mitchell, Judge.

E. Fred Harris was convicted of carrying a concealed weapon, and appeals. Affirmed.

Geo. T. Mitchell, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

HALL v. STATE. (No. 14,537.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Union County; W. A. Roane, Judge.

Edgar Hall was convicted of manslaughter, and appeals. Affirmed.

Jones & Knox, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

McKINNEY v. STATE. (No. 14,456.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Chickasaw County; Jno. H. Mitchell, Judge.

Lon McKinney was convicted of murder, and appeals. Affirmed.

J. E. Harrington, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

WILLIAMS v. WOOTEN. (No. 14,377.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Chancery Court, Lincoln County; G. G. Lyell, Chancellor.

Action between Ida Williams and Oscar Wooten. From the judgment, Williams appeals. Affirmed.

A. C. & J. W. McNair, for appellant. Jones & Tyler, for appellee.

PER CURIAM. Affirmed.

PAPCKE LEICHT LUMBER CO. v. DENT.
(No. 14,133.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Chancery Court, Washington County; M. E. Denton, Chancellor.

Action between the Papcke Leicht Lumber Company and R. K. Dent. From the judgment, the Lumber Company appeals. Affirmed.

A. J. Rose and Wm. C. Gilbert, for appellant. Byrd, Wilson & Richardson and Thomas & Bass, for appellee.

PER CURIAM. Affirmed.

MENDENHALL LUMBER CO. v. J. R. WEBSTER SAWMILL CO.
(No. 14,622.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action between the Mendenhall Lumber Company and J. R. Webster Sawmill Company. From the judgment, the Lumber Company appeals. Affirmed.

Currie & Currie, for appellant. Hilton & Hilton, for appellee.

PER CURIAM. Affirmed.

STEWART et al. v. STATE BANK OF McHENRY. (No. 14,382.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action between S. H. Stewart and others and the State Bank of McHenry. From the judgment, Stewart and others appeal. Affirmed.

Currie & Currie, for appellants. Stevens, Stevens & Cook, for appellee.

PER CURIAM. Affirmed.

SCOTT v. STATE. (No. 14,515.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Circuit Court, Harrison County; T. H. Barnett, Judge.

Tascar Scott was convicted of assault with intent to kill, and appeals. Affirmed.

J. H. Mize, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

**AXTELL v. SMEDLEY & RODGERS
HARDWARE CO. et al.**

(Supreme Court of Florida, Division B. May 18, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 181*)—CONSTRUCTION—INTENT.

The intent of a statute is the vital part—the essence of the law—and the primary rule of construction is to ascertain and give effect to that intent. A construction which results in bringing two sentences of the same section of a statute into conflict should be avoided, if it can be done without doing violence to the language used and the general intent of the whole section. The entire statute is to be considered in ascertaining the intent. Effect must be given to every part of a section if it be reasonably possible to do so. The mere literal construction of a section of a statute ought not to prevail, if it is opposed to the intention of the Legislature apparent by the statute, and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259-265; Dec. Dig. § 181.*]

2. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE—CONSTRUCTION OF STATUTE.

Applying the foregoing principles of construction to subsection 2 (a), § 2210, Gen. St. 1906, prescribing how liens in favor of one who in privity with the owner has furnished materials for the erection and repair of buildings, etc., may be acquired as against purchasers and creditors, the proper construction is that one furnishing materials has three months after the entire furnishing of the material to record his lien so as to secure his lien for twelve months after the record of the same against persons who purchase the property or creditors without notice who became such after the recording of the lien, but such recording is not notice, nor does it make the lien effectual against a purchaser without actual notice who buys the property before the lien is recorded, and after the time when the materials are furnished; in other words, the act of recording the lien has no retroactive effect upon a purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 231.*]

Appeal from Circuit Court, Duval County.

Bill by the Smedley & Rodgers Hardware Company and others against Ezra P. Axtell and others. Decree for complainants, and the mentioned defendant appeals. Reversed.

Axtell & Rhinehart, for appellant. Baker & Baker, for appellees.

HOCKER, J. Smedley & Rodgers Hardware Company, a corporation, filed its bill in the circuit court of Duval county against C. J. Duffy and Daisy B. Duffy, his wife, and Ezra P. Axtell, alleging, in substance: That on the 13th June, 1908, C. J. Duffy was the owner of lot 9, in block 5, of Riverside annex in Jacksonville; that Duffy as owner erected and constructed thereon two buildings for dwelling house purposes; that orator at Duffy's request from time to time furnished him with material and supplies for their erection and construction which were

used by Duffy in the construction of said houses, and for which Duffy became indebted to orator in the sum of \$206.98.

A detailed statement of supplies so furnished with the prices is made a part of the bill. That no part of said indebtedness has been paid. That on 12th August, 1908, the last items of said supplies were used by Duffy before the buildings were completed. That said buildings have been completed since August 12, 1908, prior to the filing of this bill. That heretofore, on 21st October, 1908, Duffy and wife sold and conveyed said premises to Ezra P. Axtell, by deed dated October 20, 1908, which deed duly acknowledged was recorded in the public records of Duval county in deed book 50, p. 405.

That on 2d November, 1908, orator filed in the office of the clerk of the circuit court of Duval county a notice of its intention to hold and claim a lien upon the premises described for \$206.98 for material furnished the defendant Duffy as owner of said premises.

The notice of lien duly proven, filed, and recorded is made part of the bill. That defendant Axtell purchased said premises within three months after the erection and completion of the buildings thereon, and within less than three months after the entire furnishing by orator of the material used in the construction of said buildings, and while he is not, and was not, a bona fide purchaser of said premises without notice by reason of the facts stated. The bill contains the usual prayer for relief, etc.

Decrees pro confesso were entered against Duffy and wife.

Ezra P. Axtell answered the bill, admitting the allegations of the bill, except the allegation that he was not an innocent purchaser for value, and, as to this, he alleges that he paid \$1,000 in cash for the lot in question and assumed a mortgage for \$1,500 then existing as a lien on the property; that this was the full value of the property; that he had no knowledge or notice of any kind or description that complainant had, or claimed any lien against the property, or that it had furnished any materials for the erection of the buildings; that when he purchased the dwelling houses were occupied by families living therein, and had been so occupied—one from the 8d August, 1908, the other from August 15, 1908; that C. J. Duffy, then owner of the property, informed the defendant there were no liens or claims on the property other than the \$1,500 mortgage; that at the time he paid the purchase price for said property and the deed therefor was delivered to him he examined the records of Duval county to ascertain if there were any liens or claims of record against said property, and found none except the mortgage aforesaid.

This is a sufficient statement of the con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tents of the answer to show the issue made by it. The case was set down for hearing on bill and answer by the complainant. On final hearing the judge rendered a decree that complainant was entitled to the relief prayed for in the bill, that the amount due complainant for materials and supplies furnished Duffy is a lien on the lot in question superior in dignity to the interests of defendants, or any of them, and referring the case to a master to take the testimony that may be offered by the parties, as to the amount due complainant for materials and supplies to state an account, and also to take and state an account of the attorney's fees due the solicitor for complainant.

E. P. Axtell appealed from this decree to this court.

The matter before us requires the construction of subsection 2 (a) of section 2210 of the General Statutes of 1906, prescribing how liens in favor of one who in privity with the owner has furnished material for the erection and repair of buildings, etc., may be acquired as against purchasers and creditors.

It reads as follows:

"(a) As to Real Estate—As against purchasers and creditors of such owner without notice, such lien shall be acquired upon real estate only from the time of the record in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such lien. Such notice shall contain a statement of the amount claimed, a description of the property upon which the lien is claimed, and a notice of the intention to hold a lien for the said amount, and shall be verified by the oath of the lienor or his agent. It shall be filed only after the labor has been entirely performed and the materials entirely furnished.

"No such notice of a perfected lien shall be effectual against creditors or purchasers of the owner without notice unless it be filed within three months after the entire performance of the labor or the entire furnishing of the material."

It will be noticed that the first sentence of this subsection states that "such lien shall be acquired upon real estate only from the time of the record in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such a lien." The last sentence of the subsection says: "No such notice of a perfected lien shall be effectual against creditors or purchasers of the owner without notice unless it be filed within three months after the entire performance of the latter, or the entire furnishing of the material."

It is the contention of the appellees that the last sentence modifies the former one, and gives the materialman three months in which to record his lien, and that, if he does so, such a lien becomes effectual even against an innocent purchaser for value who bought the property within three months after the

entire materials were furnished and before the record of the lien.

The decree appealed from seems to be based on this construction. If this be the proper construction, then there is a conflict in the meaning of the two sentences, for the first sentence affirmatively states the lien shall be acquired as to creditors and purchasers without notice only from the time of recordation. That is to say, it specifically provides that the recorded lien shall only be prospective in its operation, whereas the last sentence makes the lien retroactive in operation. Without meaning to deny the contention of appellees that the Legislature has the power, if it chooses to exercise it, to give such an effect to a lien, it seems to us the question is: Did the Legislature intend to produce this result in this case? If they did intend this result, then probably the last sentence should be taken as the expression of the legislative intent. Paragraphs 268 and 349, 1 Lewis' Sutherland Statutory Construction (2d Ed.).

The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. Paragraph 368, *Id.* Most certainly a construction which results in bringing two sentences of the same section into conflict should be avoided, if it can be done without doing violence to the language used and the general intent of the whole section. The entire statute is to be considered in ascertaining the intent. Paragraph 368, *Id.* Effect must be given to every part of the section, if it be reasonably possible to do so. Paragraph 380, *Id.* Each part or section of a statute should be construed in connection with every other part or section and so as to produce a harmonious whole. Paragraph 368, *Id.*; *Curry et al. v. Lehman*, 55 Fla. 847, 47 South. 18.

The mere literal construction of a section of a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute, and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. Paragraph 376, *Id.* Many other rules of interpretation of statutes might be referred to illustrating the earnest purpose of the courts to decree and carry into effect the intent of the Legislature.

Now, we think the last sentence of the subsection above quoted, without violence to its language, may be construed to mean that one furnishing material shall have three months after the entire furnishing of the material to record his lien, so as to secure his lien for 12 months after the record of the same (see section 2223, Gen. St. 1906) against persons who purchase the property or creditors who become such after the time of recording the lien. There is no time limit upon recording in the first sentence of the subsection, but there is an emphatic statement that the lien shall be good against

creditors and purchasers only from the time of the record. The person furnishing materials has three months in which to record his lien. He may record it immediately or he may, at his own risk, wait until near the end of that period. That is a matter of choice with him. But we cannot conceive it to be consistent with the plain meaning of the first sentence of the subsection that he should be permitted to use his liberty of recording within three months, as a trap to catch an innocent creditor or purchaser. Thus construed, the whole section is harmonious in all its parts, and a construction is reached which is in harmony with the general and just rule that innocent purchasers without actual notice are to be protected, unless they have constructive notice; for if proper constructive notice is given them, and they do not avail themselves of it, they have no one to blame but themselves.

The appellant, Axtell, acquired the property by purchase for a valuable consideration, after the completion of the buildings on the lot in question, without actual or constructive notice of the rights of the appellees; and that he did not have constructive notice is the fault only of the appellees.

We think the decree appealed from erroneous in giving the appellees superior rights to those of the appellant, and it is therefore ordered that the decree be reversed as to said appellant.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

ATLANTIC COAST LINE R. CO. et al. v. McCORMICK et al.
(Supreme Court of Florida, Division A. June 20, 1910.)

(Syllabus by the Court.)

1. TRIAL (§ 156*)—DEMURRER TO EVIDENCE.

A demurrer to evidence admits the truth of the testimony as stated in the demurrer and also such conclusions of fact as may be fairly drawn from the testimony. Forced or violent inferences from the testimony are not admitted by the demurrer; but the testimony is to be taken most strongly against the demurrant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

2. TRIAL (§ 156*)—DEMURRER TO EVIDENCE.

In passing upon a demurrer to evidence, only the evidence as stated in the demurrer can be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

3. TRIAL (§ 156*)—REVIEW—DEMURRER TO EVIDENCE.

An investigation of the facts in dispute, and the reconciliation of conflicting or inconsistent testimony cannot be had on a demurrer to evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

4. NEGLIGENCE (§ 101*)—INJURIES—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.

The provision of the statute defining the liabilities of railroad companies in certain cases that "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him," is applicable only when the injury is done "by the running of locomotives or cars, or other machinery of such company," or "done by any person in the employ and service of such company."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163-167; Dec. Dig. § 101.*]

5. NEGLIGENCE (§ 119*)—CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF.

Where contributory negligence is a defense to an action in tort, it should be pleaded and proven by the defendant, unless it appears from the allegations or proofs of the plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

6. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW AND FACT.

Whether contributory negligence appears by direct testimony, or by fair inference from the evidence of the plaintiff, it is a question for the jury to determine under proper instructions from the court, where a conclusion of contributory negligence does not indisputably arise from the evidence offered by the plaintiff so as to become a question of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-336; Dec. Dig. § 136.*]

7. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMING FACTS.

While it is error to assume in charges facts that are disputed or not conceded, it is not error to assume the existence of a fact shown by uncontroverted testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

Error to Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by Connie O. McCormick and husband against the Atlantic Coast Line Railroad Company and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Doggett & Smith, J. B. Johnson, Rees & Rees, and Carter & McCollum, for plaintiffs in error. Hardee & Smith, for defendants in error.

WHITFIELD, C. J. This writ of error is to a judgment recovered by the defendants in error against the plaintiffs in error for injuries received August 15, 1908, by the wife by stepping into a hole in the floor of the waiting room of the passenger depot used by the several defendant railroad companies.

The negligence alleged is that the railroad companies "wrongfully and negligently suffered the said waiting room to be and remain in bad and unsafe repair and condition, in this, to wit: That a portion of the flooring in said room of said passenger depot in which passengers and their friends were required to await the arrival and departure of trains running over the defendants' line of road, that is to say, that said waiting room

was the only room provided by the defendants for the uses aforesaid, was rotted, decayed and broken, and by means whereof the said Connie McCormick, the wife of the said M. L. McCormick, who was then and there on the date aforesaid, in said waiting room in company with a friend whom she, the said Connie McCormick, had come to assist in boarding one of the trains of one of the said defendants, and who was about to become a passenger of one of the said defendants, then and there necessarily and unavoidably broke through the said rotted, decayed and broken floor in said room of said passenger depot, and without fault on her part, and thereby did fall with great force and violence to the floor, striking against a projection, and thereby was injured." A single, separate plea of not guilty was filed by each one of the four defendant railroad companies. The following demurrer to the evidence was overruled:

"Comes now the defendants in the above entitled cause and demur to the evidence herein introduced by the plaintiffs and say that the plaintiffs ought not to have judgment of the defendants herein on said testimony, and the said defendants, for the purposes of this demurrer, admit as true all the testimony herein introduced, with all reasonable deduction to be made therefrom, and the defendants pray judgment of the plaintiffs hereon.

"Matters of Law to be Argued.

"(1) The testimony shows the plaintiff, Mrs. McCormick, to have been guilty of contributory negligence.

"(2) The testimony shows the said plaintiff at the time and place of her injury to have been a mere licensee, towards whom the defendants owed no duty of ordinary and reasonable care, but only the duty to refrain from willfully injuring her.

"(3) The testimony does not show any sufficient connection between these defendants, or either of them, and the place where the plaintiff was injured, as to fix responsibility upon the said defendants, or either of them, for the lack of repair or condition of the floor at the point where the said plaintiff was injured.

"(4) There is a fatal variance between the allegations in the declaration and the proof as to the time of the alleged accident.

"Matters of fact with all reasonable deductions therefrom admitted as true, applicable to the propositions of law raised herein:

"That the plaintiff, Mrs. McCormick, on September 15, 1908, went down to the Union Depot with friends to see and assist said friends off on the train of the Florida Railway Company, one of the defendants herein, said friends being two ladies and one man, and being quite a number of bundles with them, and one of the ladies had a child. That upon arriving at the depot her friends immediately boarded the train at the Union Depot, she bade them good-bye and turned

at once and went into the depot waiting room to get a drink of water, and is almost sure the train was still standing on the track by the depot. The time was about 5 o'clock in the afternoon and during daylight. That the said plaintiff approached the water cooler where there was already a hole in the flooring; that plaintiff is a little nearsighted for seeing or doing anything like that. That the plaintiff stepped in the hole and injured herself. That the hole was big enough for her to get her foot in it; that she broke part of the floor on the right side. That it was about 5 o'clock in the afternoon and getting a little dark; that it was a cloudy afternoon and the waiting room was crowded with people. That the plaintiff did not look down at the floor while walking to the water cooler, but if she had she would have seen the hole in the floor before she stepped into it.

"That the defendants A. C. L. R. R. Co., S. A. L. Ry. Co., L. O. P. & G. Ry. Co., and Fla. Ry. Co. each have tracks leading past the depot where plaintiff was injured.

"That they stop at this point for passengers, and that the defendants A. C. L. R. R. Co., S. A. L. Ry. Co. and Fla. Ry. Co., in the building where plaintiff was injured, known as the 'Union Depot,' sell tickets for passage on their respective trains."

Only the first two grounds of the demurrer to the evidence are argued here. By this demurrer to the evidence, the defendant railroad companies admitted the truth of the testimony as stated in the demurrer, and also such conclusions of fact as may be fairly drawn from the testimony. Forced or violent inferences from the testimony are not admitted by the demurrer, but the testimony is to be taken most strongly against the demurrants. *Fee v. Florida Sugar Manufg. Co.*, 38 Fla. 612, 18 South. 653. Only the evidence as stated in the demurrer to the evidence can be considered in passing upon the demurrer. Guided by these rules, it is apparent that the liability of the defendants is shown by their use of the depot, by the condition of the floor, and by the circumstances under which the plaintiff was in the waiting room and was injured, as stated in the demurrer to the evidence.

The statement in the evidence "that the plaintiff did not look down at the floor while walking to the water cooler, but if she had, she would have seen the hole in the floor before she stepped into it," when considered with the statements that it was "getting a little dark; that it was a cloudy afternoon and the waiting room was crowded with people," and applying the rule that in a demurrer to evidence, the testimony is to be taken most strongly against the demurrants, it is not apparent from the demurrer to the evidence that the plaintiff was guilty of contributory negligence. An investigation of the facts in dispute, and the reconciliation of conflicting or inconsistent testimony cannot

be had in a demurrer to evidence, but are for the jury upon a consideration of all the evidence adduced at the trial. *Mugge v. Jackson*, 50 Fla. 235, 39 South. 157.

The statement in the testimony incorporated in the demurrer to the evidence that the plaintiff "went down to the Union Depot with friends to see and assist said friends off on the train of the Florida Railway Company, one of the defendants herein, said friends being two ladies and one man, and being quite a number of bundles with them, and one of the ladies had a child," is sufficient on the demurrer to indicate that the plaintiff was properly in the waiting room of the defendant companies. The law imposed upon the defendants the duty to have the floor of its waiting room in a reasonably safe condition, and a liability for nonperformance of this duty where injury proximately results, and the plaintiff does not contribute proximately to the injury. 28 Am. & Eng. Enc. Law (2d Ed.) 508. The demurrer to the evidence was properly overruled. The case could then be submitted to the jury. Section 1446, Gen. St. 1906.

Under the title of "An act defining the liabilities of railroad companies in certain cases," chapter 4071, Acts of 1891, contains five sections, the first two of which are brought forward in the General Statutes of 1906, as follows:

"3148. Liability of Railroad Company.—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

"3149. When Recovery of Damages Forbidden.—No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both in fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

The title under which these sections were enacted is restrictive, and the terms of the sections are specific and narrow in their scope. No added effect is given the sections by being subsequently incorporated in the General Statutes of 1906.

The act applies only to railroad companies and the constitutionality of the third section, now section 3150, Gen. St. 1906, as a discriminating regulation has been sustained upon the theory that the business of operating railroads differs from other employments in the particular dangers incurred, and calls for special regulation to meet the

conditions peculiar to it. *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428.

It is competent for the Legislature, when acting within constitutional limitations, to change the common-law liabilities of railroad companies for damage done to its employes and others. See *Seaboard Air Line Ry. v. Simon*, 56 Fla. 545, 47 South. 1001, 20 L. R. A. (N. S.) 126; *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680.

The subject regulated by the statute is expressly limited to damage done by the running of the locomotives, or cars or other machinery of a railroad company and to damage done by any person in the employment and service of such company. All the sections originally enacted together are to be considered as one act regulating a single restricted subject-matter.

The provision in section 2 of the original act, now section 3149 of the General Statutes of 1906, allowing a plaintiff to recover damages from a railroad company where both the plaintiff and the defendant are at fault, is to be construed with the other sections and is limited to damage done by the running of locomotives, cars, or other machinery, or by any person in the employ and service of a railroad company.

The injury in this case was not caused by the running of locomotives, cars, or other machinery or by any person in the employ and service of the defendants. The duty to keep the floor of the waiting room in a reasonably safe condition for the purposes of its use devolves upon the companies, but it does not appear that the "damage" complained of was "done by any person in the employ or service of" the defendant companies.

In its charges to the jury the trial court did not apply the statutory provision as to the presumption of negligence on the part of the railroad companies arising out of the injury, apparently because the injury was not caused by the running of locomotives, cars, or other machinery, or by any person in the employ and service of the companies; but the court did apply the statutory provision that the plaintiff may recover if both were at fault. This was error because the regulation in each instance is designed to apply to the same subject-matter, viz., damage done by the running of locomotives, cars, or other machinery of a railroad company, or by persons in the employ and service of a railroad company.

Where contributory negligence is a defense to an action in tort, and does not merely reduce the damages, the contributory negligence should be pleaded, and proven by the defendant, unless it appears from the allegations or proofs of the plaintiff. In this case the only plea was the general issue of not guilty which did not put in issue any matters of inducement contained in the declaration and did not present the defense of contrib-

utory negligence. Louisville & Nashville R. R. Co. v. Ynietra, 21 Fla. 700; Jacksonville Electric Co. v. Sloan, 52 Fla. 257, text 288, 42 South. 516; Atlantic Coast Line Ry. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Atlantic Coast Line Ry. Co. v. Beazley, 54 Fla. 311, 45 South. 761; Moore v. Lanier, 52 Fla. 353, 42 South. 462; Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 S. W. 1083, 15 Am. & Eng. Ann. Cas. 429, and notes; Atlantic Coast Line Ry. v. Ryland, 50 Fla. 190, 40 South. 24; Ryland v. Atlantic Coast Line Ry. Co., 57 Fla. 143, 49 South. 745; 29 Cyc. 580; 5 Ency. Pl. & Pr. 10.

Whether contributory negligence appears by direct testimony, or by fair inference from the evidence of the plaintiff, is a question for the jury to determine under proper instructions from the court, as a conclusion of contributory negligence does not indisputably arise from the evidence offered by the plaintiff so as to become a question of law. See Louisville & Nashville R. R. Co. v. Ynietra, 21 Fla. 700; Florida Cent. & P. R. Co. v. Mooney, 40 Fla. 17, text 32, 24 South. 148.

As the existence of the hole in the floor is not controverted, the apparent negligence of the defendants follows, and while it is error to assume in charges facts that are disputed or not conceded, it is not error to assume the existence of a fact shown by uncontroverted testimony. In the charges given the assumption that the hole was in the floor is not on this record error.

No question of reckless or willful negligence arises in this case. Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

In giving charges applying the statutory rule as to comparative negligence and in refusing requested charges that the plaintiff cannot recover if she is guilty of contributory negligence, the court committed errors for which the judgment is reversed and the cause remanded.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

ESCAMBIA LAND & MFG. CO. v. FERRY PASS INSPECTORS' & SHIP- PERS' ASS'N.

(Supreme Court of Florida, Division B. April 19, 1910. Headnotes Filed June 25, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 40*)—SEPARATE INSTRUMENTS—INSTRUCTIONS.

Two separate instruments under seal, executed by the parties at the same time, one an indenture of lease, the other in the nature of a defeasance which defeats the force or operation

of the lease, must be read and construed together as one contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 104; Dec. Dig. § 40.*]

2. CONTRACTS (§ 108*)—VALIDITY—PUBLIC POLICY—LEASE OF BED OF STREAM AND RI- PARIAN RIGHTS.

A contract whereby one party leases to another the shore or space between high and low water mark, a part of the bed of a navigable stream, the title to which is in the state in trust for the public, and the riparian rights which are concurrent with the rights of other inhabitants of the state, and must be exercised subject to the rights of others, is void, as being illegal and contrary to public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 496; Dec. Dig. § 106.*]

3. CONTRACTS (§ 138*)—ILLEGALITY—EFFECT.

Courts will take notice of their own motion of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 681; Dec. Dig. § 138.*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"DEFEASANCE."

A "defeasance," says Lord Coke, is "fetched from the French word 'defaire'; i. e., to defeat or undo, 'infectum reddere quod factum.'" The true meaning of this language is to make void the principal deed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1930, 1931.]

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Bill by the Escambia Land & Manufacturing Company against the Ferry Pass Inspectors' & Shippers' Association. Judgment for defendant, and plaintiff brings error. Affirmed.

Reeves & Watson, for plaintiff in error. John C. Avery, for defendant in error.

PARKHILL, J. On the 22d day of April, 1907, the plaintiff in error and the defendant in error entered into two agreements. The one was an indenture of lease under seal, whereby the Escambia Land & Manufacturing Company did let and rent to the Ferry Pass Inspectors' & Shippers' Association for a period of five years from the 12th day of April, 1907, "the use of twenty (20) feet of the following portions of the river front of certain lands upon the Escambia river in said county of Escambia, and in township one (1), north, range thirty (30) west, to wit:" Then follows a more particular description of the premises, for the yearly rental of \$550 per year, payable semiannually in advance on the 1st day of May and the 1st day of November of each year. It was further provided: "The term 'River Front,' as used in this instrument, means, and shall be construed to include, a strip of land twenty (20) feet wide and extending back from the high-water mark, as well as all the land below high-water mark, and all the riparian rights incident to the ownership of said land the wa-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter front of which is leased by this instrument."

By means of the other instrument, likewise under seal, the said parties further agreed: "This agreement, made this 22d day of April, 1907, by and between the Escambia Land & Manufacturing Company, a corporation, and the Ferry Pass Inspectors' & Shippers' Association, a corporation, witnesseth: That, whereas, the parties have this day executed the contract of lease for twenty (20) feet of the water front of certain property situated on the Escambia river in said county of Escambia and in township one (1) North, range thirty (30) West, and township one (1) South, range thirty (30) West, more particularly described in said indenture:

"Now, it is understood and agreed that the party of the second part is to institute suit against the White River Inspectors' & Shippers' Association, a corporation, to enjoin and restrain said last-named corporation from the use of said property and the riparian rights incidental thereto, and that if said suit shall result adversely to the party of the second part—that is, if the court shall hold that the White River Inspectors' & Shippers' Association has the right to use said water front for the purposes against the use of which said injunction is sought—that then the aforesaid indenture of lease between the parties of the first and second part shall be canceled and annulled, and the parties thereto shall be released from any and all liability arising therefrom."

A suit was instituted by the Ferry Pass Inspectors' & Shippers' Association against the White River Inspectors' & Shippers' Association and was brought here, and will be found reported in 57 Fla. 399, 48 South. 643, 22 L. R. A. (N. S.) 345. After that decision the suit was dismissed by the plaintiff. Thereupon the plaintiff in the instant case, the Escambia Land & Manufacturing Company, terminated the lease by re-entry on January 23, 1909, and seeks to recover the rental alleged to be due up to that time, the lessee having paid no rental, claiming a release therefrom because the said suit instituted against the White River Inspectors' & Shippers' Association has resulted adversely to the Ferry Pass plaintiff; that is, that this court held that the White River Inspectors' & Shippers' Association has the right to use said water front for the purposes against the use of which said injunction was sought.

The court below held with the contention of the defendant herein, and we must construe the contract which is contained in the two separate instruments. These two instruments must be read and construed together. The second instrument providing for the institution of the suit against the White River Inspectors' & Shippers' Association is in the nature of a defeasance, which defeats the force or operation of the other deed. Lord Coke has given a very correct definition of a "defeasance" in stating its derivation. "It

is," says he (Co. Litt. 236b), "fetched from the French word 'defaire'; i. e., to defeat or undo, 'infecum reddere quod factum.'" The true meaning of this language is to make void the principal deed. See *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 222; *Words & Phrases*, vol. 2, p. 1930; *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474, 486 (citing *Bouv. Law Dict.*).

The effect of the defeasance in the instant case is to defeat the force or operation of the contract of lease, to undo it, cancel and annul it, and to release the parties thereto "from any and all liability arising therefrom," if the court shall hold that the White River Association has the right to use said water front. If the effect of the defeasance is to release the parties from liability for the rental only after the decision of the court upon the rights of the White River Association, then its language should have been "to release the parties thereto from any and all liability arising thereafter"; but the language of the contract is that upon a decision adversely to the Ferry Pass Association and in favor of the White River Association the parties shall be released from any and all liability arising therefrom; that is, from the terms of the lease.

The release of liability provided for is in reference to the nature of the liability—that is, the liability arising from the lease—and does not have reference to the time when the liability shall cease, but covers any and all liability arising from the lease in clear and unambiguous language.

The language of the defeasance is clear. It provides that if said suit shall result in a certain way "that then" (in that event) "the aforesaid indenture of lease between the parties of the first and second part shall be canceled and annulled, and the parties thereto shall be released from any and all liability arising therefrom." "Any and all liability arising therefrom" means any and all liability growing out of or having its origin, life, and existence in the contract. "Any and all liability" does not mean some of the liability, as, for instance, liability for rental after the decision of the court upon the question mentioned, but any and all liability growing out of or having its existence in the contract whether before or after the decision of the court upon the rights of the White River Association. The provision that if the court shall hold the White River Association has the right to use said water front that then the indenture of lease shall be annulled means that in the event mentioned and suit be brought on the lease the court shall annul the lease or hold it void and of no effect. This the lower court did, and the action of the court was correct as the demurrer to the plea setting up these matters admitted that the court held the White River Association had the right to use the said water front.

The defendant did not pay the rental. The plaintiff is suing to recover it. If the rental

sued for did not arise from, grow out of, or have its existence in, the contract, the plaintiff is not entitled to recover, for this suit is brought to recover under the express contract. If the rents sued for did arise from, grow out of, or have their existence in, the contract, the defendant is released therefrom by the very words of the contract upon the holding by the court that the White River Association has the right to use said water front. But that is not all. The plaintiff must fail in this suit for another reason. Upon its face, the contract on which this suit is brought is void, as being illegal and contrary to public policy. By the terms of the contract the plaintiff undertook to lease to the defendant the river front and the riparian rights incident thereto to the exclusion of the use thereof by the White River Association. This the lessor had no right to do. In the *Ferry Pass Inspectors' & Shippers' Association v. White River Inspectors' & Shippers' Association*, supra, this court held that "the shore or space between high and low water mark is the part of the bed of navigable waters, the title to which is in the state in trust for the public. If the owner of land has title to high-water mark his land borders on the water, since the shore to high-water mark is a part of the bed of the waters, that if it is a navigable waterway he has as incident to such title the riparian rights accorded by the common law to such an owner. * * * A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the state, and must be exercised subject to the rights of others. * * * In the absence of a valid grant from the state no riparian owner or other person has an exclusive right to do business upon public waters of the state whether such waters are in front of the land of the riparian owner or not. * * * While the complainant and the defendant in common with all other inhabitants of the state have a right to use the waters of the navigable streams and the lands thereunder including the shore or space between high and low water mark for purposes of navigation and the transportation of logs thereover, neither the complainant nor the defendant has such right to the exclusion of its lawful exercise by the other or by any other inhabitant of the state."

The contract here is to lease the shore or space between high and low water mark, a

part of the bed of a navigable stream the title to which is in the state in trust for the public, and to lease the exclusive use of riparian rights so far as the White River Association was concerned, when such riparian rights were concurrent with the rights of the White River Association and other inhabitants of the state and must be exercised subject to the rights of others. The contract, therefore, is an illegal contract. The plaintiff's right to a recovery is based upon the illegal contract, a breach of which is the very gist of the action. In *Shortall v. Fitzsimmons & Connell Co.*, 93 Ill. App. 231, the court held, "a contract to build a wall through the waters of Lake Michigan by driving piles into, and making a permanent structure upon, lands under said waters, the title to which is in the state of Illinois in trust for the public, is an illegal contract, and the wall, when built, is a purpresture, and liable to abatement at the instance of the state." The court said, "we know of no well-considered case where a recovery has been allowed where the very basis of the action is an illegal contract or its breach."

In *Stewart & Bro. v. Stearns & Culver L. Co.*, 56 Fla. 570, 48 South. 19, this court said: "The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in pari delicto, and perhaps in other cases not pertinent here." In that case the court said further that "when it appears from a contract and the circumstances under which it was made, and from its purposes, operation, and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts."

Courts will take notice of their own motion, too, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur. WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur only in the conclusion that the contract is illegal and unenforceable.

LEONARD et al. v. BAYLEN STREET WHARF CO.

(Supreme Court of Florida, Division A. May 27, 1910.)

(*Syllabus by the Court.*)

1. FRANCHISES (§ 1*)—NATURE OF RIGHT.

A franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right.

[Ed. Note.—For other cases, see *Franchises*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2929-2942; vol. 8, p. 7666.]

2. FRANCHISES (§§ 3, 11*)—DURATION—EXTENT OF PRIVATE RIGHT.

Franchises are not consumed in their use, and, when a particular use of them by individuals or corporations ceases by nonuse, forfeiture, limitation or otherwise, the further use may be granted or permitted to others. Private rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation.

[Ed. Note.—For other cases, see *Franchises*, Dec. Dig. §§ 3, 11.*]

3. FRANCHISES (§ 3*)—EXTENT OF RIGHT.

The character and extent of the right granted to individuals and corporations in the use of a franchise depend upon the terms of the grant, the nature of the franchise, and the purpose designed to be accomplished.

[Ed. Note.—For other cases, see *Franchises*, Dec. Dig. § 3.*]

4. EXECUTORS AND ADMINISTRATORS (§ 329*)—SALES FOR PAYMENT OF DEBTS—PROPERTY SUBJECT—FRANCHISES.

The right to the use of a franchise is the property of the grantee, and its sale by judicial decree for the payment of his debts is not forbidden by law where the use continues for the public good as originally designed by the grant.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 329.*]

Appeal from Circuit Court, Escambia County; J. E. Wolfe, Judge.

Bill by S. S. Leonard and another against the Baylen Street Wharf Company. Decree for defendant, and complainants appeal. Affirmed.

Jno. C. Avery, for appellants. Maxwell & Wilson, for appellee.

WHITFIELD, C. J. The appellants, being denied an accounting for the use of a wharf franchise and an injunction against the further use of the franchise, appealed.

In substance, the bill of complaint alleges that the appellants are the heirs at law of Samuel A. Leonard, to whom was granted by legislative act in 1854 (Laws 1854, c. 678) the right to construct a wharf at and from the termination of Baylen street, in the city of Pensacola; the act also providing "that the said Samuel A. Leonard, his heirs, executors, administrators and assigns shall have power to assess and collect tolls and rates of wharfage, by suit or otherwise, for the uses of said wharf, so far as may be consistent with the rights of the city of Pensacola to regulate

such rates;" that said act has never been repealed; that, after the passage of the act, Samuel A. Leonard constructed a wharf, in pursuance of the terms thereof at and from the termination of said Baylen street; that after the death of Samuel A. Leonard, without authority of law, his interest in said wharf was sold in 1867 by order of the county judge by the administrator; that said sale did not divest the title of the heirs of Samuel A. Leonard to said franchise; that S. Z. Gonzalez became the purchaser at such sale, but acquired no title thereby; that, in 1889, the defendant appellee here was incorporated with authority to acquire, manage, control, and operate the Baylen street wharf, and to collect tolls and charges for its use; that the defendant corporation has acquired only the rights of said S. Z. Gonzalez to said franchise, and a conveyance of the space where the wharf is, from the water front commissioners appointed under chapter 4802, Laws Fla. 1899; that the defendant is, and for a long time has been, using the wharf and collecting tolls and charges thereon. The prayer is for a delivery of the wharf to appellants, for an accounting, and for appropriate injunctions and general relief. A demurrer on the ground that no equity was stated being sustained, and no amendment being made, the bill of complaint was dismissed, and on appeal it is urged that the right granted to Samuel A. Leonard by the act of 1854 is a franchise, and that the sale of the franchise was ineffective to divest the title of appellants, who are the heirs of the grantee of the franchise; that the rights of appellants are not barred by limitations or laches; and that the charter of the defendant required it to acquire the wharf, which it has not legally done.

A franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right. All franchises belong to the government in trust for its people. Franchises do not become the absolute property of any one, but their use may be granted or permitted by proper governmental authority, subject to supervision and regulation, and upon such terms as may be lawfully imposed. They are permitted to be used for the good of the public, usually for the purpose of rendering an adequate service without unjust discrimination, and for a reasonable compensation. Franchises are not consumed in their use, and, when a particular use of them by individuals or corporations ceases by nonuse, forfeiture, limitation, or otherwise, the further use may be granted or permitted to others. Private rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation.

By the common law of England a franchise granted by the sovereign to an individual is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

regarded as a hereditament, and the franchise, if it survives the grantee, passes to his heirs, and not to his personal representatives, as general assets for the payment of all debts. Under our system all property rights of a decedent not exempt by law are subject to his debts—the personalty going directly to the administrator, and the realty to the heirs, subject to be taken by the administrator to pay debts (with).

Whether a governmental franchise in this state is to be regarded as realty or personalty, it is a property right, and, unless exempt by law, it is subject to the debts of the franchise holder. That a wharf franchise is a property right subject to alienation has been recognized in this state. *Sullivan v. Lear*, 23 Fla. 463, 2 South. 846, 11 Am. St. Rep. 388. A franchise has been declared by this court to be an incorporeal hereditament, not lands or tenements. *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700. Being intangible, it partakes of the nature of personalty. The failure of the proceedings under which the sale of the franchise was made to show an insufficiency of the personalty for the payment of debts so as to make the real estate of the decedent available for his debts is immaterial here, since the franchise is not realty or real estate.

The character and extent of the right granted to individuals and corporations in the use of a franchise depend upon the terms of the grant, the nature of the franchise, and the purpose designed to be accomplished. Where the use of a franchise is granted to an individual and his heirs, personal representatives, and assigns, the franchise may be exercised by the heirs or personal representatives of the deceased grantee of the franchise, or by the assignee of the grantee. The right of the grantee in the use of the franchise may not be subject to sale for the payment of the debts of the grantee after his death, if the rights of the public in the use of the franchise are thereby impaired. But the right to the use of the franchise is the property of the grantee, and its sale for the payment of his debts is not forbidden by law where the use continues for the public good as originally designed by the grant. As between the purchasers at an administrator's sale of a franchise and the heirs of a deceased grantee of the franchise, where the granting power interposes no claim, and it does not appear that the rights of the public have been injured by the sale of the franchise, the courts will not declare the sale illegal merely because it is of a franchise. So long as the franchise is properly used in the public interest, and no private rights are invaded, the use of the franchise by particular individuals or corporations is of concern only to proper governmental authority. The wharf privileges conferred by the act of 1854 upon Samuel A. Leonard is a franchise granted to

him and his heirs, executors, administrators, and assigns. The right to use the franchise was a property right of the grantee, and its sale under judicial decree for the payment of his debts cannot be objected to by his heirs. Any property right of the grantee descended to his heirs subject to his debts, unless exempt by law for the benefit of the heirs. The law does not exempt a wharf franchise merely as such from the debts of the grantee of the franchise. While the franchise right of the decedent being intangible may not be subject to seizure and a ministerial sale by execution, a point not here decided, it was subject to a sale under a proper judicial decree for his debts at least in the absence of objection from the granting power, or of a showing of injury of the public. The franchise cannot be separated from the particular wharf mentioned in the granting act. The sale was of "the interest of Samuel A. Leonard in the Baylen street wharf," which carried the franchise right in the wharf, the right being in the nature of personal rather than of real property. The grantee of the franchise had no inheritable interest in the wharf property except as incident to the franchise. It may fairly be assumed that the franchise right was the only property right the decedent had in a wharf that presumably is upon navigable waters not subject to private ownership.

The showing made by the allegations of the bill of complaint and the exhibits indicates that the appellants have long delayed in asserting a right to the franchise, even if the sale of it was not authorized. No right of the state is involved here. The sale was in 1867, and the present users of the franchise were by law authorized to assume it in 1889, while this suit was begun in 1909.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ.
concur.

TAYLOR, HOOKER, and PARKHILL, JJ.,
concur in the opinion.

BROWN v. PEOPLE'S BANK FOR SAVINGS OF ST. AUGUSTINE.

(Supreme Court of Florida. Division A. June 4, 1910.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 165*)—BILLS AND NOTES (§ 280*)—LIABILITY OF INDORSER—LIABILITY OF BANK FOR COLLECTIONS.

In the absence of a controlling statute or agreement, where a check payable in another city is indorsed in blank and deposited with a bank to be credited to the depositor, the indorser engages only that, if the check shall not be paid on due presentation, he will pay the amount to the holder of the check. The bank selects its agents for collection at its own risk, and, if the check is paid, the bank of deposit

is liable, even though the collecting agent does not remit the collection.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 571; Dec. Dig. § 165;* *Bills and Notes*, Dec. Dig. § 280.*]

2. BANKS AND BANKING (§ 165*)—COLLECTIONS—DILIGENCE—STATUTORY PROVISIONS.

Chapter 5951, Acts 1909, does not affect rights existing prior to its passage.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 165.*]

Error to Circuit Court, St. Johns County; R. M. Oall, Judge.

Action by D. C. Brown against the People's Bank for Savings of St. Augustine, Fla. There was a directed verdict for defendant, and plaintiff brings error. Reversed.

Bisbee & Bedell, for plaintiff in error. Cooper & Cooper, for defendant in error.

WHITFIELD, C. J. Brown indorsed in blank and deposited in the St. Augustine bank a check drawn in his favor and payable in Miami. The amount of the check was credited to Brown, and he was given a pass book showing the credit. The bank sent the check for collection through its banking correspondents, but the collecting bank at Miami failed after the amount of the check was paid to it, and did not remit to the St. Augustine bank. The credit to Brown by the bank of deposit was canceled and payment refused.

Action was brought March 21, 1908, against the bank to recover the amount of the check. The court directed a verdict for the defendant, and the plaintiff took writ of error.

In a number of jurisdictions it is held that in the absence of a statute or special agreement where commercial paper payable in one locality is deposited with a bank in another locality, and the bank of deposit uses due care and diligence in selecting the collecting agent and in forwarding the paper for collection, it is not liable for the failure of the agency to pay the proceeds of the paper when collected, upon the theory that the depositor knows the bank must act through some agency in making the collection at a distance, and therefore impliedly, from the nature of the business, assents to the employment of such agency, and makes them his agents. 1 *Morse on Banks*, par. 267 et seq.; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; *Second Nat. Bank of Louisville v. Merchants' Nat. Bank of New Albany, Ind.*, 111 Ky. 930, 65 S. W. 4, 23 Ky. Law Rep. 1255, 55 L. R. A. 273, 98 Am. St. Rep. 439.

In other jurisdictions it is held that, in the absence of a statute or agreement where commercial paper is deposited with a bank and has to be sent to a distant place for collection, the bank selects its agents for collection at its own risk, and, if the collection is made, the bank of deposit is liable, even

though the collecting agent does not remit the collection. 2 *Bolles on Banking*, 575; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; 5 Cyc. 502; *Mackersy v. Ramsays*, 9 Clark & F., *818; *Allen v. Merchants' Bank of N. Y.*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of N. Y.*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; 3 Am. & Eng. Ency. of Law (2d Ed.) 810, and notes.

There is no statute or special agreement to control this case.

Sound reason and practical justice require the enforcement of the rule imposing liability for the loss of the proceeds of a deposited check upon the bank of deposit when the check is paid by the drawee in a distant city upon its presentation by the collecting agent of the depositing bank, where the depositor had no part in the selection of the collecting agent or in the collection. See *Power v. First Nat. Bank of Ft. Benton*, 6 Mont. 251, 12 Pac. 597; *Streissguth v. National German-American Bank*, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 218; *State Nat. Bank of Ft. Worth v. Thomas Mfg. Co.*, 17 Tex. Civ. App. 214, 42 S. W. 1016.

If, being expressly or impliedly authorized to do so, an agent employs a subagent for his principal, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the subagent, the agent is only responsible for a want of care in selecting the subagent. But if the agent, having undertaken to do the business of his principal, employs a servant or agent on his own account to assist him in what he has undertaken, such a subagent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent. This liability extends to defaults as well as negligence. *Barmard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; 2 *Clark & Skyles on Agency*, par. 438, p. 971.

This rule is generally recognized in cases involving the law of agency, but its application to varying facts and circumstances has not always led to the same result.

In this case the bank of deposit at St. Augustine received from the depositor a check indorsed in blank which at least prima facie carried title to the bank, and the undertaking of the bank was to do on its own account everything necessary to collect the check as the basis of the credit given by the bank to the depositor upon the indorsement and delivery of the check to it. This undertaking included the sending of the check to Miami, the demand for and receipt of the amount it called for, and the return

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the amount to the bank of deposit at St. Augustine, where it had already been credited to the depositor and a pass book showing the credit given to the depositor. The relation of debtor and creditor was established between the depositor and the bank by the deposit. There is nothing in the transaction between the depositor and the bank of deposit indicating any reservation to the indorser of title or right in the check or any directions or agreement express or implied as to the manner of its collection. By the indorsement in blank and delivery of the check the depositor engaged that, on due presentation, the check would be paid, and if not honored, and the necessary proceedings on dishonor be duly taken, that he would pay the amount to the holder of the check. Section 2999, Gen. St. 1906. The consideration to the bank was the use of the check in its dealings with other banks, and the use of the proceeds after collection. For the continued use of the money interest at the rate of four per cent. per annum was to be allowed to the depositor upon amounts remaining on deposit continuously for at least six months. The use of the check and the contingent use of the proceeds were a sufficient consideration for both the collection and the interest allowed. The depositor lost control over, and transferred his title to, the check by its indorsement and delivery to the bank. In return he received a credit with the bank. His only obligation was that the check should be paid upon due presentation. This obligation was discharged by the payment of the check when it was presented to the drawee. The depositor had no part in selecting the agent to make the collection or in the collection. Taking the check as indorsed indicated ability and desire to use it.

The transaction between the parties contemplated the binding relation of debtor and creditor contingent only upon the payment of the check. The bank selected its own agents to collect the check for it. After payment of the check, the depositor was not liable for a loss resulting from the bank's selecting of its own agent.

The bank necessarily had far better opportunities to know of the safest agencies for the collection of the check, and it made its own selection of its agents without reference to the depositor. There was no ground upon which the law could imply authority from the depositor to the bank for the selection of an agency for collecting the check that would be the depositor's agency. The bank owned the check and the depositors had a credit for it. The depositor needed no agent. No such agency was contemplated by the plaintiff or by the law. There was no privity of contract or relation between the depositor and the collecting agent. The pass book contained the "Rules and Regulations Governing Deposits and Depositors," which were assented to, and they do not

include any suggestion that the check deposited was received on any condition or contingency whatever. The law imposed the condition that, if the check be not paid on due presentation, the indorsee should pay the amount to the holder of the check. The loss resulted from the selection by the bank of its own agent to collect a check to which it had title and possession.

It was agreed that it was to be considered that, over the objection of the plaintiff Brown, it was shown in evidence that the check was sent for collection "according to the usual and customary business of banks in St. Augustine, Fla., on and in making such collections; that according to the usual and customary manner of doing such banking business in the city of St. Augustine and in the state of Florida generally that so receiving and crediting a check on deposit is done and made subject to the actual collection of said check and the receipt of the proceeds thereof by the bank so receiving the same of deposit and crediting same, and is subject to be corrected and such credit to be canceled or done away with in case such check should not be actually collected and its proceeds actually received by such bank, and that defendant in receiving for deposit and crediting said check to plaintiff as aforesaid acted upon said general understanding and manner of doing such banking business and with intent of so receiving and crediting said check, although there was no discussion of that matter with the plaintiff." It was also agreed that it was shown that the plaintiff was an experienced business man engaged for many years in a general merchandise business in Florida, and that he never knew of any such custom as above stated. It was further agreed to be considered that over the objection of the defendant bank it was shown in evidence that it is "customary for banks in Florida to have printed on the cover of the pass books issued to depositors a notice or rule substantially in these words, viz., 'checks, drafts, etc., deposited for credit or collection are taken at risk of depositor until final actual payment is received. This bank will assume no responsibility for neglect or default of collecting agents.'" No such notice or rule was printed or written in the pass book issued to plaintiff by defendant.

It appearing that the plaintiff knew of no custom by which banks took checks as deposits subject to the final receipt of the proceeds thereof by the bank of deposit, and that no such custom or purpose was disclosed to him when the deposit was made so as to bind the depositor by such knowledge or implied assent, the testimony on this subject was not admissible; it being contrary to the rule of liability imposed by law.

The testimony as to the custom for banks in Florida to have printed on the pass books issued to depositors a notice or rule that checks, etc., are taken on deposit at the risk

of the depositor until final actual payment is received, and that the bank assumes no responsibility for neglect or default of collecting agents, is consistent with the rule of law on the subject, and admissible in evidence. The custom contemplates the existence of liability unless otherwise impliedly agreed to by the acceptance of the pass books with the rule of exemption printed thereon. As no such rule or notice was indorsed on the pass book delivered to the plaintiff showing the unconditional credit to him, the rule of liability contemplated by the custom to have the notice placed on the pass books of banks in this state is applicable under the facts of this case. No negligence on the part of the bank of deposit is shown here, but this is not essential to liability. The liability arises out of the contract relation of debtor and creditor created by the deposit. The check having been paid to the agent of the defendant bank who was not the agent of the plaintiff, the plaintiff's undertaking that the check would be paid is performed; and the defendant's credit to the plaintiff should have stood as originally made. The failure of the bank of deposit to pay the amount upon the demand of the plaintiff makes a liability in his favor.

Subsequent to the bringing of this action the Legislature enacted chapter 5951, approved June 8, 1909, which contains the following provisions:

"Section 1. That when a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and that the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and that when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part, as aforesaid.

"Sec. 2. All laws which are in conflict with this act are hereby repealed, and this act shall take effect immediately upon its approval by the Governor."

A legislative regulation may be declaratory of the common-law rules of liability or procedure, or it may modify or change such rules. The rule of liability herein announced being the rule consistent with the jurisprudence of this state and its commercial conditions and practices, as recognized in the custom to proclaim a rule or notice to avoid by acquiescence the consequences of

the rule of liability, the legislation above quoted was manifestly designed to change the existing rule, and, being prospective merely, does not affect this case. See *Carney v. Hadley*, 32 Fla. 344, 14 South. 4, 22 L. R. A. 233, 37 Am. St. Rep. 101; *Vinson v. Palmer*, 45 Fla. 630, 34 South. 276; *Lewis' Sutherland Stat. Const. pars. 11, 294, 329*. The judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

GILLESPIE, Mayor, et al. v. CHAPLINE, Town Clerk and Treasurer.
(Supreme Court of Florida, Division A. June 9, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 755*)—NECESSITY FOR BRIEFS.

It is the duty of counsel for defendant in error or appellee to file in this court a brief in support of the correctness of the judgment or decree rendered by the trial court which has been brought here for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3090; Dec. Dig. § 755.*]

2. EQUITY (§ 133*)—PLEADING—SUFFICIENCY OF BILL.

It is incumbent upon a complainant to allege in his bill every fact clearly and definitely that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. This principle applies to all bills in equity, but is especially applicable to bills seeking an injunction, the rule being that the title or interest of the complainant and the facts upon which he predicates his prayer for such relief must be stated positively, with clearness and certainty. The bill must state facts, and not opinions or legal conclusions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 313; Dec. Dig. § 133.*]

3. INJUNCTION (§ 143*)—TEMPORARY INJUNCTION WITHOUT NOTICE—SUFFICIENCY OF BILL.

When an application is made to the court for a temporary injunction or restraining order without notice to the defendant, the allegations in the bill should be even more closely scanned and considered than when the defendant has been served with notice and has the opportunity of resisting the application. Before granting a temporary injunction or restraining order without notice, the court should be satisfied that a clear case is made by the bill therefor, and also that it has been clearly made to appear that it is a case of urgent necessity and one in which irreparable mischief will be produced if the aid of the court is denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. § 143.*]

4. INJUNCTION (§ 143*)—TEMPORARY INJUNCTION WITHOUT NOTICE—SUFFICIENCY OF BILL.

An affidavit to or an allegation in a bill for an injunction asserting simply the legal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

conclusion that notice to the defendant of the application for injunction will accelerate the injury apprehended is not a sufficient excuse and furnishes no reason for dispensing with notice. To justify the granting of an injunction *ex parte* and without notice, the allegations of the sworn bill or accompanying affidavits must state facts showing how and why the giving of notice will accelerate or precipitate the injury complained of or apprehended, from which the court can determine for itself whether the giving of notice will, or is likely to, so result, and such facts must make it manifest to the court that the giving of notice of the application will, or is likely to, have such result.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. § 143.*]

5. INJUNCTION (§ 148*)—RESTRAINING ORDER—ALLOWING TIME FOR FILING INDEMNITY BOND.

The practice of granting a restraining order and allowing time in which to file an indemnity bond is unauthorized.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 323; Dec. Dig. § 148.*]

6. INJUNCTION (§ 118*)—SUFFICIENCY OF BILL—ALLEGATIONS OF DISHONEST OR FRAUDULENT ACTS.

Where dishonest or fraudulent acts are sought to be charged against defendants, the allegations relating thereto should be clear, positive, specific, and direct, and not couched in vague, indefinite, and uncertain language.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 226, 227; Dec. Dig. § 118.*]

7. INJUNCTION (§ 172*)—RESTRAINING ORDER—DISSOLUTION.

While it is not a matter of course to dissolve a restraining order where all the equities of the bill are denied by a sworn answer, as a general rule, this should be done. Whenever it is plainly made to appear to the court that a restraining order should not have been granted in the first instance for any reason, it should be dissolved by the court at the earliest opportunity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 376; Dec. Dig. § 172.*]

Appeal from Circuit Court, Manatee County; J. B. Wall, Judge.

Action by J. B. Chapline, Jr., Clerk and Treasurer of the Town of Sarasota, against J. Hamilton Gillespie, Mayor, and others. From an order granting a temporary restraining order and an order denying a motion to dissolve it, defendants appeal. Reversed.

On the 14th day of December, 1909, the appellee as complainant filed his bill in chancery against the appellants as defendants, which, omitting the formal parts, is as follows:

"J. B. Chapline, Jr., as clerk and treasurer of the town of Sarasota, Manatee county, Florida, brings this his bill of complaint against J. Hamilton Gillespie, as mayor of said town of Sarasota, and J. A. Clark, G. W. Barker, T. J. Bryan, C. M. Biorstyth, and Harry L. Higel, as town council of the town of Sarasota, and thereupon your orator complaining says:

"That on the 13th day of October, 1909, he was duly elected as clerk and treasurer of the town of Sarasota, and that on the 2d day

of November, A. D. 1909, he was duly qualified by taking oath and giving bond, as required under the laws of the state of Florida and the ordinances of said town of Sarasota. That immediately, upon taking charge of the books of account of said town of Sarasota, he discovered many errors and irregularities in said books, and they were of sufficient nature to lead your orator to believe that there had been dishonesty perpetrated by some of the officers of said town in the matter of the expenditure of the town's money and in the handling of the finances of said town, and he immediately requested the town council of the town of Sarasota to have said books audited. That many of said irregularities in the expenditure of said money implicated the said J. Hamilton Gillespie, mayor of said town, and that said town council, under the direction, advise, and domination of said mayor, refused to have said books audited, leading your orator to believe, and he so charges, that the said mayor of the town of Sarasota had other than honest motives in so acting in the matter of dominating said city council and preventing the said books from being audited. That said town council of the town of Sarasota had presented to them by the leading citizens of the town of Sarasota and taxpayers of said a petition praying that said books be audited, and, upon said council refusing to have said books audited, said citizens offered to pay all cost of said audit, and your orator thereupon for himself and for his protection as an officer of said town employed one D. B. High to audit said books, and the said D. B. High proceeded to Sarasota to begin auditing said books, but your orator was informed and believes that the said J. Hamilton Gillespie, as mayor of said town, would take steps to prevent your orator from having said books audited, and did threaten to take said books out of the possession of your orator before the same could be audited, and your orator was further informed and believes that many citizens of the town of Sarasota who are taxpayers, being so incensed over the action of said mayor, would take such steps to prevent said mayor from taking said books out of the possession of your orator and prevent his having them audited as would lead to riot and bloodshed. That thereupon your orator, upon advice of counsel, removed said books to the town of Bradentown, and placed the same in the hands of said auditor, with direction that the same be audited, and that said auditor is now working on said books.

"And your orator would further represent that he has been informed and believes that since he left the town of Sarasota this morning the said mayor of said town has suspended him from office in order to get possession of said books, and your orator believes that if said mayor gets possession of said books that he will so mutilate them as to destroy

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the evidence and render it impossible to show by said books the true condition of the town's finances, and show that said mayor was implicated in the wrongful appropriation of the funds of said town.

"And your orator would further represent that in having said books audited he is representing himself as an officer of said town so as to intelligently keep the finances of the town and to clear himself from any implication in the future as to the misappropriation of said funds, and is also following the wishes of more than 100 citizens and taxpayers of said town in having said books audited, and that the audit of said books will not cost the town of Sarasota one cent, as the citizens of the said town are paying therefor.

"And your orator would further represent that he fears that unless the court restrains the defendants named herein from taking action to deprive him, either by force or otherwise, from the custody of said books, that said defendants, or some of them, will take said books away from him and will so deprive him from having them audited as aforesaid.

"The premise considered, and inasmuch as your orator is without remedy save in a court of equity where such matters have cognizance, your orator would pray for a restraining order restraining said defendants and each of them, their agents, servants, or employes, from taking said books out of the possession of your orator until he has had the same audited, and, if said books have already been taken into possession by some of said defendants, their servants, agents, or employes, that they be directed and commanded to restore the said books and all papers to your orator, and that the said mayor of said town and the town council of said town of Sarasota be restrained from taking any steps towards removing your orator from office until he has had said books audited and given an opportunity to report said audit to the town council of the town of Sarasota; and that your orator have such other and further relief in the premises as equity shall require and to your honor shall seem meet."

To this bill was appended the following affidavits:

"State of Florida, County of Hillsborough.

"Before me the undersigned authority personally appeared J. B. Chapline, Jr., who being first duly sworn says that he has read the foregoing bill of complaint; that the matters and things therein contained are true, and that he has not given notice of his intention to apply for an injunction for the reason that to give notice would but accelerate the injury sought by said injunction to be avoided.

J. B. Chapline, Jr.

"Sworn and subscribed to before me this 14th day of December 1909.

"J. B. Wall, Judge."

"State of Florida, County of Hillsborough.

"Before me the undersigned authority personally appeared H. V. Whitaker, who, being first duly sworn, says that he is a citizen and a taxpayer of the town of Sarasota; that he has read the foregoing bill of complaint, and of his personal knowledge there is much excitement among the citizens of Sarasota, and that the said citizens are desirous of having the books of account of said town audited; and he further believes that unless a restraining order is granted preventing the mayor of the town of Sarasota and the town council of said town from interfering with the clerk and treasurer of said town in having the books of account of said town audited that he will be removed from office and said books taken from him and the same will be prevented from being audited.

"H. V. Whitaker.

"Sworn and subscribed to before me this 14th day of December, 1909.

"J. B. Wall, Judge."

Upon the same day an interlocutory order was made by the circuit judge, which, omitting the caption, is as follows:

"This cause coming on to be heard this day upon an ex parte application on the part of the complainant for a temporary restraining order to prevent the defendants from taking from the possession of the complainant the books and accounts of the town of Sarasota, the complainant being the town clerk and treasurer of said town of Sarasota, until the same can be audited, and to restrain the mayor of said town and the town council of said town of Sarasota from removing from office the complainant until said books can be audited and report of such audit be made to the town council, and the court having read the said bill and having considered the same, together with the appending affidavits, and it appearing to the satisfaction of the court that it has jurisdiction of the complainant and the defendants and that an ex parte injunction is proper to be issued in this cause:

"It is therefore ordered, adjudged, and decreed that the said J. Hamilton Gillespie as mayor of said town of Sarasota and the said J. A. Clark, G. W. Barker, T. J. Bryan, C. M. Blorsyth, and Harry L. Higel, as town council of said town of Sarasota, be, and they are hereby, restrained from interfering in any way with the complainant in having said books audited, and that they be restrained from taking said books out of the possession of the complainant, and, if they have taken said books out of the possession of the complainant, that they return the same so that they may be audited.

"And it is further ordered, adjudged, and decreed that said defendants be, and they are, hereby restrained from taking any steps whatsoever looking towards the removal of said complainant from office until said books

have been audited and said auditor's report be made to the town council of the town of Sarasota.

"It is further ordered, adjudged, and decreed that said complainant within three days from the issuing of this order make and execute in this cause a good and sufficient bond as required by law and the rules and practice of this court in the sum of \$50.

"It is further ordered, adjudged, and decreed that this order be in full force and effect immediately from and after the same is signed.

"Done and ordered this 14th day of December, 1909, at chambers in the city of Tampa, county of Hillsborough, state of Florida.

"J. B. Wall,

"Judge of the Sixth Judicial Circuit of the State of Florida."

On the 15th day of such month the complainant filed the bond required by such order.

On the 20th day of December, 1909, the defendants filed their joint and several answer to the bill, in which they incorporated a demurrer, by which answer they positively and unequivocally controverted and denied all the essential allegations in the bill. To this answer were appended the affidavits of the defendants.

On the 23d day of December, 1909, the defendants filed a motion to dissolve the restraining order previously granted and which we have copied above, which motion, omitting the formal parts, is as follows:

"And now come J. Hamilton Gillespie, as the mayor of the town of Sarasota, and J. A. Clark, G. W. Barker, T. J. Bryan, C. M. Blorsyth, and Harry L. Higel, as town council of the town of Sarasota in the above-styled cause, and move the court to dissolve the injunction heretofore granted in said cause, on the following grounds, to wit:

"(1) Because there is no equity in the said bill of complaint filed by complainant in said cause.

"(2) Because the allegations of said bill do not entitle complainant to an injunction.

"(3) Because the same was granted without bond.

"(4) Because the same was granted without notice to defendants.

"(5) Because the same was granted without notice and without sufficient allegations or evidence of the existence of such facts and circumstances as entitle complainant to the injunction without notice.

"(6) Because of the matters and facts set forth and alleged in the answer of defendants in said cause.

"(7) Because of the matters and facts alleged and sworn to by defendants in their answer upon file in said cause.

"Singletary & Reaves,
Solicitors for Defendants."

Upon this motion the following order was made:

"It appearing to the court that no good

purpose will be served by dissolving the injunction and that the interests of the citizens and taxpayers of the town may be jeopardized by its dissolution, the motion to dissolve is denied.

"Dec. 23, 1909. J. B. Wall, Judge."

The defendants entered their appeal to this court from these two interlocutory orders, assigning errors on each.

Singletary & Reaves, for appellants. C. C. Whitaker, for appellee.

SHACKLEFORD, J. (after stating the facts as above). This is another case in which the appellee has not favored us with a brief. See *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 51 South. 547, and authorities there cited.

We have several times within the last few years had occasion to discuss the practice of granting restraining orders without notice and have laid down the principles which should regulate the same, so shall content ourselves with referring to some of such cases. See especially *Godwin v. Phifer*, 51 Fla. 441, 41 South. 597, where the subject is fully discussed and authorities collated. Also see *Hall v. Horne*, 52 Fla. 510, 42 South. 383; *Savage v. Parker*, 53 Fla. 1002, 43 South. 507; *Builders Supply Co. v. Acton*, 56 Fla. 756, 47 South. 822. We have also held that the practice of granting a restraining order and allowing time in which to file an indemnity bond is unauthorized. *Hall v. Horne*, supra, and *Savage v. Parker*, supra. Tested by the principles enunciated in the cited cases, it is very doubtful, to say the least of it, if the allegations in the bill and appended affidavits warranted the granting of the restraining order in the first instance, especially without notice to the defendants. We call attention to the fact that the bill was brought by the complainant as clerk and treasurer of the municipality, not as a citizen and taxpayer.

The allegations as to the dishonest or fraudulent acts which are sought to be charged against the defendants are couched in vague, indefinite, and general language. See *McClinton v. Chapin*, 54 Fla. 510, 45 South. 35, s. c. 14 Am. & Eng. Ann. Cas. 365.

It is also alleged in the bill that the complainant had removed the books of account from the town of Sarasota to another municipality, though by what legal right or authority we are not advised. We are also at a loss to understand under what principle of equity jurisprudence the defendants could be restrained or enjoined from removing or suspending the defendant from his official position.

Even if we should pass by all these matters, when it was plainly made to appear that the restraining order as made should not have been granted in the first instance for any of the reasons discussed in the cited cases, or which we have mentioned, it should have been dissolved by the court at the earli-

est opportunity. See the authorities already cited.

While it is not a matter of course to dissolve a restraining order where all the equities of the bill are denied by the answer, as a general rule, this should be done. See *Godwin v. Phifer*, supra, and *Robbins v. White*, 52 Fla. 613, 42 South. 841.

We are clear that in the instant case, after a careful examination of all the pleadings, that the court erred in refusing to grant the motion to dissolve the restraining order, therefore it necessarily follows that such interlocutory order must be reversed, and it is so ordered.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, P. J., and HOCKER and PARK-HILL, JJ., concur in the opinion.

MURRELL v. PETERSON et al.

(Supreme Court of Florida. June 9, 1910.)

(Syllabus by the Court.)

1. TRUSTS (§ 63½*) — IMPLIED TRUST — PAYMENT OF TRUST.

A verbal agreement at the time title is taken that it will be held upon the same terms that the law implies does not interfere with the implied trust resulting from the payment of the purchase price by two and the taking of title in the name of one of the two.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 93; Dec. Dig. § 63½.*]

2. TRUSTS (§ 63¾*) — IMPLIED TRUST — ENFORCEMENT.

There is equity in a bill of complaint that seeks to enforce an implied or constructive trust as to the ultimate ownership of lands, even though there be an express agreement as to the preliminary use of the land.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 91, 92, 98-100; Dec. Dig. § 63¾.*]

3. EQUITY (§ 94*) — PARTIES.

All those against whom relief is prayed are proper and necessary parties.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 252; Dec. Dig. § 94.*]

Cockrell, J., dissenting.

In Banc. Appeal from Circuit Court, Hernando County; W. S. Bullock, Judge.

Bill by George B. Murrell against William R. Peterson and the Peterson-McNeill Company. Decree for defendants, and complainant appeals. Reversed and remanded.

Davant & Davant, for appellant. H. M. Hampton and H. L. Anderson, for appellees.

WHITFIELD, C. J. On a former appeal the original bill of complaint in this cause was held to be subject to the demurrer interposed. *Murrell v. Peterson*, 57 Fla. 480, 49 South. 31. The amended bill alleges in brief that the complainant, George B. Murrell, and

William R. Peterson, by parol agreement, bought in equal interests certain described lands each paying one-half the purchase price, but the title was taken in the name of Peterson; that it was agreed complainant should first use the lands for turpentine purposes, and then defendant should use the timber rights; that an undivided one-half interest in the land exclusive of the turpentine and timber rights should be conveyed to complainant when desired, and that the turpentine rights and the timber rights would be regarded as and were of equal value; that complainant "sold out and assigned his turpentine business, * * * including his said right of possession and turpentine privilege in and to said lands," under an agreement with the defendant Peterson and the purchasers that Peterson would recognize the vendees and should convey to them the said undivided one-half interest and estate in and to the said land in lieu and stead of the complainant; that the vendees took possession and were recognized by Peterson as the holders of said turpentine privilege; that the vendees paid complainant for the turpentine privilege and for the one-half interest in the land to be conveyed by Peterson, and, although admitting the agreement, Peterson delayed and has failed to execute his deed to the half interest, and, by reason thereof, the purchasers rescinded their agreement and recovered the purchase price from complainant; that Peterson repeatedly promised to convey to complainant but failed to do so and finally refused to do so; that, disregarding his agreement, Peterson formed a corporate company under the name of Peterson-McNeill Company, of which company Peterson is president, and conveyed the lands by warranty deed to said company in February, 1905, and said company with full knowledge of complainant's rights "has continued to withhold the conveyance of the said half interest, but complainant is informed and believes, and therefore alleges, has sold and by warranty deeds conveyed unto certain strangers certain parcels of the said lands," and complainant knew nothing of said conveyances by any of said parties "until during the month of June or July, 1908." The prayer is for an accounting for one-half the value of the lands conveyed by the company, and "that complainant be decreed to be the owner in fee of an undivided one-half interest in and to such parcels of said lands as have not been sold by said Peterson-McNeill Company prior to the institution of this suit, and that the said defendant W. R. Peterson be decreed to pay the complainant the fair value of an undivided one-half interest in and to such parcels of land as have been sold by said Peterson-McNeill Company," and for general relief.

The bill of complaint was demurred to because in brief (1) it is without equity; (2)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

complainant has no right to maintain this suit; (3) gross laches; (4) the remedy at law is adequate; (5) the agreement is void under the statute of frauds; (6) no personal decree can be rendered against Peterson; (7) the bill is multifarious. This demurrer was sustained, and the complainant appealed.

The original bill was filed July 23, 1908, and, in view of the allegations of the bill as to Peterson's conduct, laches to bar this suit do not appear.

A verbal agreement at the time title is taken that it will be held upon the same terms that the law implies does not prevent the implied trust from resulting from the payment of the purchase price by two and the taking of title in the name of one of the two. See 15 Am. & Eng. Ency. Law (2d Ed.) 154; Robinson v. Leflore, 59 Miss. 143; Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793.

The alleged agreement "that an undivided one-half interest in said lands, exclusive of said turpentine rights and said sawmill right, should belong to said complainant, and should be conveyed to said complainant by the said defendant William R. Peterson, when desired by said complainant," is, except as to the turpentine and timber features, the same that the law would imply from the payment of the purchase price equally by both complainant and defendant Peterson and the taking of title by the latter only.

The special express agreement as to the turpentine and timber rights in the lands may be disregarded in this application for a conveyance of the title under the implied trust.

When the title is adjusted, any rights of the parties in the lands may be determined in due course.

W. R. Peterson is a necessary party because he is alleged to have had the title and to have conveyed the land by warranty deed. The prayer for a personal judgment against Peterson is incidental to the other relief prayed, and does not render the bill multifarious.

This bill does not seek to enforce the express agreement as to the turpentine and timber rights, but to enforce the implied or constructive trust growing out of the payment of one-half of the purchase price by the complainant and the taking of the title in the name of the defendant Peterson. Under the allegations of the bill, the Peterson-McNeill Company is a proper defendant in stating the equities. There is equity in the bill, and the demurrer should have been overruled. The amended bill is essentially different from the original bill.

The decree is reversed, and the cause remanded.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

COCKRELL, J. (dissenting). In my opinion the moving consideration for the purchase of the land was that Murrell should have the turpentine and Peterson the logging rights therein, and that the subsequent ownership of the land was a minor and almost negligible consideration. This would make it inequitable to enforce upon unwilling parties an implied and resulting trust, making for them a contract that neither would voluntarily have entered into. The statute of frauds forbids the enforcement of the express trust, and the fact that an express contract was entered into by the parties prevents the enforcement of an implied trust.

CONNOR v. CONNOR et al.

(Supreme Court of Florida, Division A. June 9, 1910.)

(Syllabus by the Court.)

1. MORTGAGES (§ 32*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE AS TO CHARACTER OF TRANSACTION.

A deed absolute on its face may by parol evidence be shown to be a mortgage, and, in cases of doubt, the instrument should be held to be a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 60; Dec. Dig. § 32.*]

2. MORTGAGES (§ 42*)—NATURE OF INSTRUMENT.

An instrument must be deemed and held to be a mortgage, whatever may be its form, if, taken alone or in connection with the surrounding facts and attendant circumstances, it appears to have been given for the purpose or with the intention of securing the payment of money, and the mere absence of terms of defeasance cannot determine whether it is a mortgage or not.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 116; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4596-4606; vol. 8, p. 7725.]

3. MORTGAGES (§ 137*)—NATURE OF LIEN—DEED AS MORTGAGE.

Under the statutes of this state a mortgage acquires only a specific lien on the property of another described in the mortgage, and an "instrument of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money," may upon its face convey title to property, subject to the provisions of the statute that it "shall be deemed and held a mortgage," if by extrinsic facts the statute is shown to apply.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270, 273; Dec. Dig. § 137.*]

4. MORTGAGES (§ 33*)—EFFECT OF CONTRACT TO RECONVEY.

While an express provision that a contract to reconvey is not to be regarded as an evidence that the conveyance was intended as a mortgage may be of controlling force if it is consistent with the entire transaction, yet, if it is not in harmony with all of the facts and circumstances showing the intention of the parties, the express provision that it is intended to be a sale, and not a mortgage, does not determine the matter.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 73; Dec. Dig. § 33.*]

5. MORTGAGES (§ 1*)—CHANGE OF CHARACTER OF INSTRUMENT.

If an instrument is a mortgage when executed, its character does not afterwards change; for, "once a mortgage, always a mortgage," is a maxim of the law.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. MORTGAGES (§ 380*)—FORECLOSURE—NATURE OF REMEDY.

At common law a mortgagee took legal title and foreclosure was to terminate the mortgagor's right to redeem. Under the statute, the mortgagee has only a lien and foreclosure enforces the lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1145; Dec. Dig. § 380.*]

7. MORTGAGES (§ 591*)—REDEMPTION—PURPOSE.

The right of redemption now is to satisfy and remove the lien. The rights to foreclose and to redeem afford mutuality.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1693; Dec. Dig. § 591.*]

8. MORTGAGES (§ 32*)—EFFECT OF AGREEMENT THAT CONVEYANCE IS ABSOLUTE.

Where an agreement that a conveyance is not a mortgage, but an absolute conveyance, is wholly inconsistent with the facts of the case, such agreement does not make absolute a conveyance that under the statute may be shown to have been executed "for the purpose and with the intention of securing the payment of money."

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 62; Dec. Dig. § 32.*]

Appeal from Circuit Court, Marion County; W. S. Bullock, Judge.

Action by Rubie C. Connor, by next friend, Jefferson D. Young, against Claude E. Connor and another. A demurrer to the bill was sustained, and complainant appeals. Reversed.

Wm. Hocker and L. W. Duval, for appellant. Hampton & Hampton, for appellees.

WHITFIELD, C. J. The bill of complaint alleges, in substance, that Rubie C. Connor is the wife of Claude E. Connor; that, the husband being indebted to the defendant Elliott in certain sums of money upon open account and otherwise, the wife consented to secure the payment of said indebtedness and any future indebtedness of the husband to Elliott, and, joined by her husband, executed and delivered to Elliott conveyances to certain lands; that, though in form absolute conveyances, yet the deeds were given for the purpose of securing the payment of the said indebtedness of the husband to Elliott; that the lands are the property of Rubie C. Connor, who is in possession of them; that as part of the transaction Elliott executed and delivered to the plaintiff the following agreement, viz.:

"The State of Alabama, Etowah County:

"Whereas I have this day purchased of Mrs. Rubie C. Connor and husband C. E. Connor the lands described in their deeds executed by them to me this day, and

"Whereas the consideration of said deeds

is the absolute payment by said Rubie C. Connor of the present indebtedness of her husband C. E. Connor to myself, Now

"Know All Men By These Presents: That at any time before Dec. 31, 1903, I hereby agree upon the payment to me by Mrs. Connor of an amount equal to said C. E. Connor's present indebtedness to me, with interest from date to sell and convey by quit claim deed to Mrs. Rubie C. Connor all the lands described in her said deeds to myself.

"It is understood that the deeds executed by Rubie C. Connor and her husband to me this day are not mortgages but are absolute deeds giving Mrs. Rubie C. Connor the right to buy back said lands on the terms and conditions expressed herein.

"Executed in duplicate, Mch. 23rd, 1903.

"Witness: J. M. Elliott, Jr.

"J. H. Harden."

"A true copy of the original, filed 24th and recorded 31st December, 1903.

"S. T. Sistrunk, Clerk,

"By M. E. Sumner, D. C."

It is further alleged that the complainant, Rubie C. Connor, is ready and willing to pay to said Elliott any and all amounts due him by her husband the payment of which is secured by the said conveyances, and that complainant is willing to produce and deposit in the registry of the court the money as required. The prayer is for an accounting and a right to redeem the land upon proper payments. A demurrer to the bill of complaint was sustained upon the theory that the allegations were inconsistent with that portion of the agreement signed by Elliott, and made a part of the bill, that "it is understood that the deeds by, Rubie C. Connor and her husband to me this day are not mortgages, but are absolute deeds giving Mrs. Rubie C. Connor the right to buy back said lands on the terms and conditions expressed herein." The bill was amended so as to state that the complainant never signed the quoted agreement, and did not intend to rely upon the provisions of it. A demurrer to the amended bill was sustained, and the complainant appealed.

Under the rules of the common law, the right of redemption is inherent in every transaction having the essential features of a mortgage. This right is a highly favored equity, and, unless it is released to the mortgagee for a consideration, free from fraud and oppression, or in some way waived or lost or barred, it can be cut off only by foreclosure. Section 2495 of the General Statutes of 1903 provides that "a mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession." Section 2404 provides that: "All deeds of conveyance, obligations conditioned or defeasible, bills of sale or other instruments of

writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."

A deed absolute on its face may by parol evidence be shown to be a mortgage, and, in cases of doubt, the instrument should be held to be a mortgage. *De Bartlett v. De Wilson*, 52 Fla. 497, 42 South. 189; *Hull v. Burr*, 58 Fla. 432, 50 South. 754; *Franklin v. Ayer*, 22 Fla. 654.

An instrument must be deemed and held a mortgage, whatever may be its form, if, taken alone or in connection with the surrounding facts and attendant circumstances, it appears to have been given for the purpose or with the intention of securing the payment of money, and the mere absence of terms of defeasance cannot determine whether it is a mortgage or not.

Under the statutes of this state, a mortgagee acquires only a specific lien on the property of another described in the mortgage, and an "instrument of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money," may upon its face convey title to property, subject to the provisions of the statute that it "shall be deemed and held a mortgage," if by extrinsic facts the statute is shown to apply. *Hull v. Burr*, supra.

While an express provision that a contract to reconvey is not to be regarded as an evidence that the conveyance was intended as a mortgage may be of controlling force if it is consistent with the entire transaction, yet, if it is not in harmony with all the facts and circumstances showing the intention of the parties, the express provision that it is intended to be a sale, and not a mortgage, does not determine the matter.

If an instrument is a mortgage when executed, its character does not afterwards change, for "once a mortgage, always a mortgage," is a maxim of the law.

At common law a mortgagee took legal title, and foreclosure was to terminate the mortgagor's right to redeem. Under the statute, the mortgagee has only a lien and foreclosure enforces the lien.

The right of redemption now is to satisfy and remove the lien. The rights to foreclose and to redeem afford mutuality.

The allegations in this case admitted by the demurrer indicate that the intention of the parties was to secure the payment of money due to the mortgagee by the husband of the mortgagor. In view of the provisions

of the statute above quoted, and of the rules of interpretation in such cases announced by this court, the provision of the agreement made a part of the bill of complaint that the deeds were conveyances and not mortgages, while wholly inconsistent with the facts of this case, does not make absolute a conveyance that under the statute may be shown to have been executed "for the purpose or with the intention of securing the payment of money."

The decree appealed from is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOOKER, and PARKHILL, JJ., concur in the opinion.

CONNOR et ux. v. ELLIOTT.

(Supreme Court of Florida, Division A. June 9, 1910.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 21*)—GROUNDS—ACTION ON ISSUE TENDERED.

Where no action is taken on an issue tendered by a replication, a new trial should be granted.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 21.*]

2. ACTIONS (§ 69*)—STAY—ANOTHER ACTION PENDING.

When a chancery case and a case at law involving the same legal questions between the same parties are pending in the same court and the legal questions will be determined in the chancery suit, good practice suggests the continuance of the law case until the chancery case is disposed of.

[Ed. Note.—For other cases, see Actions, Cent. Dig. § 745; Dec. Dig. § 69.*]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action between C. E. Connor and Rubie C. Connor and J. M. Elliott. From an order granting a new trial, C. E. Connor and Rubie C. Connor bring error. Affirmed.

Wm. Hocker and L. W. Duval, for plaintiffs in error. Hampton & Hampton, for defendant in error.

WHITFIELD, C. J. Writ of error was taken to an order granting a new trial, and, under the statute, the court "shall review the said order, and if the cause be reversed, shall direct final judgment to be entered in the court below, for the party who had obtained the verdict in the court below, unless a motion in arrest of judgment, or for judgment non obstante veredicto, shall be made and prevail." Section 1695, Gen. St. 1906.

The motion for new trial appears in the bill of exceptions with a statement that the motion was granted and an exception noted. An order granting the new trial signed by the trial judge is in the record proper.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On a writ of error to an order granting a new trial in an action at law under the statute, the only questions to be considered are those involved in the order granting a new trial. A motion for new trial is addressed to the sound judicial discretion of the trial courts, and, where a trial court grants such a motion, the action in doing so is presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record. An order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated. *Jones v. Jacksonville Ed. Co.*, 56 Fla. 452, 47 South. 1.

The action was ejectment under the statute. One of the pleas offered as a defense on equitable grounds averred that "these defendants executed and delivered to the plaintiff two deeds embracing and describing the lands described and referred to in plaintiff's declaration, which said deeds were made and executed to the said plaintiff to secure the payment of a debt then and there due from the defendant C. E. Connor to the said plaintiff, and that the plaintiff's only interest in said lands is as security for the said debt so due from the defendant C. E. Connor to the plaintiff, and this the defendants are ready to verify." The court refused to strike this plea, and allowed the plaintiff to file the following replication thereto: "That it is not true that he accepted the deeds and conveyances recited in said plea as security for the payment of a debt then and there due and owing by the defendant C. E. Connor to the plaintiff, but he accepted and received said deeds as absolute conveyances of the fee simple title to the property described therein, and as a full and final settlement of all differences between the plaintiff and the defendant C. E. Connor, and thereafter the plaintiff leased the said property to the defendants and put the defendants in the possession thereof, and the defendants went into possession of the property under this plaintiff and as the tenants of this plaintiff, and agreed to pay the plaintiff rental therefor, but did not pay the rent for the said property and are now holding over after the termination of their lease, without the consent of the plaintiff, and directly contrary to the wishes of the plaintiff. And this the plaintiff is ready to verify and prove." No reply of any kind was made to this replication.

As no action was taken on the issue tendered by the replication, a new trial should have been granted. See *Owens v. Wilson*, 58 Fla. 325, 50 South. 674; *Jones v. Shoemaker*, 41 Fla. 232, 26 South. 191.

The main questions of law involved here are determined in the chancery case of Con-

nor v. Connor (this day decided) 52 South. 727.

When a chancery case and a case at law involving the same legal questions between the same parties are pending in the same court and the legal questions will be determined in the chancery suit, good practice suggests the continuance of the law case until the chancery case is disposed of.

The order is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

JACKSON v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. LARCENY (§ 64*)—"RECENT" POSSESSION OF STOLEN ARTICLE.

The term "recent," in the rule that the recent possession of a stolen article imposes on the possessor the burden of explaining his possession, and that his failing to make a reasonable explanation raises an evidential presumption of guilt, which will support a conviction, has reference to the time of the larceny; so that the evidence being that the article was stolen in November of a certain year, and he testifying that he received it some time before Christmas of that year, there is evidence of such possession.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 5998.]

2. LARCENY (§ 68*)—EVIDENCE—SUFFICIENCY.

Evidence of guilt on a prosecution for larceny held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

3. LARCENY (§ 43*)—EVIDENCE.

On a prosecution for larceny of a gun while it was being shipped by an express company, all the facts attending the shipment, what the package appeared to contain, the proximity of defendant and his father to the place from which the evidence tended to show the gun was taken, their opportunity to have taken it, and the finding of it in the house in which they lived, are admissible in evidence.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 130, 133; Dec. Dig. § 43.*]

4. CRIMINAL LAW (§§ 407, 412*)—EVIDENCE—STATEMENT AND SILENCE.

Statement of defendant, when a gun claimed to have been stolen was found in the house in which he and his father lived, that it was his, and his silence when asked where he got it, are admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 898-900, 968, 994-972; Dec. Dig. §§ 407, 412.*]

5. CRIMINAL LAW (§ 459*)—OPINIONS—IDENTITY OF ARTICLE.

Opinion as to the identity of the gun found in defendant's possession with that claimed to have been stolen is admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. CRIMINAL LAW (§ 1170½* — APPEAL — HARMLESS ERROR.

The bill of exceptions complaining of interference with defendant's cross-examination of a witness to test his recollection, by the court directing him to consult papers showing the number of a gun, is insufficient in not showing he availed himself of, or obeyed, such direction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Vernon Jackson was convicted of larceny, and he appeals. Affirmed.

Almon & Andrews, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MCLELLAN, J. The property involved in the offense charged was a shotgun, alleged to have been, in November, 1906, shipped by express from Iron City, Tenn., to W. A. Porter at Russellville, Ala. The evidence tended to show that it was stolen, while at Sheffield, Ala., en route to destination. In February, 1908, the house of William Jackson, the prisoner's father, and their common abode, was searched, and a shotgun was found in a closet therein, which gun, the evidence tended to show, was the gun shipped as indicated. It was further open to the jury to find that the prisoner as well as his father was favorably situated, by reason of the place of employment, to have taken the gun from the custody of the express company. It further affirmatively appears from the evidence that when the gun was found, as stated, the prisoner said, and so without any inducement usually rendering a confession inadmissible, that the gun was his. The witness Shelton stated that the prisoner (on the occasion of the search and finding of the gun) said: "That is my gun;" that "I (he, the witness) says, 'Where did you get it?' and he did not answer." The explanation of his possession of the gun offered by the prisoner was that his father, William Jackson, bought the gun "some time before Christmas, 1906," from a party not identified, and gave it to him (the prisoner).

"It is the settled law of this state that the recent possession of stolen goods, imposes on the possessor the onus of explaining the possession; and, if he fails to make a reasonable explanation, raises a presumption of guilt, which will support a verdict of conviction. If there was evidence tending to connect the defendant with the larceny, the recent, unexplained possession of the goods, it may be, would raise the presumption that he had stolen them, rather than that he had received them knowing them to have been stolen. But where the evidence, though proving the larceny, does not connect him with its commission, tending to fix the guilt of it upon another, and he has the recent possession of the goods, if he makes no reasonable ex-

planation of the possession, the same presumption should be applied, which would be applied if the possession had remained with the first taker. There is no unfairness in the presumption; it is reasonable." This quotation is taken from Martin's Case, 104 Ala. 71, 78, 16 South. 82. See, also, Boyd's Case, 150 Ala. 101, 43 South. 204.

The basis of the evidential (only) presumption stated is that the goods were "stolen." The evidence here tended to establish that fact. If they so found, then the inquiry was, whether, from the explanation offered in connection with the indicated presumption, and both phases of this inquiry were matters for the jury's consideration and final finding, the defendant was guilty. Thomas' Case, 109 Ala. 25, 19 South. 403.

The qualifying term "recent" has reference to the possession of the goods as that is related to the time of the commission of the larceny. Thomas' Case, supra; 1 May. Dig. p. 582 et seq. The prisoner himself fixed his possession of the gun which the evidence tended to show was the stolen gun, at "some time before Christmas, 1906," a point of time referable to "recently" after the larceny the evidence tended to show.

As readily appears, on the whole evidence, the guilt vel non of the accused was for the jury's determination. So the affirmative charge to acquit was not his due.

The appellant complains, in 23 errors assigned, of that many errors of the trial court. They have all been carefully considered, in the light of the record and the extended argument of appellant's counsel. No prejudicial error appears.

As to the rulings on evidence complained against, all of the facts and circumstances attending the shipment of the package, its appearance, what it "appeared" to contain, the proximity of the appellant and of his father to the place from which the gun, the evidence tended to show, was taken, their opportunity to have taken the gun, the search for and finding of the gun as before indicated, the statement of the appellant that he claimed the gun, the question asked by Shelton as to where he got it, and his "silence" when explanation was directly invited, and the evidence, even though a matter of opinion, of identity of the gun found and that alleged to have been taken, were admissible and in this case were properly admitted on the trial.

The complaint that the court erroneously interfered with the right of the prisoner's counsel to cross-examine one of the state's witnesses cannot avail. It does not appear from the bill of exceptions, if indeed that would alter the matter, that the witness availed himself of, or obeyed the direction of the court to consult papers showing the number of the gun, and hence it does not appear that his recollection, sought to be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tested by the cross-examiner, received any aid from that source.

Let the judgment be affirmed.
Affirmed.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

TILLEY v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

WITNESSES (§ 361*)—IMPEACHMENT OF—CHARACTER TESTIMONY.

Where, in a prosecution for the wrongful sale of liquor, defendant tried to disprove by other witnesses the statements of a witness that he got a \$5 bill changed on C.'s porch to pay defendant for some whisky, that he paid him there, and that he had not stated that defendant had done him a dirty trick, and was going to get even with him, being an attempt to impeach the witness, the state could then introduce testimony showing his good character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1167; Dec. Dig. § 361.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Judge.

George Tilley was convicted for the wrongful sale of spirituous liquors, and he appeals. Affirmed.

Tate & Walker, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the offense of selling spirituous, vinous, or malt liquors contrary to law. The principal witness against the defendant was one Buttram, who testified to the sale by the defendant of the whisky. He testified that he got Jason Couch to change a \$5 bill, on Couch's porch in order to get the change to pay defendant for the whisky, and that he paid defendant on said Couch's porch. He also testified that he did not say to Clem Kimball that defendant had done him a dirty trick and he was going to get even with him. The defense tried to break the force of his testimony, by proving by other witnesses that said Buttram did not get the \$5 bill changed, that he did not talk with the defendant on said porch, and that said witness had said to Clem Kimball that the defendant had done him a dirty trick, and he was going to get even with him, which statement the witness had denied making. The proof of the contradictory statements laid the predicate.

This was an evident attempt to impeach the witness, and show that his testimony was not entitled to credit, and there was no error in allowing the state to introduce testimony as to the good character of said witness. *Bell v. State*, 124 Ala. 94, 27 South. 414; *Hadjo v. Gooden*, 13 Ala. 718; *Holley v. State*, 105 Ala. 100, 17 South. 102; *Lewis v. State*, 35 Ala. 380; 1 Greenl. on Ev. (5th

Ed.) § 469; *Towns v. State*, 111 Ala. 1, 20 South. 598.

There being no error apparent in the record, the judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and MCLELLAN and MAYFIELD, JJ., concur.

BAUMHAUER v. MOBILE ELECTRICAL SUPPLY CO.

(Supreme Court of Alabama. June 14, 1910.)

1. EXCEPTIONS, BILL OF (§ 16*) — STATING TESTIMONY IN EXTENSO.

In an action for work and labor done on a house, the bill of exceptions recited that the court took the case under advisement, and afterwards rendered a judgment to rendition, of which defendant excepted, and that the evidence tended to show a contract between the parties for the wiring of a house and the completion before it was burnt of the part denominated "roughing in," and that the burning thereof rendered it impossible to complete the job. *Held*, that the bill did not violate rule of court 32 (Civ. Code, p. 1528), forbidding the statement of testimony or any portion thereof in extenso.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 17; Dec. Dig. § 16.*]

2. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

In an action for wiring a building for electricity under a contract, providing that 85 per cent. of the stipulated gross price should be payable on "roughing in," balance after acceptance of work, plaintiff sought to recover the per cent. payable on "roughing in," the building having burnt before it was completed, and introduced a witness who testified without objection that the "roughing in" part of the work had been completed before the fire, and defined it as the work put in ahead of the finished walls. *Held*, that there was no error admitting his testimony, though on cross-examination he was unable to give details of the work stated without the aid of the plans.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 80; Dec. Dig. § 37.*]

3. APPEAL AND ERROR (§ 695*) — RECORD — QUESTIONS PRESENTED — SUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to support the conclusion of the court on the issues of fact cannot be reviewed on appeal where the finding is not sufficiently shown in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Assumpsit by the Mobile Electrical Supply Company against Jacob H. Baumhauer. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was for work and labor done on a building of defendant for the price of wiring, put in under a contract. The answer of the witness Sconyers, noted in assignment 2, is as follows: "Well, I have completed what we contracted for in the electrical business, roughing in; that was

work put in ahead of the finished walls of the building." The recitals of the bill of exceptions as to the exceptions to the finding of the court are as follows: "The court took the case under advisement, and afterwards rendered the judgment set out in the transcript, and to the rendition of the judgment the defendant excepted. The evidence tended to show a contract between the parties for the wiring of the house, and the completion of the part denominated 'roughing in' before the burning of the building, and that the burning of the building rendered it impossible to complete the job." The recovery was for 85 per cent. of the contract price.

D. B. Cobbs, for appellant. Bestor, Bestor & Young, for appellee.

MCCLELLAN, J. The motion to strike the bill of exceptions because violative of rule 32 (Civ. Code, p. 1528) is overruled. The construction of the bill is close upon the border line of a violation of the rule, in the particular that questions and answers, not the subjects of objections and exceptions, are often set out, verbatim, in the bill. The bill is not framed in strict accord with the requirements of the rule, but the departure from those requirements is not so flagrant as to lead to the imposition of any of the penalties of the rule.

The cause of action is set forth in common counts. The plaintiff (appellee) engaged to wire for electricity a building of defendant (appellant) in the course of construction. The contract provided that 85 per cent. of the stipulated gross price should be payable on "roughing in, balance after acceptance of work by city electrician." The building burned before the electrical work was completed. The recovery sought is of the 85 per cent. payable on "roughing in." The appellant expressly waives in brief insistence upon the first assignment.

There was no error in declining to exclude the answer of the witness, Sconyers, set out in the second assignment. While the answer employed the contract term, "roughing in," it in the same breath defined that term. The motion to exclude (most generally) portions of the testimony of the witness, Sconyers, was properly overruled. The witness had testified without objection that the "roughing in" part of the work had been completed before the fire, whereupon the indicated percentage of the contract price became payable.

On the cross, the counsel for appellant inquired as to the details of what was, in fact, done in "roughing in," to which the witness replied, in substance, that he could not answer without the plans, not then available to him. The motion's object was to eliminate from the jury's consideration all of the witness' evidence on the subject of

"roughing in," including that wherein he testified to the completion of that feature of the work. Obviously, the inability of the witness to give the details of the work stated without the aid of the plans, did not render inadmissible the general statement already made by the witness that the indicated feature of the work, viz., "roughing in," had been completed. A witness might well, without objection, testify that a bridge had been completed according to contract, when, unaided by plans and specifications, he could not tell minutely every act performed in construction.

The evident conclusion of the court on the issues of fact finds substantial support in evidence before it. However, if that were not so, review of the conclusion of the court could not be had here, for the reason that no sufficient recital of the finding of the court appears in the bill of exceptions. Davis v. Simpson Coal Company, 50 South. 368.

The judgment of the court is affirmed.
Affirmed.

SIMPSON, MAYFIELD, and EVANS, JJ., concur.

ROBINSON et al. v. CROTWELL BROS. LUMBER CO.

(Supreme Court of Alabama. June 2, 1910.)

1. MECHANICS' LIENS (§ 271*)—MATERIALS—USE IN BUILDING.

Since a materialman's lien does not attach to material furnished for a building but not used therein, a bill to foreclose such lien, alleging only that the material was furnished for the building, was demurrable.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 499; Dec. Dig. § 271.*]

2. MECHANICS' LIENS (§ 271*)—FORECLOSURE—BILL—FILING STATEMENT.

A bill to foreclose a materialman's lien alleged that the statement attached to the bill was filed with the judge of probate, and at the end of the statement was a note stating that the account was due and payable January 1, 1908; the statement being filed March 17th following. *Held*, that such exhibit and statement did not take the place of an allegation in the bill that the statement was filed within four months after the indebtedness accrued, as required by Acts 1900-01, p. 2118, § 2, for which omission the bill was demurrable.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 509; Dec. Dig. § 271.*]

3. MECHANICS' LIENS (§ 136*)—STATEMENT—DESCRIPTION OF PROPERTY.

Where in a bill to foreclose a materialman's lien on the building, but not on the lot, the description of the building in the lien was sufficient, it was not material that the statement did not sufficiently describe the lot.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 224; Dec. Dig. § 136.*]

4. MECHANICS' LIENS (§ 271*)—STATEMENT—NOTICE—VARIANCE.

Under Acts 1900-01, p. 2117, relating to materialman's liens, and requiring duplicate accounts to be furnished the contractor and the owner when the material is furnished, where a bill to foreclose such a lien alleged that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

exhibit was a copy of the duplicates so furnished, but the notice did not correspond with such duplicates and the bill claimed a lien on the building, while the notice claimed a lien on the lots, the bill was fatally defective.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 508; Dec. Dig. § 271.*]

Appeal from Bessemer City Court; William Jackson, Judge.

Bill by the Crotwell Bros. Lumber Company against Tom F. Robinson and others to foreclose a materialman's lien. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Trotter & Odell, for appellants. Pinkney Scott, for appellee.

SIMPSON, J. The bill in this case was filed by the appellee to enforce a materialman's lien on a building owned by said respondent Robinson, which had been erected by Fred. Jay, contractor. The assignments of error relate to the action of the court in overruling the demurrer to the original bill.

The first insistence is that the bill does not allege, nor do the exhibits show, that the materials furnished were used in the building described. The third section of the amended bill alleges that the material was furnished for the building. This court has said that: "In actions by which it is sought to declare and enforce the lien given by statute to mechanics, materialmen, and the like, every fact necessary to the creation of the lien must be alleged and proved. This is the general rule of pleading which is applied with much strictness to this class of actions."

Cook v. Rome Brick Co., 98 Ala. 409, 413, 12 South. 918, 919. We have also held that the lien does not attach to material furnished for the building not used in it, but left lying on the premises after the completion of the building. *Lee v. King*, 99 Ala. 246, 13 South. 506; *Porter & Blair Hardware Co. v. Lee et al.*, 105 Ala. 361, 368, 17 South. 216. This court also said: "We do not declare as a universal proposition that the burden is on the materialman to show that the goods were used in the construction of the particular building; but, where the contractor stipulates to furnish the material, and the owner of the property is not notified of the purchase, the materialman should show, with reasonable satisfaction, that the goods were used in the building." *May & Thomas Hardware Co. v. McConnell*, 102 Ala. 577, 581, 14 South. 768. In another case where there was a contract to build two houses, this court said: "It does not appear by the statement of the claim filed in the office of the judge of probate what part of the gross amount claimed was for materials used in the building of this house. Very clearly, in principle, and upon all authority, the statement thus filed was wholly bad and inefficacious to fix a lien upon either of the lots and houses in question." Left-

wich Lumber Co. et al. v. Florence, etc., Ass'n, 104 Ala. 584, 595, 596, 18 South. 48, 51.

The act of March 4, 1901 (Acts 1900-01, p. 2115), provides for the enforcement of the lien, where two or more buildings are erected under a general contract; and this court in commenting on that act said: "Prior to this statute, in order to acquire a lien, the particular goods must have been furnished for the erection of the particular building on which the lien is sought, and, to secure the benefits of the lien, it was necessary to allege and prove that each piece of material so furnished was actually used upon the particular building so designated." *Cocciola et al. v. Wood-Dickerson Supply Co.*, 136 Ala. 532, 33 South. 856. In that case the bill alleged that the material was purchased for the building "*and so used*" (italics supplied), so that, taking the statement of the court in connection with the statute in question, we hold that this case, in connection with the others cited, is authority for the principle that "it must be alleged and proved" that the material was actually used upon the particular building, where there is but one, and on the particular building, where there is a contract for more than one building. Consequently this ground of demurrer was well taken.

The bill is also subject to the demurrer on the ground that it does not allege that within four months after the indebtedness accrued the statement required by law was filed in the office of the judge of probate. Acts 1900-01, p. 2118, § 2. It is true that the bill alleges that the statement (Exhibit A to the bill) was filed, and, at the end of that statement, there is a note stating that the account was due and payable January 1, 1908, the statement being filed March 17, 1908, but that does not supply the deficiency of the necessary averment in the bill that the statement was filed within the time required by law. This is not only not an allegation in the bill, but is not proof of the fact, as the law does not provide for any such statement in the paper, nor make it proof of any such fact. 3 Ency. Pl. & Pr. 362; 13 Id. 986-988.

The description of the property in "Exhibit A" referred to in the bill for that purpose is probably not sufficient (*Montgomery Iron Works v. Dorman*, 78 Ala. 218, 220, 221); but this is not material in this case, as the bill does not pray for the enforcement of the lien on the lot, but only "that a decree be rendered for lien and judgment on said building," and the description is sufficient to identify the building.

The bill is also subject to the ground of demurrer "that the statement filed in the office of the judge of probate was not the one of which complainant gave respondent 10 days' notice." The two statements are for different amounts, and different items. Said act of March 4, 1901 (page 2117), requires duplicate accounts to be furnished the con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tractor and the owner at the time the material is furnished, and the bill alleges that said Exhibit A is a copy of said duplicates, and the notice does not correspond with said duplicate accounts furnished. It will be noticed, also, that the bill claims a lien on the building, while the notice is that a lien will be claimed on the lots.

We have not deemed it necessary to discuss that part of the bill alleging that a small portion of the material was furnished to the owner directly, for two reasons, to wit: The statement filed claims only that the goods were furnished to the contractor, and the account attached to the notice shows affirmatively that the goods claimed to have been furnished to the owner had been paid for before the notice was given, and the original statement filed shows the same fact.

The decree of the court is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, and SAYRE, JJ., concur.

ROYAL v. ROYAL.

(Supreme Court of Alabama. June 7, 1910.)

1. PARENT AND CHILD (§ 2*)—SUIT FOR THE POSSESSION OF CHILD—EVIDENCE.

Where an agreement of separation in writing was made between a husband and wife, in a subsequent suit by the wife to obtain possession of their child, brought under Code 1907, §§ 4503, 4504, providing for such custody of the child on voluntary separation, such agreement made out a prima facie case of voluntary separation.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 2.*]

2. INJUNCTION (§ 172*)—TEMPORARY INJUNCTION—DISSOLUTION—DISCRETION OF COURT.

There is no invariable rule which requires the court of chancery to dissolve an injunction upon the denials of the answer, but the situation of the parties and the consequences of the order must be considered.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 376; Dec. Dig. § 172.*]

3. PARENT AND CHILD (§ 2*)—SUIT FOR POSSESSION OF CHILD—AWARD OF POSSESSION.

Where, on the hearing of a petition for the possession of a child, while awaiting the outcome of a suit for its permanent possession, it appeared that the husband lived without the state, while the wife was living within the jurisdiction of the court, with friends and relatives and under good influences, it was held, that the chancellor correctly exercised his judicial discretion in awarding the custody of the child to the wife.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 2.*]

Appeal from Chancery Court, Butler County; L. D. Gardner, Chancellor.

Petition by Dora O. Royal against S. H. Royal for the possession of a child. From an order refusing to dissolve a temporary injunction against interference with plaintiff's custody, defendant appeals. Affirmed.

A. B. Gamble and Steiner, Crum & Well, for appellant. Powell, Hamilton & Lane and Ball & Samford, for appellee.

SAYRE, J. Appellant and appellee are husband and wife. Appellee filed her petition to have decreed to her the custody and control of William Calhoun Royal, a minor son of the parties. The petition proceeds under sections 4503 and 4504 of the Code of 1907. Upon the filing of the sworn petition and the execution of the bond required, the Honorable H. A. Pearce, judge of the Twelfth judicial circuit, ordered a preliminary injunction commanding and enjoining defendant not to interfere with or disturb petitioner's custody and control of the child pending a final hearing on the petition. After filing his sworn answer circumstantially denying the allegations of the petition, defendant moved a dissolution of the injunction on the ground that there was no equity in the petition, and on the denials of the answer. This motion, being submitted on the petition and answer and numerous ex parte affidavits, was denied by the chancellor. From that denial this appeal was taken.

No serious question is raised against the equity of the petition except that it fails to show a voluntary separation of the parties, husband and wife. The petition distinctly alleges a voluntary separation. As bearing upon the jurisdictional fact here involved, it appears that in the latter half of the year 1906 the parties lived in Virginia. Mrs. Royal had filed a bill for divorce and for the custody of her child in one of the courts of that state, and had obtained an order enjoining defendant not to interfere with her custody and control of her son. The grounds stated in that bill are not repeated here. Petitioner, however, does complain that the defendant is of a jealous disposition, harsh and overbearing in his treatment of her. Defendant recriminates. Whatever may have been or may now be the merits of the controversy between the parties, it appears that shortly after the bill was filed in the Virginia court they entered into an agreement in writing as a result of which that bill was withdrawn. That agreement recited the filing of the bill, the desire of both parties to avoid publicity and to settle their domestic difficulties, and their conclusion that the welfare of the child was the consideration of first importance and would be best subserved by the agreement. It provided that the parties should live apart for a period of 12 months, that the care, custody, control, and education of the child during the 12 months should be with the mother, and contained other stipulations which need not be recited. It concluded: "If, after the expiration of twelve months from this date, the parties are persuaded that they can live amicably together, then the provisions of this contract are in every particu-

lar to cease and determine, and the rights of neither party hereto shall be prejudiced hereby." Since the date of the agreement the parties have lived apart. Appellant seeks to show that the status of separation now existing between the parties is not voluntary on his part by evidence which tends to fasten the fault for a continuance of the separation upon the petitioner. Petitioner recriminates. We are of opinion that, so far as the jurisdiction to entertain the petition is concerned, the agreement makes out a prima facie case of voluntary separation. How that question should be finally settled, and what are the general merits of the controversy between the parties, are questions which are left by the ex parte statements of the parties, and the several affiants besides them, in a state of painful uncertainty. We think it best at this time and on the presentation of facts now made not to enter upon a discussion of them. We are not sure that any detailed discussion of them will at any time serve a good purpose, while we apprehend the possibility that it may accentuate the differences between the parties—a result which the court must always be careful to avoid.

There is no invariable rule which requires the court of chancery to dissolve an injunction upon the denials of the answer. The situation of the parties and the probable or possible consequences of the order to be made must be considered. Petitioner lives in this state among friends and relatives where she lived before her marriage. The influences surrounding the child are conceded to be good. The defendant lives in the state of Virginia, and if, the temporary injunction being dissolved, he should acquire possession of the child and succeed in getting him beyond the boundaries of the state, the court will have lost its power to control his actions. The jurisdiction of the court ought to be preserved. It is charged that defendant at one time retained possession of the child in violation of a solemn agreement. On the other hand, it is charged that the petitioner acquired her present custody of the child stealthily. There is evidence tending to sustain both charges. But, as we have stated, the evidence is taken ex parte, and not with a view to a final decree. Under these circumstances, and after due consideration we are of the opinion that the chancellor correctly exercised his judicial discretion in leaving the child with the petitioner until parties and witnesses may be examined and cross-examined and thus the whole truth of the estrangement between them developed. If it should appear that the wife has abandoned the husband without sufficient cause, and the husband is a suitable person to have charge of the child, the law favors the custody of the husband; but the court may give the custody and education of the child to either

father or mother, as may seem right and proper.

Accordingly, the chancellor's decree will be affirmed, and the cause remanded for final disposition upon the pleading and the proof as it may appear.

Affirmed.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

TAYLOR v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

CRIMINAL LAW (§§ 995, 1188*)—JUDGMENT—SUFFICIENCY—REMAND.

Where the sentence in a criminal prosecution fails to stipulate the amount of the costs, or the time of labor necessary for working them out, the case will be remanded for proper sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2523, 2524, 3222-3224; Dec. Dig. §§ 995, 1188.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Charles Taylor was convicted of a criminal charge, and he appeals. Reversed and remanded.

Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, C. J. The appeal in this case is prosecuted from a judgment of conviction in the criminal court of Jefferson county. There is no bill of exceptions in the record.

The sentence of the court for the costs fails to ascertain the amount of the costs, or to fix the time of hard labor for working out the same. In this respect, and in this only, the judgment is erroneous. Under the authority of *Linnahan v. State*, 120 Ala. 293, 25 South. 6, the judgment must be reversed back to the judgment of conviction, and the cause remanded for proper sentence by the court.

Reversed and remanded.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

HAIGLER et al. v. GOLDSMITH.

(Supreme Court of Alabama. June 9, 1910.)

APPEAL AND ERROR (§ 169*)—QUESTION NOT RAISED IN LOWER COURT.

A question not raised in the lower court will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1018; Dec. Dig. § 169.*]

Appeal from Circuit Court, Lowndes County; J. C. Richardson, Judge.

Action by W. L. C. Haigler and others against R. L. Goldsmith. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Tyson, Wilson & Martin, for appellants.
Marks & Sayre, for appellee.

SAYRE, J. In the case of *Norwood v. Goldsmith* (recently decided here) 50 South. 894, it was held that the statute in question was enacted without constitutional authority, that the board of revenue had authority to determine that fact, as it did, and that the appellants were entitled to have their warrants paid by the county treasurer. We will not consider the propriety of the remedy sought, since, as to that, no question was made in the court below. The demurrer to appellants' petition, as for any ground taken by it, should have been overruled.

Reversed and remanded.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

SHAHAN v. BROWN.

(Supreme Court of Alabama. May 31, 1910.)

1. VENDOR AND PURCHASER (§ 83*)—CONTRACT—VALIDITY—MISREPRESENTATIONS.

In a suit to rescind a sale of land because of misrepresentation by the vendor, where the representation was of a material fact which influenced the transaction, it was of no consequence that it may have been made in good faith.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 88-44; Dec. Dig. § 33.*]

2. FRAUD (§ 22*) — MISREPRESENTATIONS — RIGHT TO RELY ON.

Where statements are made of facts, which could be assumed to be within the knowledge of the person making them, the person to whom they are made has a right to rely upon them, and, in the absence of knowledge of his own which would arouse suspicion, he is not bound to make inquiries or examine for himself.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 18-23; Dec. Dig. § 22.*]

3. FRAUD (§ 18*)—ASSERTION OF FACTS.

A party asserting facts cannot complain that the other took him at his word.

[Ed. Note.—For other cases, see *Fraud*, Dec. Dig. § 13.*]

4. VENDOR AND PURCHASER (§ 108*)—FRAUD—RESCISSION—SOLVENCY OF VENDOR.

Misrepresentations of a material and controlling fact being charged, the solvency of the vendor is of no consequence as affecting the vendee's right of rescission.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 108.*]

5. VENDOR AND PURCHASER (§ 33*)—RESCISSION—FRAUD.

Fraud alone is, in equity, sufficient to avoid a sale of land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 38-44; Dec. Dig. § 33.*]

6. VENDOR AND PURCHASER (§ 44*) — RESCISSION—EVIDENCE—SUFFICIENCY.

In a suit to rescind a sale of land, evidence held to sustain a decree for plaintiff.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 44.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Suit by J. R. Brown against W. P. Shahan. Decree for plaintiff, and defendant appeals. Affirmed.

Cullli & Martin, for appellant. Goodhue & Blackwood, for appellee.

SAYRE, J. The city court of Gadsden, sitting in equity, on the prayer of Brown, decreed the rescission of a deed which Shahan had made to complainant. The deed had been executed and delivered on May 15, 1907, conveying a parcel of land which was described as follows, and not otherwise: "Lot two and lot three, block 542, up to the line of T. & C. Railroad according to the map of the Attalla Iron & Steel Company in Etowah County, Alabama." It is agreed that the map referred to was not on record at the time. This, however, is not considered to be of special importance. The averment of the bill is that at and prior to the time of the purchase Shahan, the defendant, pointed out to complainant the boundaries of the lots, and represented that they extended up to the edge of the cross-ties of the Tennessee & Coosa Railroad; that complainant entered into the contract of purchase in reliance upon that representation; and that the fact was that the Anniston & Cincinnati Railroad Company owned a strip of land 25 feet wide lying between the edge of the cross-ties of the Tennessee & Coosa Railroad and the lots sold by defendant to complainant. The substance of the demurrer filed to the bill was twofold: (1) That the representation was not alleged to have been made with intent to deceive. But the representation was of a material fact which affected and influenced the transaction. This being so, it was of no consequence that, as for aught appearing in the bill, it may have been mistakenly made in good faith. The equity of the bill, as against this objection, is abundantly supported by decisions of this court. *Perry v. Boyd*, 126 Ala. 162, 28 South. 711, 85 Am. St. Rep. 17; *Porter v. Collins*, 90 Ala. 510, 8 South. 80; *Lindsey v. Veasy*, 62 Ala. 421; *Baptiste v. Peters*, 51 Ala. 158; *Lanier v. Hill*, 25 Ala. 554; *Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 203; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448. (2) That complainant was negligent in relying upon the misrepresentation and ought not to be protected against the consequences of his own folly. *Porter v. Collins*, 90 Ala. 510, 8 South. 80, is cited here. In that case there had been a sale of a small parcel of land which was described in the deed as part of a 10-acre tract, which was described by government numbers, and as being "at or near the town of Sheffield." The claim of relief was based solely on alleged misrepresentations of the grantor as to the loca-

tion of the land. It was said in the course of the opinion: "It would seem that the location of the land appearing, as the proof shows, from the public records of the county, due diligence would have imposed on complainant the duty of ascertaining the real fact in this regard from these records, in such sort as that he could not have the sale set aside on the ground that he was misled as to it by information derived from the respondent." A decision to that effect was, however, expressly pretermitted, and the case was disposed of on the fact that there was absolutely no evidence in the record of any misrepresentation as to the location of the land. In *Younge v. Harris*, 2 Ala. 108, the court used this language: "Where one by the fraudulent silence, or fraudulent representations of another, in relation to material facts concerning the title of land, the falsehood of which he had not the means of ascertaining, and could not have ascertained by reasonable diligence, is induced to invest his money in the purchase of land, or has made on the faith of such purchase, valuable and lasting improvements, he can have relief in chancery before an eviction, and without abandonment of the possession." This language, with the omission of so much as relates to fraudulent silence—omitted no doubt because the cases called for no application of the principle—has been quoted in *Meeks v. Garner*, 93 Ala. 17, 8 South. 378, 11 L. R. A. 196; *Coleman v. National Bank of Decatur*, 115 Ala. 307, 22 South. 84; *Rarden v. Badham*, 142 Ala. 500, 38 South. 1029. The principle of *Younge v. Harris* has been repeatedly followed. But it has never been held that, in the absence of knowledge to the contrary or of circumstances calculated to arouse suspicion, a vendee may not rely upon the positive and material statements of his vendor. On the contrary, in a number of the cases heretofore cited it was assumed that he might so rely. And in *Crown v. Carriger*, 66 Ala. 590, it was said, in substance, that a purchaser who does not know their falsity may rely upon the truth of his vendor's material representations unless they relate to matters patent and open to inspection, or to facts equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other. And in *Younge v. Harris* it was held that a purchaser was not to be censured for relying on the representations of the vendor, when no circumstance had transpired which should have aroused his suspicions, although the records of the land office afforded proof that the representations were false. And in *Munroe v. Pritchett*, supra, the facts of which render it peculiarly apt, it was said: "The seller, who owns the land, and who proposes to sell it, must be presumed to know more about the lines and what land is embraced within the tract than the buyer. In this case, whether he did or did not, he assumed to know the fact

that certain good land, which formed an inducement to the purchase, was included, and he asserted this as a fact, upon which the purchaser relied and might well rely in concluding the bargain." And, generally, where statements are made of facts, especially where they concern matters which may be assumed to be within the knowledge of the party making them, the party to whom they are made has a right to rely upon them. In the absence of knowledge of his own which would arouse suspicion, he is not bound to make inquiries or examine for himself. A party asserting facts cannot complain that the other took him at his word. "Positive representation of a fact cannot be counteracted by the implication that the party might have ascertained to the contrary; under such circumstances he need not institute an independent investigation." *McDonald v. Pearson*, 114 Ala. 638, 21 South. 534. We conclude that the bill was not subject to the demurrer interposed.

The authority of those cases, cited by appellant, in which the insolvency of the vendor was held to be essential to relief, does not reach the case in hand. Misrepresentation of a material and controlling fact being charged, the solvency of the vendor is of no consequence as affecting the vendee's right of cancellation upon restoration of the status quo ante. The distinction between the ground of relief here urged and other grounds for rescission is that misrepresentation, amounting to constructive fraud, itself taints and vitiates the contract. Fraud alone is, in equity, sufficient to avoid it. *Garner v. Leverett*, 32 Ala. 410.

We think, also, that the chancellor is to be sustained in his conclusion on the facts. Evidently the property was considered valuable because it was supposed to be contiguous to the Tennessee & Coosa Railroad which would afford shipping facilities for the milling business which complainant proposed to establish there. It is shown without contradiction that the Anniston & Cincinnati Railroad Company, owned an intervening strip of 25 feet, though there was nothing upon the strip to indicate its ownership at the time of the sale. These and other facts fairly beyond dispute render it improbable that complainant would have assumed to pay the stipulated purchase price had he known the true boundaries. Complainant and defendant went to inspect the lots on two occasions, and the testimony of both of them makes it clear that the purpose of the inspection was to ascertain and locate the property lines. The defendant contends that notwithstanding this precaution the complainant bought the lots without assurance as to the location of their boundary lines. Indeed, his contention goes to this extent: That complainant bought the lots notwithstanding defendant's assurance that he did not know their area and boundaries. Complainant, on the other hand, testifies

that the defendant made the representation charged in the bill. There is no theory upon which the testimony of the parties as to what passed between them on these occasions can be reconciled. There was, however, the testimony of two witnesses, Stowers and Ventress, to the effect that on other occasions, one an occasion where defendant was negotiating for a sale of the lots to a person other than the complainant, defendant had asserted that his ownership extended up to the line of the railroad. Each party refers to the testimony of these witnesses as corroborative of his version of the facts; defendant referring to it as going to show his belief at the time of the transaction in question that his lots did extend up to the line of the railroad, and so his good faith; complainant referring to it as lending probability to his testimony that defendant did make the representation alleged. But this testimony does not aid the defendant's case. His contention just here is out of harmony with his theory of the facts, while, so far as concerns the law, his belief that his lots extended up to the line of the railroad was, as we have seen, immaterial. Considering the inherent probabilities of the case in connection with the testimony of the complainant and the corroborative circumstances shown by his witnesses, we have concluded that the decree of the court below should be affirmed.

Affirmed.

SIMPSON, ANDERSON, and **McCLELLAN, JJ.**, concur.

GALLANT v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

1. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE—ADMISSIBILITY.

Where, on a trial for murder by causing an explosion partially wrecking the house occupied by decedent and by accused's sister and stepmother, evidence that accused entertained ill will towards his sister and stepmother and that he believed that, if he survived them or either of them, he would succeed to the estate of his deceased father, possessed by the stepmother, was admissible to tend to identify accused as the guilty party.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 330; Dec. Dig. § 166.*]

2. HOMICIDE (§ 17*)—KILLING OF DECEDENT BY MISTAKE—EFFECT.

A killing by mistake of one not intended subjects accused to the same liability as if he had slain the person intended.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 23; Dec. Dig. § 17.*]

3. HOMICIDE (§ 157*)—EVIDENCE—ADMISSIBILITY.

Where accused by mistake killed decedent when he intended to kill another person, evidence of accused's ill will towards the other person was admissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 157.*]

4. HOMICIDE (§ 17*)—MURDER—KILLING ONE WITH DESIGN TO EFFECT DEATH OF ANOTHER.

Where, on a trial for murder by causing an explosion partially wrecking the house occupied by decedent and by accused's sister and his stepmother, the state showed that accused entertained ill will against his sister and stepmother, and that a room of the dwelling from the sills through the roof was demolished and a large hole in the ground beneath the house was made by the explosion, the responsibility of accused was not lessened by the fact that his relations with decedent were friendly, and that the purpose of accused in causing the explosion was to cause the death of the sister and stepmother, because the act which caused decedent's death was one greatly dangerous to the lives of others, and evidenced a depraved mind, regardless of human life within Code 1907, § 7084, defining murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 23; Dec. Dig. § 17.*]

5. CRIMINAL LAW (§ 386*)—EVIDENCE—ACTS OF DOGS IN SCENTING HUMAN BEINGS.

To justify proof of the acts of dogs in trailing human beings, it must appear that the dogs were trained to take the scent of human beings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 768; Dec. Dig. § 386.*]

6. CRIMINAL LAW (§ 465*)—OPINION EVIDENCE—ADMISSIBILITY.

A witness testifying to the ability of a dog to take the scent of human beings may give a comparison between the dog in question and other dogs the witness had seen perform to show his qualification from observation to give an opinion as to when a dog is trained to track human beings.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 465.*]

7. HOMICIDE (§ 174*)—EVIDENCE—CONDUCT OF ACCUSED.

Whether accused came to the scene of the homicide caused by an explosion wrecking the house in which decedent was promptly after knowledge of the event was a circumstance for the jury in determining the issue of guilt.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.*]

8. HOMICIDE (§ 174*)—EVIDENCE—CONDUCT OF ACCUSED.

Whether accused appeared nervous, and, if so, whether the nervousness was from a consciousness of guilt in causing the death of decedent by an explosion wrecking the house in which decedent was, or from the natural impulse such an event would inspire, were admissible to aid the jury in determining the issue of guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 360, 361; Dec. Dig. § 174.*]

9. WITNESSES (§ 337*)—IMPEACHMENT—EVIDENCE—ADMISSIBILITY.

Proof that accused was intoxicated when he made statements ascribed to him by the evidence of the state was admissible as bearing on his credibility as a witness in the denial by him of the statements.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 337.*]

10. HOMICIDE (§ 161*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder caused by an explosion partially wrecking the dwelling occupied by decedent, evidence of the extent and character of the injury sustained by decedent's wife, sleeping beside decedent, was admissible to show

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

accused's criminal purpose, and his reckless disregard of life.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 161.*]

11. HOMICIDE (§ 166*)—MOTIVE—EVIDENCE—ADMISSIBILITY.

Where, on a trial for murder by an explosion partially wrecking the dwelling occupied by decedent and by accused's sister and his stepmother, the state showed accused's mercenary spirit as to property left by his deceased father in possession of his stepmother, the court properly permitted the jury to consider the evidence, and determine the truth from all the facts.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 166.*]

12. HOMICIDE (§ 178*)—EVIDENCE—ADMISSIBILITY.

One on trial for murder may not show where another indicted for the offense stayed on the night of the tragedy, in the absence of an effort to show that the latter committed the crime.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 178.*]

13. CRIMINAL LAW (§ 713*)—ARGUMENT OF COUNSEL.

The argument of the solicitor for the state in a criminal case, wherein he states his relation to organized society and his duty in the prosecution of the case, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 713.*]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Howard Gallant was convicted of murder, and he appeals. Affirmed.

Daniel Collier and R. H. Scrivener, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. About 2:30 a. m., February 24, 1909, a destructive explosion was set off beneath a house in which Charles Gallant, his wife, Mrs. Alf. Gallant, and Mrs. Talford had their abode, and in which they were then asleep. The house was greatly damaged, and Charles Gallant was killed, and his wife, who slept beside him, was painfully injured. Mrs. Alf. Gallant and Mrs. Talford were uninjured, occupying as they did a room across the hallway from the room in which Charles Gallant and his wife were when the explosion occurred, and immediately beneath which (room) the explosive was set off. This house was before his death the abode of Alf. Gallant. His death occurred November 30, 1908, three months prior to the tragedy in question. He had two children then living, viz., Howard (the defendant) and Bessie, now Mrs. Talford, adults when Alf. Gallant died. His widow was their stepmother. Charles Gallant, the deceased, was a cousin of the Alf. Gallant children.

Our statute (Code 1907, § 7084) provides that every homicide " * * * perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved

mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree. * * * " The corpus delicti was incontestably proven.

The only issue was the identification of the defendant as a guilty agent. This was undertaken, by the prosecution, upon the theory that the defendant entertained ill will and malevolent purpose toward Mrs. Alf. Gallant and Mrs. Talford, or that he yielded in the act to a mercenary motive predicated upon the assumption that if he survived Mrs. Alf. Gallant and Mrs. Talford, or either of them, he would succeed to property rights in the estate of Alf. Gallant, deceased, not enjoyable by him while they lived, or that he entertained the vengeful purpose to prevent the enjoyment by Mrs. Alf. Gallant of the property, in whole or in part, claimed and possessed by her as the widow of Alf. Gallant, deceased, defendant's father. The evidence tending to identify defendant as a guilty agent was circumstantial. It of necessity required and took a wide range. Numerous objections by defendant were interposed to the reception of testimony tending to support the stated theory of the prosecution. These objections are entirely too numerous to admit of separate treatment in this opinion. Each one has been with great care considered, and no prejudicial error appears to have attended the rulings of the court in dealing with the great number of circumstances thus offered by the state, pointing to the conclusion, if the jury so found, that the defendant was motivated, as stated, to commit and did have part, at least, in the commission of the crime charged in the indictment. If in point of fact the title of the widow to the property left by Alf. Gallant was not of such character as to cast the estate therein to defendant's advantage, if he survived her, did not, of course, render inadmissible evidence tending to show that defendant entertained a different, though erroneous, view—a view in accord with the prosecution's theory that mercenary motive, entertained by defendant, inspired the act resulting in Charles Gallant's death. The insistence for defendant that the doctrines of *Clarke's Case*, 78 Ala. 474, 56 Am. Rep. 45, have application to this case cannot be approved. There the homicide was the result of mistake in the identity of the intended victim; and this court announced the well-recognized principle that the killing by mistake of one not intended subjects the accused to the same accountability as if he had slain the person intended. It was further ruled therein that, where the mistake in identity was a fact supported by tendencies of the evidence, evidence of ill will entertained by the accused toward the person intended to be slain but who because of mistake in identity escaped is admissible. The guilt of this defendant under the evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence in this record rests upon broader ground. Aside from anything else, the act causing Gallant's death was one "greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life." A room of a dwelling from the sills through the roof was demolished, a large hole in the ground beneath the house was forced by the explosion, and a part of the porch of the house was wrecked. That the force—its scope in effect—of the explosion may have been miscalculated or the point of location of the explosion may have been the result of error in judgment if the death of Mrs. Alf. Gallant and Mrs. Talford, or either, was the purpose of the act, cannot mitigate the extreme hazard of the act to all within the house or exculpate to any degree the agent or agents committing the act. That the consequences of such an act were not more direful cannot avail to excuse the guilty agent or to mollify the measure of that guilt. Washington's Case, 60 Ala. 10, 31 Am. Rep. 28, and the statement of principle in Lewis's Case, 96 Ala. 10, 11 South. 259, 38 Am. St. Rep. 75, take account of the principle which, we think, applies to the case at bar.

The facts that defendant knew that deceased slept in the room beneath which the explosive was set off, that their relations were amicable and intimate, that he knew where Mrs. Alf. Gallant and Mrs. Talford slept, across the hallway from the room in which deceased slept, were, of course, considerable by the jury in determining the guilt vel non of the defendant, in determining whether he had part in the act killing his friend, and not physically harming the two women toward whom, the evidence tended to show, he entertained ill will, if not evil purposes.

It is a condition precedent to the admission of evidence of the acts of dogs in trailing human beings that the dogs in question were trained to take the scent of human beings. *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17. While the evidence showing the qualifications of the Lucile dogs was not as full as it might have been, yet we cannot pronounce the reception of the evidence by the court to have been erroneous. Nor is there merit in the insistence of counsel for appellant that a witness was allowed to institute a comparison between the Lucile dogs and others he (the witness) had seen perform. The statement of the witness in this connection went to show his qualification from observation to have and entertain an opinion as to when a dog was trained to track human beings, and did not involve a comparison of the Lucile dogs and others, as was the case on Simpson's trial. 111 Ala. 6, 20 South. 572. The court excluded from the jury by charge the evidence of the acts of the Bessemer dogs.

Evidence of the conduct of the defendant

in coming to, at what hour, and about, the scene of the tragedy, was well admitted. His place of abode was not distant. His kinship or relation to those in the damaged house was to some quite close—to others, more remote. To the deceased he was shown to have been certainly most friendly. Whether he came to the scene promptly after knowledge of the event was a circumstance properly considerable by the jury in determining the issue of his guilt. Whether he appeared nervous, and, if so, whether that indication of excitement or disturbance proceeded from a consciousness of guilt or from the natural impulse such an event would inspire, were matters for admission to and consideration by the jury.

The evidence tending to show that defendant was intoxicated upon the occasion when he was said to have made statements pertinent to the ill will ascribed to him by the evidence for the state was properly admitted as bearing upon his credibility as a witness in the denial by him of the statements attributed to him while so intoxicated.

The extent and character of the injury suffered by Mrs. Charles Gallant was relevant to show the scope and effect of the criminal act producing her husband's death while he slept beside her. The volume of the unlawful force put in motion was a pertinent fact reflecting the criminal purpose and reckless disregard of life to which we have before referred.

Those features of the evidence tending to show a mercenary spirit, on the part of the defendant, in respect of the property left by his father upon his decease—to show his contentions in reference thereto—his acts in that regard, were properly allowed to go to the jury for their consideration in the premises. They may have consisted with righteous motives, but it was the jury's province to find the truth from all the facts and circumstances.

Troy Kennedy was not on trial, though he had been indicted for the offense of which the defendant now stands convicted. Where Kennedy stayed on the night of the tragedy was obviously immaterial when offered to be shown by the defendant. It was not an effort to elicit evidence tending to show that another committed the crime. *McDonald v. State*, 51 South. 629.

We see no error in the refusal to exclude the argument of the solicitor. It but stated his relation to organized society, and his duty in the premises.

No prejudicial error appearing, the judgment is affirmed.

Affirmed.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

ROSENBERG v. CITY OF SELMA.

(Supreme Court of Alabama. April 20, 1910.
On Rehearing, June 30, 1910.)

1. MUNICIPAL CORPORATIONS (§ 641*)—VIOLATION OF MUNICIPAL ORDINANCES—CONVICTION — SUPPORT OF JUDGMENT BY STATE STATUTE.

A conviction for the violation of a municipal ordinance cannot be supported by a state statute not validly appropriated as a rule in the municipality by the authorities thereof, or so expressly enacted by the state as to render its violation a municipal, as distinguished from a state, offense.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1411; Dec. Dig. § 641.*]

2. MUNICIPAL CORPORATIONS (§ 639*)—ORDINANCES — VIOLATIONS—COMPLAINT—SUFFICIENCY.

A complaint charging a violation of a municipal ordinance must allege the substance of the ordinance, its adoption by the municipality, and aver that accused violated it, but it need not set out the ordinance verbatim.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1406-1409; Dec. Dig. § 639.*]

3. MUNICIPAL CORPORATIONS (§ 639*)—ORDINANCES — VIOLATIONS—COMPLAINT—SUFFICIENCY—"CONTRARY TO LAW"—"LAW."

A complaint by a city by its attorney which alleges that accused did the prohibited act "contrary to law" fails to charge a violation of a municipal ordinance; the phrase "contrary to law" having been appropriated by Code 1907, § 7353, to the definition in indictments of violations of statutes, and the word "law," unless otherwise qualified in a penal proceeding presumptively, referring to the common law, in the absence of a statute giving it another meaning.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1406-1409; Dec. Dig. § 639.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1548; vol. 5, pp. 4014-4023; vol. 8, p. 7701.]

On Rehearing.

4. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—STATUTES.

The Municipal Code (Code 1907, § 1213 et seq.), conferring on the recorder, the person authorized to hold municipal court, jurisdiction over misdemeanors committed within the municipality, or within the police jurisdiction thereof, and providing that the limits of the fine shall be the same as the limits imposed by the state for the same offense, and when the state law prescribes for the offense one or more of the punishments conjunctively the punishment by the municipality shall be as prescribed by law, etc., does not make state misdemeanors offenses against a municipality, but municipalities have the same powers as to orderly government secured by the adoption of ordinances as existed before the Code.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Sam Rosenberg was convicted of violating an ordinance of the city of Selma and he appeals. Reversed and remanded.

The complaint was in the following form: "The city of Selma, a municipal corporation

under the laws of the state of Alabama, by its attorney, complains of Sam Rosenberg that within 60 days before the commencement of this prosecution he did sell, offer to sell, keep for sale, or otherwise dispose of spirituous, vinous, or malt liquors contrary to law." The demurrers were that the complaint failed to show or aver or state any offense committed by this defendant against the said city of Selma, a municipal corporation under the laws of the state of Alabama; that it fails to show what ordinance or by-laws of the city of Selma, a municipal corporation have been violated by this defendant; that it fails to set out the by-law or ordinance, or the substance thereof, that has been violated; and other points not necessary to be made.

W. W. Quarles, for appellant. Robert C. Young, for appellee.

McCLELLAN, J. The prosecution in this instance is obviously for a violation of an ordinance of the city of Selma. The adjudication of the defendant's guilt in the recorder's court concludes that the "city of Selma have and recover of the defendant" the fine imposed, and that, if the fine was not presently paid, the defendant should satisfy it by work on the streets of the city of Selma. The complaint filed in the circuit court, on appeal, alleged the claim against the defendant to have been that of the municipality, and the judgment now appealed from is in accord with the preceding proceedings, and is a judgment in favor of the city of Selma.

What jurisdiction the recorder may have under the Municipal Code to try persons accused of violations of state statutes is not material in this instance, since this prosecution was made, and is clearly grounded, on a violation of municipal prohibition, and the basis of this appeal is a judgment of conviction of an offense against that authority only. It need hardly be added that, to justify a conviction in such case, there must be a valid municipal ordinance forbidding the act for the commission of which a defendant is condemned. Such a conviction cannot, of course, be supported by a state statute not validly appropriated as a rule of conduct in the municipality by the governmental authority of the municipality, or so expressly enacted by the state, the source of municipal power and authority, as to render its violation a municipal, as distinguished from a state, offense. *Mayor, etc., v. Allaire*, 14 Ala. 400, 403; *Mayor, etc., v. Flitzpatrick*, 133 Ala. 613, 32 South. 252, among others in each cited. The complaint filed in the city court is defective as pointed out in some of the grounds of the demurrer. The rule for definiteness and certainty in cases of this character is stated in *Goldthwaite v. City of Montgomery*, 50 Ala. 486. The rule does not require that the

ordinance be set out in *hæc verba*. *N. C. & St. L. Ry. v. Alabama City*, 134 Ala. 414, 32 South. 731; *Kenamer v. State*, 150 Ala. 74, 43 South. 482. As interpreted in *Goldthwaite v. City of Montgomery*, *supra*, *Case v. Mobile*, 30 Ala. 538, did not conclude to the point that the ordinance should be set out verbatim in the complaint. Pleading, with us, is not required to be so exact, so definite, so certain, as would be the result of an affirmation that ordinances should be set out in *hæc verba*. The substance of the ordinance, its authoritative ordination as a rule of conduct in the municipality, and that the party charged has violated it meets all the requirements of good pleading. Author, *supra*.

The complaint in this case on appeal omitted both the averment of authorized ordination by the municipality of a prohibition of the sale, etc., of the liquors described in the complaint and the substance of the ordinance assumed to have been violated. The allegation that the act charged was committed "contrary to law" manifestly did not necessarily (though it did merely inferentially) refer the described act to an infraction of a municipal ordinance, rather than to a violation of an inhibition of another authority, viz., the state of Alabama. Occasion was presented in *T. C. I. & R. R. Co. v. Roussell*, 155 Ala. 435, 46 South. 866, 130 Am. St. Rep. 56, to consider the term "law" as employed in the pleading in a civil cause, and, in stating the opinion prevailing here, we noted the exception with respect to its interpretation in pleadings in penal matters as clearly drawn by *Shaw, C. J.*, in *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662. It is that the term "law," unless otherwise qualified, is in penal proceedings presumed to refer to the common law, provided, of course, statute has not given to the term another meaning. By statute (Code 1907, § 7353), the phrase "contrary to law" has been appropriated to the definition in indictments of violation of statutes touching the sale, etc., of prohibited liquors. So far as we are advised, the phrase has not been thought apt or fit in the allegation of a violation of any municipal ordinance. The mere fact that the city of Selma appeared to be the complainant against appellant cannot we think avail to give the expression "contrary to law" a meaning and effect equivalent to an express averment that in doing the act described the appellant violated an ordinance of the city of Selma. With that in this case he must have been clearly charged. Without that unequivocal allegation, the complaint was defective as the demurrer objected. It should have been sustained.

For the error indicated, the judgment is reversed and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

On Rehearing.

After careful consideration of the pertinent provisions of the Municipal Code, particularly those sections creating the office of recorder and providing his jurisdiction and powers (Pol. Code 1907, §§ 1213-1226), and so in connection with the exhaustive briefs of the respective counsel, we find no warrant in the enactment for the asserted, for the appellee, conclusion that misdemeanors, as against state authority, are made by that enactment offenses against municipal authority. In the particulars indicated that enactment does confer on recorders defined jurisdiction in certain criminal (offenses against state authority) matters; but, aside from the unguarded employment of the word "municipality," in section 1222, there is nothing in the enactment evincing any intent to make state misdemeanors offenses against the municipality. The general scheme of jurisdiction and power provided for recorders by the enactment under consideration confirms the view that municipalities were intended to be and were left with the same powers and burdened with the same duties in respect of orderly government, as that may be secured by the adoption of proper ordinances, as was the case before the Municipal Code was enacted. To read the enactment as working such a radical (if permissible) change in municipal government as the appellee insists would not, we think, have been expressed in other than plain language.

The whole prosecution was for violation of a municipal ordinance—the judgments so conclude—and the survival of it must depend upon the ordinary rules of law applicable to such prosecutions.

The rehearing is denied.

FOUST v. BAINS BROS.

(Supreme Court of Alabama. June 16, 1910.)

CHattel Mortgages (§ 17*) — PROPERTY WHICH MAY BE SUBJECT OF MORTGAGE—CROP IN LEASED LAND.

Code 1907, § 4743, provides that when one party furnishes the land and the team to cultivate it and another party furnishes the labor, with stipulation to divide the crop between them in certain proportions, the contract is one of hire. The owner of land contracted with W. to furnish the land and teams, and W. contracted to furnish the labor, the crop to be divided equally between them. *Held*, that the contract created the relation of hiring, and that W. had no interest in the crop which could be the subject of a valid mortgage, although the owner, in response to a statement made by the mortgagee that W. was going to quit his crop unless the mortgagee advanced to him, told the mortgagee to take a mortgage on the crops of W., and the owner also waived his landlord's lien in favor of one from whom the mortgagee pur-

chased one of his mortgages, and the owner also told the mortgagee before he took his mortgage that, if he would advance to W., he, the owner, would see that he got half of the crop, as such statements by the owner did not put the legal title to the crop in W.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 55-58; Dec. Dig. § 17.*]

Appeal from Circuit Court, Blount County; A. H. Alston, Judge.

Action by V. Foust against Bains Bys. From a judgment on a verdict directed for defendants, plaintiff appeals. Affirmed.

T. B. Russell and J. B. Sloan, for appellant. Ward & Weaver, for appellees.

SIMPSON, J. This suit is by the appellant against the appellees in trover and trespass for certain cotton claimed to belong to the plaintiff. The plaintiff's title is based on certain mortgages made by G. W. Wynn on his crop of cotton, corn, etc.

The evidence is without conflict that the cotton in question was raised on the land of Frank Wynn, under a contract by which said Frank Wynn furnished the land and the teams or stock, and G. W. Wynn furnished the labor, and each was to have one-half of the crops raised. Under section 4743 of the Code of 1907, this contract created the relation of hiring, and G. W. Wynn had no interest in the crop which could be the subject of a valid mortgage. The plaintiff undertook to prove title by certain conversations between Frank Wynn and himself, in which he told said Frank Wynn that G. W. Wynn was going to quit his crop unless plaintiff advanced to him, and said Frank Wynn told him to take a mortgage on the crops of G. W. Wynn, that Frank Wynn told G. W. Wynn that any contract he made with plaintiff would be all right with him.

He also introduced a paper signed by Frank Wynn, by which he waived his landlord's lien in favor of one Wittmire, from whom plaintiff purchased one of the mortgages. He also proved by Frank Wynn that he told plaintiff, before he took the mortgage, that, if he would advance to G. W. Wynn, he (Frank Wynn) would see that he got half of the crop. It is evident that, whatever may have been the obligations assumed by Frank Wynn by the various conversations with plaintiff, nothing that was said could operate to put the legal title to the cotton in G. W. Wynn, and he could not make a valid mortgage on that which he did not own.

It results that the court committed no error in giving the general charge in favor of defendants. The judgment of the court is affirmed.

Affirmed.

MCLELLAN, MAYFIELD, and EVANS, JJ., concur.

ORENDORFF v. SUIT et al.

(Supreme Court of Alabama. June 2, 1910.)

1. ACKNOWLEDGMENT (§§ 8, 55, 56*)—CONCLUSIVENESS OF CERTIFICATE.

The taking and certification of an acknowledgment is a judicial function, and when the certifying officer acquires jurisdiction by having the grantor and the instrument to be acknowledged before him, and enters upon the exercise of his jurisdiction, the resulting certificate is conclusive of the truth of all the facts therein stated which the officer is by law authorized to state, until successfully assailed for duress or fraud participated in by the grantee or brought to his notice when parting with the consideration.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 58, 59, 290-302, 315; Dec. Dig. §§ 8, 55, 56.*]

2. ACKNOWLEDGMENT (§ 24*) — CERTIFYING OFFICER—JURISDICTION.

The mere casual presence of a putative grantor and the possession of an instrument purporting to have been signed are not sufficient to confer jurisdiction upon the certifying officer; there must be an acknowledgment in some form by the grantor of the instrument signed.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 24.*]

3. ACKNOWLEDGMENT (§ 62*)—CERTIFICATE—HOW IMPEACHED.

Much weight is to be accorded to an official certificate of acknowledgment, and it may be impeached only by clear and convincing proof of its falsity.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 346, 347; Dec. Dig. § 62.*]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit to foreclose a mortgage by Eliza A. Orendorff against W. R. Suit and others. Decree for defendants, and plaintiff appeals. Affirmed.

F. E. St. John, for appellant. Wert & Lynne, for appellees.

SAYRE, J. Appellant filed her bill to foreclose a mortgage. The mortgaged property constituted the homestead of the mortgagees, and notwithstanding the mortgage purported to have been signed and acknowledged by the wife in due form appellees defended on the ground—along with another which need not be considered—that the mortgage had not in fact been executed or acknowledged by the wife as required by the statute in such cases.

It is the settled law of this jurisdiction that the taking and certification of an acknowledgment is a judicial function, and when the certifying officer acquires jurisdiction by having the grantor and the instrument to be acknowledged before him, and enters upon the exercise of his jurisdiction, the resulting certificate is conclusive of the truth of all those facts therein stated which the officer is by law authorized to state, until successfully assailed for duress or fraud participated in by the grantee or brought to his notice when parting with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the consideration. *Grider v. Mortgage Company*, 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58; *Giddens v. Bolling*, 99 Ala. 319, 13 South. 511; *Mortgage Company v. James*, 105 Ala. 347, 16 South. 887; *Jinwright v. Nelson*, 105 Ala. 399, 17 South. 91; *Cheney v. Nathan*, 110 Ala. 254, 20 South. 99, 55 Am. St. Rep. 26; *Thompson v. Mortgage Company*, 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29. The mere casual presence of a putative grantor and the possession of an instrument purporting to have been signed are not sufficient to confer jurisdiction. There must be an acknowledgment in some form by the grantor of the instrument signed. Much weight is to be accorded to an official certificate of acknowledgment, and it may be impeached only by clear and convincing proof of its falsity. *Barnett v. Proskauer*, 62 Ala. 486.

On consideration of the evidence the chancellor was of opinion, and so decreed, that the alleged mortgage had not been signed by the wife, nor had it been acknowledged by her as required by law. We do not deem it necessary to discuss the evidence. After considering the decided cases which we have noted above, and after reading the evidence in consultation, this court thinks that the chancellor's decree should not be disturbed. It is accordingly so ordered.

Affirmed.

SIMPSON, ANDERSON, and MAYFIELD,
JJ., concur.

LOLLAR v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. WITNESSES (§ 236*)—EXAMINATION—PRELIMINARY QUESTIONS.

The question as to witness having been before the grand jury in the case on trial having been merely for the purpose of identifying the occurrence as to which he was about to testify with that on which the indictment was based, its allowance was not error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 818; Dec. Dig. § 236.*]

2. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR.

Overruling objection to the part of witness' answer that defendant was cursing and swearing was harmless; the conclusion that defendant was doing so, though not for witness to draw, being justified by the specific words that witness testified to defendant having used, and it not being developed by cross-examination, so as to afford a basis for motion to exclude, that such conclusion of witness had reference to other language of defendant which witness was unable to reproduce.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

3. DRUNKARDS (§ 10*)—OFFENSES—MANIFESTATION IN PUBLIC PLACES.

Under Code 1907, § 6770, declaring a punishment for one who, while intoxicated, appears in a public place, where others are present, and manifests a drunken condition by boisterous or

indecent conduct, or loud and profane discourse, such a condition may be manifested in the prohibited method, though the language used be caused by anger.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

Appeal from Law and Equity Court, Walker County; A. F. Fite, Special Judge.

Isaac Lollar was convicted of a violation of Code 1907, § 6770, and appeals. Affirmed.

Leith & Gunn, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. The question put to the witness Windham as to his having been before the grand jury in the case on trial was merely for the purpose of identifying the occurrence as to which he was about to testify with that upon which the indictment was based, and there was no error in its allowance.

As showing the profane discourse, necessary under the indictment to be shown as manifesting a drunken condition, the witness was allowed to state that the defendant was cursing and swearing. The objection taken to this ruling is that the witness deposed to nothing more than his opinion. *Jackson v. State*, 137 Ala. 80, 34 South. 611, is cited. In that case the defendant was indicted for using abusive or insulting language in the presence of a woman. A witness was allowed to testify that the defendant did use abusive or insulting language. This court said that whether the defendant used abusive or insulting language was a fact in issue, the issue the jury was called to try and decide. It was said that "the witness had already testified that he did not remember the language used; non constat, if he had remembered and repeated the language, it might have been shown that what in the opinion of the witness was an abusive or insulting epithet was not in fact such." In *Linnehan v. State*, 116 Ala. 471, 22 South. 662, in which the defendant was charged with murder, it was held that a question asking a witness whether she heard the defendant call the deceased hard names was proper, as calling for the statement of a collective fact, subject to cross-examination as to the facts on which the statement or inference was based. But it was said that the answer should have been excluded when it further appeared that the witness did not know what the defendant had said in calling the deceased hard names.

In the case under consideration the witness on direct examination, and in response to a question requiring him to state what he saw defendant do and what he heard defendant say on the occasion in issue, testified: "I do not remember the words he used. He was mad at some one, and my recollection is that he said 'God damn him, I am going to whip him.' He was cursing

and swearing and staggering." Defendant objected to so much of the answer as stated that he was cursing and swearing as the mere conclusion of the witness. It appeared from the testimony of the witness that he had at least a partial recollection of the words used by the defendant, and that the specific language deposed to justified the conclusion stated, although it was not for the witness to draw it. If it was apprehended that the testimony to which objection was taken would be accepted by the jury as a statement of the general effect of other language which the witness was unable to reproduce, a cross-examination developing that fact would have afforded a basis for a timely motion to exclude. As it is, we are unable to say that there was prejudicial error calling for the reversal of this case.

Charges asserting that if the language used by the defendant was used as the result of anger, and not of drunkenness, the defendant must be acquitted, were refused without error. The statute (Code 1907, § 6770) is aimed at drunkenness in public places only when that drunkenness is manifested by boisterous or indecent conduct, or loud and profane discourse, and thus the method of manifestation is made an essential element of the offense; but the language used may have manifested the defendant's drunken condition, although caused by anger.

We find no error.

Affirmed.

SIMPSON, MCLELLAN, and MAYFIELD, JJ., concur.

PHILLIPS v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF OFFENSE INCLUDED IN CHARGE—GRAND LARCENY—LARCENY FROM STOREHOUSE—PETIT LARCENY.

Under an indictment for grand larceny, or for larceny from a storehouse, which by Code 1907, § 7324, is made a felony, if the value stolen is \$5 or more, the defendant may be convicted of petit larceny as an included offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 594; Dec. Dig. § 189.*]

2. CRIMINAL LAW (§ 1173*)—APPEAL—PREJUDICE.

Where, under an indictment for grand larceny, accused was convicted of petit larceny only, he was not harmed by the court's refusal to charge on grand larceny.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3166; Dec. Dig. § 1173.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Stanford Phillips was indicted for petit larceny, and he appeals. Affirmed.

Pinkney Scott, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was indicted for larceny; the first count charging grand larceny in general terms, and the second charging grand larceny, setting out a number of articles of drugs stolen, aggregating enough to make grand larceny.

The charges requested by the defendant and refused are all to the effect that the defendant could not be convicted at all unless the evidence showed that he was guilty of grand larceny, or that he could not be convicted of grand larceny. Our decisions are clear to the point that, under an indictment for grand larceny, a party may be convicted of petit larceny. *Morris v. State*, 97 Ala. 82, 12 South. 276. As the verdict in this case was for petit larceny only, no injury could occur to the plaintiff from the refusal to charge on the subject of grand larceny. *Mitchell v. State*, 133 Ala. 65, 32 South. 132; *Williams v. State*, 140 Ala. 10, 37 South. 228.

Neither count charges the statutory offense of stealing from a "storehouse, etc." Code 1907, § 7324. Hence the charges which seem to have reference to that offense are inapposite, and the cases of *Stone v. State*, 115 Ala. 121, 20 South. 275, and *State v. McFarland*, 121 Ala. 45, 48, 25 South. 625, are not applicable. Moreover, this court has held that, since the amendment to the statute making the stealing from a "storehouse, etc.," grand larceny only when the value is of \$5 or more, the defendant may, under an indictment charging grand larceny from a storehouse, be convicted of the lesser offense of petit larceny. *Storrs v. State*, 129 Ala. 101, 103, 29 South. 778.

There being no error apparent on the record, the judgment of the court is affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

BLAKENEY v. DU BOSE.

(Supreme Court of Alabama. April 21, 1910.)

1. WILLS (§ 483*)—CONSTRUCTION—TIME OF TAKING EFFECT.

A will speaks only from the death of testator, and must be construed as of that time without reference to consequences resulting from subsequent events probably not foreseen at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1014; Dec. Dig. § 483.*]

2. WILLS (§ 634*)—CONSTRUCTION—ESTATES DEVEISED—VESTED AND CONTINGENT REMAINDERS.

Testator gave a half of described real estate to his wife for life and the other half in trust for the lives of his only son and his wife, and the remainder of the whole to his grandchildren. He gave a half of his residuary estate to his wife and the other half to the trustee, and provided that, on the death of the wife, the trustee should take possession of the property devised to her, and hold it as a part of the trust estate,

and, on the death of his son and wife, the property should go to the grandchildren. *Held*, that the wife and trustee for the son took a life estate, and there was a vested remainder in the grandchildren living at testator's death and a contingent remainder operating under Code 1852, § 1301, as an executory devise in favor of grandchildren born after testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. TENANCY IN COMMON (§ 55*)—ACTION FOR POSSESSION OF PROPERTY—SUIT BY TENANT IN COMMON.

A tenant in common may recover the whole estate from a stranger in possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 147; Dec. Dig. § 55.*]

4. WILLS (§ 578*)—DISPOSITION OF SUBSEQUENTLY ACQUIRED PROPERTY—STATUTES.

Under Code 1852, §§ 1591, 1592, 1604 (Code 1907, §§ 6154, 6155, 6165), providing that every devise of testator in express terms of all his real estate shall be construed to pass all the real estate he was entitled to devise at the time of his death, etc., a will devising all of testator's real estate includes real estate acquired after the execution of the will and seized by him at the time of his death, and such after-acquired property passes in accordance with the terms of the will, and it is not necessary to have a residuary clause in the will to pass after-acquired property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1258-1265; Dec. Dig. § 578.*]

5. WILLS (§ 588*)—CONSTRUCTION—RESIDUARY LEGATEES.

An express devise of all the real estate of testator to his grandchildren after the death of life tenants is not a devise to the grandchildren as residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1280; Dec. Dig. § 588.*]

6. WILLS (§ 688*)—CONSTRUCTION—ESTATES DEVISED.

Where, under a will, testator's wife took a life estate in a half of his property, and a trustee took the other half for the use of a son and his wife during their lives, and grandchildren living at testator's death took a vested remainder in the whole, and after-born grandchildren a contingent remainder, operating by way of an executory devise, the inability of the trustee to hold the property in trust did not affect the rights of the beneficiaries, and, on the inability of the trustee to hold the estate, the life estate of the trustee passed to testator's son, and no trustee was necessary to support the estates of the grandchildren.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1644-1649; Dec. Dig. § 688.*]

7. TRUSTS (§ 160*)—FAILURE FOR LACK OF TRUSTEE.

A trust will not be permitted to fail for lack of a trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 204; Dec. Dig. § 160.*]

8. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION AS AGAINST REMAINDERMAN—REGISTRATION.

Where a will creating a life estate with a vested and contingent remainder in fee was recorded before five years' possession by the life tenant as required by Code 1852, § 1290 (Code 1907, § 8385), no act of the life tenant allowing adverse possession could, in view of section 1805, defeat the interest of the remaindermen.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

9. WILLS (§ 420*)—RECORD OF WILL AS NOTICE.

Under Code 1852, § 1822, providing that the recording of an instrument declaring a trust is notice to the world of the terms thereof, the recording of a will creating a trust is notice of its terms.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 903; Dec. Dig. § 420.*]

10. REMAINDERS (§ 17*)—RUNNING OF LIMITATIONS.

Where beneficiaries under a will had a vested remainder or a contingent remainder operating by way of an executory devise, after the death of a life tenant, limitations did not begin to run as against the beneficiaries until the death of the life tenant.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 16; Dec. Dig. § 17; Limitation of Actions, Cent. Dig. § 231.]

11. WILLS (§ 529*)—CONSTRUCTION—SHARES OF MEMBERS OF CLASS.

Testator gave half of his property to his wife for life and a half to a trustee for the use of a son and his wife, and provided that, on the death of the wife and the son and his wife, the trustee should deliver to the grandchildren the property so as to make a division thereof as nearly equal as possible. *Held*, that the grandchildren shared equally in testator's property after the death of the wife, son, and his wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1142; Dec. Dig. § 529.*]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Ejectment by Jones L. Blakeney against S. B. Du Bose. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Abrahams & Taylor, for appellant. William Cuninghame and Pettus, Jeffries & Pettus, for appellee.

MAYFIELD, J. This is an action of ejectment.

Plaintiff (appellant here) claims title as remainderman and devisee under the will of his grandfather, John Blakeney, who is indisputably shown to have been seised and possessed of the lands at the time of his death, viz., in 1862; his right of possession being thereby conditioned upon the deaths of three life tenants, his grandmother, Polly Blakeney, his father, Robert Blakeney, and his stepmother, Nancy Blakeney, the last of whom to die was his father, who departed this life May 4, 1908. Nancy Blakeney died before the testator. The defendant (appellee here) claimed title as a purchaser and by adverse possession for more than 10 years, but claims as a stranger to and not under or through the testator, John Blakeney, or his privies. The defendant or those through whom he claims had been in possession for more than 10 years before the bringing of the suit. The court gave the general affirmative charge for defendant, and plaintiff appeals, insisting that the general affirmative charge should have been given for him.

The only questions of law upon which the rights of the parties to this record depend

are: First. Did this property pass under the will of John Blakeney? Second. Did plaintiff take under that will as a remainderman? Third. Was his right of possession postponed until the 4th day of May, 1908, so that the statute of limitations of 10 years does not bar his action? All of these may be reduced to one—Was defendant's possession, or that of those under whom he claims, adverse to plaintiff? This question can and must be answered alone upon a proper construction of the will of John Blakeney, who is conclusively shown to have been the owner at his death in 1862. This property was not specifically mentioned in the will as was other property, both real and personal, for the reason that the testator did not own this land at the making of the will; but subsequently he sold that devised, and purchased this, which he owned at his death. The property mentioned in the will, real and personal, was given one half to Polly, the wife of the testator and grandmother of plaintiff, for her life only, and the other half was given in trust during the lives and to the survivor of Robert and Nancy Blakeney, the only son, and daughter-in-law of the testator, said Robert being the father of plaintiff, and the remainder of the whole was devised to testator's grandchildren, the children of Robert, his only son or child. While the will is unusually lengthy, this, we think, is clearly the intent and meaning of the testator. Polly survived the testator, and died a few years after the War. Nancy, the daughter-in-law, died before the testator, and Robert married again. The plaintiff is a son of the second wife of Robert, and was born in 1868, four years after the death of the testator, but before the falling in or termination of either of the life estates. There were, however, grandchildren living at the death of the testator. The death of the survivor of the life tenants was the date which determined the grandchildren who should take under the will.

The will contained a residuary clause, which is as follows:

"The residue of my property (if any) is to be divided into equal parts, one half to go to my said wife and the other half to my said trustees to be held as a portion of the trust estate. If, however, the said residue or any portion thereof consists of money, the whole of it is to go to my wife."

The tenth and twelfth clauses of the will are as follows:

"10th. I hereby declare it to be my desire in bequeathing and devising the property in the foregoing items to protect my son and his wife and his children against any act of imprudence on his part and also and accident which may befall him hereafter."

"12th. After the termination of the life estate of my wife in the property before bequeathed & devise to her. It is my will and the trustee then to be appointed by my said son and his wife, is hereby directed to take

possession of the same (Real and Personal) and to hold and use and employ the same as a portion of the trust estate created in item nine of this my will, and upon the death of my said son and his wife, the same is to be equally divided among the children of my said son—provided however any other child or children shall be born to my said son, I hereby direct, said trustee out of the negroes or their increase in this item mentioned (after the death of my wife and before the division among my grandchildren) to give and deliver to such child or children which may hereafter be born each a negro about equal in value to the average value to the negroes specifically given to my Grandchildren. So as to make the final division of my property among my Grandchildren as nearly equal as possible."

Wills speak only from the death of the testator, and must be construed as they would have been construed at the moment of death, and without regard to the consequences resulting from subsequent events, which were probably not foreseen or anticipated at the making of the will. *Taylor v. Harwell*, 65 Ala. 1. We therefore conclude that from the whole will it clearly appears that it was the testator's intention to give one-half of all his real property to his wife, Polly, for life only, to create a trust in the other half of his real estate for Robert H. Blakeney and his family, during the life of said son, provided said Robert survived his wife, Nancy, and for and during the life of Robert if his wife Nancy survived him; that, if said Nancy survived Robert, she was to have said one-half for the support of herself and children during her life; that, after the termination of these life estates in said real estate, all of the real estate should go to the children of Robert who were living at the death of the testator and at the death of said Robert, and any who had lived between the death of the testator and the death of Robert; that after the death of Robert H. Blakeney, and not until then, the property was to be divided equally between the testator's grandchildren, the children of Robert. Under the provisions of the will Polly and the trustee for Robert took life estates in all the testator's real property, with a vested remainder in the testator's grandchildren in esse at testator's death, in possession, only after the deaths of Polly and Robert, which remainder would open up to let in after-born children of Robert as they should or might come in esse. *Gindrat v. Western Railway of Ala.*, 96 Ala. 162, 11 South. 372, 19 L. R. A. 839; *Smaw v. Young*, 109 Ala. 533, 20 South. 370; *Watson v. Williamson*, 129 Ala. 362, 30 South. 281; *Findley v. Hill*, 133 Ala. 229, 32 South. 497; *Acree v. Dabney*, 133 Ala. 437, 32 South. 127. Under the evidence in this case, the estate became vested in the youngest child of Robert in the year 1870. The will was executed in 1856, and is governed by the Code of 1852.

The interest of the plaintiff and of such children as were not in esse at testator's death was contingent, but under the law they took, while not in esse, by way of executory devise. Code 1852, § 1301. It therefore follows that life estates or interests in these particular lands were by the will of John Blakeney granted to his wife, his son, and his son's wife, during their lives, and to the survivor, with remainder to the children of Robert. All the life tenants being dead, and the survivor having died less than a year before suit was brought by the remainderman, it follows that plaintiff was entitled to recover. We do not now attempt to decide the respective interest which the plaintiff or the other grandchildren or their descendants will take under this will, as that is not before us. It appears that there are other grandchildren who take as tenants in common with plaintiff; but as against this defendant, under the facts of this case, the plaintiff was entitled to recover the whole, and the court erred in giving the affirmative for defendant.

If there could be any doubt as to the foregoing conclusions, we think they are made certain by the following statutes and for the following reasons: Section 1592 of the Code of 1852 (Code 1907, § 6155) provides: "Every devise made by a testator in express terms of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise, at the time of his death." Section 1604 of the Code of 1852 (Code 1907, § 6165) provides: "When any testator, after having executed a will devising any real property, afterwards makes a conveyance of his interest, and acquires a new estate therein, such new estate passes by his will to the person to whom the original estate or interest was devised; unless it appears from the will, or the instrument conveying the estate, or by which the new estate was acquired, that the testator intended such conveyance to operate as a revocation." Section 1591 of the Code of 1852 (Code 1907, § 6154) reads thus: "Any estate, or interest in real property, devised to a person, or corporation incapable of taking, descends to the nearest of kin capable of taking; or if he have no heirs competent to take, to the residuary devisee, if any are named in the will capable of holding such estate or interests; otherwise, to the husband or wife; otherwise to the state." Prior to the statute of 1837, a testator could only devise lands of which he was seised or owned at the date of his will; and if he made a will and devised certain real estate and afterwards conveyed it away, and acquired other such property, such other lands or new interests did not pass by the will, but passed as in case of intestacy. This rule is now changed by statute. So now, when it has been ascertained that a testator has

devised all of his real estate, by virtue of the statute the will passes all the lands owned by him at his death, according to its terms, just as it before passed the estate owned at the date of making his will. 1 Jar. Wills (5th Am. Ed.) p. 608; *Johnson v. Holifield*, 82 Ala. 129, 2 South. 753; *Kelly v. Richardson*, 100 Ala. 596, 597, 13 South. 785. "A will conveys all the property owned by the testator at his death, although between the execution of the will and the death of the testator, the property has wholly changed." *Succession of Marks*, 35 La. Ann. 1054; 49 Cent. Dig. § 1012, p. 1121. "A will must be held to speak from testator's death, and whatever estate he then possessed must be held to pass according to its terms." *Henderson v. Ryan*, 27 Tex. 670; 49 Cent. Dig. § 1009, p. 1119 et seq. Here there is an express devise of all the real estate to the grandchildren of the testator after the deaths of the life tenants, and they do not take as mere residuary legatees. *Maybury et al. v. Grady et al.*, 67 Ala. 153. By force of the statute (Code 1852, § 1592) all the real estate owned at testator's death went one half to his wife individually for life, and the other half went to her, as trustee, for the use of Robert H. Blakeney and his wife during their lives, and a vested remainder in the whole of it to the children of Robert who were living at the death of the testator, and a contingent remainder in the whole of it, operating by way of executory devises, to any after-born children of Robert H. Blakeney. And, even if the wife was incapable of holding said one-half in trust, the beneficial estate granted to Robert remained, and Robert took a life estate in said one-half and his children the remainder, and the devise did not lapse; and, if any estate or interest lapsed, it was only the life estate of the trustee, and it passed to said Robert, and not the fee, for that had been devised to the grandchildren by way of vested remainders and executory devises, and no trustee was necessary to support their estates. *Gindrat v. Western Railway of Alabama*, 96 Ala. 165-168, 11 South. 372, 19 L. R. A. 839. And, again, "it is a maxim of equity that no trust can be permitted to fail for lack of a trustee, and courts of equity have full authority to supply any lack of this character." *Whitehead v. Whitehead*, 142 Ala. 165, 37 South. 929. The will was properly recorded before five years' possession by the life tenants. Code 1852, § 1290 (Code 1907, § 3385); *Sheridan v. Schimpf*, 120 Ala. 475, 24 South. 940. No acts of the life tenants allowing adverse possession could defeat the remainders in this case. Code 1852, § 1305. Recording of the trust will was notice to the world of the terms of the trust. Code 1852, § 1322; *Sheridan v. Schimpf*, supra; *Marx v. Clisby*, 128 Ala. 114, 28 South. 388. The children of Robert H. Blakeney being vested remaindermen and

contingent remaindermen by way of executory devises from and after the death of John Blakeney, the testator, there was never a moment of time during the period from the testator's death in 1862 until the death of Robert H. Blakeney in May, 1908, when the statute of limitations could begin to run. *Gindrat v. Western Railway of Alabama*, 90 Ala. 165-168, 11 South. 372, 19 L. R. A. 839; *Lecroix v. Malone*, 157 Ala. 434, 47 South. 725; *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *Pope v. Pickett*, 65 Ala. 487; *Pickett v. Pope*, 74 Ala. 122; *Bass v. Bass*, 88 Ala. 408, 7 South. 243; *Findley v. Hill*, 133 Ala. 229, 32 South. 497; *McMichael v. Craig*, 105 Ala. 382, 16 South. 883; *Robinson v. Allison*, 124 Ala. 325, 27 South. 461; *Washington, Adm'r, v. Norwood*, 128 Ala. 383, 30 South. 405; *Stiff v. Cobb*, 126 Ala. 387, 28 South. 402, 85 Am. St. Rep. 38; 20 Amer. & Eng. Ency. Law (1st Ed.) pp. 913-914.

In this case, by virtue of the statutes, the after-acquired property passes under the specific devises as well as under the residuary devises, and it is not necessary to have a residuary clause in will in order to pass after-acquired property. The devisees being the same identical persons in both the specific clauses and the residuary clause, and the testator's intention being clear to devise the fee in all his real estate to the children of Robert, the fee to this after-acquired real property passed to the plaintiff and other children of Robert H. Blakeney. It is clear from the entire will that the testator intended all his real estate to go to his grandchildren, share and share alike, after the deaths of Polly, Robert, and Robert's wife, the residuary devisees as well as the specific, for in the twelfth clause of the will occurs the following: "Upon the death of my said son and his wife, the same is to be equally divided among the children of my said son, provided, etc. (giving after-born children a negro apiece) so as to make the final division of my property among my grandchildren as nearly equal as possible." He does not say, division of property "devised in the foregoing items," as he does in clause 10 and other clauses of the will, but refers to the division finally of all his property devised in the entire will.

The plaintiff was entitled to the affirmative charge as requested.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

McWHORTER v. LOWNDES COUNTY.

(Supreme Court of Alabama. June 7, 1910.)

STATUTES (§ 76*) — GENERAL AND SPECIAL ACTS—LOCAL ACTS—VALIDITY.

Owing to the previous existence of Gen. Acts 1903, pp. 307, 414, conferring authority

upon the county commissioners to levy special taxes for the construction of public roads, etc., the act (Loc. Acts 1907, p. 684), being a local act and providing for the same thing, is unconstitutional as being contrary to Const. 1901, § 105, providing that no local law, except a law fixing the time for holding courts, shall be enacted in any case which is provided for by general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78; Dec. Dig. § 76.*]

Appeal from Circuit Court, Lowndes County; J. C. Richardson, Judge.

Action by R. S. McWhorter against Lowndes County. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Tyson, Wilson & Martin, for appellant. R. L. Goldsmith and A. Scott Sayre, for appellee.

EVANS, J. This is a suit by R. S. McWhorter against Lowndes county to recover certain moneys paid by said R. S. McWhorter to the tax collector of Lowndes county during the years 1908 and 1909, by virtue of an assessment made under the provisions of an act entitled "An act for the improvement of the public roads of Lowndes county," approved August 2, 1907. See Loc. Acts 1907, p. 684.

The contention of the plaintiff below, appellant here, is that the act above mentioned is unconstitutional and void, for the reason that the said statute is a local one, and that at the time of its passage there were two general laws conferring authority upon the court of county commissioners or other governing body of like jurisdiction, to levy and collect special taxes for the erection, construction, or maintenance of public buildings, bridges, or roads, not to exceed one-fourth of 1 per cent. to be applied exclusively for the purposes for which they are so levied, collected, etc. (Gen. Acts 1903, pp. 307 and 414); and that such general laws being in existence at the time of the passage of the local law assailed, and conferring jurisdiction upon the board of revenue of Lowndes county to levy the tax that was levied under the legislative act under consideration; that said local act was in violation of section 105 of the Constitution, which provides that "No special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the Legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

The constitutionality of the act in question has already been passed upon by this court in the case of *Joseph Norwood v. Robert L.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Goldsmith, as treasurer of Lowndes county (recently handed down) 50 South. 394. It was held to be unconstitutional and void, as violative of said section 105 of the Constitution.

The above question being the only one raised by the assignment of error and the argument of counsel, upon the authority of said case of *Norwood v. Goldsmith*, the said local act, under and by virtue of which the assessment and collection of the tax here in question was made, is held to be unconstitutional and void. We therefore hold that the trial court erred in giving the affirmative charge asked by defendant, and in refusing to give the affirmative charge requested by plaintiff.

Reversed and remanded.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

DAVIDSON v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for homicide, it was error to refuse to charge that if, on consideration of all the evidence, the jury had a reasonable doubt of defendant's guilt, arising out of any part of the testimony, they should find him not guilty.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Griffin Davidson was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Leith & Gunn and L. D. Gray, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. This case must be reversed for the refusal of the trial court to give charge H as it was requested by the defendant. The charge was: "The court charges the jury that if, upon consideration of all the evidence, they have a reasonable doubt of defendant's guilt, arising out of any part of the testimony, they must find the defendant not guilty." This charge has time and again been held proper, and many cases have been reversed by this court because it was refused at the request of the defendant. As has been often decided by this court, it asserts a correct legal proposition, and of necessity is apt in most, if not in all, criminal trials, and could hardly be abstract in any criminal case.

As was pointed out by Chief Justice Stone, in *Hurd's Case*, 94 Ala. 100, 10 South. 528 (the first, so far as we are aware, that was reversed for the refusal of this charge), the charge does not single out a part of the evidence and request a verdict upon that part. It hypothesizes a consideration of all the

evidence, and a failure of all to produce conviction of guilt. If the jury entertain a reasonable doubt of the defendant's guilt, after considering all the evidence, it is their duty to acquit, though the doubt arises from a part only of the evidence. "It is certainly the duty of the jury, in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. This does not mean that all, or any part of it, shall be believed. The law exacts no such rule as that. It must be considered, and given such weight as the manner of giving it in its intrinsic nature and the other testimony in the cause entitle it to. This much, and nothing more. This the jury must and will do, as the only way of performing their highest, sworn duty of rendering a true verdict according to the evidence." *Hurd v. State*, 94 Ala. 101, 10 South. 528. *Hurd's Case* has been followed and reaffirmed in many cases, among which may be cited the following: *Walker's Case*, 117 Ala. 55, 23 South. 149; *Riddle v. Webb*, 110 Ala. 604, 18 South. 323; *Miller v. State*, 107 Ala. 58, 19 South. 37; *Prince v. State*, 100 Ala. 146, 14 South. 409, 46 Am. St. Rep. 28; *Forney v. State*, 98 Ala. 21, 13 South. 540; *Williams v. State*, 129 Ala. 659, 30 South. 910; *Hale v. State*, 122 Ala. 85, 26 South. 236.

The other charges refused to defendant were properly refused. Some were argumentative, some requested a verdict based upon a part of the evidence only, some invaded the province of the jury, some were abstract, some were in bad form, some did not state any correct proposition of law, and some had duplicates among the given charges requested by defendant.

As the case must be reversed on account of charge H, and as the other questions may not arise on another trial, it would subserve no useful purpose to discuss them in this opinion.

Reversed and remanded.

SIMPSON, McCLELLAN, and EVANS, JJ., concur.

SLOSS-SHEFFIELD STEEL & IRON CO. v. MARYLAND CASUALTY CO.

(Supreme Court of Alabama. June 9, 1910.)

1. DISCOVERY (§ 19*)—BILL—RIGHT TO RELIEF.

A bill by a casualty company alleging that it had a liability insurance contract with defendant corporation, the premiums of which were based on the number of defendant's employes, and providing that complainant should be entitled at all reasonable times to inspect defendant's books, so far as they related to the number of employes and the amount of wages paid, and that, if the wages actually paid during the insurance term exceeded the sum stated in the estimate, insured would pay the additional premiums earned by reason of the excess, that it had applied to defendant for an inspection

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of its books, which had been refused, and prayed an order for discovery and an accounting to ascertain the premiums due, sufficiently showed that complainant had no adequate remedy at law, and was not demurrable for want of equity.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26; Dec. Dig. § 19.*]

2. EQUITY (§ 313*)—BILL—QUALIFICATION.

Where a bill prayed for discovery and an accounting to ascertain the premiums to be paid on an employer's liability policy, it was not for discovery only, and was, therefore, not required to be sworn to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 614, 615, 620; Dec. Dig. § 313.*]

3. EQUITY (§ 41*)—DISMISSAL—FAILURE OF DISCOVERY—WANT OF EQUITY.

Discovery cannot be used as a mere pretext for bringing a common-law action in a court of chancery, and, if the discovery in such a case fails, the suit should be dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.*]

4. DISCOVERY (§ 3*)—EQUITY JURISDICTION—STATUTORY DISCOVERY.

Chancery jurisdiction of discovery is not affected by the statutory discovery by interrogatories to the adverse party; the remedies being cumulative.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

5. DISCOVERY (§ 8*)—EXAMINATION OF ADVERSE PARTY—SCOPE.

In a proceeding for discovery, a party may not be compelled to furnish against himself testimony tending to convict him of a violation of the criminal law, or to subject him to a penalty or forfeiture, nor to testify to communications between him and his attorney relating to the matters in suit; nor can a public officer be compelled to testify to facts, publication of which would be prejudicial to the community, but with these exceptions, the party may be compelled to discover on oath every fact and circumstance within his knowledge, information, or belief relating to the issues, and to produce and allow his adversary to inspect and copy every document in his possession material to the adversary's case.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 8, 9, 11, 12, 13; Dec. Dig. § 8.*]

6. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS—ACTIONS—PLEADING—COMPLIANCE WITH STATE LAWS.

An allegation in a foreign corporation's bill that at the time of making the contract in question, and continuously since that time, and at the filing of the suit, it had been duly qualified to transact business in Alabama in accordance with the statutes of that state prescribing the conditions on which a foreign corporation might do business therein, sufficiently alleged that complainant had complied with the Alabama laws as to the right of foreign corporations to do business there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by the Maryland Casualty Company against the Sloss-Sheffield Steel & Iron Company. From an order overruling demurrers to the bill, defendant appeals. Affirmed.

Tillman, Bradley & Morrow, for appellant. Weatherly & Stokely, for appellee.

MAYFIELD, J. Appellee, a casualty insurance company, had a contract of insurance with the appellant by which it insured appellant against loss or liability to its employes, and the premiums of these insurance policies were based upon the number of employes engaged by appellant; and by which it was provided that appellee insurance company should have the right at all reasonable times to inspect the books of the appellant corporation, so far as they related to the number of the employes and to the wages paid. Said contract contained also the provision "that, if the wages actually paid during said period should exceed the sum stated in said estimate, the assured should pay the additional premium earned by reason of such excess." The bill is to obtain and require an inspection of the books of appellant company in so far as they relate to the wages of its employes covered by the contracts of insurance, and an order for an accounting to ascertain the premiums to be paid under the contracts of insurance, in accordance with the provisions of the insurance policies. The bill alleges a failure and refusal on the part of respondent to comply with the contract, as to the inspection of the books, and other provisions. The respondent demurred to the bill, assigning various grounds. The court overruled the demurrers, and from that decree this appeal is prosecuted.

The bill certainly contains equity; no other adequate relief is availing. The information necessary to the stating of the account is exclusively with respondent, and can be had in no other way than by the production of its books, which it contracted to produce for inspection, and which are shown to be the sole repository of the information necessary to state the account, or to ascertain the exact amount of the premiums due. The bill is not one for discovery only, and therefore it was not necessary that it be sworn to. *Bromberg v. Bates*, 98 Ala. 629, 18 South. 557.

It was said by Chief Justice Marshall, in the case of *Russell v. Clark*, 7 Cranch, 69, 3 L. Ed. 271: "That if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy." But this rule is of course subject to the limitation that the discovery cannot be used as a mere pretext for bringing a common-law action in a court of chancery; and if the discovery falls the suit should be dismissed. This court has spoken as follows with regard to this rule: "While the foregoing has been distinctively called the Ameri-

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can doctrine, the best-considered cases do not regard discovery as the independent source of equitable jurisdiction to grant relief, in respect to a matter of purely legal cognizance, in a suit for discovery and relief. In such suit, the discovery is incidental, and may be the occasion for the exercise of the jurisdiction." *Va. & Ala., etc., Co. v. Hale*, 93 Ala. 545, 9 South. 256.

Mr. Pomeroy, speaking of the same rule, which he calls the American doctrine, says: "The so-called American doctrine concerning the effect of discovery upon the equitable jurisdiction is thus practically as follows: Whenever in a controversy purely legal, depending upon legal interests and primary rights of the plaintiff, and seeking to obtain final reliefs which are wholly legal, the plaintiff prays for a discovery as a preliminary relief, and alleges and proves that such discovery is absolutely essential to the maintenance of his contention—that he is utterly unable to establish the issues on his part by testimony of witnesses, or by any other kind of evidence admissible in courts of law—so that an action at law is utterly impracticable, then the court of equity, having jurisdiction of such a case to compel a discovery, acquires a jurisdiction over it for all purposes, and may go on and determine all the issues, and decree full and final relief, although the relief, so given is of the same kind as that granted by the courts of law in similar controversies."

The jurisdiction of chancery for discovery is not affected by the statutory discovery by interrogatories to the adverse party; that remedy is only cumulative.

It seems that the real source of equity jurisdiction, in cases like this, is the inadequacy of legal remedies when discovery or production and examination of books is necessary.

The following quoted maxims and propositions tend to show the equity of the bill under our chancery practice: The common law laid down as a maxim "*Nemo tenetur armare adversarium suum contra se*;" in furtherance of which principle it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause. Best on Evidence, § 624; 1 Greenleaf on Evidence, § 329. A different rule grew up in equity. The defendant there was obliged to answer under oath the allegations of the bill, and might be compelled to produce for inspection by the plaintiff documents that were in the defendant's possession and control and were material to the issues involved in the suit. In such cases the discovery was inci-

dent to the equitable relief sought. But it was not limited to the issues arising in suits in equity. "Many cases existed in which the plaintiff had a legal title, or legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence, there was a failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law." *Bispham's Equity* (6th Ed.) § 557; 2 *Story's Equity Jurisprudence*, §§ 1484, 1485; 1 *Pomeroy's Equity Jurisprudence*, §§ 191, 195. The law excepted from the testimony, which a party might be compelled to furnish against himself in this way, testimony tending to convict him of a violation of the criminal law, or to subject him to a penalty or forfeiture; also communications between him and his attorney relating to the matters in suit, and, of a public officer, testimony a publication of which would be prejudicial to the community. With these exceptions, a party could be compelled "to discover and set forth upon oath every fact and circumstance within his knowledge, information, or belief," and to produce and allow his adversary to inspect and copy every document in the party's possession material to the other's case. *Adams' Equity*, c. 1.

The same principles govern in the practice as to discovery, whether it be invoked in aid of other issues involved in the suit in equity, or be invoked independently in aid of an action at law. *Lyell v. Kennedy*, L. R., 8 App. Cas. 217; *Drake v. Drake*, 3 Hare, 525; *Wigram's Points on the Law of Discovery*, 123.

It is urged that the bill does not sufficiently allege that complainant has complied with the laws of this state as to the right of foreign corporations to do business here. The bill alleges, among other things, "that at the time of making and entering into said contract, and continuously since that time, and at the time of the filing of this suit, it has been duly qualified to transact business in the state of Alabama in accordance with the statute of this state prescribing the terms and conditions upon which a foreign corporation may do business in Alabama." This, we think, is sufficient.

The bill contains equity, and was not subject to the demurrer interposed, and the decree of the chancellor is affirmed.

Affirmed.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

WEAVER v. PEPPER et al.

(Supreme Court of Alabama. May 19, 1910.)

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Action by John W. Weaver, by his next friend, against J. D. Pepper and another. Judgment for defendants, and plaintiff appeals. **Affirmed.**

E. M. Oliver, for appellant. Strother, Hines & Fuller, for appellees.

MAYFIELD, J. This case is affirmed on the authority of *Bryant v. Whisenant*, 52 South. 525, to the effect that no right of action is shown by the complaint or evidence. In this all the Justices concur; but the writer thinks that the case ought to be affirmed upon other grounds and for other reasons than those expressed in *Bryant v. Whisenant*, supra, and the following are his views upon the case:

This action is that of a minor, John W. Weaver, who sues by his father as next friend; and is brought against J. D. Pepper, superintendent of the public school at Milltown, and against J. D. Denney, chairman of the board of trustees of said school, and seeks to recover \$1,000 damages for the wrongful, wanton, and malicious act of the defendants in turning plaintiff, an eligible pupil, out of said school.

The first count of the complaint is as follows: "The plaintiff claims of the defendant one thousand dollars damages, for this, that on or about November 18, 1907, J. D. Pepper was the teacher in charge of the Milltown public free school which was being taught by him at Milltown in the school district known as the Milltown High School District in Chambers county, Ala., as a free public school; that the said defendant J. D. Denney was the then acting superintendent of the board of trustees of said school district; that plaintiff was at said time and is now a bona fide resident citizen residing with his father, J. E. Weaver, within said school district; that he was then and is now of the school age, under 21 and over 7 years of age, and was entitled to attend and be taught in said public school free of charge; that at said time the said J. D. Pepper was receiving the public school funds appropriated and set apart for said public school; that plaintiff went to said school and offered to enter same as a pupil to be taught in said school; that said defendants J. D. Pepper and J. D. Denney without any good cause or excuse did turn the plaintiff out of said school when he offered to enter same and refused him admission to same—whereby plaintiff was damaged to the amount of one thousand dollars as aforesaid, hence this suit."

The other counts are practically the same—a statement of the same material facts in slightly different language.

It is contended by the appellant that the counts each stated a good cause of action by virtue of Acts 1900-01, p. 2592, which, among other things, provided that the free public schools of the state should be kept open, absolutely free of tuition fee, to those entitled to share in the distribution of the common school fund, for a period of five scholastic months in each scholastic year. It will be observed, however, that neither count sufficiently states a cause of action under this statute. It is not averred that the free public schools were not kept open for five months during each year, nor is it averred that plaintiff had not attended such schools for five months during the year 1907, of which he complains. Nor is it shown to have been the duty of these defendants to see that such schools were so kept open and to allow the plaintiff to attend; that is, it does not sufficiently appear that these defendants owed the plaintiff any duty under the statute referred to, nor that they have denied him any right, much less that they breached the duty enjoined by the statute.

The counts do allege that plaintiff was a pupil in a public school, and that the defendants were, respectively, the teacher and the superintendent of the board of trustees of the school, and that they wrongfully, wantonly, and maliciously turned plaintiff out of said school and refused him admission thereto. But, as before stated, the counts are not sufficient to state a breach of duty created by virtue of this statute; because it is not shown that these were the officers charged with the duty of enforcing this law. Moreover, it is not shown that plaintiff had not attended such school for at least five months during the year 1907.

Again, this statute was not in force at the time of the alleged commission of the wrongs and injuries complained of. It was substituted, if not repealed, by the new Constitution of 1901, and subsequent statutes, which wrought an entire change of this provision of the school law of the state.

The Constitution of 1901 (section 256) required, among other things that "the public school fund shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships." To enforce this and other constitutional provisions, the school laws of the state were changed by new and complete laws which of necessity were substituted for the old. To conform to the above constitutional provision, it was, of course, impracticable to observe the old laws, in the appropriation of the school funds, and in the establishing of schools and the terms thereof. The acts of September 30, 1903 (page 289), July 17, 1907 (page 478), September 26, 1903 (page 264), September 9, 1903 (page 233), and of February 23, 1907 (page

187), wrought an entire and complete change of these school laws including the one on which this action is based.

Speaking of this change wrought in the school laws by some of the acts above mentioned, this court, speaking through Simpson, J., says: "The act of 1903 is clearly a re-statement of the entire law on the subject of the redistricting of the public schools, and in regard to the management and control of the same, and was intended to set up a new system, so that whatever power any school officer may have on these subjects must be derived from this act."

The complaint therefore fails to show any breach of duty on the part of defendants toward plaintiff, and fails to show that they did not have the right to do all that they are alleged to have done. In other words, the complaint fails to show that the defendants improperly or unlawfully denied to the plaintiff any rights in the premises. For aught that appears, they may have been properly discharging their duties in carrying out the rules and instructions prescribed by the proper authorities in the premises, under the school law as it existed at the time of the wrongs complained of. The proper officers have the right to make reasonable rules and regulations for the conduct and management of the public schools, and it was the duty of these persons or officers selected to conduct the schools, to manage them in accordance with the law and with the reasonable rules so provided.

It is not made to appear, by the pleadings or the proof in this case, that these defendants violated the law as it existed then, or breached any duty imposed upon them by law or contract. There is no contention that they were actuated by malice or were guilty of negligence in the premises; and if any mistake was made or injury done it proceeded from error of judgment on the part of the officers charged by law with the duty of arranging and providing for the public schools, and the defendants, who were not officers, were only obeying such orders or rules provided by the proper authorities, in declining or failing to teach plaintiff when he appeared at school.

The education of the people is regarded as a matter of such paramount importance and of so much public concern, that, as we have seen, our Constitution has enjoined upon the

Legislature the duty of providing a system of public schools, and has provided that a certain amount of taxes or public revenues of the state shall be applied to the public school fund and has provided how it shall be apportioned, and in a measure how and for what purposes only it shall be paid out. Article 14, §§ 256-270, of the state Constitution of 1901.

These constitutional provisions, for the most part, can only be made effective by appropriate legislation, which is thus properly enjoined upon the law-making power of the state. As above shown, the Legislature has provided many statutes upon the subject. It is to be regretted that the laws are constantly changing on this subject, but of course the changes are always thought by the Legislature to be for the better, and they often are. These laws create certain public school officers, and enjoin upon them certain duties, many of which necessarily involve the exercise of official discretion, and when so acting in the discharge of their official duties, as to matters necessarily within such discretion, if they act without malice, negligence, or intentional wrong, they are not responsible for erroneous decisions or errors of judgment upon matters thus submitted to their official judgment for determination. To hold them liable in such cases would be to punish them for honest convictions and conscientious efforts to discharge their duty in perfect good faith and without fraud or malice. Their decisions in such matters are quasi judicial, and they are protected in such matters as are judicial officers. Of course, unlike judges, all of their acts are not judicial, but it is only of those duties and acts which are quasi judicial and involve discretion, that we are now speaking. *Jenkins v. Waldron*, 11 Johns. 114, s. c. 6 Am. Dec. 359; *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *Spear v. Cummins*, 23 Pick. 224, 34 Am. Dec. 53; *Donahue v. Richards*, 38 Me. 379, 61 Am. Dec. 256.

It follows that there was no liability alleged or shown by the proof, and the only judgment was rendered that could have been rendered.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, and SAYRE, JJ., concur.

McKINNEY et al. v. COMMISSIONERS' COURT OF BIBB COUNTY.

(Supreme Court of Alabama. Dec. 21, 1909.
Rehearing Denied June 30, 1910.)

1. APPEAL AND ERROR (§ 335*)—NOTICE—SUFFICIENCY—PARTIES.

Where the certificate of appeal from a joint judgment against several persons, recited that "H. C. M. et als." obtained an appeal after giving security for costs, and referred to "H. C. M. et als." as plaintiffs, and the notice of appeal recited that "H. C. M. et als." had taken an appeal, the appeal would not be dismissed on the ground that it was taken by only one of the parties against whom the judgment was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1864; Dec. Dig. § 335.*]

2. COUNTIES (§ 53*)—COMMISSIONERS' COURT—JURISDICTION TO BE SHOWN BY RECORD.

The commissioners' court, in exercising the powers conferred by Gen. Acts 1903, p. 431, relating to elections to determine whether the stock law shall be enforced, is one of limited jurisdiction, and, to sustain its acts, its record must affirmatively show the existence of the elements essential to give it power to act.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 66, 69; Dec. Dig. § 53.*]

3. ANIMALS (§ 50*)—STOCK LAW—ADOPTION—COMMISSIONERS' COURT—JURISDICTION—PETITION.

The commissioners' court cannot exercise the power conferred by Gen. Acts 1903, p. 431, providing for the ordering of an election to determine whether the stock law shall be enforced, unless a petition for an election is signed by a majority of the freeholders described in the act, and an order for an election which is silent as to whether the petition was signed by the requisite number of freeholders, is fatally defective.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 149, 150; Dec. Dig. § 50.*]

4. ANIMALS (§ 50*)—STOCK LAW—ADOPTION—COMMISSIONERS' COURT—JURISDICTION.

Where the commissioners' court, exercising the power conferred by Gen. Acts 1903, p. 431, made an order reciting that it appeared to the court that a petition for an election to determine whether the stock law shall be enforced, contained more than a majority of the freeholders, and ordering an election, a subsequent order rescinding the prior order and continuing the matter for further consideration avoided the effect of the first order, and an election held under a subsequent order, which failed to recite the jurisdictional fact as to the sufficiency of the petition, was void.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 149, 150; Dec. Dig. § 50.*]

Simpson, J., dissenting.

Appeal from Circuit Court, Bibb County;
B. M. Miller, Judge.

Certiorari by H. C. McKinney and others against the Commissioners' Court of Bibb County to review an order of the court. From a judgment denying relief, plaintiffs appeal. Reversed and rendered.

D. W. Crawford, for appellants. John T. Ellison and Lavender & Thompson, for appellee.

McGLELLAN, J. The motion to dismiss the appeal is predicated upon the idea that

the appeal was taken by one only of the parties against whom joint judgment was rendered. If it were assumed that a joint judgment was entered below, the certificate of appeal refutes the asserted fact that one only of the parties prejudiced by the judgment prosecuted the appeal and that in his own name only. The certificate of appeal recites that "H. C. McKinney et als. did on the 30th day of September, 1908, after giving security for costs, obtain an appeal. * * *". The notice of appeal likewise recites that "H. C. McKinney et als." had taken an appeal. The certificate of appeal refers to "H. C. McKinney et als." as plaintiffs. The motion to dismiss the appeal must be overruled.

This common-law certiorari sought to have pronounced void the acts or orders of the commissioners' court of Bibb county declaring the stock law effective in precinct 5 in that county. The application of the stock law was sought in virtue of the act approved September 29, 1903 (Gen. Acts 1903, p. 431). Upon a petition numerously signed by "freeholders for precinct No. 5," the following order appears as having been made: "State of Alabama, Bibb county: It appearing to the court that the within petition contains more than a majority of the freeholders in precinct No. 5 of Bibb county, Alabama, it is therefore ordered that an election be held on Saturday the 23d day of November, 1907, at which election the qualified voters of said precinct shall determine whether or not a law shall be enforced in said precinct prohibiting the running at large of hogs, sheep and goats." Subsequently, the court took this action: "On motion the above order is presented, and this court is continued to the 2d day of November, 1907, for the further consideration of the said petition to hold an election in beat 5 as set out in the petition of said citizens of beat 5." Counsel for both sides insist in brief that the word "resented" in the last order should be read, and was intended in reality to be, "rescinded." We take it so.

In the exercise of the statutory powers conferred on the commissioners' court by the act above cited, the court is, of course, one of limited jurisdiction, and to sustain its acts in the premises the records of that court must affirmatively show the existence of the elements essential to give it power to act. *Commissioners v. Johnson*, 145 Ala. 553, 556, 39 South. 910, 911, and authorities cited on the latter page.

It was essential under the act in question that this court ascertain, as a prerequisite to the exercise of the power conferred by the act, that the petition for the election was signed by a majority of the freeholders described in section 2 of the act. In the first quoted order this jurisdictional factor was ascertained and declared in substantial accordance with the requirements, in that par-

ticular, of section 2. Latterly the court rescinded that order.

It is our opinion that such rescinding avoided any effect of the first order. It is earnestly argued that the only motive for the rescinding thereof was to correct the error in date for the election. We cannot read the rescinding order to so limited an effect. For aught that appears, it may have been the discovery by the court that the petition did not carry the requisite majority—had less than a majority—that led to the act of rescinding of the first order wherein that fact was ascertained and adjudged. The latter order annulled the former by the use of the most sweeping terms. We can find no warrant to read it as meaning less than it says. Accordingly, we have only the order calling the election by which to determine the existence of jurisdiction *vel non* in the premises. That order is silent in respect of the jurisdictional fact, *viz.*, that the petition for the election was signed by the requisite majority of the freeholders defined in section 2 of the act. The omission is fatal; we cannot supply it.

It results that the election was not based on a valid order therefore, was unauthorized and void. Hence, the prayer of petition will be granted, the judgment of the circuit court is reversed, and a judgment will be here entered vacating and annulling the orders of the commissioners' court of Bibb county in respect of a stock law in precinct 5 therein.

Reversed and rendered.

ANDERSON, SAYRE, and EVANS, JJ., concur. SIMPSON, J., dissents.

(126 La.)

No. 17,906.

WEIL BROS. & BAUER v. C. N. ADAMS & SON.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 25, 1910.)

(*Syllabus by the Court.*)

PARTNERSHIP (§ 208*)—APPEAL AND ERROR (§ 1024*)—WHEN LIES—PARTNERSHIP PROPERTY—RESIDENCE OF MANAGING PARTNER.

An attachment will not lie against the property of an alleged commercial firm, or against the interest of a nonresident partner therein, where the managing partner is a resident of this state. Where such managing partner has actually lived in this state with his wife and children while conducting the business of the partnership, a finding by the trial court that he was a resident of this state will not be disturbed, when not manifestly against the weight of the evidence as to intent to here remain an indefinite time.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 208; Appeal and Error, Cent. Dig. § 3816; Dec. Dig. § 1024.*]

Provosty, J., dissenting.

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by Well Bros. & Bauer against C. N. Adams & Son. Judgment for defendants, and plaintiffs appeal. Affirmed.

White, Thornton & Holloman, for appellants. Blackman & Overton, for appellees.

LAND, J. Plaintiff sued out in the district court of the parish of Rapides writs of attachment against the alleged commercial firm of C. N. Adams & Son, and against C. N. Adams and C. E. Adams, as members thereof, on the ground that the partnership and its members were residents of the state of Arkansas. Under the writs of attachment the sheriff seized and took into his possession a grading outfit, consisting of mules, horses, wagons, scrapers, etc., while in transit on a railroad train.

Defendant appeared and excepted to the jurisdiction of the court *ratione personæ*, and moved to dissolve the writs of attachment on various grounds, substantially as follows:

That the partnership of C. N. Adams & Son had been dissolved about a year before the institution of the suit, and no longer was in existence; that all the property attached belonged to C. E. Adams individually, and that he was a resident of the state of Louisiana; that C. N. Adams was a resident of Arkansas; and that the allegations on which the writ was obtained were false.

The exceptions and motions to dissolve were tried, and the judge below found from the evidence that the partnership was constituted in the state of Louisiana, and was dissolved about one year prior to the institution of this suit; that C. E. Adams was a resident of the parish of Winn, state of Louisiana, and that he was the sole owner of all the property seized under the writs of attachment; and that C. N. Adams was a resident of the state of Arkansas. There was judgment in favor of the defendants, dissolving the writ of attachment, with \$250 damages for attorney's fees, and dismissing plaintiff's suit with costs. Plaintiffs have appealed.

An attachment suit against a nonresident partnership or person may be brought in any parish of the state.

A suit against a partnership established in this state must be brought before the tribunal of the place where it is established, or, if there are several establishments, before that of the place where the obligation was entered into. Code Prac. art. 165, No. 2.

After a dissolution of a commercial partnership, the parties may be sued at the domicile of the partnership, and if nonresidents, brought in by attachment. *Lobdell v. Bushnell*, 24 La. Ann. 295; *Montague v. Weil & Bro.*, 30 La. Ann. 52. But in *Monroe v. Frosh*, 2 La. Ann. 962, it was held that a partnership conducted here by one resident partner cannot be considered as a nonresident for the purposes of the attachment of the firm prop-

erty or even the interest therein of a non-resident partner. This case was reaffirmed in *Shirley Escott & Co. v. Owners of Steamer Bride*, 5 La. Ann. 260. Hence, the pivotal question of fact to be determined is whether C. E. Adams was a *resident* partner. He was certainly present in the state conducting the business of the partnership, and had done so for several years. His wife and children had lived in the town of Winnfield for 17 months in the same house, rented by the month, and he had purchased 12 lots in the residential portion of same town. His children were attending school. He was absent from time to time as his business necessitated. He spoke of Winnfield as his home, and testified that he considered the place as such. A railroad and levee contractor is necessarily compelled to be with his work. When he cannot procure contracts within the state of his residence, he is forced to seek them elsewhere. The commorancy of such a vocation does not preclude the establishment of a fixed abode for wife and children, or, in other words, a home, to which the husband and father may return as often as permitted by the exigencies of his business pursuits. On the day the attachment was sued out, one of the plaintiffs asked C. E. Adams where was his domicile, and where he voted last, and he replied, "Wherever my camp is pitched," and, "I voted last in Arkansas."

These casual remarks do not suffice to set off his sworn statement, corroborated by facts and circumstances, that his residence was in Winnfield, and that he intended there to remain for an indefinite time. The burden of proof was on the plaintiffs to show that C. E. Adams was a nonresident.

After a careful examination of the evidence, we are not prepared to say that the findings of the trial judge are against the preponderance of the evidence.

Judgment affirmed.

PROVOSTY, J., dissents.

(126 La.)

No. 18,024.

DAVIDSON v. McDONALD et al.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 20, 1910.)

(Syllabus by Editorial Staff.)

1. ACTION (§ 52*) — MISJOINDER — PETITORY AND POSSESSORY ACTIONS.

A petition alleging ownership and possession of land, and seeking to quiet title and to have plaintiff recognized as possessor, is bad as a joinder of petitory and possessory actions, forbidden by Code Prac. art. 55.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 548; Dec. Dig. § 52.*]

2. QUIETING TITLE (§ 12*)—POSSESSION—EFFECT OF STATUTE.

Act No. 38 of 1908 providing for the establishment of title to land where none of the par-

ties are in possession, section 2 of which provides that the act shall not alter the Code of Practice, establishes a mode of determining title where neither party is in possession, in which case suit cannot be brought under the Code of Practice, and, hence, a suit in which plaintiff alleges possession is subject to the Code of Practice and not to such act.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12; Dec. Dig. § 12.*]

3. QUIETING TITLE (§ 1*)—METHODS.

The actions provided for by the Code of Practice and by Act No. 38 of 1908 afford ample remedy for the trial of rights to the ownership or possession of land under any circumstances.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; Robert S. Ellis, Judge.

Action by Mrs. Josephine H. Davidson against Thomas C. McDonald and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

W. S. Rownd and Clay Elliott, for appellant. R. C. & S. Reid, for appellees.

PROVOSTY, J. Plaintiff alleges that she is the owner and possessor of a certain tract of land described in her petition. She then sets forth her entire chain of titles. Then follows this allegation, to wit:

"That she has had the peaceable, public, unequivocal, continuous and uninterrupted possession of said land as owner under her title from said Jackson since the execution of same by him, and she joins ownership and possession to that of her said authors; that nobody has ever denied her ownership and possession of said land until recently, and within the year last past one Thomas C. McDonald has set up a title in opposition to hers."

Plaintiff then attacks, as a nullity, McDonald's title, alleging that the same is fictitious to the knowledge of McDonald; and that the same is a slander of her title, and has damaged her to the amount of \$300. She closes her petition with the following prayer:

"Wherefore, she prays that Thomas C. McDonald be cited according to law to appear and answer this demand, and, after due proceedings had, there be judgment in favor of your petitioner and against Thomas C. McDonald, recognizing your petitioner as the owner and possessor of said land under her chain of title from Allen R. Jackson and from the state of Louisiana, as above set forth, decreeing that the title to the said land set up by Thomas C. McDonald is null and void for the reasons above stated, and ordering that said title be destroyed, and the registry of the same be canceled and erased from the conveyance records."

Defendant excepted that plaintiff's petition contained a cumulation of inconsistent actions, namely, the petitory, the possessory, and the action in slander of title; and that she should be made to elect. The court ordered plaintiff to elect; and on her refusal to do so, dismissed her suit as of nonsuit.

Plaintiff's allegation and prayer of ownership would characterize her suit as peti-

tory. Her allegation of possession and prayer to be recognized as possessor would characterize her suit as possessory. Her allegation of ownership and possession, coupled with the allegations of slander and damages, and the prayer for the cancellation of the title of defendant, characterize her suit as in slander of title.

Such a cumulation of the petitory and possessory is expressly forbidden by article 55, Code Prac.

It would be unsafe for defendant to treat plaintiff's action as an action of slander of title. For, should he merely deny plaintiff's possession, and not set up his own title, she, under the allegations of her petition, could claim that her action was petitory, and he would have to go to trial as defendant in a petitory action without having pleaded his own title. If, on the other hand, he should admit the slander, and set up title himself, he would become plaintiff in a petitory action, and thereby be deprived of the advantage resulting from his being in possession. If he should deny the slander, he would be repudiating his own title.

Plaintiff next contends in her brief that this suit is brought under Act No. 38 of 1903, entitled, "An act to establish title to real estate where none of the parties are in possession." This act was passed with the view of establishing a mode of determining title where the facts did not allow of a suit being brought under the articles of the Code of Practice; that is to say, where neither party is in possession. Section 2 expressly provides that the act "shall in no wise be construed to alter, change, or repeal the rules" of the Code of Practice. Plaintiff, by alleging possession, placed her suit outside of the provision of this act; and made it subject to the formalities provided for in the Code of Practice.

Plaintiff's contention that owing to the peculiar circumstances of the case the suit is sui generis cannot be listened to one single minute. The known actions provided for by the Code and by the act of 1903 afford ample remedy for the trial of rights to the ownership or possession of real estate under any and all circumstances.

Judgment affirmed.

(126 La.)

No. 18,025.

DAVIDSON v. FROST-JOHNSON LUMBER CO. et al.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 20, 1910.)

(Syllabus by the Court.)

1. PARTIES (§ 25*)—DEFENDANTS—JOINDER.

Whilst all who are parties, or privies to, or who have a common interest in, the same title, or titles, to real estate, may, for some purposes, be joined as defendants in the same suit, to bring a number of persons into court as de-

fendants, with respect to a number of titles, without regard to their relation to them, and to hold them in court for the purposes of issues with which they have no concern, would be a hardship, would tend to confusion and embarrassment, and would be inconsistent with well-established jurisprudence.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 81; Dec. Dig. § 25.*]

2. DISMISSAL AND NONSUIT (§ 56*)—MISJOINDER OF DEFENDANTS—POWER OF COURT.

Where an exception of misjoinder of defendants is sustained, the court cannot discriminate by dismissing the suit as to one defendant, rather than another, but must, ordinarily, dismiss it as to all.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dec. Dig. § 56.*]

Appeal from the Twenty-Fifth Judicial District Court, Parish of Livingston; Robt. S. Ellis, Judge.

Action by Mrs. Josephine H. Davidson against the Frost-Johnson Lumber Company and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

W. S. Rownd and Clay Elliott, for appellant. R. C. & S. Reid, Saunders, Dufour & Dufour, Hall, Monroe & Lemann, and F. S. Weis, for appellees.

Statement of the Case.

MONROE, J. Plaintiff alleges that she is the "owner and possessor" of three tracts of land in the parish of Livingston, known as the "Stoppenhagen," "Stafford," and "Hodges" tracts, respectively; that she acquired the Stoppenhagen tract under the will of George Colmer and as a result of a partition with her sister, Mrs. McQueen, and that Colmer acquired it at a partition sale in the succession of William Stoppenhagen; that she acquired the Stafford tract by purchase from Joseph R. Stafford, the patentee; and that she acquired the Hodges tract by purchase from Abel W. Hodges. She further alleges that the Frost-Johnson Lumber Company claims title to said tracts as derived, through mesne conveyances, as follows:

One Charles Carter, pretending that he had purchased the Stoppenhagen tract from William Stoppenhagen, conveyed it to Charles W. Henry, whose widow and heirs conveyed it to the Eastern Land & Lumber Company, Limited, by which it was conveyed to Nelson W. McLeod, Clarence D. Johnson, and Edwin A. Frost, who conveyed it to the Frost-Johnson Lumber Company.

One Charles J. Fuqua, pretending that his father had purchased the Stafford tract from Thomas Green Davidson, and that the latter had bought it from Joseph R. Stafford, sold said tract to W. H. Howcott, who conveyed it to the Aztec Land Company, by which it was conveyed to the Quaker Realty Company, by which it was sold to the Pennamich Lumber Company, which sold it to McLeod, Johnson & Frost, who sold it to the Frost-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Johnson Lumber Company (the Pennamich Lumber Company, also asserting title to the same tract as derived from W. H. Howcott, through William W. Frazier).

Mrs. Margaret Davidson, as natural tutrix of Thomas Green Davidson, Jr., is said to have purchased the Hodges tract at sheriff's sale in the succession of Thomas Green Davidson, Sr., and she and Thomas Green Davidson, Jr., sold it to William H. Howcott, who sold it to the Aztec Land Company, by which it was sold to the Quaker Realty Company, which conveyed it to the Pennamich Lumber Company, which sold it to McLeod, Johnson & Frost, who sold it to the Frost-Johnson Company (the Pennamich Lumber Company also asserting title to the same tract as derived from W. H. Howcott through William W. Frazier). Plaintiff alleges that the declarations of Carter and Fuqua, as to the origin of their titles, to the Stoppenhagen and Stafford tracts, respectively, are untrue, and that the Hodges tract belonged to her, and was sold, in the succession of Thomas Green Davidson, through error, and she also alleges that the subsequent purchasers of said tracts were aware of the defects in their titles. She alleges that the persons and corporations named are, for the most part domiciled elsewhere, and she prays that all the parties mentioned be cited, through curators ad hoc, or otherwise, and that she have judgment recognizing her "as the owner and possessor of the three tracts of land * * * and quieting her in her ownership and possession of the same"; and decreeing the nullity of the pretended conveyances by Carter and Fuqua, and by the sheriff, and of all subsequent titles based thereon. Most of the parties named as defendants excepted to the citations and to the jurisdiction of the court, *ratione personæ*, and some of them, including the Eastern Land & Lumber Company and the Frost-Johnson Lumber Company, excepted on other grounds, which are recited by the trial judge, in his reasons for the judgment dismissing the suit, as follows, to wit:

"In this case the exception filed, by the Eastern Land & Lumber Co. and Frost-Johnson Lumber Co., * * * to the effect; that plaintiff's petition combines various causes of action which are entirely unrelated and should not be included in the same; that said petition makes various parties defendants whose interests are, in no way, common, and whose rights cannot be properly adjusted in the same suit; that said petition relates to chains of titles to three separate, distinct tracts of land, in which the various owners, or transferrors, are entirely separate and distinct and have no community of interest whatever, and that the trial of the various causes of action set forth in said petition would be so confusing as to make it impossible, properly, to adjust the various unrelated interests involved in the matters set forth in the petition, etc., came on to be heard, and was heard in due course of law, in these proceedings, and the court holding that said exceptions were well taken, and that the same should be maintained, the court sustained the said exceptions above mentioned, and dismissed the suit in its present form. All other exceptions herein filed are overruled."

From the judgment so rendered, the plaintiff prosecutes this appeal.

Opinion.

It seems to us clear that, if plaintiff were suing in the same action, Charles Carter, complaining that under pretense of title from Stoppenhagen, he was disturbing her possession of the Stoppenhagen tract; and Fuqua, complaining that under pretense of title from some one else, he was disturbing her possession of the Stafford tract; and Mrs. Davidson and her ward, complaining that, under still other pretense, they were disturbing her possession of the Hodges tract—each of the defendants might very well complain that he was being made defendant "upon a record, with a large portion of which, and of the case-made by which, he has no connection whatever," a condition of which, in the old and leading case of *Campbell v. Mackey*, 1 Myline & Craig, 603, Lord Cottonham said:

"But what is, more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say that he is brought as a defendant upon a record, with a large portion of which and of the case made by which, he has no connection."

Of course, it does not improve the situation in the instant case that, instead of having but the three, above named, we have more than a dozen defendants, who, for some purposes, are divided into three groups, and, for others, like the "gow chrom," will be fighting for their own hands. The widow and heirs of Charles W. Henry appear to have no connection whatever with the Stafford and Hodges tracts, and the parties through whom the titles to those tracts have passed have no connection with the title to the Stoppenhagen tract, which is said to have been derived from the widow and heirs of Henry. On the other hand, Mrs. Margaret Davidson, tutrix, and her ward, for whom, she is said to have purchased the Hodges tract, at a sale in the succession of Thomas Green Davidson, have no concern with the validity of the title of the Stafford tract, as acquired and transferred by Chas. J. Fuqua. Whilst, therefore, for some purposes (though not by the original plaintiff in a petitory action), those who are parties or privies to either one, or to all, of the titles, might be brought into court in the same suit; to bring them all into a litigation which affects all the titles, without regard to their relation to them, for the purposes of issues with which they have no concern would be a hardship, would result in confusion and embarrassment, and would be inconsistent with settled jurisdiction, not only in this state, but elsewhere. *Waldo v. Angomar*, 12 La. Ann. 74; *Mavor v. Armant*, 14 La. Ann. 181; *Leverich v. Adams*, 15 La. Ann. 310; *Surgt v. Matthews*, 24 La. Ann. 614; *Cane v. Sewall*, 34 La. Ann. 196; *Riggs v. Bell et al.*, 39 La. Ann. 1030, 3 South. 183; *Neugass v. City et al.*, 43 La. Ann. 82, 9 South. 25.

In *Gill v. City of Lake Charles*, 119 La. 18, 43 South. 897, it was held that a number of taxpayers may unite in the same suit to prevent the illegal disposition of municipal property, and that property holders may join in one suit to prevent an obstruction to a street, and to contest the right of the municipality to grant to a railroad company a right of way along a so-called street, which they assert is not a street, but private property belonging to them. But the basis of that ruling was that the plaintiffs had a common interest, were complaining of the same things, were presenting the same issues, and were seeking the same remedy. But, that the ruling in question affords no support to the plaintiff in the instant case is apparent from the first paragraph of the syllabus, which reads:

"Our Code of Practice makes no provision for determining when parties may, or may not, be joined either as plaintiffs or defendants. We have to be guided in that regard by the well-settled rules of pleading as found in the books of common law, according to which a large discretion is left to the court; the aim being to avoid a multiplicity of suits, while not permitting parties to be joined who have not a common interest, or where the defendants would be embarrassed in their defense, or delays would be caused or complications arise, in connection with costs, or otherwise."

Counsel for plaintiff suggest, at the close of their brief, that:

"If the court holds that plaintiff can proceed on her petition as filed, as to one of the tracts of land described therein, she, in that event, prays that the judgment appealed from be amended, [the case] remanded, and plaintiff allowed to proceed, as to that tract designated by the court."

We should be disposed to adopt the suggestion as made, if it were practicable, but we do not find it so, since the judgment appealed from, holding that the suit is multifarious, like the exception on which it is based, has the same application to one group of defendants as to another, and as the trial judge could not have discriminated, by dismissing the suit as to one group and allowing it to stand as to the others, neither can this court so discriminate. The judgment appealed from is accordingly affirmed.

(126 La.)

No. 18,028.

DAVIDSON v. FLETCHER et al.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 20, 1910.)

(Syllabus by Editorial Staff.)

ACTION (§ 52*)—CAUSES OF ACTION—MISJOINDER.

Plaintiff sought to recover certain land against defendant F., alleged to have entered as plaintiff's tenant, and thereafter to have claimed the land under a tax deed which plaintiff claimed was void, and in the same action sought to recover the land as against defendant G.,

whom she alleged entered clandestinely, without her knowledge and consent, as a squatter, and to recover for use and occupation. Held that, since there was no connection between the defendants, the petition contained distinct causes of action against different defendants, and was, therefore, subject to exception for misjoinder of causes of action and parties.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 548; Dec. Dig. § 52.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; Robert S. Ellis, Judge.

Action by Mrs. Josephine H. Davidson against Oscar Fletcher and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. S. Rownd and Clay Elliott, for appellant. R. C. & S. Reid, for appellees.

PROVOSTY, J. Plaintiff alleges that she is owner and in possession of a certain tract of land, which she describes; and that the two defendants, Oscar Fletcher and Larry Glover, are each occupying a part of said land, unlawfully holding same, in bad faith, against her will and without her consent; that said Fletcher entered thereon as her lessee and tenant pursuant to a written lease, executed and signed by him, whereby he rented for a period of five years commencing January 1, 1892, the land and the buildings and improvements thereon, now occupied by him; that the legal nature of his possession has not changed; that on January 1, 1894, he refused to pay rent, and then refused to vacate, and now pretends that your petitioner is not the owner of the land; that she does not know upon what pretense he bases his contention, but that about a month ago she discovered a pretended tax title in favor of said Fletcher, dated May 25, 1904; that the land described in said tax title is not that of petitioner, and that, if it is, the said tax title is null and should be so decreed, for the following reasons (we omit reasons); that said Fletcher should be made to pay \$800 for the use and enjoyment which he has had of said land since January 1, 1894; and is estopped from contesting her title to said land; that the said Glover is a squatter on her land, having entered thereon clandestinely from four to five years ago, without her knowledge or consent; that he pretends to no right thereon, and should be made to pay \$150 as a fair and reasonable recompense for the enjoyment which he has had of same; that petitioner should be decreed to be the owner and rightful possessor of said land, and said Fletcher and said Glover should be compelled forthwith to depart therefrom.

The prayer is in line with these allegations.

Defendant filed an exception of misjoinder of causes of action and of parties, and asked that plaintiff be required to elect, and that, in default of her doing so, her suit be dismissed.

The court sustained the exception, and or-

dered plaintiff to elect, and allowed her a certain number of days within which she should do so, otherwise, her suit to be dismissed. Plaintiff declined to elect, and her suit was dismissed, with right reserved to bring separate suits.

The petition contains two distinct and different suits against two defendants between whom there is no connection whatever. Our procedure does not sanction anything of that kind.

In *Waldo et al. v. Angomar*, 12 La. Ann. 74, the court said:

"The defendant Angomar, as well as the other parties defendant, has a right to object to a cumulation of several distinct causes of action against several defendants, unless they have a common interest to be adjudicated upon in one judgment."

In *Mavor v. Armant*, 14 La. Ann. 181, the court said:

"The cumulation of a demand for the partition of succession property with a demand for the partition of property held in common where there is no privity of estate between all the parties, plaintiffs and defendants, is nowhere authorized in the law, but is at variance with the well-settled rules of pleading.

"The law does not permit a creditor to sue all of his debtors in the same action, unless there is a joint liability or privity of contract which authorizes the joinder, nor will it permit a party to be joined in a demand in which he has no interest."

In *Leverich v. Adams*, 15 La. Ann. 310, the court said:

"Again, it is urged that there was error in dismissing the suit as to Mrs. Adams. The plaintiff's action is in the nature of a petitory action, and was brought to enjoin the sale of a plantation and slaves under a judgment in favor of James S. Bailey. Until Mrs. Adams had attempted to enforce her judgment to the prejudice of the plaintiff he was without interest to attack it. It is true the law abhors a multiplicity of actions, but it means actions against the same person. It does not favor the collection of a multiplicity of actions against different and distinct parties in the same suit. The suit to annul the judgment of separation of property in favor of Mrs. Adams was therefore properly dismissed."

In *Surgi v. Matthews et al.*, 24 La. Ann. 613, the court said:

"The defendant (Mrs. Matthews) excepted to the form of action adopted by the plaintiff, because he alleged separate and distinct causes of action against distinct defendants who are illegally joined in the action for the reason that there is no privity of contract between them, and that the allegations are vague and indefinite, and which, if true, go to show that plaintiff has no claim against her. The court sustained the exception and ordered a nonsuit entered as to the police jury. We think this ruling correct."

In *Cane v. Sewall et al.*, 34 La. Ann. 1096, the court said:

"It is impossible to conceive how the numerous defendants could have been legally brought together to defend an action which is not the same as to each and every one of them, and which contemplates four distinct objects."

In *Riggs v. Bell et al.*, 39 La. Ann. 1030, 3 South. 133, the court said:

"Defendants have a right to object to a cumulation of several distinct causes of action against them where these have no cognate origin, and where they have no common interest to be adjudicated upon in one judgment.

"They may sever, but are not bound to do so."

Finally, in *Neugass v. City et al.*, 43 La. Ann. 82, 9 South. 26, the court said:

"The alleged liability of the officers contained in the third declaration of the petition is for damages; it cannot be cumulated with the causes of action before declared.

"The origin is dissimilar, and the defendants have no common interest to be adjudicated upon in one judgment. *Waldo v. Angomar*, 12 La. Ann. 74.

"Different parties having been joined in a suit to annul a judgment, and to recover damages in solido, the origin of the claims not being cognate, there was a misjoinder, and the exception was maintained. *Cane v. Sewell*, 34 La. Ann. 1096."

See, also, *Gill v. City of Lake Charles*, 119 La. 17, 43 South. 897, where this question is gone into at some length.

We will now notice briefly the cases cited by plaintiff.

In *Derbes v. Romero*, 28 La. Ann. 644, all the defendants were claiming under the same title, and the matter involved was the validity of this title. Evidently the defendants were properly joined.

In *Railroad Co. v. Elmore*, 46 La. Ann. 1237, 15 South. 701, the court said:

"The defense of one is the defense of all the defendants, as each holds by virtue of the same title."

On the rehearing the court said:

"The defendants exhibit no title whatever, common or individual. There is, it is true, on the part of some of the defendants, the avowment that they made homestead entries of portions of the land; but, in our view, such entries, even if sustained by proofs, would not, under the circumstances of the case, distinguish the position of those who assert such entries from that of trespassers."

That decision may perhaps be justified "under the circumstances of this case," but it certainly goes to the limit. In the case at bar, the plaintiff would have the court go much further, and hold that even defendants whose positions are alleged in the petition to be different, who would necessarily raise different issues, and against whom different judgments are asked, can be joined in one suit.

In the third and last case cited by plaintiff, that of *Greer y. Mezes*, 24 How. 268-277, 16 L. Ed. 661, one of the reasons assigned by the court why the defendant could be joined was that the plaintiff "cannot know how they claim, whether jointly or severally, or if severally, how much each one claims." There can hardly be any need to point out how inapplicable this is to the case at bar.

Judgment affirmed.

(126 La.)

No. 18,162

STATE ex rel. GUION, Atty. Gen., v. PEOPLE'S FIRE INS. CO. OF NEW ORLEANS.

(Supreme Court of Louisiana. April 11, 1910.
On the Merits, June 6, 1910.)

(Syllabus by Editorial Staff.)

1. INSURANCE (§ 49*)—DISSOLUTION OF COMPANY—PROCEEDINGS—APPEAL—INTEREST OF STATE AS APPELLANT.

Acts 1908, No. 124, provides that, whenever suit is brought by the state to forfeit the charter of a corporation, the court shall have jurisdiction of all the property belonging to it from the date of filing suit and that on rendering a decree of forfeiture, the court shall order the sequestration of the property and delivery thereof to a liquidator appointed by the Governor. *Held*, that where, in a suit by the Attorney General for dissolution of an insurance company, the court decreed a foreclosure, but directed that the property be delivered to liquidators chosen by the stockholders, pursuant to the corporation's charter, the state had a sufficient interest to entitle it to appeal from the judgment, in so far as it denied the state's right to have the property turned over to a liquidator to be appointed by the Governor.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 49.*]

2. APPEAL AND ERROR (§ 801*)—MOTION TO DISMISS—QUESTIONS REVIEWABLE.

Where, in proceedings on the relation of the Attorney General to dissolve an insurance company, the state appealed from a judgment of dissolution, in so far as it directed a delivery of the corporation's property to liquidators appointed by the stockholders, whether the state was entitled to have the property delivered to a liquidator appointed by the Governor was a question involving the merits which could not be determined on motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 801.*]

3. APPEAL AND ERROR (§ 50*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Jurisdiction of the Supreme Court in a contest over the administration of a fund is determined by the amount of the fund to be administered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 50.*]

4. INSURANCE (§ 49*)—DISSOLUTION OF COMPANY—SEQUESTRATION OF PROPERTY—DELIVERY TO LIQUIDATOR.

Acts 1908, No. 124, provide that, whenever suit is brought by the state to forfeit a corporation's charter, the court shall have jurisdiction of all the corporation's property from the date of filing the suit, and that pendente lite the court may have the property sequestered, and, if the corporation in such case is a going concern, the sheriff shall hold and administer as a receiver, and that, on rendering the decree of forfeiture, the court shall "order the sequestration of the property and the delivery of it to a liquidator to be appointed by the Governor." *Held*, that the statute in so far as it requires delivery of the property to a liquidator appointed by the Governor is mandatory, and that, on the forfeiture of the charter of an insurance company at the suit of the Attorney General, the court erred in directing a delivery of the corporation's property to liquidators appointed by the stockholders under a dissolution by vote

of the stockholders pursuant to the charter, adopted after the forfeiture suit was instituted.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 49.*]

5. CORPORATIONS (§ 619*)—FORFEITURE OF FRANCHISE—DISSOLUTION—PROCEEDINGS BY STATE—"JURISDICTION."

Under Acts 1908, No. 124, providing that, whenever suit is brought by the state to forfeit a corporation's charter, the court shall have jurisdiction of all the corporation's property from the date of filing the suit, the word "jurisdiction," as there used, meant legal control and seisin, so that voluntary dissolution proceedings taken by the stockholders of a corporation, after suit brought by the Attorney General to forfeit its charter, were ineffectual to authorize liquidation by the corporation's liquidators, instead of by a liquidator to be appointed by the Governor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 619.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

6. CORPORATIONS (§ 592½*)—DISSOLUTION—CHARTER AND STATUTORY PROVISION.

Where a corporation was organized after the passage of Acts 1908, No. 124, regulating the dissolution of corporations by suit on relation of the Attorney General to forfeit its charter, and distribute its assets, such act must be read into the charter and is paramount to provisions therein for liquidation of the corporation's charter.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 592½.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Suit by the State on the relation and information of Walter Guion, Attorney General, against the People's Fire Insurance Company of New Orleans. Judgment for relator for less than the relief demanded, and he appeals. Motion to dismiss appeal denied. Judgment reversed in part and remanded.

See, also, 52 South. 120.

Walter Guion, Atty. Gen. (R. G. Pleasant, of counsel), for appellant. Meyer S. Drelfus, for appellees.

PROVOSTY, J. The state brought this suit to forfeit the charter of the defendant corporation, and to enjoin it from doing any further business, and added a prayer that the court, as required by Act No. 124 of 1908, p. 181, cause the property of the defendant corporation to be sequestered, and, upon rendering judgment of forfeiture, order the sheriff "to turn over the property to the liquidator appointed by the Governor."

The court decreed the forfeiture and perpetuated the injunction; but, instead of complying with the said Act No. 124 of 1908, directed the property to be delivered to the liquidators whom the stockholders of the defendant corporation had chosen, in pursuance of the charter of the corporation, to liquidate its affairs.

The appeal is by the state. The defendant corporation and the liquidators have

asked that it be dismissed. Their grounds are that the state is not aggrieved by the judgment, and has no pecuniary interest in the appeal; and that, if she has, her appeal was taken after the expiration of the legal delays within which an appeal could have been taken legally, and that, at all events, this court has no jurisdiction, there not being \$2,000 involved, and the case not presenting any one of the special features which confer jurisdiction on this court irrespective of amount involved.

Appellees say that the only interest the state had in the suit was to forfeit the charter and prevent the defendant corporation from doing any further business, and that that interest has been fully satisfied by the judgment appealed from, which has forfeited the charter and perpetually enjoined the defendant corporation from doing business; that the evidence shows that the corporation owes no debts, and had ceased to do business and gone into liquidation before the filing of this suit; and that, under these circumstances, the liquidation is a matter of purely private concern, the mere private business of the stockholders, in which the state has no interest. In support of that view the cases of *State v. Herdic Coach Co.*, 35 La. Ann. 245, *State ex rel. Debenture Co. v. Judge*, 51 La. Ann. 488, 25 South. 65, *State v. Debenture Co.*, 107 La. 582, 32 South. 102, and *Stark v. Burke*, 5 La. Ann. 740, are cited.

The reply is that, if the state has the right to require that the sheriff be ordered to turn over the property to the liquidator to be appointed by the Governor, she has an interest in appealing from the judgment which denies that right, and that the question of whether she has the right or not is one involving the merits of the case, and properly to be considered when the case comes to be considered on its merits, and not on motion to dismiss.

The suggestion that the appeal has been taken too late is based on the assumption that the suit has been brought under Act No. 159 of 1898, whereas it has been brought under Acts No. 124 of 1908, No. 224 of 1902, and section 741, Rev. St., and the appeal is governed by Act No. 106 of 1908 and other laws.

The jurisdiction of this court in any contest over the administration of a fund is determined by the amount of the fund to be administered. *State ex rel. Bellamore v. Rombotis*, 120 La. 152, 45 South. 43; *Succession of Welp*, 120 La. 64, 44 South. 921. In this case the fund largely exceeds \$2,000.

The motion to dismiss is denied.

On the Merits.

Section 3 of Act No. 106 of 1898, as amended by Act No. 50 of 1902, provides that, if "the whole of the capital stock" of an insurance company "shall not be paid for in twelve months from the date of its charter, its charter shall be forfeited."

Act No. 124 of 1908 provides that:

"Whenever a suit is brought by the state to forfeit the charter of any corporation, or pretended corporation, the court shall be considered to have jurisdiction of all the property belonging to such corporation from the date of the filing of the suit."

The statute goes on to provide that pendente lite the court "may" have the property sequestered, and that, in such case, "if the corporation is a going concern, the sheriff shall hold and administer as a receiver."

The statute further provides that on rendering a decree of forfeiture the court (not "may," but) "shall" order the sequestration of the property, and the delivery of it to a liquidator to be appointed by the Governor.

The present suit is by the Attorney General in the name of the state under said statutes. The prayer is for a forfeiture, and for the delivery of the property to a liquidator to be appointed by the Governor. There was a sequestration pendente lite.

The defendant in its answer admitted that its capital stock had not been paid, but went on to allege that two days after the filing of the suit the corporation had been dissolved by a vote of the stockholders at a meeting duly held for that purpose, and liquidators appointed, all in pursuance of the charter, and that the court should order the property delivered to these liquidators, and not to a liquidator to be appointed by the Governor.

The liquidators elected by defendant intervened, and asked that their appointment be confirmed, and that the property be ordered delivered to them.

The court decreed the forfeiture; but, instead of obeying the injunction of said Act No. 124 of 1908 that the property shall be turned over to the liquidators to be appointed by the Governor, it ordered the property turned over to the interveners.

This was on the theory advanced by the defendant that the statute has application only to cases in which there has been a judgment of forfeiture, and that the instant case does not present that feature, because the corporation had been dissolved before the rendition of said judgment, and hence at the date of said judgment there was no charter to be forfeited, and as a consequence there could not be a forfeiture.

We think the court erred. The statute is imperative. No discretion whatever is left to the court. A sequestration must issue when a judgment of forfeiture is rendered, if not already issued, and the sheriff must turn over the property to the liquidator appointed by the Governor.

If, for argument's sake, defendant's contention were conceded, that at the date of the rendition of the judgment there was no charter to forfeit, and hence no judgment of forfeiture could validly be rendered, the logical conclusion would be that, instead of rendering a judgment of forfeiture, the

court should have dismissed the suit praying for the forfeiture.

But the court did not do that. Far from it, it decreed the forfeiture. The court should either have dismissed the suit, or, on rendering the judgment of forfeiture, complied with the imperative injunction of the statute.

Defendant's said contention that a valid judgment could not be rendered because the corporation had already been dissolved, and hence there was no charter to be forfeited, resolves itself into a denial of the validity of the judgment of forfeiture. But manifestly, if this judgment of forfeiture was invalid, defendant's remedy was to have it set aside by appeal or by answer to the present appeal; and defendant has not resorted to either of these remedies.

We will add, however, though not really involved in this appeal, that the judgment of forfeiture was properly rendered. A suit by the Attorney General in the name of the state for the forfeiture of the charter of a corporation cannot be vacated, or the action of the court in it forestalled, by any action on the part of the stockholders of the corporation. The legal status becomes fixed as of the date of the filing of the suit. This is what the statute means when it says that "the court shall have jurisdiction of all the property of the corporation from the date of the filing of the suit." "Jurisdiction" here means legal control and seisin. The court is not bound to take actual possession by sequestration, but it may do so. Let it be noted that it is not of the suit the court is thus said to have "jurisdiction"; but of "the property."

By such suit the state seeks to protect the public in two ways: First, by forfeiting the charter of the offending corporation; and, secondly, by taking charge of its property, and liquidating its affairs. The idea that the suit can be nullified or forestalled by the stockholders making haste and voting the dissolution of the corporation is not to be entertained.

That the dissolution of the corporation does not vacate a suit such as the present one, see *Platt v. Archer*, 9 Blatchf. 559, 19 Fed. Cases, p. 834, No. 11,218. That was a case in bankruptcy; but the underlying principle is the same.

We are not sure that defendant is to be understood as contending that the charter provisions for the liquidation of the defendant corporation override the statutory provisions hereinabove referred to. Such a contention would ignore the fact that these statutes were already in existence when the defendant corporation was organized, and must therefore be read into the charter, and are necessarily of paramount authority.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be

set aside in so far as dissolving the sequestration, appointing liquidators, and ordering the sheriff to deliver the property to the liquidators so appointed, and that it be in other respects affirmed, and that the sequestration be reinstated, and the case be remanded to be proceeded with according to law, costs of appeal to be paid by appellees.

(126 La.)

No. 18,234.

LOUISIANA GLASS & MIRROR WORKS,
Limited, v. IRWIN et al.

In re IRWIN.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 229*)—MATERIALMEN—CLAIMS OF SUBCONTRACTOR.

Under the provisions of Act No. 134, p. 223, of 1906, relative to building contracts in cities in this state of over 50,000 inhabitants, a furnisher of materials under a contract with the undertaker, who has not filed a sworn statement of his claim with the owner, and has not caused the same to be recorded, as required by the third paragraph of the first section of said act, within 45 days after the date of the completion of the building, has no cause of action against the owner in default for not exacting bond and surety from the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 229.*]

2. MECHANICS' LIENS (§ 229*)—LIABILITY OF OWNER—FAILURE TO EXACT BOND.

Under said Act of 1906, the owner in default is not bound personally as under Act No. 180 of 1894 as amended by Act No. 123 of 1896, but only "to the same extent as the surety would have been," and such surety is not bound except as to claims duly recorded within the legal delay.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 229.*]

Action by the Louisiana Glass & Mirror Works, Limited, against Widow Edward D. Irwin and others. Judgment for defendants was reversed by the Court of Appeal, and Widow Edward D. Irwin applies for certiorari or writ of review. Judgment of the Court of Appeal vacated, and judgment of the First city court affirmed.

Sidney F. Gantier (Hall, Monroe & Le-mann, of counsel), for plaintiff. McCloskey & Benedict, for defendants.

LAND, J. The case for review is clearly stated by the judge of the First city court as follows:

"In this suit judgment is sought to be obtained against Mrs. Irwin, with lien and privilege on her property, plaintiff claiming that in the year 1909 plaintiff furnished, sold, and delivered certain materials, etc., which were used by the contractor Shaddinger, in the construction, repair, building, or reconstruction of a house on property owned by Mrs. Irwin.

"There is no contention as to the facts; the case as presented to the court showing as follows:

"That the contract exceeded \$100; that there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was no written contract, and that there was no bond; that the material sued for in this case was used in the construction of the building referred to in the petition herein; that no attested account was served on Mrs. Irwin, within 45 days from the completion of the contract; and that no sworn account of plaintiff was recorded in the mortgage office of this parish."

The judge held that the plaintiff had no lien or privilege for want of the registry of its claim as required by law, and had no recourse against the owner personally, because of plaintiff's failure to file a sworn statement of its claim with the owner, and to record a similar sworn statement in the mortgage office within 45 days after the completion of the building, as required by paragraph 4, § 1, of Act 134 of 1906.

From a judgment dismissing the suit as to Mrs. Irwin, the plaintiff appealed to the Court of Appeal, where the cause was heard and determined by one of the judges of said court.

Without assigning any reasons in writing the judgment was amended by condemning Mrs Irwin, in solido, with the contractor, to pay the full amount sued for, with interest and costs, and by recognizing the lien and privilege as claimed by the plaintiff on Mrs. Irwin's lot and building. The case comes before us on a writ of review.

The decision of this cause hinges on the proper construction of Act No. 134, p. 223, of 1906, relative to building contracts in cities of over 50,000 inhabitants.

The provisions of said statute may be succinctly stated as follows:

The first section provides that all building contracts for \$1,000 or more shall be in writing and signed by the parties, and shall be duly recorded in the office of the recorder of mortgages, wherein the work is to be executed, before the day fixed on which said work is to commence, and not later than seven days after the date of the contract; and that such recordation shall create a lien and privilege on the building and ground or other work, in favor of the contractor, subcontractor, workman, furnisher of materials, etc., as their interests may appear.

The second paragraph provides that the owner shall require of the contractor a good and solvent bond for not less than one-half of the amount of the contract price, to be recorded with the contract, and conditioned for the true and faithful performance of the contract, and the payment of all subcontractors, workmen, laborers, mechanics, and furnishers of materials, etc., said bond to be made in favor of the owner, subcontractors, etc.

The third paragraph provides that every person having a claim against the contractor, etc., shall file a sworn statement thereof with the owner, and shall record a sworn statement thereof in the office of the recorder of mortgages for the parish where the work has been done within 45 days after the completion of the contract.

The fourth paragraph provides that, if at the expiration of said 45 days there are no such recorded claims, the recorder of mortgages shall, at the request of any party in interest, cancel and erase all inscriptions of the contract and bond.

The fifth paragraph relates to proceedings on objection to the solvency of the surety on the contractor's bond.

The sixth and seventh paragraphs read as follows, to wit:

"If objection is made to the sufficiency or solvency of the surety, this objection shall be tried summarily, and if the surety is found to be not solvent or insufficient to cover the full amount for which he is bound, or if the owner fails to exact said bond, or if he fails to have the same recorded in the office of the recorder of mortgages in the manner and within the time hereinabove provided, the owner shall be deemed in default, and shall be liable to the same extent as the surety would have been. The surety herein shall be limited to such defenses only as the principal on the bond could make."

"The purpose of this act is to require owners to secure bond with solvent and sufficient surety from the undertaker, contractor, master mechanic or engineer, for the protection of all parties interested in the contract, as their interests may appear, and which said surety is to stand in the place and stead of a defaulting undertaker, contractor, master mechanic or engineer."

If the owner be bound under the statute he is "liable to the same extent as the surety would have been." The owner who has failed to exact bond and surety is on the same plane with the owner who has permitted the contractor to give an insolvent or insufficient surety.

It is very clear, in the case of an insufficient or insolvent surety, that a person, who has failed to file a sworn statement of his claim with the owner, and to duly record the same, within the delay of 45 days, has no right of action on the bond, which may be summarily erased and canceled upon the written demand of any party in interest. In case no bond be furnished, nothing prevents the workman or furnisher of materials from filing his sworn statement with the owner, and recording his claim within the legal delay, for the purpose of holding the owner as surety.

In the interest of the prompt and speedy settlement of mechanics' liens against buildings and other structures, all of the statutes on the subject-matter require the recordation of claims within brief periods of time after the completion of the work. Under Acts 180 of 1894 and 123 of 1896, the bond continues in force only 90 days, and under Act 134 of 1906, when no claim is recorded, the bond may be canceled after the lapse of 45 days. There is no privity of contract between the owner and persons who furnish materials to the contractor, and the latter in order to acquire a right of action against the owner must comply strictly with the requirements of the statute. The Civil Code requires the service of an attested account on the owner, before payment is due or

made to the contractor, and Act 134 of 1906 provides for the filing of a sworn statement with the owner within 45 days after the completion of the building. In the case at bar, the furnisher has complied with neither the requirements of the Code, nor of the statute. The noncompliance of the owner does not dispense the furnisher of material under Act 134 of 1906 from fulfilling on his part the requirements of the statute. The act of 1906 differs in several material respects from Act No. 180 of 1894 as amended by Act No. 123 of 1896. Under the last statute the owner who does not comply with its requirements is made "personally liable for all balances due to the workmen, laborers and furnishers of materials used in the building," and the recordation of sworn claims is for the sole purpose of acquiring a lien on the land and building. Under the act of 1906, the owner in default is not bound personally, but only as surety, and the lien claimants are required not only to record sworn statements of their accounts, but to file duplicates with the owner, within the short delay of 45 days after the completion of the building. In the instant case, if bond had been given and recorded as required by the act of 1906, it is plain that prescription of 45 days would avail the surety. In the words of the law the owner in default "is liable to the same extent as the surety would have been."

It is therefore ordered that the judgment of the Court of Appeal in this case be vacated and set aside, and that the judgment of the First city court be affirmed, and that the plaintiff pay costs in both appellate courts.

(126 La.)

No. 17,885.

GUILLORY et al. v. ELMS.

(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 734*)—ADJUDICATION FOR TAXES—SUFFICIENCY OF DESCRIPTION.

The adjudication for taxes of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of an undesignated section of land, in a designated township and range, identifies no property, and cannot convey title to the whole or any designated section, less the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, in such township and range, or elsewhere.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. TAXATION (§ 788*)—ADJUDICATION FOR TAXES—INSUFFICIENT DESCRIPTION.

Where there has been what purports to be an adjudication for taxes of property which, from the description in the assessment and advertisement, is not susceptible of identification, or there has been an adjudication of a sufficiently described tract, an act of sale, predicated thereon, cannot "afford proof" of the sale to the adjudicatee of a described tract, other than that which has been adjudicated; for, there having been no such sale, there can legally be no proof of it, and the insertion in the deed of a description of property not assessed, advertis-

ed, or adjudicated cannot affect the title of the property so described.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 788.*]

3. TAXATION (§ 734*)—SALE FOR TAXES—NECESSITY FOR ASSESSMENT.

Whilst it is true that for the purposes of the prescription established by article 233 of the Constitution an assessment may be good, though made in the name of one not the owner of the property, or of one who is dead, or in no name, nevertheless there can be no sale of property for taxes which the law can recognize, unless there has been an assessment; that is to say, a valuation of the property, without which the tax could not have been levied; and, where a tax collector makes what he may call "a sale for taxes," without such warrant, his act is a tort, rather than a sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

4. ADVERSE POSSESSION (§ 84*)—GOOD FAITH.

Where property not susceptible of identification (from the description in the assessment and advertisement) purports to have been adjudicated for taxes, and the adjudicatee, preparing the act of sale, inserts a description which identifies property of which he subsequently claims possession under such deed, he must be held to be a possessor in bad faith.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.*]

5. EVIDENCE (§ 434*)—PAROL EVIDENCE—FRAUD.

On a charge that fraud was practiced in inserting in a tax deed a description of property not assessed, advertised, or adjudicated, parol evidence is admissible to identify and explain the use of a book kept by the sheriff (and tax collector) showing the advertisements of property offered for sale for taxes and the results of the offers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; William P. Edwards, Judge.

Action by Joseph A. Guillory and others against Charles S. Elms. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gilbert L. Dupré, for appellant. Garland & Harry, for appellees.

Statement of the Case.

MONROE, J. Plaintiffs allege that as the heirs of their ancestor, Joseph Simon Fontenot, they are the owners of a tract of land in the parish of St. Landry, described as section 33, in township 3 S., range 3 E., less the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section; that their ancestor acquired the land from the state of Louisiana on April 17, 1862, and that neither he nor his heirs have ever parted therewith; that there were assessed for the year 1895 to the heirs of Joseph Simon Fontenot "391.34 acres of land, being the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ in township three, south, of range three, east"; that, as thus assessed, said property was advertised, and on January 21, 1897, adjudicated to George O. Elms, who thereupon prepared a deed evidencing a sale of the property inherited

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by petitioners; that said assessment, advertisement, and adjudication were insufficient to identify the property so inherited, and that the description was inserted in said deed in fraud, and vested no title in the adjudicatee; that the land here claimed has never been in the possession of said Elms or his vendors (vendees); that Charles S. Elms claims to have acquired the same from his father, Geo. O. Elms. Plaintiffs pray for citation, and for judgment, decreeing the nullity of said tax deed, maintaining their title and sending them into possession, etc.

Defendant, Charles S. Elms, sets up a claim of title running back, through mesne conveyances, to the tax sale to George O. Elms of January 21, 1897, which is the main object of plaintiffs' attack. He alleges that he and his authors have been in undisturbed possession of the land in question, and have paid the taxes thereon since said tax sale; that he purchased in good faith, and that his title is protected by the prescription of 10 years, under Civ. Code, art. 3478, and of 3 years, under article 233 of the Constitution; that neither plaintiffs nor their author ever paid any taxes on the land claimed, and that their demand is stale; that, should there be judgment against him, he is entitled to recover the amount disbursed for taxes, etc.

The evidence shows that plaintiffs are the sole heirs of Joseph Simon Fontenot, and that their ancestor acquired the land claimed by them, as alleged in the petition, and by the following description:

"Frac'l N. E. $\frac{1}{4}$ of Sec. Frac'l W. $\frac{1}{2}$; W $\frac{1}{2}$ and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 33; Town. 3 S; Range 3 E; area 391.33."

In other words, he acquired all of section 33, except the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$. The assessment and advertisement under which the property thus described is said to have been sold to Geo. O. Elms are as follows:

"Fontenot, Jos. Simon, Heirs of
"391³⁴/₁₀₀ acres—S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ tp 3 s r 3 e value \$3.90; state tax, \$2.34; parish \$3.90; total \$6.24."

From which it will be seen that there is no designation of the section in which the land attempted to be described is situated, and that, if any property can be said to be assessed or advertised, it is the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of an undesignated section, whereas, Jos. Simon Fontenot acquired all of section 33, except the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$.

Geo. O. Elms admits that the deed purporting to have been executed pursuant to the adjudication under said assessment and advertisement was prepared by him, and the property said to have been adjudicated is therein described as having been borne on the assessment rolls as follows:

"No. 2270. Jos. Simon Fontenot, Heirs of: 391.34 acres; being all of section thirty three in T. three, south, range three, East, except the southeast quarter of southeast quarter."

On April 16, 1898, the children of Geo. O. Elms, as heirs of their deceased mother, Mary E. Barker, conveyed to their father all of their interest in various tracts of land, including that described in the tax deed above referred to.

On July 31, 1899, Geo. O. Elms, acting, apparently, as natural tutor, and by order of the district court directing him to sell the property in community of his deceased wife, adjudicated the "north, fractional, half section; the north half fractional south half, the south half of southwest fractional $\frac{1}{4}$ and the southwest $\frac{1}{4}$ of southeast $\frac{1}{4}$ of section 33," to his son-in-law, John W. Rohrer, who on February 10, 1905, sold to Charles S. Elms, the present defendant, "all of section 33, in township 3 South, of range 3 East, * * * except the southeast $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of said section." On September 11, 1906, Chas. S. Elms sold to Geo. O. Elms "the west, fractional, half—the northeast fractional quarter—the north half of southeast quarter and southwest quarter of southeast quarter sec. 33," said to contain 391.34 acres; and on October 15, 1906, Geo. O. Elms reconveyed said property to Chas. S. Elms, describing it as "391.34 acres in sec. 33, in T. 3 S., R. 3 E., * * * being all of section except 40 acres (S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)."

This last-mentioned conveyance purports to be a sale for \$2,700 cash, and Chas. S. Elms (examined under commission) testifies that he paid the price in cash, and hence had no check to exhibit. On the other hand, Geo. O. Elms (also examined under commission, and at a different place), being asked: "Did you ever receive any consideration for the various sales made by you?" replied: "Not as yet; the note given me had only matured a short time before this suit was instituted." Geo. O. Elms gives some other testimony, the purpose of which is to show that he took possession of the land by surveying it, asserting title, and leasing one acre to a party "for him to put a sawmill on," and that the sawmill was erected and was operated for several years.

Opinion.

It is plain that the adjudication for taxes of the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of an undesignated section of land in a designated township and range conveys to the adjudicatee no title to the whole of a particular section in such township and range, except the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$; and it is equally plain that a tax deed having no other basis than such adjudication, but describing the property as all of said section, except S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, can have no other or greater effect.

The adjudication alone transfers the title of the seized debtor, and the act of sale which follows "adds nothing to the force and effect of the adjudication, but is only intended to afford the proof of it." Code Prac. arts. 690, 695. Where, however, there has been what

purports to be an adjudication for taxes of property which from the description in the assessment and advertisement is not susceptible of identification, or there has been an adjudication of a sufficiently described tract, an act of sale, predicated thereon, cannot "afford proof" of the sale to the adjudicatee of a described tract other than that which has been adjudicated; for, there having been no such sale, there can legally be no proof of it and the insertion in the deed of a description of property not adjudicated cannot affect the title of the property described.

That there can be no sale of property which is neither identified nor susceptible of identification goes without saying. Scott et al. v. Parry et al., 108 La. 11, 32 South. 188; Levy v. Gause, 112 La. 789, 36 South. 684; Posey v. City of New Orleans, 113 La. 1059, 37 South. 969; Lewis v. Brock, 123 La. 1, 48 South. 563. And, where there has been no sale, article 233 of the Constitution, establishing the prescription of three years against attacks on sales, has no application. Shelly v. Friedrichs, 117 La. 679, 42 South. 218. It is true that it has been held by this court more than once that for the purposes of the prescription established by article 233 of the Constitution an assessment may be sufficient though made in the name of a person not the owner of the property, or in the name of one who is dead, or in no name, but, so far as we are at present informed, it has never been held whether for the purpose stated or for any other that in legal contemplation there can be a sale of property for taxes without an assessment. In fact, it is of the essence of such a sale that there should have been an assessment, just as it is the essence of an execution that the executioner should have legal authority for what he does, since otherwise the killing is merely a homicide, and perhaps a murder. No one will pretend that one ordinary citizen can make a "sale for taxes" of the property of another, no matter what he may choose to call it, and a sheriff or tax collector without a writ or warrant—or, in other words, without an assessment and levy—is no more than an ordinary citizen, and his sales without such authority are not sheriff's sales, or sales for taxes, but are acts which are better known to the law as "torts."

Of course, an assessment, without an identification of the property attempted to be assessed, is no more possible than is the cooking of an uncaught hare, and, where one piece of property is described in an assessment and advertisement, it cannot be said that another piece is thereby identified, assessed, and advertised, or that any authority is thereby conferred on the sheriff or tax collector to sell such other piece for taxes; and, as we have said without authority, he cannot make a sale for taxes within the meaning either of article 233 of the Con-

stitution or of any other provision of our law. The general rule, as thus stated, has been recognized in many cases besides those hereinabove cited, and in Shelly et al. v. Friedrichs, 117 La. 679, 42 South. 218, it was applied to the prescription established by article 233 of the Constitution, it having been there held (quoting from the syllabus) that:

"The constitutional provision invoked [referring to the prescription established by article 233] does not cure the tax title where the description is insufficient to identify the property."

See, also, Crillen v. N. O. Terminal Co., 117 La. 354, 41 South. 645; Terry v. Helsen, 115 La. 1080, 1081, 40 South. 461.

We may remark here that the record does not show that the land in question was the only land owned by the heirs of Jos. Simon Fontenot in section 33, township 3 S., range 3 E., or in that township. The only evidence tending in that direction being an excerpt from the inventory in Fontenot's succession from which it appears that there were 700 acres (doubtful as title and acreage) on Bayou Crocodile.

We agree with the learned counsel for defendant that it makes no difference, in so far as the original validity of the tax deed is concerned, that the deed was prepared by the adjudicatee, rather than by the sheriff, but that circumstance makes this difference in determining whether the adjudicatee acted in good or bad faith; that, if the deed had been prepared by the sheriff, there would be a possibility that the adjudicatee had accepted it without knowing that it described property which had never been assessed, advertised, or sold, whereas, having prepared the deed himself, we are bound to assume that the change in the description of the property was made with knowledge and deliberation, and for the purpose which it seemed likely to accomplish, thus bringing the adjudicatee within the meaning of Civ. Code, art. 3452, which reads:

"The possessor in bad faith is he who possesses, as master, but who assumes this quality when he well knows that he has no title to the thing or that his title is vicious or defective."

We therefore agree with the learned judge a quo that the author under whom the defendant claims was not a possessor in good faith, and, as the title emanating from him was not as much as 10 years old when this suit was brought, the prescription of 10 years *acquiescentis causa* cannot avail to sustain it. On the trial of the case counsel for plaintiffs called to the stand Mr. O. Deshotels, a son of the former sheriff, by whom the act of sale here attacked was executed, and the witness identified a certain book, as having been used by his father, as sheriff; and in which are pasted the advertisements, cut from the official paper, of property offered for sale for taxes, with a memorandum opposite each advertisement showing whether

the property had been sold, and, if so, to whom. Counsel for defendant objected to the testimony, identifying the book and explaining its purpose, on the ground that it was parol evidence, inadmissible to contradict the recitals of an authentic act. We are of opinion that the objection was properly overruled. The book was part of the record kept by the sheriff and was not parol evidence, and the testimony given to identify and explain its purpose was necessary, because it does not altogether explain itself. Moreover, the petition alleges that:

"The description of your petitioners' property in the deed evidencing said adjudication, when the same was never assessed against your petitioner or adjudicated by the tax collector of the parish of St. Landry, was a fraud, practiced on them and vested no title to your petitioners' property in said Elms."

And a charge of fraud opens the door to oral as well as documentary evidence. No effort was made by the defendant to prove the taxes paid, and the court a quo in giving judgment for plaintiff reserved defendant's rights with respect to such taxes. We think the judgment as rendered is correct, and it is accordingly

Affirmed.

(126 La.)

No. 18,196.

TAYLOR v. UNITED FRUIT CO. et al.
(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

SHIPPING (§ 84*) — INJURIES TO SERVANT — EVIDENCE.

The United Fruit Company, having in its possession and control at the landing of the city of New Orleans as charterer of a steamship named the Bertha, employed the defendant Legeal, engaged in the business of loading and unloading ships and having a number of men under him, to load a cargo of cross-ties upon said steamship. While Legeal's workmen were in the hold of the vessel to receive and properly stow the ties when received there, others upon the shore were swinging the ties from the shore upon the vessel. When the men first went into the hold, the hatch above was open, but later, by direction of one of the officers of the United Fruit Company, the mate of the ship had a portion of the open hatchway covered. The cover was improperly and insecurely placed over the hatch, so that, in lowering the ties into the hold, they struck this covering, dislodged it, and caused it to fall upon the men below in the hold. The plaintiff was severely injured by the falling of the cover and has sued Legeal and the United Fruit Company to recover damages for the injury so received by him. Judgment having been rendered in plaintiff's favor against the fruit company, it has appealed. It was under the circumstances legally responsible for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by James Taylor against the Unit-

ed Fruit Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

James Legendre and Edward Rightor, for appellant United Fruit Co. Samuel Sansum, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff brings this suit against the United Fruit Company and James J. Legeal, claiming that they are indebted in solido to him in the sum of \$10,000, with legal interest thereon. In his petition he alleges that on November 7, 1906, the United Fruit Company had possession of a certain steamship named Bertha, which said defendant used in its business of common carrier, and the other defendant, the said James J. Legeal, was engaged in the business of loading and unloading vessels in the port of New Orleans; and on the day and year aforesaid, the said steamship being in the port of New Orleans, the said United Fruit Company, desiring to have said steamship loaded with a cargo of ties, timber, and other goods, procured and directed the other defendant, the said James J. Legeal, to have said steamship loaded with said cargo, and the said James J. Legeal, on the day and year aforesaid, at New Orleans hired and employed plaintiff to go with other men into the hold of said steamship and assist in the storing of said cargo in the hold of said steamship; and plaintiff and a number of other men under the direction of said James J. Legeal went on board of said steamship and descended into the hold of said steamship into that part of said steamship which is known as "hatch No. 2," and entered upon the work of storing said cargo; and then and there it became and was the duty of both defendants to furnish plaintiff and said other men employed in said hatch No. 2 with a reasonably safe place to work, and to keep said place reasonably safe while plaintiff and said other men were working in said hatch; and to use reasonable care to prevent anything from falling down into said hatch upon plaintiff and said other men while plaintiff and said other men were working in said hatch. But both defendants wholly neglected all their said duties in the premises, and did not, nor would not, furnish plaintiff and said other men with a reasonably safe place to work, and did not, nor would not, use any care to prevent things from falling down said hatch upon plaintiff and said other men; and, while plaintiff and said other men were working in said hatch, the said James J. Legeal negligently and carelessly allowed and permitted the other defendant, the said United Fruit Company, to wrongfully, negligently, carelessly, and insecurely place certain pieces of hatch covering on the top of said hatch No. 2, and about 2 o'clock on the day and year aforesaid, while plaintiff and said other men were working

in said hatch assisting in the storing of cargo, a certain piece of timber which was being pulled by the tackle of said steamship on board of said steamship casually came in contact with the combing of said hatch and jarred one of said pieces of hatch covering which the said United Fruit Company had wrongfully, negligently, carelessly, and insecurely placed over said hatch No. 2, and said piece of hatch covering fell down said hatch and struck plaintiff's left foot, bruising, contusing, and crushing it to a pulp; and plaintiff was taken to the Charity Hospital where he remained for a long time, to wit, one month, and, in consequence of said injuries, plaintiff suffered and still suffers great mental and physical pain, and plaintiff is informed, and believes, that his said foot is permanently injured, and that he is a cripple for the balance of his life.

Plaintiff further averred that he had no knowledge that said pieces of hatch had been so insecurely placed on said hatch that they might fall down upon plaintiff, and plaintiff avers that neither of the defendants gave plaintiff any warning or notice of the dangerous and insecure way in which said pieces of hatch covering had been placed on said hatch, although it was their duty so to do.

In view of the premises, plaintiff prayed that defendants be cited to appear and answer the matters and things aforesaid, and, after due proceedings shall be had according to law, plaintiff have judgment in his favor and against defendants in solido for the sum of \$10,000 with 5 per cent. interest from date of judgment, and all costs of suit, and plaintiff prays for all general relief.

Both the defendants filed exceptions which were referred to the merits.

The United Fruit Company answered, pleading a general denial.

The defendant Legal first pleaded the general issue. He subsequently by supplemental and amended answer averred that for several years he has been engaged in the business of loading and unloading ships in this port, and that, in order to carry on his said business, he requires the services of a large number of men; that it is now, and has been for a number of years, an utter impossibility for him to secure such services outside of the membership of the Stevedores & Longshoremen's Benevolent Society and the Longshoremen's Protective Union Benevolent Association, two organizations which have for a long time controlled the labor market available to this defendant and others engaged in the same line of business in this port, and which jointly frame and enforce on their individual members certain rules or conditions under which they may or may not be permitted to work in the pay of this defendant and others engaged in the same line of business; that the plaintiff herein was at the time that he came into the pay of this defendant, and on November 7th a member of one of said organizations and a party to all the rules or condi-

tions created and maintained by said associations as aforesaid, but this defendant is not, and has never been, a member of either of said organizations, nor has he ever had a voice in their deliberations or in the formation of their said rules; that owing to the rules of said associations and the conditions created and maintained in this port by said associations and the individual members thereof, including the defendant herein, it is now and has been for several years impossible for defendant to secure the services of members of said associations, except on the following conditions, to wit: He must abstain from having in his employ any one who is not a member of said associations. When he has a ship to load or unload, he must, in order to secure the necessary services, employ from among the members of said associations one man to act as foreman. He must surrender to said foreman the right and power of determining how many men shall be employed. He must invest him with the sole power of employing and discharging them. He must allow him the exclusive right of determining and fixing their compensation, according to the schedule of hours and scale of wages fixed by the rules of said associations, and he must commit into the hands of said foreman absolute power of determining the distribution of the men about the ship, assigning to each his particular duties, and of directing and superintending the performance of the entire work. That said foreman when so employed becomes the representative of said associations, and exercises all his powers in accordance with the rules laid down to him by said associations, and he cannot be discharged by defendant, nor will he receive or carry out any orders from defendant except in conformity with the rules of said associations.

That on or about November 7th, when the plaintiff herein came into defendant's pay, under the conditions above outlined and begun his day's work in hatch No. 2 of the steamship Bertha, the said hatch by this defendant's orders and in accordance with the rules of said associations was clear of all covers. That defendant did not consent to any one putting wooden covers over a part of said hatch as alleged in plaintiff's petition. That, if wooden covers were put on said hatch as alleged by plaintiff, the same were there in full view of the plaintiff herein and to his knowledge as well as to the knowledge of his fellow workmen, and plaintiff had the right under the rules of said associations, as it was his duty under the orders of defendant, to have removed said covers. In view of the premises, defendant prayed that this suit be dismissed in so far as defendant is concerned, and for costs and general relief.

The case was taken up for trial on December 14, 1909. On December 16, 1909, the plaintiff through his counsel having suggested to the court that he had compromised his

claim and demand against James J. Legeal, one of the defendants in the above-entitled cause, and has reserved all his rights against the said United Fruit Company, the other defendant in said cause, it was ordered that the claim and demand against James J. Legeal be dismissed in so far only as the said James J. Legeal was concerned and with full reservation of all plaintiff's rights against the said United Fruit Company, and especially the right to prosecute this suit against the said United Fruit Company to final judgment.

On March 2, 1910, the court rendered judgment in favor of the plaintiff against the United Fruit Company for \$1,000 with legal interest from date of judgment and costs.

That company has appealed.

Opinion.

The trial judge assigned the following reasons for his judgment:

The defendant United Fruit Company was the charterer of the ship *Bertha* at the time of plaintiff's accident. *Pro hoc vice*. Said company was the owner and responsible for the results of any negligence on the part of the ship's officers or men. Said company also at the time had the stevedores engaged as its employes in loading the vessel with cross-ties, lumber, etc. Plaintiff was a stevedore employed in said service, and was stationed in the hold of the vessel below the hatchway, engaged in receiving and properly storing the timber lowered into the hold. The hatchway has a cover of heavy timbers or thick planks which fit into the sides of the opening resting on ledges cut down into the side pieces of the hatch opening. When placed down flat on the ledges, they are safe and keep in place a secure covering to the hatchway. When plaintiff went down in the hold to labor, the hatchway was open, and the timbers to be stored below were taken from the wharf, swung over the hold and by machinery lowered into it.

The ship was also coaling, and the first mate, in order, as he testifies, to protect the men in the hold from falling pieces of coal, ordered the partial covering of the hatchway, and superintended the placing of the pieces, forming the cover over it. He was in charge and in the employ of the United Fruit Company, the charterers of the vessel and the defendant here.

Evidently the cover was not properly placed and adjusted. If it had been, no part of it would have fallen into the hold. It makes no difference how it was adjusted; it was not properly done, because it fell, and the proof is that, if properly placed and fitted, it could not have fallen.

A witness who illustrated intelligently said that the fault of placing the pieces forming the cover lay in the fact that the piece which fell and crushed the plaintiff's foot was not placed squarely down in the ledges devised as its receptacles, but rested one end on the

ledge of one side, with the other end resting on the top of the combing or side of the hatch opening, in a manner easily to be tilted and thrown into the hold beneath. However all this may be, the fact is that a heavy piece of the hatch cover fell, and crushed the plaintiff's foot. *Res ipsa loquitur*. It was the duty of the defendant and its employes to furnish plaintiff a safe place for his work. He was in the ship's hold and unable to guard himself from the results of what might be going on, on the vessel's deck above. While so engaged, a heavy piece of wood, forming part of the hatch cover, fell on his foot, and inflicted the injuries for which he claims damages. The authorities cited by plaintiff's counsel are conclusive in his favor on the established facts of the case.

In *re The Joseph B. Thomas*, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; *Payne v. Georgetown Lumber Co.*, 117 La. 983, 42 South. 475; *Fuller v. Tremont Lumber Co.*, 114 La. 266, 38 South. 164, 108 Am. St. Rep. 348.

The only question is the quantum of damages. I saw the plaintiff's foot which he bared and exhibited. The great toe is stiff, the joint being in some way unable to perform its natural function. The great toe shows the scars of severe mashing and laceration. The red scar on the black skin surface (plaintiff is a negro) shows severe laceration of the bottom of the foot, under the instep, in the hollow of the foot (if this be predicated of an African) and on the inside of the foot, and on the top of the foot from the toes along the instep, nearly to the ankle. The scars are deep and ugly and show the tearing away of the flesh. The great toe as stated is stiff and motionless.

No wonder at this, when the cause is considered; i. e., a heavy piece of timber falling end foremost from the top of the hatch to the bottom of the hold and alighting on the plaintiff's foot. He was a month in the hospital and for eight months reporting to the hospital, and only recently pieces of fractured bone have worked their way through the flesh and were taken out. I heard the doctor testify for defendant as it seemed to me flippantly, and without remembrance of the facts, for he saw the plaintiff's foot three years ago, and not since.

I saw and carefully looked at the plaintiff's foot on the day he testified, and from what I saw I cannot rely on the physician's opinion as to the extent of the injury or its probable permanency. The plaintiff's foot was horribly mashed and crushed and lacerated, and I believe that the stiffening of his great toe joint is permanent. As a stevedore he worked at \$4 per day—not every day, but as such laborers are employed. It is three years and more since the accident, and his capacity except for light work is gone. As a stevedore where a strong body and sound foot are required he can labor no more. By

compromise with one of the defendants with reservation of his right of action against the present defendant he received \$375.

Defendant's estimate of a stevedore's earnings average is \$80 per month. During plaintiff's confinement of eight months he lost at this rate \$480. He was injured November 7, 1906. Estimating that he could work to some extent from and after July, 1907, and could earn at light work \$30 per month, his damages to date in loss of wages (since July, 1907) would be for two years and six months \$900, total loss of wages \$1,380 (\$480-\$900).

Deducting the amount received in compromise, and we have in round numbers \$1,300 loss of wages to date. This goes on the theory that he would have found steady work and have been able to perform it. No one can assume that this would have been so, and sound discretion would suggest a conservative deduction from these estimates. They are only suggestive and not infallible guides. Plaintiff's age was not proved, but I take him to be past middle life.

That he suffered greatly from such a wound goes without saying. I find it hard to estimate—i. e., to give plaintiff reparation—without oppressing the defendant whose loss is for the negligence of an employé and wholly vicarious. Plaintiff is a negro, an humble laborer. He was laboring where he was wholly dependent upon defendant's care of him for immunity against any harm that could befall him from the ship's deck. Defendant's duty was to make his place of labor safe, and this duty defendant's employés in charge of the ship did not fulfill. I fix his damages at \$1,000 against the defendant the United Fruit Company, this over and above the amount he has received by compromise from the other defendant. Judgment for plaintiff against the United Fruit Company, defendant, for \$1,000 with interest from date of judgment and costs.

The mate of the ship who caused the hatchway to be covered testified that he had done so under instructions from an officer of the United Fruit Company.

We are of the opinion that that company is responsible for his acts in the premises. *Green v. Sansom*, 41 Fla. 94, 25 South. 332. The judgment appealed from is correct, and it is hereby affirmed.

(128 La.)

No. 17,842.

THIBODEAUX et al. v. THIBODEAUX.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 25, 1910.)

(Syllabus by Editorial Staff.)

1. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPOINTMENT.

A nephew of one of the heirs of a decedent has no standing in court to file an opposition to the appointment of an administrator,

and a denial of his opposition is not res adjudicata as against the heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 95; Dec. Dig. § 20.*]

2. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—COLLATERAL ATTACK.

A suit by heirs of a decedent and by a purchaser of the interest of some of the heirs against an administrator of the succession for judgment decreeing plaintiffs to be the owners, and in possession of the property which the administrator seeks to sell, on the ground that the succession of decedent has been closed and the heirs put in possession, is not a collateral attack on the appointment of the administrator, but is a suit which merely denies that the property which is in possession of plaintiffs can be taken from them or a cloud cast on their title by proceedings by the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 178-182; Dec. Dig. § 29.*]

3. EXECUTORS AND ADMINISTRATORS (§ 180*)—RIGHTS OF HEIRS.

Where the heirs of a decedent obtained a decree putting them in possession of decedent's real estate, rendered in a suit to destitute the administrator and to be put in possession, and the decree was not appealed from, and the heirs went into possession and continued in possession, they could not be divested and dispossessed by proceedings taken ex parte in the succession closed by the decree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 180.*]

Appeal from Nineteenth Judicial District Court, Parish of St. Martin; James Simon, Judge.

Action by Philomene Thibodeaux and others against Ulysse Thibodeaux, administrator. From a judgment denying relief, plaintiffs appeal. Reversed.

R. Lee Garland, for appellants. Voorhies & Voorhies and Martin & Martin, for appellee.

PROVOSTY, J. Treville Thibodeaux died in 1891, leaving six grown children, sons and daughters, issue of his marriage with his predeceased wife, Aspasia Le Blanc. These sons and daughters were married and had children. Valery Thibodeaux was appointed administrator of the succession. He obtained an order for the sale of all the property of the succession to pay debts, and advertised the sale. The heirs enjoined the sale, claiming that one-half of the property belonged to them as heirs of their mother, and was not liable for the debts of their father, and the court so decreed. The administrator then caused the succession's undivided half of the property to be sold; and in May, 1895, he filed a so-called final account of his administration. In this account he asked that the heirs be sent into possession of their mother's half of the property, and the court so decreed. There were oppositions to the account. Judgment on the oppositions was rendered October 1, 1901. In January, 1903, the following judgment, which explains itself, was rendered in the succession proceedings:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"This proceeding was filed by the heirs of Treville Thibodeaux and Aspasie Le Blanc, and tried contradictorily through its attorney, Robert Martin, and it asks that the administrator be ipso facto divested of his administration, and that, in default thereof, he be ordered to furnish new securities on the ground of insolvency of those now signing the bond.

"In 1891 Valery Thibodeaux was appointed administrator of the above estate, giving a bond for fourteen thousand (\$14,000) dollars.

"From this time up to date the administrator has filed two or three accounts, and has always sold under order of court various properties to meet the debts, although few, if any, debts were due by the estates.

"In 1895 he filed what he called a final account, and prays therein that the same be homologated and approved, and that he be discharged; that his bond be canceled, and that the heirs be placed in possession of certain described real estate, described in said account.

"This account was opposed by certain heirs, and said opposition was maintained and the administrator ordered to correct the account in accordance with the judgment, and further ordering him to make a settlement with the heirs for amounts collected by him belonging to the estates since the filing of said account. This was in 1901.

"Since then nothing has been done by him. He has neither corrected his account as ordered, nor has he accounted to the heirs for the amounts collected by him as rents from the date of filing the said account up to this date. This is in violation of his duty as administrator and a disregard for the orders of the court, of which he must be cognizant, because he, through his attorney, was in court at the time of the rendition of this judgment. That he has collected money from various parties is shown by the evidence in this matter, and no account rendered therefor to the heirs whom he represented.

"Taking into consideration the wanton disregard of his duties as administrator, his failure to file his yearly account as required by law, his constant collecting of rents of the succession property, when there are no debts really due by it, and, if any, those created by him.

"And in view of the fact that he has been disregarded by judgment of this court, I am of the opinion that he should be ipso facto divested of the office of administrator, and that he is now an intermeddler reserving to the heirs their right to sue him and his bondsmen for whatever amount he has collected and not accounted for, and that they should be placed in possession of the property of said estates without delay as ordered, adjudged, and decreed."

Ovignac Thibodeaux, one of the sons of Treville Thibodeaux, to whom the real estate of the succession had been adjudicated in 1895 (seven years before this judgment), and who had been in possession ever since, now brought suit (February, 1903) against his coheirs for a partition, alleging himself to be the owner of one-half of the property by virtue of the adjudication. His coheirs in answer to the suit set up that the adjudication to him was null because of the nonobservance of the formalities prescribed by law, and also because of fraud; and in May, 1904, the court so decreed. See *Thibodeaux v. Thibodeaux*, 112 La. 906, 36 South. 800. The heirs then made an informal, verbal partition of the property among themselves. They had two disinterested persons to divide the property into six parts and then drew lots. Since then they or their children have been in possession of the property, each enjoying

in severalty the share acquired by the partition. Three of the four children of one of the heirs have sold their interest to Paul Hebert, one of the plaintiffs in the present suit. In July, 1905, Alexandre V. Fournet filed a petition, alleging that the succession of Treville Thibodeaux was unsettled; that it owned property and owed debts; that some of the heirs were minors; that an administration was necessary; and that he, as heir and creditor, was entitled to be appointed administrator. There were two oppositions—one of Ulysse Thibodeaux, who claimed the preference over Fournet in the choice of an administrator, and one, by a son of one of the plaintiffs in this suit. The latter opposition denied that an administration was necessary, as all the debts had been paid, and the heirs were in possession. The oppositions were tried, with the result that Ulysse Thibodeaux was appointed administrator. He in July, 1906, filed a petition alleging that the succession owed debts (of which he filed a list), and owned property (namely, the real estate involved in this suit), and asked that this property be sold to pay the debts. The court so ordered, and the sale was advertised. Thereupon the present suit was filed. The plaintiffs are Paul Hebert, vendee of the interest of some of the heirs in the property, joined by two of the heirs.

They allege that notwithstanding the fact that the succession of their father was closed in 1903, and that all the debts have either been paid or assumed by the heirs, and the heirs sent into possession, and notwithstanding the fact that they and their coheirs have been in possession ever since and are now in possession, Ulysse Thibodeaux has by ex parte proceedings caused himself to be appointed administrator of the succession of Treville Thibodeaux, and obtained an order for the sale of certain real estate (namely, the real estate involved in this suit), at one time depending upon the succession of Treville Thibodeaux, but now owned and possessed by petitioners and their coheirs, and which said coheirs by an amicable partition have partitioned among themselves, that the petitioners are entitled to an injunction enjoining the said sale, and enjoining Ulysse Thibodeaux from interfering with their possession of said property, and that there should be judgment decreeing the petitioners to be owners and in possession of said property.

The defendant first filed an exception of *res judicata*, based on the judgment rendered on the opposition to the appointment of an administrator. Whether that exception was ever passed on by the lower court does not appear from the record. It has no merit. The person who filed the opposition was a nephew of one of the heirs, and had no better standing in court to litigate the matter than an uncle, an aunt, or a cousin would have had.

In his answer the administrator pleads the general denial, denies specially that all the

heirs of Treville Thibodeaux have accepted his succession and gone into possession, and pleads that the validity of his appointment as administrator cannot be inquired into collaterally, as is attempted to be done by the present suit, avers that the succession of Treville Thibodeaux owes debts, as is shown by the final table therein, duly homologated and therefore having the force and effect of a judgment, and, finally, that, when the succession sale of the property in controversy to Ovig nac Thibodeaux was annulled by the judgment in the partition suit of Ovig nac Thibodeaux against his coheirs, the effect was to restore the property to the succession.

In the brief of defendant, it is said that one of the heirs, Angele Thibodeaux, had not attained her majority at the time when it is pretended by the plaintiffs she was in possession. There is, in the first place, no plea to that effect in the answer. In the next place, the evidence is very inconclusive as to whether she had not already attained her majority at the time of the amicable partition; and she must have done so since that time, for she acted as a person of age in selling to the plaintiff, Paul Hebert, her rights as heir in the land in controversy; her said interest being one-fourth of one-sixth.

As to attacking collaterally the appointment of the defendant as administrator, the plaintiffs are not doing so. If they were attacking at all the appointment of the defendant, they would be doing so directly, for this is a suit against the defendant in which the allegation is made that the succession of Treville Thibodeaux was closed and the heirs put in possession; but they are not doing so. They do not ask that plaintiff's appointment as administrator be annulled, nor do they question the right of the defendant to stand in judgment for the succession. What they deny is that the property which is in their possession can be taken away from them, or a cloud cast upon their title by ex parte so-called succession proceedings. In the case of Davis v. Greve, 32 La. Ann. 420, cited by defendant, the administrator brought suit to recover property for the succession he represented, and the defendant sought to question by way of exception his right or quality to stand in judgment for the succession. The plaintiffs in the present case are not doing anything of that kind. They have brought a direct action to enjoin certain proceedings which if allowed to go on might have the effect of casting a cloud upon their title.

And we think their suit is well founded. The heirs of Treville Thibodeaux all of age (for Harville Thibodeaux, father of Angele Thibodeaux, was one of them), sued to destitute the administrator and to be put in possession, and the court so decreed; and from that decree thus rendered contradictorily with the administrator, representative of the

creditors of the succession, no one has ever appealed. The heirs went into possession, and have had possession ever since. It goes without saying that they cannot be divested and dispossessed by proceedings taken ex parte in the succession closed by said judgment.

This case not being complicated by minorities is a very much stronger one than was that of Succession of Aronstein, 51 La. Ann. 1052, 25 South. 932, where this court said:

"The applicant for this administration has mistaken his remedy. Instead of seeking to reopen the succession long since concluded, his course was rather to proceed against the major and emancipated heirs who by accepting unconditionally have become his debtors, and against those who as minors accept conditionally to subject the property in question now vested in the heirs to the payment of whatever legal claim he may have as creditor of Louisa Aronstein, deceased, and as creditors of these heirs of hers who are legally capable of accepting unconditionally her succession have done so."

See, also, Messick v. Mayer, 52 La. Ann. 1161, 27 South. 815.

It is ordered, adjudged, and decreed that the judgment appealed from be set aside and that the writ of injunction herein issued be perpetuated, and that the defendant pay the costs of this suit.

(126 La.)

No. 18,081.

McGAW et ux. v. O'BEIRNE.

(Supreme Court of Louisiana. Feb. 28, 1910.

On the Merits, June 6, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 14*)—DISMISSAL—EFFECT.

A judgment dismissing an appeal for omission of any legal formality does not preclude the appellant from taking a second appeal within the year.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 49-52; Dec. Dig. § 14.*]

2. DIVORCE (§ 297*)—AGREEMENT TO SUPPORT CHILDREN—CONSTRUCTION—"COMPLETE EDUCATION."

A contract by the husband with his divorced wife to pay for the "complete education" of the three children of the marriage will be construed with reference to the social and financial standing of the parties at the time and in the light of all the surrounding facts and circumstances. The term "complete education" construed in this case not to include a post-graduate course in some distant university.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 780; Dec. Dig. § 297.*]

3. DIVORCE (§ 297*)—CONTRACT TO EDUCATE CHILDREN—BREACH—RIGHT OF ACTION.

On the breach of such a contract, the divorced wife may treat the contract as absolutely and finally broken, and recover damages as of the total breach of an entire contract.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 780; Dec. Dig. § 297.*]

4. DIVORCE (§ 297*)—CONTRACT TO EDUCATE CHILDREN—BREACH—RIGHT OF ACTION.

A previous putting in default is not required where the defendant has refused to per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

form the obligation of his contract as construed by the court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 780; Dec. Dig. § 297.*]

(Additional Syllabus by Editorial Staff.)

5. SPECIFIC PERFORMANCE (§ 76*)—CONTRACTS ENFORCEABLE—CONTRACTS TO PAY MONEY.

A contract to pay money cannot be specifically enforced.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 211; Dec. Dig. § 76.*]

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Action by Mr. and Mrs. William H. McGaw against Edward J. O'Beirne. Judgment for defendant, and plaintiffs appeal. Reversed and rendered.

See, also, 124 La. 989, 50 South. 819.

Wm. J. Formento and Teissier & Teissier, for appellants. George W. Flynn, for appellee.

On Motion to Dismiss.

LAND, J. Plaintiffs took a former appeal in this case, which they perfected by giving bond and filing transcript. The said appeal was dismissed at the instance of the defendant and appellee because it was made on a motion at an ensuing term without citation to the appellee.

The present motion to dismiss is on the ground that plaintiffs cannot take a second appeal.

In *Dugas v. Truxillo*, 15 La. Ann. 116, the court said:

"That appeal was dismissed on motion of the appellees, and cannot be considered as an abandonment of the appeal by the appellants. The second appeal having been taken within the year, is valid under the authority of the case of *Smith v. Vanhille*, 11 La. 382." See, also, *Johnson v. Clark & Meador*, 29 La. Ann. 763; *Hoover's Heirs v. York*, 35 La. Ann. 574; *Succession of Weber*, 110 La. 675, 34 South. 731.

Motion overruled.

On the Merits.

Mrs. McGaw, born Moore, was the wife of the defendant; but in November, 1899, obtained against him a judgment of divorce, and awarding her alimony at the rate of \$40 per month, and the permanent custody of her minor children, Mary, Sherly, and Jack. The judgment further ordered that the residence of the plaintiff's mother, Mrs. William H. Moore, at Huntsville, Alabama, be assigned to the plaintiff. On the next day after the judgment was signed, the parties entered into a notarial contract for the purpose of carrying out the judgment of divorce. The divorced wife in this agreement renounced all her interest in the community property, and was to receive \$5,000 in interest-bearing bonds of a certain corporation to be held in trust for the three children of the marriage, during the natural life of the mother, and also alimony at the rate of \$40 per month until her remarriage. She also agreed to re-

side with said children at the residence of her mother, Mrs. Moore, as long as possible, and, in the event that she should leave said residence, the children were to be consulted as to whether they would follow the mother or not, and, if they should choose to separate, the alimony was to be discontinued.

Among other stipulations was the following, to wit:

"Said Edward J. O'Beirne hereby agrees to pay for the complete education of said children."

After the execution of this agreement the mother and the three children resided with Mrs. Moore for about a month. The mother then married Wm. H. McGaw, and moved to New Orleans, leaving the children with Mrs. Moore. From that time on the father took entire charge of the two girls, and supported and educated them. The boy, Jack, remained with his grandmother about a year, and then went to New Orleans to pay his mother a visit. Thereafter the boy remained with his mother, who sent him to a preparatory school in New Orleans for six years.

The mother defrayed the expenses of the boy, amounting to \$520.

In October, 1908, the present suit was instituted, to recover said sum of \$520, and to compel the defendant to specifically perform the contract to educate the boy; or in the alternative for \$3,930 as damages for breach of the stipulation, to pay for his education.

For answer the defendant admitting the agreement, averred that it was violated in both its letter and spirit by the plaintiff in the matter of the education of the boy, which was neglected and ill advised; and that the plaintiff ignored the defendant's protests and refused to permit him to exercise any joint supervision over the education of the boy; and that plaintiff violated and ignored the contract in other particulars.

In his amended answer the defendant averred that the plaintiff made no demand or claim whatever on him on account of the education of her son, Jack, until a short time before the institution of this suit, and made no complaint whatever that he had violated the contract between them; that respondent has always been ready and willing to provide for the support and education of his said son, but declines to do so, unless allowed a voice in the matter; and that the contract has been long since ignored and abandoned by the parties concerned. The permanent custody of the three children was given to the mother by the judgment of divorce. A residence was also assigned to the divorced wife. Under the contract the only penalty for the abandonment of the residence assigned to plaintiff, was the forfeiture of alimony. In case of such abandonment, the children were to be consulted as to whether they should follow their mother or not. Conceding the validity of the latter stipulation, it appears that the boy elected to reside with his mother.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contract gives the father no control over the education of the son while residing with the mother. The father was to pay for the complete education of the son. It is difficult to determine what the words "complete education" mean. The father gave the two girls the benefit of the best local schools and colleges in this section of the country. Considering the social position of the parties, and the means of the father at the time, we think that he was bound to pay for a similar education for the son. The evidence shows that the preparatory education of the boy has cost Mrs. McGaw \$520, that \$100 will be required for another session at the same school, and \$310 for a two-year course in the Electrical and Mechanical Engineering Department of Tulane University. The additional demand for \$3,000, for a three-year course in a similar department of some leading university of the North does not seem to us to be sustainable. The necessity for such an extra course rests on the unsupported testimony of the mother, who is not shown to be an educational expert. It may be assumed that Tulane University has competent instructors, and that the two-year course at that institution affords sufficient time for the ordinary student to become well grounded in the theory and practice of electrical and mechanical engineering. The testimony of the parties as to what kind of education they intended to bestow upon the son is painfully conflicting, and we are left to ascertain their intention by the words of the contract interpreted in the light of surrounding facts and circumstances. The father at the time of the execution of the contract was worth about \$15,000. The small allowance of \$65 per month for the support of the mother and three children was deemed commensurate with the fortune of the defendant at the date of the divorce.

The court after hearing the parties had fixed the permanent alimony of the wife at \$40 per month. In the light of these facts, we do not think that the parties contemplated at the time of the contract that the father should pay for an expensive postgraduate course in some distant university after the graduation of the son from Tulane University. As the obligation of the defendant is to pay money, there can be no specific performance, and the case resolves itself into one for damages for breach of contract. No default was necessary, as the defendant refused and declined even in his pleadings to comply with his contract as we construe its stipulation.

A breach of a contract to pay for the education of a child does not differ in principle from a breach of a contract to support and maintain. At the common law, in case of the breach of a contract to support and maintain for life, the plaintiff may treat the contract as absolutely and finally broken, and recover damages as of a total breach of an entire contract. Such damages are not subsequent

or prospective, as the duration of life can be ascertained by reference to the mortality tables. See A. & E. Enc. of Law (2d Ed.) vol. 27, p. 424, and cases cited in notes.

It is therefore ordered that the judgment below be reversed, and it is now ordered that the plaintiff Mrs. William H. McGaw do have and recover of the defendant, Edward J. O'Beirne, in full of all demands for the education of her son, the sum of \$930, with legal interest thereon from judicial demand until paid, and costs in both courts.

(126 La.)

No. 17,984.

VARNADO et al. v. BANNER COTTON OIL CO. et al.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 553*) — RECEIVERS — APPOINTMENT—GROUNDS.

The appointment of a receiver at the instance of a stockholder is proper under Act No. 159 of 1898, where the managers have administered the affairs of the corporation without regard to the provisions of the charter as to meetings and notices to stockholders, and have refused to pay out declared dividends, and are proceeding to liquidate the business of the corporation in a mode not authorized by the charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2209; Dec. Dig. § 558.*]

2. EVIDENCE (§ 78*) — PRESUMPTIONS — EVIDENCE WITHELD.

The refusal to produce the corporate books, which have been kept out of the state, justifies the application of the maxim of omnia præsumuntur contra spoliatores.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 98; Dec. Dig. § 78.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by O. D. Varnado and others against the Banner Cotton Oil Company and others in which certain parties intervened. Judgment for plaintiffs, and defendants and interveners appeal. Affirmed.

George Montgomery, for appellants. Reid, Purser & Reid, for appellees. F. Watkins Sherman, for interveners.

LAND, J. Plaintiffs, minority stockholders, petitioned for the appointment of a receiver. The corporate officials, joined by the majority stockholders as interveners, contested the necessity and legality of the proposed appointment.

The court appointed the Amite Bank & Trust Company as receiver, and the defendants and interveners have appealed.

The corporation was organized in March, 1907. In the summer of 1908, the entire plant, except the engine, boiler presses, and a few buildings, was destroyed by fire. The loss was adjusted, and \$28,500 paid to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

corporation. Later, the engine, boiler, and presses were sold by the management. The remaining property of the corporation, consisting of about nine acres of ground with the buildings thereon, was leased to negroes.

In September, 1908, the president of the company, who with his majority associates resided in Summit, Miss., wrote to one of the Louisiana stockholders that he deemed it unnecessary to call a meeting of the stockholders at that time, and that such a meeting would be called when he deemed it proper and advisable. The letter winds up as follows:

"I have an idea that in the event we cannot sell the balance of the property without sacrificing the same, that it might be better for us to figure on rebuilding the oilmill, or else putting in a compress and cotton warehouse. But, of course, on these matters I will not act until a meeting is called, and every stockholder has an opportunity to express himself.

"I would be glad if you would show this letter to all your friends who are interested with us in the Banner Cotton Oil Company."

No such meeting was ever called, and after the lapse of six months the president of the company wrote to several of the minority stockholders that a dividend of 20 per cent. had been declared on the capital stock of the corporation, and that checks for their respective interests would be forthcoming within a few days. The checks never came. All the books, papers, and moneys of the corporation were kept in Summit, Miss. One of the minority stockholders went to Summit for the purpose of examining the books, but was put off with excuses. Under this state of facts, the minority stockholders instituted the present suit for the appointment of a receiver. For answer to an order to produce the books, papers, etc., of the corporation, return was made by its president under oath that the minute book, stock book, original subscription list, cash book, journal, and ledger were in Summit, Miss., in the custody of the president of the company, and hence could not be produced at that time, but were subject to examination by any stockholder or any expert appointed by the court.

On sworn allegations of the plaintiff that the defendants were depredating on the property of the corporation, removing portions of the same, and attempting to sell the remainder of the property, the court ordered writs of injunction to issue restraining the defendants from disposing of the property until the determination of the receivership proceedings.

The evidence tends to show that the managers of the company used and treated the corporate property and assets as if they were sole owners. If they held any meeting under the charter the fact is not shown by any record of the proceedings, nor by the testimony of any person who attended such meetings. The defendants live out of the state, and not one of them appeared at the

trial. The records and books of the corporation have been kept out of the state, and the refusal of the defendants to produce the same creates an unfavorable presumption against their management of the affairs of the corporation. The suppression of evidence will justify a court and jury in drawing the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which the opposite party has been precluded from using and examining as a means for the discovery of the truth. 9 Cyc. 790, note.

Directors and officers of corporations are trustees for stockholders and creditors. In this case there were no creditors, and there was no just excuse for the nonpayment of the declared dividend of 20% on the stock of the company. The retention without cause of this dividend was a misuse or misapplication of the funds of the corporation. The refusal to produce the books of the corporation creates an inference that their examination would disclose mismanagement of the business, or waste, misuse, or misapplication of the funds of the corporation.

The sale of the real estate in Louisiana and the transfer of the proceeds to the state of Mississippi, where all the defendants reside, would have left all the minority stockholders without remedy under the laws of the domicile of the corporation.

The appointment of a receiver to a corporation is authorized at the instance of any stockholder when the directors or officers are jeopardizing his interest by gross mismanagement, or by acts ultra vires, or by wasting, misusing, or misapplying the funds of the corporation. Section 1, par. 2, Act No. 159 of 1898.

The authorities cited by counsel for defendants have no application to the facts of this case. There is no question here of the legitimate control of the affairs of a corporation by a majority of the stockholders. In the case at bar, a stockholders' meeting should have been called as promised by the president, and the question of continuing the business of the corporation presented and determined at such meeting. But no such meeting was called, and the majority stockholders seem to have arrogated to themselves the right of liquidating the affairs of the corporation as they pleased. The charter itself provides for dissolution by a vote of three-fourths of the stock of the corporation at a stockholders' meeting called for that purpose after 30 days' notice to all of the stockholders; and, in case of dissolution, for a liquidation, settlement, and distribution by a commissioner elected by a majority of the stock voted at the election. There is no provision of the charter that empowers the board of directors to sell out or liquidate.

It follows that in the absence of a dissolution and liquidation under the terms of

the charter, an attempted liquidation by the board of directors constitutes an act ultra vires that would authorize the appointment of a receiver under the statute. The undisputed fact seems to be that the management of this corporation was carried on without regard to the provisions of the statute as to meetings and notices to stockholders.

Judgment affirmed.

(126 La.)

No. 17,850.

McCORMACK v. ROBIN et al.

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 755*) —
STREETS—LIABILITY FOR INJURIES.

The charter of the city of New Orleans requires it to keep "open and free from obstruction all streets," and the right of a citizen to recover damages for injury sustained by reason of a failure in the discharge of the mandatory duty thus imposed is beyond question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587-1591; Dec. Dig. § 755.*]

2. MUNICIPAL CORPORATIONS (§ 806*) —
STREETS—CARE REQUIRED IN USING.

Streets and sidewalks are intended for free and constant use, and those who use them have the right to assume that they are safe, and are not expected to exercise the care that would be required in traversing a jungle.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1678; Dec. Dig. § 806.*]

3. MUNICIPAL CORPORATIONS (§ 806*) —
STREETS—INJURIES—NEGLIGENCE.

A lady who starts from her home on one of the principal streets of New Orleans, after nightfall, to go to the theater, and, whilst putting on her gloves and contemplating the catching of an approaching street car, fails to see, and falls over, a block of stone, which had been placed on the banquette by a paving contractor, employed by the city, is not guilty of such negligence as will preclude her from recovering damages for the injury thereby sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1682; Dec. Dig. § 806.*]

4. MUNICIPAL CORPORATIONS (§ 777*) —
STREETS—OBSTRUCTIONS.

An obstruction, like dirt upon a boy's face, is matter out of place, and that which may be a stepping stone, when in a position where it is needed and can be used as such, becomes an obstruction when occupying a place, intended for other use, and where it is not needed and cannot be so used. And, so, though a block of stone which spans a gutter may serve a useful purpose, as a stepping stone, where a pavement has been laid, the asphaltum surface of which runs smoothly down to the curb, which, there being no gutter, may serve as a stepping stone, and, incidentally to the paving, the block has been removed from its position and placed within the curb, on the banquette, it ceases to be a stepping stone and becomes a nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1631; Dec. Dig. § 777.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 4800-4804.]

5. MUNICIPAL CORPORATIONS (§ 808*) —
STREETS—OBSTRUCTIONS—LIABILITY FOR IN-
JURY.

Where a paving contractor, employed and directed by the city, as an incident to his work, removes a stepping stone, which spans a gutter, and places it on the banquette, where it becomes a nuisance, the city and the contractor, and not the owner of the property in front of which the paving is done, are the parties who are liable for the resulting damage to a citizen who falls over the stone.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1684, 1689; Dec. Dig. § 808.*]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. Marguerite McCormack against Mrs. Emma Robin, the City of New Orleans, and another. Judgment for plaintiff against the city, and plaintiff and the city appeal. Affirmed.

I. D. Moore, City Atty., and John F. C. Waldo, Asst. City Atty., for appellant City of New Orleans. B. R. Forman and Rufus J. Paddock, for appellant McCormack. W. S. Parkerson, for appellees Robin.

Statement of the Case.

MONROE, J. This is an action in damages for personal injuries sustained by plaintiff in falling over a stone block that was lying on the banquette in front of the house owned by the defendant Mrs. Robin, and rented to Mrs. White. Plaintiff sues Mrs. Robin and her husband, also the city of New Orleans; and defendants, in effect, plead the general denial and contributory negligence, the city calling Mrs. Robin in warranty. The facts are as follows: Plaintiff is rather an elderly lady, who occupied a house on the river side of St. Charles street, the front door of which is, say, 125 feet below the corner of St. Joseph street. She had moved in there in October, 1904, and had not had occasion to pay much attention to the banquette between her house and St. Joseph street up to the time of the accident, which occurred between 7 and 8 o'clock on the evening of December 27, 1904, and she does not appear to have been aware that, immediately in front of the Robin house, which is between the house occupied by her and the corner, there was lying, on the banquette, inside of the curbstone, and in a catercornered position, a block of stone about 3 feet square and, probably, 8 or 10 inches thick. It had formerly occupied a position extending from the curbstone across the gutter and served as a stepping stone. A year, or perhaps two years, before the accident, however, St. Charles street had been paved by the city, or under its direction, with asphaltum, and the stone had been moved, no doubt by the paving contractor, to the position in which the plaintiff unfortunately found, and fell over, it. On the evening mentioned, she, Mr. Laine (who died before the trial in the district

court), Mr. Marigny and his sister, Mrs. Coleman, left plaintiff's house with the intention of going to the theater. Mr. Laine went somewhat in advance in order to stop the street car, which was just turning into St. Charles street, at Lee Circle, a block above, the two ladies followed, plaintiff being on the right, nearer the curb, and being engaged in putting on her gloves, and Mr. Marigny being in the rear. Plaintiff testifies that the light was bad; in fact, that it was rather dark. On the other hand, defendants' witnesses say that, diagonally across the street, at a distance of, perhaps, 100 feet or more, there were two electric lights in front of a saloon, and that there was a city light over the intersection of the streets; also, that the hall light in the Robin house threw some rays on the banquette. Upon the whole, however, though very likely plaintiff could have seen the stone if she had been looking closely, we find no reason to doubt her statement that the light was bad. She says that she was not hurrying, but Mrs. White testifies that plaintiff told her, the next day, that she was hurrying. Whether she was or not, she failed to see the stone, and, stumbling over it, fell, and was knocked senseless, sustaining injuries which laid her up for several weeks, and incapacitated her for some time longer. Mr. Kracke, an active man of 40, testifies that, though he sees fairly well, with his glasses on, he stumbled over the same stone. Mrs. White had been occupying the Robin house as a tenant for about 10 years, and she testifies that Dr. Robin, who represents his wife, rarely visited the place, and that, some time after the accident, she asked him to give her the stone over which plaintiff had fallen, for her church, which he readily consented to do, saying that he was not aware that there was such a stone. It is fairly evident that he did not know that, as the result of the paving which the city had done, the stone had been misplaced and had become a dangerous obstruction to the banquette, the fact being, as we take it, that, after the street was paved with asphalt, there was no place and no use for such a stone. Mrs. White concluded not to take the stone, after it had been given to her, and, some time later, it disappeared, and the record does not inform us what became of it. The trial in the district court resulted in a verdict and judgment in favor of plaintiff and against the city of New Orleans for \$500, the demand against Mrs. Robin being rejected. The city and the plaintiff have appealed.

Opinion.

The charter of the city of New Orleans requires it to "keep open and free from obstruction all streets." Act 45 of 1896, § 14. The right of the citizen to recover damages for injuries sustained by reason of the failure of a municipal corporation to discharge the mandatory duty thus imposed on it is beyond question. Dillon's Mun. Corp. (4th Ed.)

p. 687 (§ 731), p. 1203 (§ 980), p. 1284 (§ 1020); Buswell's Law of Personal Injuries, §§ 53, 167; Lorenz v. City of New Orleans, 114 La. 802, 38 South. 566; Weinhardt v. City of New Orleans, 125 La. 351, 51 South. 286; Gueble v. Town of Lafayette, 121 La. 909, 46 South. 917; Thompson on Negligence, vol. 5, p. 497, § 6022. 'No doubt, the person injured may, by his own negligence, so contribute to the injury as to preclude the recovery of damages, but streets and sidewalks are intended for free and constant use and those who use them have the right to assume that they are safe, and they are not expected to exercise the care which would be required in traversing a jungle. As has been held by this court:

"All that is required of a pedestrian upon the street is ordinary care, and this does not necessitate his looking constantly where he is going. * * * He has the right to assume that the roadway is safe for travel." Weber v. Union, etc., Co., 118 La. 77, 42 South. 652 (syllabus).

In another case, in which a man, with poor eyes and a basket on his head, fell into an excavation which was left in the sidewalk, it said:

"With his poor eyes and his basket on his head, he was not particularly well situated to discover the hole into which he had walked, but the sidewalk is intended for such as he, as well as for those with good eyes and who carry no baskets, and he had the right to assume, within reasonable limits, that if it had been made unsafe, those who made it so would warn him of the fact or protect him from danger." Rock v. American Const. Co., 120 La. 831, 45 South. 741, 14 L. R. A. (N. S.) 653.

The plaintiff in the present case had lost one of her eyes, many years before the accident, but she testified that she had experienced no difficulty in going about, on that account; and we are not prepared to hold that the feminine habit of putting on gloves between the front door and the street car, whilst en route to the theater in the city of New Orleans, exhibits such reckless disregard of danger to life and limb as to preclude the recovery of damages resulting from the failure of those whose duty it is to keep the route free from obstruction.

The learned counsel for the city of New Orleans says, in his able brief:

"A carriage block, or stepping stone, upon a sidewalk, in front of a house, at or beside the curb, which does not interfere with the use of the roadway, nor, to any reasonable extent, with the use of the sidewalk, does not constitute a public nuisance, and is a reasonable and proper use of the sidewalk, and the municipality is not liable in damages for injuries sustained by a person who stumbles over the stone."

And he cites a number of authorities, in support of the proposition, in which it is held that water hydrants, trees, hitching posts, telegraph poles, awning posts and stepping stones have been held to be permissible, from custom, based on necessity. Thus, in Dubois v. City of Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804 (one of the cases cited) it was said:

"The courts have gone quite far in holding such corporations" (municipal corporations) "to a very strict responsibility in reference to accidents caused by a failure to keep the streets and sidewalks in proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public, in the maintenance of the walks, avenues, and streets, constitute a nuisance and obstruction, and that corporations are liable for damages by reason of accidents caused thereby."

We concur, in the main, in the doctrine enunciated in the cases thus referred to, and, if the plaintiff in this case had been injured by coming in contact with a hydrant, hitching post, telegraph pole, awning post, or stepping stone which was shown to be a reasonable necessity or convenience, and the maintenance of which was shown to be sanctioned by time and usage, we should find for the defendant. But, though stepping stones, extending from the curbs across the gutters, have been, and, on some streets, are, still, reasonably necessary in New Orleans the evidence shows that the street, upon the sidewalk of which the stepping stone here in question was lying, was paved, a year or two before the date of the accident, with asphaltum, and, as an incident to the paving, that the stone was moved from the position which it then occupied and placed inside of the curb, catercornered, on the sidewalk, where, so far as we are informed, it was not only useless, but an unmitigated nuisance. Mrs. White (defendant's witness) says:

"It had spanned the gutter until the city removed it and placed it inside the curb, three or four inches, just enough to keep it from being on the curb, but flat on the banquette"—

a statement which she afterwards corrected by saying that the moving of the stone was done by the paving contractor (who did the work under the direction of the city). An obstruction, like dirt on a boy's face, is merely matter out of place, and that which may be a stepping stone, when in a position where it is needed and can be used as such, becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. If, as we assume is the case, there is, now, no gutter on St. Charles street, and, the asphaltum, extending smoothly down, a vehicle may be driven up to the curb, and the curb rises to the height of an ordinary carriage step, the stone, 3 feet square and 8 or 10 inches high, lying catercornered on the banquette, inside the curb, cannot be called a stepping stone, since it is not needed, and cannot be used for the purpose indicated by the name. It is merely an obstruction, on the banquette, and a nuisance; and, as it became so by reason of the act of the paving contractor, employed by the city, the city, and, perhaps, the contractor, and not the owner of the property in front of which the paving was done, are the

parties who should be held liable for the resulting damage.

The judgment is accordingly affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 17,988.

McQUEEN et al. v. FLASDICK-BLACK LAND & LUMBER CO., Limited, et al.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 874, 1119*)—PARTIES—MISJOINDER—SEPARATE JUDGMENTS.

Plaintiff, alleging that she is the owner and legal and rightful possessor of a certain tract of land, and that the corporation holding an adverse title is not in possession, prays that said corporation and its authors in title (naming them) be cited, and that she have judgment recognizing her "as the owner and legal possessor" of said tract, and ordering the cancellation of the chain of adverse titles held by, and acquired from, the parties made defendant. On an exception of improper cumulation of action and motion to require plaintiff to elect, the trial court held that the action is petitory, and overruled said exception and motion, and on the following day it maintained an exception of misjoinder of defendants and dismissed the suit as to all defendants save the alleged immediate holder of the adverse title. Plaintiff appealed from the judgment last mentioned. Held, in view of the judgment, unappealed from, holding the action to be petitory, the judgment appealed from is correct, in so far as it dismisses the suit against defendants, not alleged to be in actual possession; and in so far as it maintains the suit against the one defendant, holding the adverse title, it must be affirmed because no one complains of it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 874, 1119.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by M. W. McQueen and others against the Flasdick-Black Land & Lumber Company, Limited, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Clay Elliott and W. S. Rownd, for appellants. B. B. Purser, for appellee Flasdick-Black Land & Lumber Co. R. O. & S. Reid, for other appellees.

Statement of the Case.

MONROE, J. Plaintiff Mrs. McQueen alleges: That she "is the owner and legal and rightful possessor" of a certain tract of land in the parish of Tangipahoa. That the same was devised to her by George Colmer, whose will was probated in 1878 and recorded in Tangipahoa in 1909. That Colmer acquired the land by patent from the state, issued to him as the representative of Denis Lary and John Cottar, which patent was recorded in 1909, and that he owned and possessed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said land at the time of his death by virtue of said patent and also under a title from Samantha Manning, recorded in 1863. That petitioner's sister, Mrs. Davidson, has an interest and joins in this suit. That they have recently learned that the Fladick-Black Land & Lumber Company, Limited, is asserting title to said land, said to have been acquired from the Fladick-Rexman Lumber Company, Limited, by deed recorded in 1906. That the Fladick-Rexman Company asserted a title to said land, said to have been acquired from Martin Haney, who asserted title under deed from William A. Chambers, who asserted title under deeds from Denis Lary and John Cottar, which deeds she alleges (for reasons assigned) to be of no effect. That Chambers and Haney and those buying under them are chargeable with bad faith, because they knew, or ought to have known, that a patent had been issued to Colmer as the legal representative of Lary and Cottar. That the land in question is unimproved and uninclosed and covered with virgin timber. That the Fladick-Black Land Company is not in possession thereof. That the adverse titles mentioned constitute an attack upon, and a denial of, the title of petitioner, and a defamation of, and cloud upon, the same, which renders this action necessary.

That Martin Haney died, leaving a will whereby he appointed John Saal his executor and made him a remunerative legacy, which Saal accepted, but that Saal instituted other heirs (and the petition names them, and alleges that they reside out of this state), and that the whereabouts of Lary and Cottar are unknown. Petitioner prays that a curator ad hoc be appointed to represent the heirs of Martin Haney, and that they and the various others mentioned in the petition be cited, etc., and that there be judgment against them, recognizing her "as the owner and legal possessor of the tract of land above described * * * and ordering her title to be cleared," and said titles from Lary and Cottar to Chambers, from Chambers to Haney, from Haney to the Fladick-Rexman Company, and from the latter to the Fladick-Black Land Company to be erased from the records.

The Fladick-Black Land, etc., Company, first, prayedoyer of the titles sued on, and then excepted, alleging that plaintiffs have attempted to cumulate a petitory action with an action of jactitation, and praying that they be ordered to elect. Other defendants excepted, on the same ground, and the further ground that there is misjoinder of defendants, between whom there exists no privity of contract, obligation or blood, and the Fladick-Black Land, etc., Company, joined in said last-mentioned exception.

The judge a quo as to all the defendants, save the Fladick-Black Land Company, maintained the exception of misjoinder of parties, and dismissed the suit, and as to said company overruled the exception. The

other exception and motion to elect (on the ground of improper cumulation) was also overruled. Plaintiffs have appealed.

Opinion.

Since the appeal Mrs. McQueen has departed this life and Miss Sophia Augusta McQueen, as her daughter and sole heir, has been made party plaintiff in her stead. The trial judge overruled defendants' motion to require plaintiffs to elect on the ground that the action is petitory. But the petitory action "must be brought against the person who is in actual possession of the immovable, even if the person having the possession be only the farmer or lessee." Code Prac. art. 43.

To this has been added the act No. 38 of 1908 (page 38), which authorizes an action "to establish title to real estate, where none of the parties are in actual possession."

In the instant case plaintiffs allege possession in themselves, but, as they do not allege that their possession is "actual," and do allege that the present holder of the adverse title (the Fladick-Black Land Company) is not in possession, we should be inclined to think that the action might fall under the statute of 1908 as "an action to establish title to real estate." From the judgment on that question, however, no appeal has been taken and no amendment of the judgment has been asked, plaintiffs' motion for appeal specifying the judgment on the exception of misjoinder as that by which they are aggrieved.

Since the trial judge has held that the action is petitory and no one complains of his judgment, we are constrained to deal with the question here presented from that point of view.

The defendants do not, however, complain of the judgment from which the appeal was taken, and the plaintiffs complain of it only in so far as it dismisses the suit against the others, but do not complain of its holding the Fladick-Black Land, etc., Company, as a defendant. As matters stand, therefore, the ruling brought up by the appeal of which plaintiffs complain must be sustained, since the ruling of the trial judge that the action is petitory is not before us for review, and the defendants as to whom the suit has been dismissed are not alleged to be in actual possession. The same thing is true of the Fladick-Black Land Company, but no one is asking that the judgment appealed from be reversed or amended so far as that company is concerned.

Counsel for plaintiffs argue in their brief as though appeals had been taken from the judgments on both exceptions, or as though the one appeal taken by them had brought up both of those judgments. But the record shows that on November 8th "court overruled motion to elect, on the ground that the plaintiffs' suit is a petitory action"; that on November 9th the exception of misjoinder

of parties was heard, and, after hearing, it was ordered "that said exception, as to the Fladlick-Black Land Company, Limited, be * * * overruled, and as to" (the other defendants, naming them) "the said exception is hereby maintained, and as to them this suit is dismissed at plaintiffs' cost," and that on the same day (November 9th) plaintiffs filed their motion for appeal, "suggesting to the court that plaintiffs are aggrieved by the judgment rendered herein on this day on the exception of the misjoinder," etc., and thereon obtained the order of appeal, by virtue of which, and of which alone, they are now before this court. The only thing that can be done here therefore is to affirm the judgment appealed from, and the judgment appealed from is accordingly

Affirmed.

(126 La.)

No. 17,924.

McMELON v. ILLINOIS CENT. R. CO.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by Editorial Staff.)

CARRIERS (§ 333*)—INJURY TO ALIGHTING PASSENGERS—LIABILITY.

A carrier is not liable for injury to an incumbered passenger who fell from a train after dark, while attempting to alight where the train made a slight stop just before reaching the station, where she acted hastily, was familiar with the station, knew that a trainman always assisted alighting passengers, and where the brakeman was standing opposite her on the next car ready to alight and assist the passengers when the train reached the station.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by Mrs. Margaret McMelon, widow of George Hogan, deceased, against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and suit dismissed.

Hunter C. Leake, Kemp & Spiller, and Gustave Lemle (Blewitt Lee, of counsel), for appellant. Matthew J. Allen and Thomas M. Bankston, for appellee.

PROVOSTY, J. On Christmas evening, after dark, the plaintiff, a lady of 60, boarded the train of the defendant company at Amite, where she lived, to go to Independence, to visit her sister, who lived there. The distance between Amite and Independence is not shown by the record, but we infer the two places are not far apart, since there is but one station between them—Gullett—and since the conductor testifies that, when the train reached Independence, he had not had time to make his round collecting his fares. Plaintiff took a seat in the rear, or ladies', coach. The train was composed of five coach-

es. It stopped at Gullett. As soon as it had resumed its course, the brakeman passed through the coach, announcing that Independence would be the next stop. On reaching Independence, the engineer slowed down and put on his air brakes sooner than he would otherwise have done owing to the presence of a freight train on the side track opposite the station; and, in order to approach the station very slowly and cautiously, he put on his air brakes a second time when within about 150 feet of the regular stopping place at the station. This second putting on the air brakes when a train is moving very slowly has the effect, it seems, of creating the impression that the train has come to a standstill. As soon as the announcement that Independence would be the next stop was made, two gentlemen who were in the same coach with plaintiff rose and walked to the platform, so as to greet in passing any of their friends who might happen to be at the station. One of them testifies that when he reached the platform plaintiff was one step behind him, and that he let her pass; that by that time the train had stopped; and that plaintiff went to the west side of the platform, while he went to the east side; that he saw plaintiff go upon the first step of the platform just as the train resumed its motion, and he does not know whether plaintiff thereafter stepped down or fell down. A witness in front of whose store the plaintiff fell, and who was at his store and saw plaintiff fall, says that the train came to a standstill; but that it so remained only a few seconds. Plaintiff herself says that she waited in her seat—as her custom is—until the train had come to a standstill, and until all passengers who might desire to get out had done so, and that she then took upon her arm a basket she had, and went to the platform, and then to the steps, and that, as she was stepping down, with her basket on her arm, the train gave a sudden jerk, whereby she was thrown off. Plaintiff says that she saw no one on the platform; that it was dark outside, and she could not see; that she did not stop to observe whether it was the right place for getting off or not, or to notice whether the conductor or the brakeman was at the steps with his lantern, as is usual, to assist the passengers in getting off; that she could not think; that all she could think of was to try to get off. Plaintiff had not bought a ticket at Amite, although it is a ticket station, and had not paid her fare on the train. She says that the reason of her not taking a ticket was that the train was late, and that she was not certain she would not relinquish the idea of taking it, and that, when it did come, there was no time for taking a ticket; that she did not pay her fare because the conductor did not call for it; that he collected fares from persons across the aisle from her, but passed her by without demanding a fare.

The conductor says that he had not yet reached the place where plaintiff was in the collection of his fares, and that plaintiff must have been hastening off the train in order to escape paying her fare; that he knew plaintiff well by sight, and she was particularly strong in trying to evade the payment of her fare; that she would sit next to the window so as to take his attention away from her; and that she had never once presented him a ticket. In that connection it is but just to plaintiff to say that the same witness referred to above who was on the platform with her says that he too made it a practice not to buy a ticket, but to pay his fare cash. That same witness says that what attracted his attention to plaintiff was that she was getting off at that place, instead of at the regular stop at the depot. The witness in front of whose store plaintiff fell says that the lights from the car window and from his own store and from the hotel and from the adjoining store reached the place where plaintiff fell.

Plaintiff had often traveled on this same train from Amite to Independence. She had done so four or five times that year. She was familiar with the station. She knew that the invariable custom was for the conductor or the brakeman to be at the steps of the ladies' coach with his lantern to assist the passengers in getting out.

Under the foregoing circumstances, we do not think the plaintiff can recover. Waiving the question whether in view of the announcement that the next stop would be Independence there should not have been some warning given to the passengers that this unusual stop, or apparent stop, was not the regular stop, we think plaintiff was under the obligation of being more careful than she was.

"It is elementary that the duties of carriers and passengers are reciprocal. If carriers are held to the highest degree of care for the safety of passengers, passengers ought to be held to the exercise of ordinary care to protect themselves. More specially, while railroad companies as a general rule are required to provide means of access to and egress from their trains and stations, a passenger who leaves a train at a place which is not a regular station is held to the duty of exercising diligence in observing the

surroundings, in order that he may reasonably determine whether the train has arrived at a place where the company intended him to alight. He must take the responsibility of everyday incidents of travel, including the stoppage of cars required by statute at railway junctions, and must govern himself accordingly, even if he has been advised by the conductor that the next stop will be the place at which the passengers expect to leave the train. The mere fact that the train stops at such a junction does not justify him in concluding that it is at the place of his intended departure, nor justify him in disregarding the indications of the actual environment that the train had not arrived at such a place. If the surroundings and indications of the place at which a passenger, after such notice by the conductor, does in fact alight, are such that they preclude a reasonable belief on his part that he is getting out where the company intended him to leave the train, and such that no ordinarily prudent person, possessing average sense of sight, and using it, could suppose that the train had arrived at the place, a passenger who notwithstanding leaves the train at a wrong place and is hurt in consequence is prevented by his own contributory negligence from recovering damages." 4 Elliott on Railroads (2d Ed.) p. 569, par. 1642, taken from *Farrell v. Great Northern R. R. Co.*, 100 Minn. 361, 111 N. W. 390, 9 L. R. A. (N. S.) 1113, citing *Mitchell v. Grand Trunk Railroad Company*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; *Minock v. Detroit & Central R. R. Co.*, 97 Mich. 425, 66 N. W. 780; *Davis v. Lehigh Valley R. R. Co.*, 64 Hun. 492, 19 N. Y. Supp. 516; *Smith v. Georgia Pacific R. R. Co.*, 88 Ala. 538, 7 South. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63; *Richmond & Danville R. R. Co. v. Smith*, 92 Ala. 237, 9 South. 223.

Plaintiff was familiar with the locality. The man who was with her on the platform saw at once that the train had not yet reached the regular stopping place; and so would she have done so if she had but stopped one moment to consider and observe. Instead of this, she rushed blindly ahead incumbered with a basket, and tried to get off unassisted when she could not but have known that the conductor or the brakeman could not be far away, and would give her assistance if called on. The brakeman as a matter of fact was within arm's length of her, standing with his lantern on the steps of the next car, ready to step down and assist the passengers as soon as the train would have reached the depot.

Judgment set aside, and suit dismissed, with costs.

ROSETTO v. CITY OF BAY ST. LOUIS.
(No. 14,461.)

(Supreme Court of Mississippi. July 4, 1910.)

1. JUDGES (§ 26*)—DE FACTO JUDGE—VALIDITY OF ACTS—APPEAL FROM CONVICTION.

Under a charter provision giving the aldermen of a city power to appoint a mayor pro tem. when the mayor is absent from the city, or unable from any cause, or fails, to discharge the duties of his office, where the aldermen appoint a mayor pro tem. because the mayor was a witness against a party charged with violating a city ordinance, the legality of the appointment, and of a special session of aldermen at which the appointment was made, cannot be considered on appeal from a conviction of the offense, on trial before the mayor pro tem.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 107; Dec. Dig. § 26.*]

2. OFFICERS (§ 41*)—TITLE TO OFFICE—DETERMINATION—"DE FACTO OFFICER."

A person who is actually in possession of an office under color of title, by authority of those having power to elect, and who is performing its functions, is a "de facto officer," whose acts cannot be impeached in any proceeding in which he is not a party.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 63, 64; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1845-1851.]

3. MUNICIPAL CORPORATIONS (§ 592*)—POLICE REGULATIONS—VALIDITY.

Under Code 1906, § 3329, which gives to the mayor and aldermen of cities authority to make police regulations, and which is, by section 3441, applied to all municipalities, a city had the power to pass an ordinance making any act amounting to a misdemeanor under the laws of the state an offense against the municipality, thereby making it an offense against the city to violate Code 1906, § 1208, prescribing a punishment for conducting a gambling house.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311, 1312; Dec. Dig. § 592.*]

4. CRIMINAL LAW (§ 351*)—EVIDENCE—RESISTANCE TO ARREST—OTHER OFFENSE.

In a prosecution for violating a city ordinance by conducting a gambling house, evidence that, when defendant's house was raided and the arrest made, he had a gun and pointed it at the officers making the raid and the arrest, was admissible, not to show him guilty of another offense, but as throwing light on the question of his guilt of the crime for which he was arrested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 780; Dec. Dig. § 351.*]

5. CRIMINAL LAW (§ 421*)—EVIDENCE—HEARSAY.

In a prosecution for violating a city ordinance by conducting a gambling house, evidence that defendant's house had the reputation of being a gambling house was inadmissible, being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 976; Dec. Dig. § 421.*]

Appeal from Circuit Court, Hancock County; W. H. Hardy, Judge.

Peter Rosetto was convicted, under an ordinance of the City of Bay St. Louis, of conducting a gambling house, and appeals. Reversed and remanded.

E. J. Cox, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for appellee.

ANDERSON, J. The appellant was convicted under an ordinance of the city of Bay St. Louis for conducting a gambling house, and appeals to this court.

The following questions are presented for decision by this court: First, whether the mayor pro tem., before whom appellant was tried and convicted, had the power to try him; second, whether the city had the power to pass the ordinance in question; third, whether the affidavit charges any offense under the ordinances of the city; fourth, whether there was error in admitting testimony on behalf of the state that, when appellant was arrested, he had a gun and pointed it at the officers making the arrest; and, fifth, whether the court erred in allowing testimony on behalf of the state of the bad reputation of appellant's house for gambling—which questions we will dispose of in the order named.

Bay St. Louis is not under chapter 90, Code 1906. It has a separate charter of its own, which is found in Acts 1886, p. 434, c. 279, section 23 of which provides that, when the mayor is absent from the city, or unable from any cause, or fails, to discharge the duties of his office, the aldermen shall have power to appoint a mayor pro tem. The regular mayor being a witness against the appellant, the aldermen had a called meeting and elected R. W. Webb mayor pro tem. It is contended that the fact that the regular mayor was a witness against appellant in this case gave the aldermen no power under the charter to elect a mayor pro tem., and therefore such mayor had no power to try the appellant, and, if mistaken in this, that the special meeting, at which the election was held, on a call which was not served on all of the aldermen at least three hours before the time fixed for the meeting, as required by section 3388, Code 1906, which is applied to all municipalities by section 3441, was without authority of law, and the election of mayor pro tem. void, and he was therefore without power to try appellant. These questions, however, are not for decision; for the legality of the election of the mayor pro tem. cannot be inquired into here. It is a well-settled principle of law that the right of a person to an office, who is in charge of it, performing its functions, cannot be determined, except in a proceeding to which he is a party. Section 23 of the charter gives the aldermen of Bay St. Louis the power, under certain conditions, to elect a mayor pro tem. Conceiving that those conditions existed, they elected one, who, with the consent of the regular mayor and aldermen, took charge of the office and tried the appellant. Where one is actually in possession of an office under color of title, by authority of

those having the power to elect, he is an officer de facto, and his acts cannot be impeached in any proceeding in which he is not a party. *Bell v. State*, 38 South. 795; *Powers v. State*, 83 Miss. 691, 36 South. 6; *Cooper v. Moore*, 44 Miss. 386.

At the time of the trial and conviction of appellant, there was in force a general ordinance of said city, prohibiting, within its corporate limits, the commission of any act amounting to a misdemeanor under the laws of the state, and making the same an offense against the municipality. If the city had the power to pass such an ordinance, by it section 1208 of the Code of 1906 became an ordinance of the city. It is contended it had no such power. That question is settled in the affirmative by the recent decision of *Hurley v. City of Corinth* (decided at the present term of the court) 52 South. 695. Section 1208, Code 1906, is a police regulation, and section 3329, which, by section 3441 is applied to all municipalities, expressly authorizes the passage of such an ordinance. The affidavit sufficiently charges a violation of section 1208 of the Code.

It was not error to admit testimony that when appellant's house was raided and the arrest made he had a gun, and pointed it at the officers making the raid and the arrest. This testimony was competent, not to show that appellant was guilty of another offense, but as throwing light on the question of his guilt of the crime for which he was arrested. His conduct at the time, and any statements he made, are competent for that purpose. If appellant had requested it, the court should have instructed the jury as to the purpose for which such testimony was admitted.

Over the objection of appellant's attorneys, the court permitted testimony to the effect that appellant's house had the reputation of being a gambling house. This was error. The charge against him was for conducting and permitting to be conducted gaming in his house, under section 1208. Under such charge, this testimony was not competent. This court held, in *Handy v. State*, 63 Miss. 207, 56 Am. Rep. 803, that on the trial of a person charged with keeping a bawdy house, evidence as to the general reputation of the house is incompetent, approving the rule laid down in *Wooster v. State*, 55 Ala. 217, which held that the charge of keeping a bawdy house is a specific offense, and susceptible of proof by witnesses who testify from knowledge, and that the reputation of the house is hearsay evidence, and is not admissible to prove a specific fact capable of proof by witnesses speaking from their own knowledge. In the instant case the charge against the defendant, of carrying on and permitting to be carried on games in his house, is susceptible of direct proof by witnesses speaking

from their own knowledge, and hearsay evidence to that effect was not admissible.

For this error, which doubtless was influential with the jury, the case is reversed and remanded.

FRITH v. STATE. (No. 14,584.)

(Supreme Court of Mississippi. July 4, 1910.)
OBSTRUCTING JUSTICE (§ 11*)—INDICTMENT—SUFFICIENCY.

An indictment alleging that accused resisted a justice of the peace authorized to execute a writ, by preventing the justice by force from executing a writ against accused and a third person, by preventing an arrest by the justice for a violation of law in his presence, does not state an offense in violation of Code 1906, § 1298, punishing any person who by threats or force attempts to intimidate a justice of the peace in the discharge of his duty.

[Ed. Note.—For other cases, see *Obstructing Justice*, Cent. Dig. §§ 19-28; Dec. Dig. § 11.*]

Appeal from Circuit Court, Amite County; M. H. Wilkinson, Judge.

Charles Frith was convicted of resisting an officer, and he appeals. Reversed and remanded.

The indictment, omitting formal parts, charges that George Frith and Charles Frith, "on the 15th day of February, A. D. 1909, at the county aforesaid, did then and there unlawfully, willfully, and knowingly oppose and resist an officer, to wit, D. J. Wall, Jr., a regularly elected, qualified, and acting justice of the peace of said county and state, who was authorized under the law to execute a writ, by then and there unlawfully and willfully preventing the said D. J. Wall, Jr., officer as aforesaid, by force from executing a legal writ on the said George and Charles Frith, and did then and there unlawfully and willfully prevent and refuse to be arrested by the said D. J. Wall, Jr., they having violated the law in presence of the said D. J. Wall, Jr., by then and there cursing in a public place in the presence of two or more persons, by then and there saying 'you God damn son of a bitch,' and other profane language, to the grand jurors unknown, contrary to the statute," etc.

The verdict of the jury was as follows: "We, the jury, find the defendant, Charles Frith, guilty of resisting an officer."

Section 1297 of the Code of 1906 is as follows: "1297 (1221). Obstructing Justice—Resisting Process.—Any person who knowingly and willfully opposes or resists any officer or other authorized person in serving or attempting to serve or execute any legal writ or process, shall be guilty of a misdemeanor."

Section 1298 of the Code is as follows: "1298 (1222). The Same—Intimidating Judge, Juror, Witness, etc.—If any person, by threats or force, attempt to intimidate or impede a judge, justice of the peace, juror, witness, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

any officer in the discharge of his duty, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment in the county jail not less than one month nor more than six months, and by fine not exceeding three hundred dollars."

R. S. Stewart and Clem Ratcliff, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

WHITFIELD, C. The indictment in this case was manifestly drawn under section 1297 of the Code of 1906. The proof wholly fails to sustain this indictment. The learned Assistant Attorney General endeavors to save the case by insisting that it was a good indictment under the next section (1298), but the contention is wholly untenable. The language of the indictment does not suit that section at all.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein stated the judgment is reversed and the cause remanded.

**LONDON GUARANTEE & ACCIDENT CO.
v. MISSISSIPPI CENT. R. CO.**
(No. 14,186.)

(Supreme Court of Mississippi. June 6, 1910.
Suggestion of Error Overruled July 4, 1910.)

1. INSURANCE (§ 383*) — WAIVER OF PROVISIONS—PAROL WAIVER.

A stipulation in an employer's liability policy that no claim should be paid by the insured without the written consent of the insurer could be waived by parol.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1018; Dec. Dig. § 383.*]

2. INSURANCE (§ 376*) — WAIVER OF PROVISIONS—STIPULATION IN POLICY.

A provision that stipulations in an insurance policy cannot be waived by any agent, officer, or other representative of the insurance company cannot be sustained to prevent a parol waiver of a stipulation, as not seeking to prevent the corporation itself, but only its agents, from waiving stipulations, since the corporation can act only through its agents and officers.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

3. INSURANCE (§ 565*) — LIABILITY OF INSURER—ESTOPPEL—ACT OF ATTORNEY.

An attorney, whom an employer's liability insurer forbade to make a settlement with an employé of a railroad company of a policy for more than \$500, but whom the railroad company authorized to pay \$2,500 if necessary, and who made settlement for \$2,150, acted for the railroad company, and not for the insurer; and hence his acts created no estoppel against the insurer as to the amount of its liability to the railroad company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1412; Dec. Dig. § 565.*]

4. INSURANCE (§ 512*) — EMPLOYER'S LIABILITY INSURANCE—EXTENT OF LIABILITY.

The liability of an insurance company on an employer's liability policy is fixed by the

terms of the policy, regardless of its instructions to an attorney as to what settlement he might make with an employé who was injured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 512.*]

5. INSURANCE (§ 668*) — ACTION ON POLICY—QUESTION FOR JURY.

Whether the written consent of an employer's liability insurer to a settlement by the insured was waived by the insurer was a question for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1749; Dec. Dig. § 668.*]

6. INSURANCE (§ 668*) — CUSTOM VARYING CONTRACT—QUESTION FOR JURY.

The credibility and weight of evidence to establish a custom between a railroad company and an insurance company permitting the railroad to settle claims without giving notice to the insurance company, required by an employer's liability policy, were for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

7. INSURANCE (§ 177*) — CONSTRUCTION OF POLICY—TIME OF EXPIRATION.

An employer's liability insurance company is liable by reason of loss sustained by the insured from injuries incurred after the expiration of the policy, where the company had issued a binder validly extending the policy beyond the time of the occurrence of the injury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 377; Dec. Dig. § 177.*]

8. APPEAL AND ERROR (§ 1056*) — REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on an insurance policy, any error in the exclusion of evidence that the insured had taken another similar policy in another company to cover a claim sued on was harmless, where the policy sued on provided that in case of concurrent insurance the insurer should be liable only for its proportion of the loss, and in this case the insured sought and procured a recovery of only one-half the loss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by the Mississippi Central Railroad Company against the London Guarantee & Accident Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and remanded for new trial.

Mayes & Longstreet, for appellant. T. M. & J. D. Miller and Jeff Truly, for appellee.

WHITFIELD, C. The railroad company sued the insurance company for the sum of \$3,000, for the purpose of reimbursing itself for certain moneys paid out by the said railroad company in settlement of certain personal injury claims, for which it is alleged in the declaration the plaintiff held against the said insurance company an employer's liability policy, by the terms of which the insurance company agreed and bound itself to indemnify the said railroad company against losses growing out of liability imposed upon the railroad company for damages on account of bodily injuries or death accidentally suffered by employes while the

said policy should be in force. There were a number of claims set out in Exhibit A to the declaration, only two of which, the Fairchilds claim and the Messer claim, were for a large amount. The insurance company's first defense is that under the terms of the policy the said claim should not have been paid by the railroad company without the written consent of the insurance company. All this contention has been put definitely at rest in this state, so far as the insistence is that there can be no parol waiver of a written stipulation, by at least five express decisions, to wit, the cases of *Insurance Company v. Gibson*, 72 Miss. 58, 17 South. 13, *Sheffy's Case*, 71 Miss. 919, 16 South. 307, *Matthews' Case*, 65 Miss. 301, 4 South. 62, *Rivaras' Case*, 62 Miss. 727, and *Bowdre's Case*, 67 Miss. 631, 7 South. 596, 19 Am. St. Rep. 326. That the matter may not again be presented to us, after all the definite settlement, we set out here what was said in the *Gibson Case*, supra, on this precise point at page 63, 72 Miss., page 13, 17 South.:

"It is insisted that the waiver of the requirement that appellee's real interest should be set out in the policy, by the conduct of its agent, W. A. Drennan, Jr., who issued the policy and received the premium, after he was fully informed of all the lease showed, cannot be shown by parol, and cannot bind the company. This contention has been thoroughly considered by this court and settled adversely to appellant in *Sheffy's Case*, 71 Miss. 919 [16 South. 307], in *Matthews' Case*, 65 Miss. 301 [4 South. 62], in *Rivaras' Case*, 62 Miss. 727, and in *Bowdre's Case*, 67 Miss. 631 [7 South. 596, 19 Am. St. Rep. 326]. The very pith of the true reasoning on this subject is condensed into this single sentence of the Supreme Court of Michigan in *Insurance Co. v. Earle*, 33 Mich. 143, quoted with approval by Judge Campbell in *Matthews' Case*: 'There can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it.' And this is true as well of the provisions which relate to the formation and binding force of the contract while running, as to those provisions relating to what has to be done after a loss. 11 Am. & E. Enc. L. p. 343, note 1, and page 338, par. 4, and authorities in note 2, p. 339. The case of *Cleaver v. Insurance Co.*, 65 Mich. 527 [32 N. W. 660, 8 Am. St. Rep. 908], whilst properly distinguishing the case of *Insurance Co. v. Earle*, 33 Mich. 143, in no way conflicts with the doctrine which the last-named case announces, and which we approve. In *Cleaver's Case*, the stipulation in the policy was that (page 528, 65 Mich., page 660, 32 N. W. [8 Am. St. Rep. 908]) 'the agent of this company has no authority,' etc. Here the stipulation is that 'no officer, no agent, and no other representative shall,' etc. That this distinction was the foundation of *Cleaver's*

Case is clearly shown in [71 Mich. 414] 39 N. W. 571 [15 Am. St. Rep. 275], where the case was reversed in favor of the assured, on its being shown that R. T. Smith, the secretary, had waived the stipulation otherwise than by indorsement on the policy.

"It is vain to say that this clause does not seek to prevent the corporation itself from waiving a stipulation. The corporation acts only through agents; and if 'no agent, no officer, and no other representative' can waive a stipulation, who is left to waive it for the corporation? This clause is a species of refinement by which the corporation withdraws within its invisible and intangible ideality, when liability is sought to be imposed upon it, bound by the acts of no agent, officer, or other representative, but reaches forth therefrom with Briarean hands to receive the profits and avall of these same acts performed by these same 'agents' as against those with whom these same agents have dealt. The refinement is too subtle for the practical affairs of actual life, and we repudiate it. It may be noted, too, that in *Cleaver's Case*, 65 Mich. 531 [32 N. W. 660, 8 Am. St. Rep. 908], the premium had been received after the agent knew of the ground of forfeiture. The provision relied on here is in the exact words of the stipulation relied on in *Lamberton v. Insurance Co.* [39 Minn. 129] 39 N. W. 76 [1 L. R. A. 222], decided by Supreme Court of Minnesota in 1888, respecting which the court says in a very clear and strong opinion: 'That is to say, in other words, that one of the parties to a written contract, which is not required by law to be in writing, cannot, subsequent to the making of the contract, waive by parol agreement provisions which had been incorporated in the contract for his benefit. If this provision is effectual at all as a limitation of the power of future action, it limits the power of every agent, officer, and representative of the company, and hence, practically, that of the corporation,' and it was held that 'this provision, not being a limitation upon the authority of any particular agent or class of agents, but, in effect, upon the capacity of the corporation for future action,' could not be imposed, but was void. Same doctrine is announced in *Richards on Insurance*, 91, where this provision is said to 'amount to the contradiction of a rule of law.' And see *Insurance Co. v. Sheffy*, 71 Miss. 919 [16 South. 307]. And we think this reasoning sound."

The second contention of the insurance company is that the court below erred in giving the peremptory instruction to find for the plaintiff for the whole sum sued for, less an offset of some \$1,100, for premiums due by the railroad company to the insurance company. The Fairchilds claim was for \$1,500. This claim had been settled by the railroad company's attorney at \$2,150. Under the terms of this employer's policy, the insurance company's liability for this single

claim was limited to \$1,500. The railroad company insists on two contentions in this connection:

(A) That the insurance company is estopped to deny its liability for said \$1,500 because the settlement was made by Mr. T. Brady, acting as its attorney, and therefore the insurance company was estopped to deny the liability. The testimony in the case clearly shows that Mr. Brady did not act as attorney for the insurance company in making this settlement, but as attorney alone for the railroad company. The evidence makes it clear that the insurance company limited Mr. Brady to \$500 on this claim, and he was not able to effect any such settlement, but, on the contrary, settled the claim as the attorney of the railroad company for \$2,150. Mr. Brady's action throughout the matter was solely for the railroad company, since it is obvious he could not have settled for the insurance company when they forbade such settlement by him at a sum in excess of \$500. Mr. Brady was authorized by the railroad company to pay \$2,500, if necessary, but succeeded in making a better settlement, \$2,150. This contention on the part of the railroad company is therefore without merit.

But the railroad company contends (B) that the liability of the insurance company is fixed by the terms of the policy, whatever may have been the limit it fixed in its correspondence with Mr. Brady, and that the evidence fully shows, on any fair view of it, an admission of liability on the part of the insurance company for at least \$750 on this claim, and that its local agents at Birmingham, Clark & Co., indicated that they might get the home office in Chicago to pay as much as \$1,075, half of the \$2,150 paid by the railroad company on this claim. We think the railroad company is clearly correct in both these contentions, to wit, that the liability of the company is to be determined by the terms of the policy; and, second, that on the testimony in this record it is certainly liable for at least \$750 on this claim, provided it is liable for anything.

And this brings us to the next contention of the insurance company, which is that it is liable for nothing on this claim, because no notice was given in accordance with the terms of the policy as to these losses and settlements. We have indicated above that the written consent stipulated for in the policy might be waived by parol as a matter of law; but this still leaves open the question whether in fact it was waived. And whether as a matter of fact the evidence shows the notice was waived was a question to be submitted to the jury. The railroad company, admitting that it had no written consent from the insurance company, endeavored to obviate this by saying that there was a custom between the railroad company and the insurance company of settling these claims and giving the notice therefor with-

out this written consent; that this had been shown by a long course of dealing between the parties. But it must be obvious, upon reflection, that the whole of the evidence offered to establish this custom was a matter, as to its credibility and its weight, for the jury alone, and not for the court. The court, therefore, manifestly erred in giving the peremptory instruction, since this evidence should have been submitted to the jury, that they might determine, as the triers of fact, whether such custom had been established. We intimate, of course, no opinion whatever as to the value of this testimony. The error of the court consisted in not leaving the solution of this question of fact to those who are authorized to try the facts, to wit, the jury. In regard, therefore, to this Fairchilds item, we conclude that the insurance company was liable under the terms of the policy for the \$1,500, provided the jury shall find as a fact that the custom insisted upon by the railroad company existed.

As to the Messer item of \$500: That claim was for \$1,000 in whole, and it was paid by the railroad company. The railroad company had secured another employer's liability policy in another company, known as the Ocean Company. That company had paid half this loss, \$500, and this insurance company is sued here for only its half, \$500, of that loss. The insurance company defended against this item on the ground, which was the fact, that the injury occasioning this loss occurred after the expiration of the contract period of the original policy sued on, and for that reason it insisted that it was not liable. It is idle to waste time on this contention. The correspondence plainly shows that the insurance company issued a "binder," as it is called, which binder validly extended the terms of the policy beyond the period of the occurrence of this injury. The construction ingeniously attempted to be placed on this correspondence by the learned counsel for the appellant is far too strained. Clark meant much more by his letters than to keep the original policy in force until the railroad company could effect reinsurance. If may be conceded, and we think it is correctly contended, that the court did err in refusing to permit the defendant to introduce evidence to show that, at the time of the alleged liability of the said defendant on the Messer claim, the plaintiff had taken out a similar policy in a similar company to cover one of the identical claims sued on; but the error was a harmless one, because clause H of the policy expressly provided, in case of concurrent insurance, that the defendant should be liable only for its proportion of the loss, and that proportion here was manifestly one-half of the \$1,000. So far, therefore, as the Messer claim is concerned, we think the railroad company was clearly entitled to recover the \$500.

We remark, generally, that much valuable light is shed upon this character of policy,

presented for the first time in this state in this case, and the contentions under that sort of policy presented in this case, by the case of *New Amsterdam Casualty Company v. East Tennessee Telegraph Co.*, 139 Fed. 602, 71 C. C. A. 586, which may be profitably studied in connection with this case. Of course, the small items in Exhibit A were properly within the peremptory charge.

It follows that the judgment of the court below is reversed, and the cause remanded for a new trial.

PER CURIAM. The above opinion is adopted as the opinion of the court.

Reversed and remanded.

HATTIESBURG TRUST & BANKING CO. v. HOOD. (No. 14,410.)

(Supreme Court of Mississippi. June 20, 1910.)

1. GARNISHMENT (§ 148*)—ANSWER—FAILURE TO CONTEST—EFFECT.

A garnishee's uncontested answer denying indebtedness is conclusive.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 275; Dec. Dig. § 148.*]

2. JUSTICES OF THE PEACE (§ 209*)—REVIEW—DISPOSITION ON REVERSING JUDGMENT.

Under Code 1906, § 90, requiring the circuit court on reversing a justice's judgment to render such judgment as should have been entered, on certiorari the circuit court should reverse a judgment against a garnishee and discharge him, where he filed an uncontested answer below denying liability.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 209.*]

3. JUSTICES OF THE PEACE (§ 200*)—CERTIORARI—ANSWER OF GARNISHEE—TIME FOR CONTEST.

Under Code 1906, § 2353, requiring contest of a garnishee's answer at the term when it is filed, a garnishee's answer filed in justice court cannot be contested in the circuit court on certiorari to review a judgment against the garnishee.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 776; Dec. Dig. § 200.*]

4. GARNISHMENT (§ 144*)—ANSWER—SUFFICIENCY.

A garnishee's answer, denying indebtedness and admitting receipt of invoices for collection, is not insufficient to require contest as admitting liability.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 270; Dec. Dig. § 144.*]

5. GARNISHMENT (§ 144*)—ANSWER—SUFFICIENCY.

A garnishee's answer should clearly admit liability before being held at variance with an express denial therein.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 270; Dec. Dig. § 144.*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action by W. W. Hood against the Claude L. Nabors Lumber Company, and the Hattiesburg Trust & Banking Company, garnishee. From a judgment of the circuit court dismissing certiorari to review a justice's

judgment, the garnishee appeals. Reversed and remanded.

On March 3, 1908, the appellee sued out a writ of attachment in the court of a justice of the peace against the Claude L. Nabors Lumber Company, and garnished the appellant banking company, making the writ returnable before the justice of the peace on March 16th. On the return day the appellant filed its answer, denying any indebtedness to the lumber company, but admitting that it had received for collection certain invoices against certain nonresidents, but that it had no further interest in same except for the purpose of collection. In the meantime the defendant Claude L. Nabors Lumber Company filed a traverse to the grounds of attachment denying liability to the plaintiff. The case came on for trial on March 23d, and the appellee (plaintiff below), although he had obtained leave to file a contest to the answer, failed to do so. The court rendered judgment for the plaintiff below against the lumber company, and adjudged the appellant indebted to the appellee in the sum sued for, and awarded execution on said judgment. Five days after the rendition of the judgment appellant was advised of its rendition and threatened with execution. It then petitioned the circuit judge for a writ of certiorari, which was granted, and the case brought to the circuit court. On motion of appellee the court dismissed the certiorari, and appellant appeals.

R. S. Hall, for appellant. Currie & Currie, for appellee.

MAYES, C. J. The certiorari should not have been dismissed. The record sent up by the justice shows that there should have been no judgment entered against the garnishee, as there was an answer filed at the time denying indebtedness. There was no contest of this answer, and it was conclusive. This being the case, instead of dismissing the writ, the court should have reversed the judgment of the justice and entered a judgment in the circuit court in accordance with the requirements of section 90, Code of 1906, discharging the garnishee from any liability. After the case reached the circuit court it was too late to contest the garnishee's answer, since section 2353 of the Code of 1906 requires that the contest be made, if at all, "at the term when the answer is filed." The only judgment the circuit court could render, under the facts of this case, was a judgment reversing the justice and discharging the garnishee. No contest could be made in the circuit court for the first time. *Williams v. Jones*, 42 Miss. 270; *Gordon v. Moore*, 62 Miss. 496; *Ice Co. v. Cook Well*, 71 Miss. 886, 16 South. 259.

But it is claimed on the part of appellees that the answer of the garnishee shows it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had some property in its possession which belonged to the debtor, and therefore it was not necessary to enter into any contest, even though in another part of the answer it had denied this. If the facts sustained appellee's contention, there would be no difficulty; but it is apparent that appellant never intended to make any such admission. The answer may not be as clear as it ought to be in some of its aspects; but it is certain that it denies indebtedness, and when this is the case it should be clear that there is an admitted liability before an effect should be given to an alleged admission which is at variance with express denial. The remedy by contest is easy and available, and should be invoked by the attaching creditor, instead of relying on a supposed admission at variance with an express denial.

Reversed and remanded.

JONES v. STATE. (No. 14,339.)

(Supreme Court of Mississippi. June 20, 1910.
Suggestion of Error Overruled
July 4, 1910.)

1. HOMICIDE (§ 237*)—INSANITY—EVIDENCE—SUFFICIENCY.

Evidence in a murder trial held insufficient to raise an issue of accused's insanity.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 237.*]

2. CRIMINAL LAW (§ 696*) — STRIKING OUT EVIDENCE—INSANITY.

In a murder trial, it was error to exclude accused's evidence of insanity at the close of all the evidence, where it left evidence of the state on that issue, including the fact that decedent had killed three other men, and where there was not enough evidence to take that issue to the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 696.*]

3. CRIMINAL LAW (§ 923*) — NEW TRIAL — PREJUDICE OF JUROR.

Under Const. § 26, guaranteeing a trial for crime by an impartial jury, one convicted of murder is entitled to a new trial on showing that one of the jurors prejudged the case, was biased against him, and had stated that accused ought to be convicted on general principles, where the voir dire examination did not disclose such facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.*]

4. CRIMINAL LAW (§ 1166½*) — APPEAL — HARMLESS ERROR—PREJUDICE — IMPARTIAL JURY.

Under Const. § 26, guaranteeing trial for crime by an impartial jury, a conviction by a jury including a prejudiced juror will be reversed, though accused's guilt is conclusively shown.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166½.*]

5. CRIMINAL LAW (§ 1162*)—PREJUDICIAL ERROR—DENIAL OF CONSTITUTIONAL RIGHT.

Violation of a constitutional right cannot be harmless error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1162.*]

Smith, J., dissenting.

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Charles Jones was convicted of murder, and he appeals. Reversed and remanded.

Henry, Fox & Canizaro and Alex Y. Scott, for appellant. Earl Brewer and Geo. Butler, Asst. Atty. Gen., for the State.

ANDERSON, J. The appellant was tried and convicted of murder, and sentenced to the penitentiary for life. His defense was insanity. On that question much testimony was introduced, both on the part of defendant and of the state. At the conclusion of the testimony the court was moved by the state to exclude all the evidence of insanity which had been offered by the defendant, which motion the court sustained, leaving in the testimony offered on behalf of the state to show insanity, part of which was the fact that he had killed three other men before killing the deceased. This action of the court is assigned as error. Taking the testimony for all it proves and tends to prove, there was not sufficient evidence to go to the jury on the question of insanity. It did not tend to show insanity, but, on the contrary, that appellant's state of mind at the time of the killing was caused by anger. Had the court, therefore, excluded all the evidence of insanity offered for both the state and the appellant, there would have been no error in that respect. Failing to do this, there was left before the jury the fact that defendant had killed three other men before killing the deceased. It is hard to conceive a more damaging error. This testimony, ordinarily, would have been clearly incompetent, and was admitted here on the issue of insanity alone, and was permitted to remain before the jury, when the only reason for its admission had ceased to exist.

Another error assigned is that the court refused to grant the appellant a new trial because of the prejudice and bias of the juror T. B. Johnson. On his voir dire examination the court held, and properly so, that Johnson was a competent juror. However, on the motion for a new trial, testimony was introduced to show his incompetency, as follows (it will be borne in mind that there had been a previous trial of this case):

"J. R. Henderson, white, testified on motion for new trial: That he was in the general mercantile business at Shelby, and knew T. B. Johnson; that he had known him for five or six years, and that Johnson had worked for him, and was in his employ 'last May, just subsequent to that time'; that he had heard Johnson express an opinion in regard to Charlie Jones' case 'very often,' and 'it was commented on a good many times'; and that Johnson said 'it would be hard for him to get out of the case without a conviction, owing to his former way; he had known him

a long time, and his former record connected with this case, as he had heard it talked about, he would think he ought to be convicted.' Witness said that Johnson said he had known him [Charlie Jones] 'quite well since he was a young man, and was familiar with his past record'; that he (Johnson) connected Jones' past record with this case, and said, 'On both together it will be hard for him to get out of this case; his record was so bad before that.' These conversations with Johnson were had after the 15th day of May. On cross-examination, Mr. Henderson said that they were simply discussing the Jones case after it had been tried (meaning the first trial), and that, taking his past record, he was surprised he wasn't convicted. He further stated that Johnson was a man of splendid integrity and veracity. He said that Johnson's statements were made in his store; doesn't remember any one being present, except on one occasion a negro.

"L. W. Gordon, white, on motion for a new trial, testified that he lived at Shelby, and that his occupation was a plantation manager; that he knew T. B. Johnson 'last May,' and had known him about four years; that the last trial of Charlie Jones was in May; that he had a conversation with Johnson relative to the trial. Q. State what it was, Mr. Gordon. A. Right after the trial, along about that time, there was a discussion over the trial and everything, and Mr. Johnson made a remark that they ought never to have turned him loose; that if he had been one of the jurors he never would have turned him loose; in other words, that he would have hung him. That is the words Johnson used in my presence in front of McKee & Henderson's store. Q. That was after the first trial? A. That was after the trial in the spring before this trial. On cross-examination, he said he couldn't say who was present; he doesn't think any one was; 'but I have heard him repeatedly, several times, make the same assertion.' Q. And he said, if he had been on the jury, he would have convicted him? A. Yes, sir. He said he had also known Mr. Johnson about four years, and that he was a man of honor and veracity.

"J. C. Lauderdale, white, testified on motion for new trial: Stated that he had lived at Shelby, knew T. B. Johnson, and had a conversation with him after the first trial of Jones. Q. Did you have any discussions about the case? A. Yes, sir; we talked about it several times. Q. State, Mr. Lauderdale, what Johnson said to you with regard to the case. A. He just stated he ought to have been convicted. He didn't see how the jury ever made a mistrial of it; that he thought he ought to have been convicted on general principles, as well as anything else. Q. Did you have more than one conversation with him? A. We talked about it several times; yes, sir. It was generally talked there. Q.

That was his expression to you on several occasions? A. Yes, sir. On cross-examination witness said that they were simply discussing the Jones case, and Johnson told him what he had heard of it, and from what he had heard he would convict him; that he had known Johnson about 25 years, and had known him to be an honorable man of unquestioned veracity.

"Andrew Agnew, white, testified on motion for new trial, that he was one of the jurors on the first trial, and that he knew T. B. Johnson; that he had a conversation with T. B. Johnson after the first trial of this case. He says: When I passed the store, he (Johnson) asked me how it came off, and I told him they couldn't agree, and he said, 'Why, he ought to have been convicted on his past record.' Q. He knew you were a juror in the case? A. Yes, sir. On cross-examination witness stated that he didn't remember how long after the trial the conversation was had with Johnson, but a very short time, possibly the same evening; that it was in front of Mr. Henderson's store, and several gentlemen were present. Q. You were one of the fellows who hung the jury and prevented a verdict in this case before? A. I expect I was; yes, sir. Q. Who was present at the time (at the time Johnson made the statement)? A. Mr. Boatright was standing there. Q. Who else? A. Several others; I didn't pay any attention to them.

"F. G. Boatwright, white, testified on motion for new trial that he lived at Shelby, knew T. B. Johnson, and remembered that the first trial of Charlie Jones took place in May last, and that he had heard a conversation between Mr. Johnson and Mr. Agnew [the last-named witness on motion for new trial], who was a former juror in this case. Q. State when that was, and what you heard Mr. Boatwright say. A. I don't remember exactly the date; but a few days, as well as I remember it, after Mr. Agnew came along, and was talking to Mr. T. B. Johnson in front of Mr. Henderson's store, and he said, 'Well you all played the devil, Agnew,' and Mr. Agnew said, 'How is that?' Mr. Johnson said, 'You let a man loose that ought to have been convicted long ago on his past record.' Q. Did you ever have any other conversation with Mr. Johnson? A. Yes, sir; I did, afterwards. Q. What did he say? A. He said to me individually—he said, 'What do you think about that?' That was when they hung the jury in the Jones case. I remarked to Mr. Johnson that I just thought Jones was 30 days too late in doing what he ought to have done, and Johnson said, 'Well, he ought to have been convicted on his past record.' On cross-examination he said that he expressed an opinion favorable to Jones, and said he would have done it 30 days before Jones did. Q. And Mr. Johnson said, from what he had heard of it, and on his general reputation, he would have convicted

him? A. He didn't say from what he had heard of it; he said he would have convicted him on his past record. The witness further stated that he heard the conversation between Mr. Agnew and Mr. Johnson; that they were talking, and he walked up; that he didn't know what was said before he got there, and heard Mr. Johnson say, 'You all played the devil, didn't you?' to Mr. Agnew, and Mr. Agnew said, 'How is that?' and he said, 'You let a man loose that ought to have been convicted long ago on his past record.' Q. What did Agnew say? A. Agnew said: 'Well, he wasn't trying Jones on his past record. We were trying him on what he has done now.' The witness further stated that he was present and heard the facts as he stated them; that he had known Mr. Johnson since he (witness) was a little boy; and that he was a man of honesty and integrity.

"J. S. Martom, witness, testified on motion for new trial that he lived in Shelby; that he knew T. B. Johnson, and remembered when Charlie Jones was tried for murder the first time; that he heard Johnson discussing the case after the first trial; that there was a big crowd standing in front of Henderson's store discussing it; that Johnson was talking, 'but not to me,' and I heard him state several times 'that he ought to have been convicted, and he couldn't see why he wasn't convicted, taking his past record with this case he is being tried for now.' On cross-examination he stated that this was a general conversation on the street; that he does not remember who was present; that he had known Johnson since 1882; that he is a man of good character and unquestioned veracity. He was asked if he had ever been convicted of anything, and he said that he had, but didn't know what it was he was convicted for, and no further inquiry was made of that fact."

This was all of the testimony for defendant on motion for new trial. The state introduced five witnesses, including the juror Johnson, on motion for a new trial. The others than Johnson testified they had known the juror Johnson for a number of years, and his reputation for truth and veracity and honesty and fair dealing in the community was good. Johnson, in response to questions as to what expression of opinion he had given to the various witnesses for the appellant on the motion for a new trial, testified: "Well, I don't know. I spoke of Charlie (meaning the appellant) in the past as being unfortunate, and if it was connected with this case it was going very hard with him; but for saying that I would hang him if I was on the jury, that never entered my mind, sir."

This response is no sort of denial, on a fair construction of the testimony of the witnesses as set out above. We cannot sustain this verdict, participated in by this juror. He had prejudged the case. He was biased. He had complained that the appel-

lant was not convicted on the first trial. He stated he ought to have been convicted on general principles, etc. The answers of this juror on his voir dire furnished counsel for appellant no sort of reason to believe he had prejudged the case, or that he would do anything else as a juror than try the defendant on the facts and the law, uninfluenced by rumors and his own personal knowledge of defendant's bad record. A trial by a jury, participated in by a juror so fixed in his opinion, and biased and prejudiced, is not a fair and impartial trial under the Constitution and laws of this state. The twenty-sixth section of the Constitution of 1890 guarantees to a person charged with crime a "speedy and public trial by an impartial jury of the county where the offense was committed," and legislation encroaching upon the qualifications of jurors to such an extent as to endanger this impartiality would infringe this constitutional privilege. *Logan v. State*, 50 Miss. 269. And surely the courts have as little power in that respect as the Legislature.

Shepprie v. State, 79 Miss. 740, 31 South. 416, is directly in point. There the juror had qualified on his voir dire; but it was shown on the motion for a new trial that he had been told by a witness the facts of the homicide, and had stated to three witnesses that defendant ought to be hung, and the court held that a trial before such a jury infringed defendant's constitutional right to a fair and impartial jury. The defendant is entitled to such a jury, however guilty he may be; and no other tribunal has the power to determine guilt. If there has not been a trial "by an impartial jury," this court must reverse, even though the evidence so overwhelmingly shows the defendant's guilt that such a jury could not have honestly reached any other conclusion. To hold otherwise would amount to this court determining guilt, which it has not the power to do, and which rests alone with a constitutional jury. The trial court had not the power to direct a verdict of guilty, nor has this court any greater power in that respect. The exercise of such power by trial judges, and by this court, would evidence the end in this state of the constitutional guaranty of trial by "an impartial jury." There is no such thing in our law as "harmless error," when the Constitution is violated in the commission of such error.

Reversed and remanded.

SMITH, J. (dissenting). I am unable to agree with my Brethren in the reversal of the judgment entered in the court below, for the reason that appellant was not prejudiced by either of the errors which my Brethren say were committed in the court below. His only defense was insanity. If sane, he was guilty of murder. When this defense failed, and the court excluded it from the jury's consideration, there was only one verdict

which the jury could render, or, to be more accurate, which it had the right to render, and that was a verdict of guilty. If there had been any evidence before the jury at all from which under the law it could have reached a verdict, other than one of guilty, a different case would be presented, and the errors, if in fact such they were (as to which I express no opinion), might then have been prejudicial.

WILBURN v. COLOGERO. (No. 14,569.)
(Supreme Court of Mississippi. June 20, 1910.)

1. REPLEVIN (§ 101*)—JUDGMENT—NECESSITY FOR ASCERTAINING VALUE OF PROPERTY.

A default judgment for plaintiff in replevin, without ascertaining the value of the property by writ of inquiry, is improper.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 389; Dec. Dig. § 101.*]

2. REPLEVIN (§ 72*)—VALUE OF PROPERTY—PRIMA FACIE EVIDENCE.

Under the express terms of Code 1906, § 4221, a levying officer's valuation is prima facie evidence of the value of property replevied.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292-295; Dec. Dig. § 72.*]

Appeal from Circuit Court, Monroe County; Jno. H. Mitchell, Judge.

Replevin by George P. Cologero against H. B. Wilburn. From a judgment of the circuit court for plaintiff on his appeal from a justice's judgment for defendant, defendant appeals. Reversed and remanded.

The appellee instituted replevin proceedings in a justice of the peace's court against appellant, Wilburn; his affidavit averring that "one bay mule colt, about 7 months old and of the value of \$75," is wrongfully detained. Process was served on Wilburn by the constable, and his writ returned executed by taking into possession one bay mule colt about 7 months old, valued by the constable at \$45. Wilburn bonded the colt; his bond being fixed at \$170. On the trial the justice of the peace entered judgment for Wilburn. There was an appeal to the circuit court, and appellee appeared and secured judgment by default (Wilburn not appearing), and the court entered judgment by default, awarding the colt to appellee, the judgment reciting that appellee was entitled to the possession of the colt, or "the value of said mule colt, which is \$75," and awards judgment for this amount in case of failure of Wilburn to deliver possession of the colt.

The sheriff was proceeding to levy an execution for this amount, when a supersedeas bond was given and an appeal taken to the Supreme Court; the principal contention on appeal being that the judgment was erroneously rendered without ascertaining the true value of the property replevied, and that the

ascertainment should have been made by writ of inquiry.

Leftwich & Tubb, for appellant. L. P. Haley, for appellee.

WHITFIELD, C. The judgment by default was erroneously rendered without the ascertainment by a writ of inquiry of the value of the mule. The officer's valuation was prima facie evidence of the value of the property, and his estimate was \$45, and yet the judgment by default is for \$75. See section 4221 of the Code of 1906.

PER CURIAM. The above opinion is adopted as the opinion of the court; and for the reasons therein stated, the judgment is reversed, and the cause remanded.

YAZOO & M. V. R. CO. v. ADAMS. (No. 13,703.)

(Supreme Court of Mississippi. June 20, 1910.)

RAILROADS (§ 113*)—FENCING RIGHT OF WAY—INJURIES TO SHIPPER.

A railway company is not liable to a shipper for damage to his shipping facilities caused by fencing a right of way, preventing direct loading and unloading between cars and wagons, where ample freight depot facilities are retained; Code 1906, § 4865, authorizing the railroad commission to require sufficient platform, etc., facilities, being inapplicable.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 113.*]

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action by J. R. Adams against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

There is a station on the line of appellant's railroad called Claremont, adjacent to which appellee owns a large tract of farming land, and near said station he has built a gin and a store. A side track ran along the right of way next to the gin and store of appellee, and it was the custom of appellee, in shipping and receiving freight, to load and unload same direct from the wagons to the cars and from the cars to the wagons, without having to load and unload upon the platform of the freight depot and then into the cars, and vice versa, from the cars to the platform and then into the wagons. A double handling of the freight was avoided by the method pursued by the appellee. The appellant ran a fence along its right of way, so that freight could not be loaded and unloaded direct to and from cars on the side track, but must be handled over the freight platform. This fence also inclosed a cotton seed house, erected by the appellee on a part of the appellant's right of way leased for the purpose, and into which cotton seed bought by him were unloaded from wagons, thence

from the seed house into the cars. The fence prevented access to the seed house and to the said track and cars thereon, so that wagons could not load and unload from cars along the side track, and could not unload into the seed house of the appellee, and so that the facilities for delivering the seed from the appellee's gin into the wagons was obstructed. The appellee brought suit, alleging that the value of his property had been greatly reduced because of the loss of such facilities. From a verdict of \$3,500, the railroad company appeals.

Mayes & Longstreet, for appellant. J. W. Cutrer, for appellee.

MAYES, C. J. A careful consideration of this case fails to convince us that appellee has any right to recover damage against the railroad company for the things complained of in the record. Let it be noticed here that Claremont is just a station; it is not a municipality.

Our view is that the railroad company has not exceeded its just rights in dealing with its own property, and has violated no law of the state, nor infringed upon any lawful right of appellee, or failed in any public duty which it owed him of which the law can take cognizance. It is quite true that under section 4854, Code of 1906, when a railroad company has once established its depot at a station, it cannot abolish or disuse same, except by the consent of the commission. But the facts show that this company has not attempted to abolish the depot at Claremont, or to disuse it. The only thing which it has done is to fence its right of way north of this depot, along which there were certain side tracks formerly accessible to persons loading or unloading cars at this station, but which now, on account of this fence, cannot be made available for this purpose. It is shown, however, that the railroad company has not dismissed its depot facilities in any way, but has kept them open and still maintains them. It may be that the appellee has sustained damage on account of the fencing of this right of way and making those side tracks inaccessible to him; but, if this be true, it is a damage for which he has no recourse against the railroad company, since the railroad company has only made lawful use of its own property in a way violative of no law. We know of no statute which prohibits a railroad company from fencing its side tracks, provided it leaves ample depot facilities at its station.

It is claimed by the railroad company that this fencing was done for its own protection. Whether this be true or not, they had the right to run the fence as they did and inclose the side tracks within same. Section 4865 of the Code has no application to the controversy in this case.

The case is reversed and dismissed.

BIRDSONG v. TOWN OF MENDENHALL. (No. 14,606.)

(Supreme Court of Mississippi. June 27, 1910.)

1. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREET—ACTION FOR INJURIES—NOTICE OF DEFECT—ORDINARY CARE—QUESTION FOR JURY.

Plaintiff's knowledge of the defective condition of a street did not necessarily preclude his recovery for an injury received therefrom, as it was then a question for the jury as to whether, when using the street, he exercised ordinary diligence commensurate with such knowledge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1755; Dec. Dig. § 821.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREET—QUESTION FOR JURY—EVIDENCE.

In a suit for injuries sustained by reason of a defective street, although plaintiff had knowledge of such defect, his testimony that he was in the exercise of proper care at the time of the injury was sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1755; Dec. Dig. § 821.*]

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action by J. S. Birdsong against the Town of Mendenhall. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The appellant brought suit against the town of Mendenhall for injuries received by him from falling or being thrown by a defective sidewalk; the accident occurring on a dark, rainy night. In his testimony he admits that he knew of the defect in the walk, having seen it a number of times before, but that in attempting to use the said walk he was careful and prudent, and that his heel caught in a hole in the walk and tripped him, and he fell and sustained the injuries complained of. There was a peremptory instruction for the town, and this appeal is prosecuted.

E. L. Dent and Flowers, Fletcher & Whitfield, for appellant. J. P. & A. M. Edwards, for appellee.

MAYES, C. J. It is true that Birdsong testifies that he has been a resident of the town of Mendenhall for three years or more, and that before going upon the street in question he knew of its dangerous condition at the point where he sustained the injury; but this was not sufficient to preclude a recovery against the town for the injury sustained. Of course, his knowledge of the condition of the street was a factor in the case for the consideration of the jury in determining whether or not, in view of this knowledge, he was exercising the ordinary prudence at the time interpreted in the light of his knowledge. Citizens of a town are not prohibited from the use of a street

or sidewalk by the mere fact that the authorities have allowed it to get into a defective condition, even when they know the street is defective; but they may continue to use the street unless its defect consists in such bad state of repair as makes the very use of the street, with the knowledge, however great the care exercised, attendant with great danger.

This is not a case where there should have been a peremptory instruction for the defendant; but it should have gone to the jury. It was not shown that the condition of the street, of which Birdsong had knowledge, made the danger in its use so imminent and threatening that a prudent man, knowing of its existence, would not assume the risk of walking on the street when exercising ordinary care. Birdsong testifies that he was in the exercise of proper care at the time he received the injury, and this testimony, under the facts, necessarily carried the case to the jury. The question is, not whether Birdsong used the street knowing its condition, but whether or not, knowing its condition, he exercised the proper care to protect himself from harm by its use.

Reversed and remanded.

McCEARLEY v. STATE. (No. 14,628.)

(Supreme Court of Mississippi. July 4, 1910.)

1. INDICTMENT AND INFORMATION (§ 75*)—FORM AND REQUISITES—OMISSIONS.

An indictment for burglary, alleging that defendant, "in said county, on the 7th day of March, A. D. 1910, the storehouse of A. then and there unlawfully, willfully, and feloniously, and burglariously break and enter with felonious intent," etc., was fatally defective for omission of the word "did" before the words "then and there."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 204; Dec. Dig. § 75.*]

2. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where defendant's conviction was based wholly on the testimony of an accomplice and self-confessed thief, and the case on the facts was doubtful, it was error to deny a new trial for newly discovered evidence, supported by an ample showing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2326; Dec. Dig. § 945.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Seab McCearley was convicted of burglary, and he appeals. Reversed and remanded.

The indictment charges that appellant "in said county, on the 7th day of March, A. D. 1910, the storehouse of A. then and there unlawfully, willfully, and feloniously, and burglariously break and enter with felonious intent." It is contended that the indictment is fatally defective, because the word "did" does not appear before the words "then and there." It is also contended that a new trial

should have been granted because of newly discovered evidence.

Cassedy & Butler, for appellant. Carl Fox, Asst. Atty. Gen., for the State.

WHITFIELD, C. The court manifestly erred in not sustaining the motion for a new trial on the ground of newly discovered evidence. The conviction was based solely upon the testimony of an accomplice and self-confessed thief, and the case on its facts is a very doubtful one. In this close case the defendant made a perfectly ample case on his showing for a new trial, based on the newly discovered evidence.

Another fatal error is that urged in the assignment that the indictment charged no offense plainly and precisely, as it ought to do in order to inform the appellant of the nature and cause of the accusation against him, because of the omission of the word "did." This precise point has been twice adjudged in this state on full consideration in the cases of Cook v. State, 72 Miss. 517, 17 South. 228, and Hall v. State, 44 South. 810. In the Cook Case, the question was elaborately gone into, and the opinion is supported by many citations from other states. We are constrained, under the authorities of these two cases, to hold this assignment well taken.

PER CURIAM. The above opinion is adopted as the opinion of the court; and for the reasons therein stated, the judgment of the court below is reversed, the indictment quashed, and the prisoner will be held to answer such proper indictment as the grand jury may prefer against him.

A. H. GEORGE CO. v. PIGFORD et al. (No. 14,407.)

(Supreme Court of Mississippi. June 27, 1910.)

RECEIVERS (§ 158*)—PRIORITY OF CLAIMS—UNSECURED DEBTS INCURRED BEFORE RECEIVERSHIP.

A claim for feed delivered to a corporation before it was placed in the hands of a receiver is not entitled to preference over other unsecured claims on the ground that the feed was for animals used by the corporation in its business and that the feed was necessary for the animals.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

Appeal from Chancery Court, Lamar County; T. A. Wood, Chancellor.

Petition by the A. H. George Company against W. W. Pigford and another, receivers of the J. O. Pearson Lumber Company, to have a claim declared a preferred claim and for an order directing the receivers to pay the claim in full. From a decree dismissing the petition, petitioner appeals. Affirmed.

The lumber company was placed in the hands of receivers on January 30, 1908, and prior thereto, between October 30, 1907, and the date of the appointment of receivers, petitioners had sold and delivered to the company feed stuff, which was for the oxen used by the company in hauling logs, which were manufactured into lumber, the proceeds of which were received by the company within four months of the time it went into the hands of the receivers; a part of the lumber still being in the hands of the receivers. The receivers sold the oxen for a sum of money more than sufficient to cover the claim of the petitioners. It was sought to establish a priority because of the fact that the insolvent lumber company received the benefit of the services of the oxen, and that it was necessary that they should be fed in order that they should be of service, and to keep them alive, and that their claim should be allowed in full for the same reason as the claims of laborers for services rendered.

Geo. B. Neville and Baskin & Wilbourn, for appellant. John C. Street and Frank Johnston, for appellees.

ANDERSON, J. Until the decision of the cases of Drennen & Co. v. Mercantile Trust & Deposit Co., 115 Ala. 592, 23 South. 164, 39 L. R. A. 623, 67 Am. St. Rep. 72, and Le Hote v. Boyet, 85 Miss. 636, 38 South. 1, the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, had been confined by the courts of this country exclusively to receiverships of insolvent railroad corporations. In the Drennen Case the Alabama court extended the doctrine to claims of laborers against insolvent private corporations in the hands of receivers, and was followed by this court in the Le Hote Case, in which the claims given preference were those of laborers in and about the sawmill plant, a private corporation in the hands of a receiver, for their services performed within the period of four months before the receivership, and which were necessary to continue the business and preserve the property of the corporation. This court placed the allowance of such claims as preferences on the second ground stated by the Supreme Court of Alabama in the Drennen Case, as follows: "Second, that whether, strictly speaking, there has been any diversion of gross earnings from the employes, directly or indirectly, to the bondholders, or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders, in the enhancement of the value of their security, and hence of their bonds, they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers,

which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment at their instance of the receiver."

We decline to extend the doctrine beyond the claims of laborers, the wage class, who are favored by law, and justly so, as illustrated by our statutes giving the laborer a lien on crops produced by him, and providing there shall be no exemption from liability to judgment for labor performed, and also by the common law, which gives laborers who receive chattels for repair, at the request of the owner, the right to retain same as security for their debt. 19 Am. & Eng. Encyc. of Law (2d Ed.) 8. There is no difficulty in applying the doctrine in question to the claims of laborers; while, on the other hand, great injustice and inequality would result in its application to any other class of claims. To illustrate: In the instant case, the appellants are merchants seeking a preference for feed stuff furnished this sawmill corporation with which to feed its oxen, to enable them to haul logs to the mill to be sawed into lumber, which lumber was on hand at the time of the appointment of the receiver. Why should such a claim be preferred over that of any other unsecured creditor? Why over the claim of another merchant, who furnished the company clothing and food for the laborers in its employ, who cut the trees and drove the oxen back and forth in hauling logs to the mill? Why over the claim of a bank which loaned the concern money with which to buy materials to go into the betterment of the plant, or with which to buy timber to be sawed into lumber? Or any other indebtedness incurred, which directly or indirectly contributed to keeping the plant a going concern, and to continue or increase the income therefrom? We can conceive of no indebtedness necessarily incurred about the business which would not contribute to that end.

Affirmed.

GULF & C. RY. CO. v. FERGUSON-McKINNEY DRY GOODS CO. (No. 14,320.)

(Supreme Court of Mississippi. June 27, 1910. Suggestion of Error Overruled July 4, 1910.)

1. CARRIERS (§ 132*)—ACTION—LOSS OF GOODS BY FIRE—NEGLIGENCE—BURDEN OF PROOF.

In a suit against a railroad company for loss of goods by fire in its depot, *held*, that the burden of proof was on the plaintiff to show that defendant was guilty of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 578; Dec. Dig. § 132.*]

2. CARRIERS (§ 114*)—CARRIAGE OF GOODS—TERMINATION OF LIABILITY—REASONABLE TIME FOR REMOVAL OF GOODS BY CONSIGNEE.

The reasonable time after notice that must be allowed by a railroad company for a con-

signee to remove his goods from its depot applies to every one alike, regardless of the consignee's distance from the depot.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608, 609; Dec. Dig. § 114.*]

3. CARRIERS (§ 114*) — CARRIAGE OF GOODS — LIABILITY AS INSURER — TERMINATION OF LIABILITY — TIME FOR REMOVAL OF GOODS BY CONSIGNEE.

The liability of a carrier as the insurer of goods continues after their arrival at their destination, until notice to the consignee and until he has had a reasonable time in which to remove them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608, 609; Dec. Dig. § 114.*]

4. CARRIERS (§ 114*) — CARRIAGE OF GOODS — TERMINATION OF LIABILITY AS INSURER — GOODS 'AT DESTINATION' — TERMS OF CONTRACT.

The liability of a carrier as insurer of goods after their arrival at their destination, until notice to the consignee and until he has had a reasonable time in which to remove them, may reasonably be said to be within the terms of the contract of carriage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608, 609; Dec. Dig. § 114.*]

5. CARRIERS (§ 136*) — LOSS OF OR INJURY TO GOODS — QUESTION FOR JURY — REASONABLE TIME FOR REMOVAL OF GOODS FROM DEPOT.

What is a reasonable time for the consignee to remove his goods from a carrier's depot is a question for the jury, with reference to one residing in the vicinity of such depot.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 596; Dec. Dig. § 136.*]

Appeal from Circuit Court, Pontotoc County; J. H. Mitchell, Judge.

Action by the Ferguson-McKinney Dry Goods Company against the Gulf & Chicago Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee sold certain goods to Phillips & Murff, merchants, at Reids, Miss., 20 miles from Pontotoc, and delivered the goods to the carrier for transportation, and they were transported to Pontotoc, Miss., a station on appellant's railway, where Phillips & Murff received their freight. They arrived at Pontotoc about February 12th, and on the night of February 14th the depot and warehouse were destroyed by fire, and the goods in question totally destroyed. There is no evidence as to the origin of the fire, and no proof of any negligence on the part of the railroad company. There is a conflict in the testimony as to whether or not Phillips & Murff were notified of the arrival of the freight; the agent testifying that notice had been sent to the consignees, which they denied receiving. Appellee brought suit against the railroad company for the value of the goods, and from judgment in its favor this appeal is prosecuted.

Flowers, Fletcher & Whitfield, for appellant, cite the following authorities: Columbus & W. Ry. Co. v. Ludden, 89 Ala. 612, 7 South. 471; Hutchinson's Carriers, § 377;

Railroad Co. v. Wood, 66 Ala. 172, 41 Am. Rep. 749; Railroad Co. v. Oden, 80 Ala. 41; Moses v. Railroad Co., 32 N. H. 523, 64 Am. Dec. 381.

Mitchell & Roberson, for appellee.

MAYES, C. J. Out of the many contentions made by appellant, we find only two that we deem necessary to notice. There is proof in this record only that appellee's goods were destroyed by being burned while in appellant's depot. There is not the slightest proof that this fire was the result of any negligence on the part of the agents of appellant. Notwithstanding this, the court instructed the jury "that, if they should believe from the evidence that the loss of the goods occurred because of the negligence of defendant, then they will find for plaintiff, even though they may think the liability of the railroad company had ceased as a common carrier." This instruction sought to hold the appellants liable as warehousemen, in the face of the fact that they had fully accounted for the failure to turn over the goods, within the rule laid down in the case of Y. & M. V. R. Co. v. Hughes, 47 South. 682. In the above case it was held that "in an action against a warehouseman for the value of the goods destroyed in a fire which burned the warehouse, the burden is on the bailor, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee's negligence." The court also said: "We intimate nothing as to the quantity of proof as to negligence which will suffice to warrant the submission of this case to the jury, or which will call for an explanation by defendant." The facts of this case now on trial bring it within the rule announced above.

The court further erred in giving the fourth instruction asked for by appellee. This instruction told the jury that appellee should have a reasonable time to remove the goods from the depot, and in determining what was a reasonable time the jury might "take into consideration the distance Phillips & Murff would have to come after the goods." The liability of a railroad company as common carrier is widely different from its liability as a warehouseman after the goods have reached their destination. The liability in each case is the same as to all persons, no matter how near or remote the consignee may be to the place of delivery. If a party have his place of business distant from the depot of the railroad, he cannot, by reason of this fact, force upon the railroad a greater liability in the handling of his goods than would be incurred by the railroad in handling goods for one in close proximity. The liability of the carrier as insurer of the goods continues after arrival of the goods at their destination until notice to the

consignee and until the consignee has had a reasonable time in which to remove his goods. All these things may reasonably be said to be within the terms of the contract of carriage. But the rule is not varied in any way by any question as to how far, or how near, the consignee may reside from the place to which he had his goods consigned. What is a reasonable time for the consignee to remove the goods is necessarily a question of fact, and must be largely left to the jury; but it is to be determined with reference to what would be a reasonable time as applied to one residing in the vicinity of the place of delivery. For authorities we refer to appellant's brief, and to the notes under 5 Ency. Law (2d Ed.) p. 263, par. (c).

Reversed and remanded.

PHENIX INS. CO. v. HILLIARD et al.

(Supreme Court of Florida, Division A. May 27, 1910. Rehearing Denied June 17, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 143*)—INSURANCE POLICY.

Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

2. REFORMATION OF INSTRUMENTS (§ 2*)—RIGHT TO RELIEF.

The right to the reformation of an instrument is not absolute, but depends on an equitable showing.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. INSURANCE (§ 282*)—"SOLE AND UNCONDITIONAL OWNERSHIP."

The interest of a purchaser of property, which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him upon definite terms, is the "sole and unconditional ownership," within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 602; Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7801, 7802.]

4. INSURANCE (§§ 119, 282*)—SOLE AND UNCONDITIONAL OWNERSHIP—WAGER POLICIES.

The just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preserva-

tion of the property. Wager policies are not approved and should be avoided.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 165, 602; Dec. Dig. §§ 119, 282.*]

5. SALES (§ 467*)—CONDITIONAL SALES.

A conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354-1362; Dec. Dig. § 467.*]

6. INSURANCE (§ 282*)—"UNCONDITIONAL AND SOLE OWNERSHIP."

To be "unconditional and sole," the interest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 602; Dec. Dig. § 282.*]

7. INSURANCE (§ 282*)—"UNCONDITIONAL AND SOLE OWNERSHIP."

By fair construction and intentment the "unconditional and sole ownership" of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 602; Dec. Dig. § 282.*]

8. INSURANCE (§ 143*)—INSURANCE POLICY.

Where the insured and the insurer agree that a policy of insurance shall be issued to protect the insured "according to their respective interests," and the policy is not so issued, it may be reformed so as to show the real interest of the parties in all the property insured, and as reformed the policy may be enforced.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

Appeal from Circuit Court, St. Lucie County; M. S. Jones, Judge.

Bill by Charlotte Hilliard and others against the Phenix Insurance Company. From an order overruling a demurrer to the bill, defendant appeals. Affirmed and remanded with leave to amend.

Geo. M. Robbins, for appellant. F. L. Hemmings and John E. Hartridge, for appellees.

WHITFIELD, C. J. This appeal is from an order overruling a demurrer to a bill in equity brought to reform and enforce a fire insurance policy.

The amended bill of complaint in substance alleges that Charlotte Hilliard was the owner of a certain building used as a sawmill, and also a stock of lumber as her separate statutory property; that she agreed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to purchase from the Malsby Company certain sawmill machinery; that in pursuance of such agreement she took possession of the machinery and placed it in said building; that she paid \$150.90 in cash on the purchase and gave four notes for the balance; that by agreement between Charlotte Hilliard and the Malsby Company the title to said machinery was reserved in the Malsby Company until fully paid for; that the agreements were made by Charlotte Hilliard for the benefit of her separate statutory property; that Charlotte Hilliard agreed to keep said machinery insured for the benefit of the Malsby Company, and she became the agent of the Malsby Company for that purpose; that she made application to the agent of the Phenix Insurance Company for a policy of insurance to protect her and the Malsby Company against loss by fire of said building, lumber, and machinery; that she informed said agent that she owned the building and lumber, and was buying the machinery from the Malsby Company; that it was not paid for, and the title to the machinery would remain in the Malsby Company until fully paid for; that though the agent was fully advised of the facts he by inadvertence, accident, or mistake issued the policy to Charlotte Hilliard alone and omitted the name of the Malsby Company as the owner of the said engine, boiler, and sawmill machinery; "and also the fact that the insurance on said boiler and engine and sawmill machinery was for the benefit of the said Malsby Company;" that the premium was paid; that she received the policy from the agent believing it to have been properly prepared and written in accordance with the instructions; that it was the will, intention, and understanding of both Charlotte Hilliard and the agent to enter into a contract that would protect the interests of both Charlotte Hilliard and the Malsby Company "according to their respective interests;" that the Malsby Company was not informed of the mistake until after the property was destroyed by fire; that the property was burned without the fault of complainants and the defendant, and the policy has not been paid. The prayer is that the policy be reformed in accordance with the alleged intention of the parties and enforced as such, for attorney's fees, and for general relief.

The notes for the balance of the purchase money for the machinery provide that: "It is a part of the contract of sale that the title shall not pass from Malsby Company until all of said notes are paid; and if the amount of this note, with interest, is not paid at maturity, or in case of the removal of said machinery from the county of St. Lucie, or if the said machinery shall not be properly cared for, then the said Malsby Company may declare all our notes at once due and payable, and take possession of said machinery, sell, or dispose of the same privately or

publicly, at the discretion of Malsby Company or their authorized agent, and after payment of their debts and all costs, including counsel fees, pay over the remainder, if any, to me. The purchaser from them to receive a good and irrevocable title against me to the machinery, without offset of any kind. And further, we, makers and indorsers, hereby guarantee Malsby Company against any damage or loss to said machinery by fire or other cause, and we shall in no event be entitled to a rescission of the contract or to an abatement in the price for any cause, and also agree to keep the same insured for at least one-half the purchase money for the benefit of Malsby Company." The notes are signed only by "Charlotte Hilliard."

The grounds of the demurrer are that the bill of complaint states no equity, and that the allegations show the Malsby Company did not own or have a lien upon the property, and the policy was properly issued, and the remedy at law is adequate.

Where by inadvertence or otherwise a policy of fire insurance is issued contrary to the intention of the parties thereto, a court of equity may in a proper case reform the policy so as to make it express the real agreement and intention of the parties, and as so reformed to enforce the policy in order to do complete justice in the controversy. *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887. See, also, *Horne v. J. C. Turner Cypress Lumber Co.*, 55 Fla. 690, 45 South. 1016; 19 Cyc. 652, 655; 11 Ency. Pl. & Pr. 378. The right to the reformation of an instrument is not absolute, but depends on an equitable showing. 34 Cyc. 907.

In this case the policy expressly provides that it shall be void unless otherwise indorsed on the policy "if the interest of the insured be other than unconditional and sole ownership." An allegation of the bill of complaint is that Charlotte Hilliard requested the agent of the insurance company "to write a policy on said described property to protect herself and the said Malsby Company against loss by fire," and that through inadvertence, accident, or mistake the agent omitted the name of the Malsby Company as the owner of the machinery. The prayer is that the policy be so corrected or reformed as to show the Malsby Company to be the owners of the machinery, and the demurrer to the bill of complaint states that as matter of law the Malsby Company was not the owner of the machinery.

Where a purchaser of personal property takes possession of it, but the title remains in the vendor till the purchase price is paid in full, the vendee in possession has an insurable interest in the property, even though he has not fully paid for it. *Reed v. Williamsburg City Fire Ins. Co.*, 74 Me. 537. But under the terms of the policy the insured must have the "unconditional and sole ownership" of the property. The interest of

a purchaser of property, which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him upon definite terms, is the "sole and unconditional ownership" within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. *Insurance Co. of North America v. Erickson*, 50 Fla. 419, 39 South. 495, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121; *Phenix Ins. Co. of Brooklyn, N. Y. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 63 L. R. A. 569; *Rumsey v. Phenix Ins. Co. (C. C.)* 1 Fed. 396; 8 Words & Phrases, 7154; 2 Cooley on Insurance, 1375; *Richardson Insurance* (3d Ed.) 336.

Appellees contend that this rule does not apply to personal property, and cite 2 Clements on Fire Insurance, 170. The rule there announced has some support in cited cases where the vendor reserved the right to retake possession and ownership of the property. The facts in this case are not of that character.

The just and reasonable purpose of insurance policies in requiring the insured to have the "unconditional and sole ownership" of the property insured is to give protection to only those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property insured might tend to encourage carelessness or wrongdoing in the use or preservation of the property. Wager policies are not approved and should be avoided.

A conditional sale of personal property by which the vendee takes possession of the property with an unconditional promise to pay for it, but the vendor retains the title till payment in full of the purchase price is made, confers upon the vendor the absolute right of the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, and also casts upon the vendee all the risks of loss incident to the full and complete ownership of the property, unless otherwise specially provided by contract. 6 Am. & Eng. Ency. Law (2d Ed.) 455.

To be "unconditional and sole," the interest or "ownership" of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

By fair construction and intentment the "unconditional and sole ownership" of prop-

erty for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured.

The contract of sale in this case expressly reserved the title in the vendor till all the goods were paid for, with a provision that upon certain defaults and contingencies the vendor might take possession of the property, not for the purpose of resuming the ownership of it, but to sell it to make the purchase price out of it. The vendors were guaranteed against any loss or damage to the property by fire or other cause; and as an express stipulation the vendee was in no event entitled to a rescission of the contract or to an abatement in the price for any cause. These agreements expressly fixed the rights of the vendee, and the agreement to keep the property insured for the benefit of the vendor was only an additional security for the purchase price, and did not affect the vendee's interest or risks in the property.

While the vendor, the Malsby Company, did not have the "unconditional and sole ownership" of the machinery when the policy was issued, such vendor reserved the title for the purpose of securing the purchase price, and consequently had an insurable interest in the machinery. 19 Cyc. 588; 13 Am. & Eng. Enc. Law (2d Ed.) 181. The prayer for relief for the Malsby Company is on the ground that it is "the owner of said * * * machinery"; but it is alleged that it was mutually intended to enter into a contract that would protect the interests of the insured "according to their respective interests." Under this allegation, admitted by the demurrer, the real interest of the parties in all the property insured may be shown, and appropriate relief may be granted under the general prayer. 16 Cyc. 224; 18 Enc. Pl. & Pr. 867.

The order appealed from is affirmed, and the cause is remanded, with leave to amend if so desired.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

ÆTNA INS. CO. v. HOLMES et al.
(Supreme Court of Florida. June 11, 1910.)

(Syllabus by the Court.)

1. INSURANCE (§ 556*)—FIRE INSURANCE—AUTHORITY OF AGENT—WAIVER OF PROOFS OF LOSS.

A local agent of a fire insurance company, who has authority to issue policies for the company and to collect premiums therefor, also has authority to waive required proofs of loss, by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

repudiating on behalf of the company, after a loss, all liability on such policy, either in writing, or by parol, or by matter in pais.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1374-1377; Dec. Dig. § 556.*]

2. PRINCIPAL AND AGENT (§ 99*)—LIABILITY FOR ACTS OF AGENT.

The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal. The public have a right to rely upon an agent's apparent authority, and are not bound to inquire as to his special power, unless the circumstances are such as to put them upon inquiry.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. § 99.*]

In Banc. Appeal from Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by James Holmes and another against the Aetna Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cockrell & Cockrell, for plaintiff in error. Hardee & Butler, for defendants in error.

TAYLOR, J. The defendants in error, as plaintiffs below, sued the plaintiff in error in the circuit court of Suwannee county on a policy of fire insurance, and recovered judgment, and the defendant, the insurance company, brings the case here by writ of error.

The defendant pleaded that the plaintiffs have failed to furnish the notice and proof of loss within the time limited by the policy. To these pleas the plaintiffs by replication set up that the local agent of the company after the loss had waived the proofs of loss by absolutely denying any and all liability by the defendant company on the policy sued upon. At the trial the court gave the following charge, which is assigned as error:

"If you believe from the evidence in this case that the defendant company, through its agent, B. W. Helveston, issued a fire insurance policy to the plaintiff in this case, and that they received a premium for that policy from the plaintiff, and that during the life of that policy the house was burned down and totally destroyed, and if you believe from the evidence in this case that the plaintiff sought to recover his loss from the agent that issued the policy, to wit, B. W. Helveston, and that the defendant, through its agent, B. W. Helveston, repudiated the policy and absolutely denied the liability of the defendant for that loss, or words amounting to that same thing, then you should find that the company had waived the requirement of this proof, because the law is that, where a local agent of an insurance company has authority to represent the company in making contracts of insurance, in collecting premiums and in signing policies, he also has authority to waive proof of loss, either in writing, or by parol, or by matters in pais, which amounts to an estoppel. An insurance company cannot make its local agent a me-

dium through which all the benefits of a policy flow from the insured to it, and then deny he has authority to represent it when the benefits of the insured are involved. The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal. The public have a right to rely upon an agent's apparent authority, and are not bound to inquire as to his special power, unless the circumstances are such as to put them upon inquiry. The court charges you that the plaintiff in this case is not called upon to inquire as to Mr. Helveston's authority to waive the requirements of notification in writing of the loss he sustained, and would not be bound by the lack of authority upon the part of Mr. Helveston, unless he had been put upon notice."

Other charges of similar import are also assigned as error.

That there was no error in these charges is fully settled here in the case of Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 South. 228. See Eagle Fire Co. v. Lewallen & Co., 56 Fla. 246, 47 South. 947.

The proofs in the case, although conflicting, abundantly sustain the verdict returned by the jury. Finding no error, the judgment of the court below in said cause is hereby affirmed, at the costs of the plaintiff in error.

WHITFIELD, C. J., and SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

COCKRELL, J., absent.

BROWN et al. v. FLORIDA CHAUTAUQUA ASS'N et al.

(Supreme Court of Florida, Division A. June 4, 1910.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 153*)—OBSTRUCTION—NUISANCE.

The unlawful obstruction of a public highway is a public nuisance that may be redressed by appropriate judicial proceedings at the instance of proper governmental authorities.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 417; Dec. Dig. § 153.*]

2. ACTION (§ 13*)—PERSONS ENTITLED TO SUE—PUBLIC WRONGS.

In order to secure an efficient administration of the law for the benefit of the public and to avoid the evil of many suits to accomplish one purpose, public wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain separate judicial proceedings to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 76; Dec. Dig. § 13.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. NUISANCE (§ 72*)—PUBLIC NUISANCE—CIVIL REMEDY OF INDIVIDUAL.

If a public nuisance causes special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy. If the remedy at law is inadequate, equity will afford appropriate relief.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

4. HIGHWAYS (§ 155*)—OBSTRUCTION—RELIEF.

If an unlawful obstruction in a public highway merely interferes with the right of passage that is common to all, and no individual rights are specially or peculiarly injured, relief should be had through the proper public authorities.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 432, 433; Dec. Dig. § 155.*]

5. HIGHWAYS (§ 159*)—OBSTRUCTION—EQUITABLE RELIEF.

Any person whose property rights are specially injured by an unlawful obstruction in a public highway may have the aid of a court of equity in removing the obstruction when the remedy at law is inadequate.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 435; Dec. Dig. § 159.*]

6. HIGHWAYS (§ 159*)—OBSTRUCTION—INJUNCTION—PLEADING.

In proceedings brought by an individual to enjoin an obstruction to a public highway, the complainant should distinctly allege facts showing the special and peculiar injury complained of with sufficient clearness to enable the court to determine whether the complainant is entitled to maintain the suit.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 431, 435; Dec. Dig. § 159.*]

7. HIGHWAYS (§ 159*)—OBSTRUCTION—INJUNCTION—PLEADING.

Where there is equity stated, a general demurrer should be overruled, even though the allegations are not full and complete.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 431, 435; Dec. Dig. § 159.*]

8. INJUNCTION (§ 118*)—GROUNDS—INADEQUACY OF LEGAL REMEDY.

A mere allegation of irreparable injury not sustained by the allegations of facts will not ordinarily warrant the granting of relief by injunction; but, where it appears that an action at law will not afford adequate redress, equitable relief may be had.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 227; Dec. Dig. § 118.*]

9. MUNICIPAL CORPORATIONS (§ 671*)—OBSTRUCTION—RIGHT OF INDIVIDUAL TO SUE.

Where it is alleged that the complainant owns a lot bounded on a street that is obstructed, upon which lot a hotel business is conducted, that the obstruction of the street prevents direct passage from the hotel to the depot, necessitating two crossings of a railroad track or else a more circuitous route in reaching the passenger depot from the hotel, resulting in irreparable damage to the hotel business and decreasing the value of the property, a special, peculiar, and substantial injury to the complainant is shown for which he may maintain a suit for appropriate relief.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

10. HIGHWAYS (§ 159*)—OBSTRUCTION—EQUITABLE RELIEF.

Where an individual sustains special substantial injury in his property rights by an ob-

struction of a public highway, he may have equitable relief where the remedy at law is inadequate.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 435; Dec. Dig. § 159.*]

Appeal from Circuit Court, Walton County; J. E. Wolfe, Judge.

Bill by Minnie I. Brown and husband against the Florida Chautauqua Association and others. Decree of dismissal, and complainants appeal. Reversed.

William W. Flournoy, for appellants. Daniel Campbell & Son and Blount & Blount & Carter, for appellees.

WHITFIELD, C. J. The appellants brought a bill in equity for the removal of obstructions in Baldwin avenue, a public highway in the town of De Funak Springs, Fla. Demurrers to the bill on the ground that the plaintiffs have not stated such a case as entitles them to the relief prayed were sustained, and, no amendment being made, the bill of complaint was dismissed. An appeal was taken by the complainants. The only questions argued are as to the right of the complainants to maintain the suit for the relief prayed. A dedication of the locus in quo as a street and its obstruction are stated, and to support a right of action in the complainants it is alleged that they own and operate a hotel situated upon a lot numbered 674, bounded on the north by Baldwin avenue, on the east by Crescent street, and on the west by Eleventh street; that a railroad track runs "about the center of Baldwin avenue and traverses the same throughout its length from east to west"; that a "part of Baldwin avenue which lies east of the front of said lot 674 and south of the said railroad track to the passenger depot of the said railroad company has been inclosed"; that such inclosure "prevents the passage of the public and of complainants thereover all of that part of Baldwin avenue * * * east of the front of said lot" 674 towards the passenger depot; "that because of said fence the right of the public to enjoy an easement over that portion of said avenue has been, since the erection thereof, prevented, and the right of complainants to enjoy said easement has been, also, thereby prevented, which has been of great damage to the public and of great and irreparable damage to your complainants, preventing, as it does as aforesaid, the use of said avenue for a right of way to and from its hotel east to the depot, and impedes the management and conducting of said hotel business to the passenger depot of the said railroad; that because of said obstruction said complainants are forced at much inconvenience to cross the railroad at the juncture of Baldwin avenue and Crescent street, * * * pass to the north of said railroad, and then recross the said railroad 400 feet east of the passenger depot, or pass to the south through

Crescent street around through Live Oak street, then back through Wright avenue, * * * and then through Chipley Park * * * over a right of way that has been made through necessity because of the obstruction of Wright avenue;" "that because of said obstruction of said Baldwin avenue, therefore, your complainants suffer, not only great and irreparable damage and inconvenience in the management, conducting, and operating of their hotel business, but also said obstruction is of a direct and material damage to the value of their said property, decreasing, as it does, the value of said property, because, furthermore, said obstruction not only prevents the enjoyment by the public of the dedicated right of way and public easement, and prevents, also, as aforesaid, the passage and access of complainant and public and enjoyment of the right of way and easement over that part of said Baldwin avenue from said lot east to said passenger depot." As to some of the obstructions it is alleged specially that "because thereof your complainants suffer great and irreparable injury to their said hotel business and to the value of their said property and lot" 674. This allegation is in substance repeated several times in specific and in general terms.

The unlawful obstruction of a public highway is a public nuisance that may be redressed by appropriate judicial proceedings at the instance of proper governmental authorities. In order to secure an efficient administration of the law for the benefit of the public and to avoid the evil of many suits to accomplish one purpose, public wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain separate judicial proceedings to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong. If a public nuisance causes special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy. If the remedy at law is inadequate, equity will afford appropriate relief. Where an unlawful obstruction of a public highway merely affects injuriously an individual's right in common with the public to pass over the highway, the individual suffers no injury different in kind from the public and has no private right of action. Where, however, an unlawful obstruction to a public highway not only injures the right of an individual, in common with the public, to pass over the easement, but causes peculiar and special injury of a substantial nature to an individual, he has his private right of action to redress the special wrong to him; and, where the remedy afforded by an action for damages in a court of law is inadequate, appropriate relief may be sought in a court of equity. These principles of law are generally recognized,

but difficulty is frequently experienced in applying them to the facts and circumstances of particular cases. See *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48.

In *Robbins v. White*, 52 Fla. 613, 42 South. 841, it was held that the unlawful obstruction of a public street is a public nuisance, that may also constitute a private nuisance; and that an individual cannot enjoin the obstruction of a public street unless some special damage to his property or injury to him differing not only in degree but in kind from the damage sustained by the community at large is threatened. The court there held the injunction should be dissolved and said the bill of complaint contained "no allegation of fact showing that the complainant will suffer any injury to her property or any other injury different in kind from the general public." See *Payne v. McKinley*, 54 Cal. 532.

If an unlawful obstruction in a public highway merely interferes with the right of passage that is common to all, and no individual rights are specially or peculiarly injured, relief should be had through the proper public authorities. *Thomas v. Wade*, 48 Fla. 311, 37 South. 743; *Jacksonville, T. & K. W. Ry. Co. v. Thompson*, 34 Fla. 346, 16 South. 282, 26 L. R. A. 410; *Garnett v. Jacksonville, St. A. & H. R. R. Co.*, 20 Fla. 889; *Bowden v. City of Jacksonville*, 52 Fla. 216, text 225, 42 South. 394; *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 South. 643.

Any person whose property rights are specially injured by an unlawful obstruction in a public highway may have the aid of a court of equity in removing the obstruction when the remedy at law is inadequate. *Luttrell v. Mayor, etc.*, 15 Fla. 306; *Pedrick v. Raleigh & P. S. R. Co.*, 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554; *Bischof v. Merchants' Nat. Bank*, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. (N. S.) 486; *Sloss-Sheffield Steel & Iron Co. v. Johnson*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89; *Close v. Witbeck*, 52 Misc. Rep. 224, 102 N. Y. Supp. 904; *Bent v. Trimball*, 61 W. Va. 509, 56 S. E. 881; 29 Cyc. 1210.

In *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n* 57 Fla. 399, 48 South. 643, it is said that, if the highway is so used as "to injure the complainant in the use and enjoyment of his riparian land or the business thereon, the defendant may be enjoined from a continuance of such wrong."

A mere allegation of irreparable injury will not ordinarily warrant the granting of relief by injunction (*Metcalf Co. v. Martin*, 54 Fla. 531, 45 South. 463, 27 Am. St. Rep. 140); but the injury here complained of is of such a character that an action at law for damages would clearly be inadequate redress. Relief by appropriate injunctions should be granted if the special injury to the complainants as alleged is sufficient in law to authorize them to maintain this suit.

It is alleged that the complainants own lot 674 bounded on the north by Baldwin avenue, and are conducting a hotel business thereon; that a part of Baldwin avenue south of the railroad track lying east of the front of said lot and extending to the railroad depot is obstructed so as to prevent direct passage along Baldwin avenue from said lot to the depot, and necessitates two crossings of the railroad track or else a more circuitous route in reaching the passenger depot from the hotel, resulting in irreparable damage to complainants, "impedes the management and conducting of said hotel business to the passenger depot," and results in "direct and material damage to the value of their said property decreasing as it does the value of said property," and "great and irreparable injury to their said hotel business and to the value of their said property."

In cases of this character, the complainants should distinctly allege facts showing the special and peculiar injury complained of with sufficient clearness to enable the court to determine whether the complainants are entitled to maintain the suit.

The allegations here as to special injury are not very explicit or full and complete; but the demurrer is to the bill of complaint as an entirety, and there were no specifications in the demurrer addressed to this feature of the pleading; therefore, if there is any equity in the bill, the demurrer should be overruled. See *Thompson v. Maxwell*, 16 Fla. 773; *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 7 South. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823, 23 Am. St. Rep. 537; *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272.

The location of complainants' lot, the hotel business being conducted thereon, the proximity and location of the obstruction with reference to the complainants' lot and the passenger depot, the character of the business conducted by complainants on the lot and its natural relation to the passenger depot, and the inconvenience and increased risks in being forced to use more dangerous and longer route which crosses the railroad track twice, or else to use a still more circuitous route to the depot from the hotel, make the unlawful obstruction of the street a special and substantial injury to the complainants' business in accommodating the traveling public that naturally results in "direct and material damage to the value of their said property, decreasing as it does the value of said property," and causes "great and irreparable injury to their said hotel business and the value of their said business." These considerations show a special, peculiar, particular, and substantial injury to the complainants caused by the unlawful obstruction that is not common to the public and that cannot be adequately remedied by an action at law. The demurrer to the bill of complaint should have been overruled. In the case of *McGour-*

in v. Town of De Funiak Springs, 51 Fla. 502, 41 South. 541, it was not shown that the locus in quo was in Baldwin avenue.

The decree is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

WHITE v. STATE.

(Supreme Court of Florida. May 21, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 338*)—CIRCUMSTANTIAL EVIDENCE—ADMISSIBILITY.

Great latitude is to be allowed in the reception of indirect or circumstantial evidence. It includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the exclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded in truth.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 753; Dec. Dig. § 338.*]

2. HOMICIDE (§ 157*)—MURDER—ADMISSIBILITY OF EVIDENCE—PREVIOUS DIFFICULTY.

In a prosecution for murder, evidence as to the particulars or merits of a previous difficulty between the defendant and the deceased, not within the issues being tried, is not admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 290; Dec. Dig. § 157.*]

3. HOMICIDE (§ 189*)—MURDER—ADMISSIBILITY OF EVIDENCE—SELF-DEFENSE.

Where a homicide is shown, and an issue of self-defense is made, evidence is admissible as to the fact of a hostile meeting between the defendant and the deceased shortly before the fatal encounter, and also as to the apparent feeling of the parties towards each other when they separated, since such circumstances may tend to show the probable attitude of friendliness or hostility of each towards the other when the fatal meeting occurred.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 398; Dec. Dig. § 189.*]

Cockrell and Shackelford, JJ., dissenting.

In Banc. Error to Circuit Court, Jackson County; J. E. Wolfe, Judge.

J. V. White was convicted of murder, and brings error. Reversed, and new trial awarded.

Price & Lewis, J. W. Kehoe, E. F. Davis, and Milton Pledger, for plaintiff in error. Park Trammell, Atty. Gen., Paul Carter, and Reeves & Watson, for the State.

WHITFIELD, C. J. This writ of error is to a judgment of conviction of murder in the second degree. The homicide occurred on a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

street at night with no eyewitnesses. The points that will be here discussed relate to the admissibility of circumstantial evidence.

"Great latitude is to be allowed in the reception of indirect or circumstantial evidence. It includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." *Mobley v. State*, 41 Fla. 621, 28 South. 732; *Reynolds v. State*, 52 Fla. 409, 42 South. 373.

In a prosecution for murder, evidence as to the particulars or merits of a previous difficulty between the defendant and the deceased, not within the issues being tried, is not admissible. *Sylvester v. State*, 46 Fla. 166, 35 South. 142; 4 Elliott on Ev. par. 3036.

But where a homicide is shown and an issue of self-defense is made, evidence is admissible as to the fact of a hostile meeting between the defendant and the deceased shortly before the fatal encounter, and also as to the apparent feeling of the parties towards each other when they separated, since such circumstances may tend to show the probable attitude of friendliness or hostility of each towards the other when the fatal meeting occurred. See *Sylvester v. State*, supra; 4 Elliott on Ev. par. 3036; 21 Cyc. 894, 915; 21 Am. & Eng. Ency. Law (2d Ed.) 217; *White v. State*, 30 Tex. App. 652, 18 S. W. 462. See, also, *Lester v. State*, 37 Fla. 382, 20 South. 232.

An issue of self-defense under the plea of not guilty was made when the defendant testified that, as he was going home about 10 o'clock at night, he unexpectedly saw the deceased approaching him within six or more feet with what he supposed was a weapon in a threatening attitude. After ascertaining it was the defendant, and saying, "Well, we can settle this matter right now, and will settle it right now," whereupon defendant shot deceased five times; the deceased advancing on the defendant in a threatening manner when each shot was fired, and the defendant believing as he fired each shot that his life was in imminent danger. Testimony was admitted of a meeting of the defendant and deceased in the presence of a friend of the defendant, about an hour before the homicide, at which time the defendant struck the deceased once with his fist.

The defendant was then asked, "What commenced the altercation between you and him there and caused to blow to pass?" This question was objected to by the state, and was properly excluded by the court, because

it clearly relates to the merits of a previous encounter that was not a part of the res gestæ and was not within the issues being tried.

The bill of exceptions shows that, after the above-quoted question was excluded, the following proceedings were had:

"Mr. Price: * * * We further proffer to prove, in response to the same question, that he (Dr. Alexander) was leaving the office, having been let out of the office by the defendant, and the defendant told Dr. Alexander that it was his purpose to publish him to the people of Marianna publicly the next morning, and that the last thing that Dr. Alexander said before leaving and the last words that he said to the defendant before the meeting just preceding the shooting was: 'Jim, for God's sake, don't do that. It will ruin me here in Marianna.'"

"Mr. Kehoe: After having made that proffer, and the court having ruled on it, we again except."

The same testimony had been offered and excluded and the ruling excepted to before the defendant testified.

Treating the above testimony as having been properly offered, and as having been excluded by the court and an exception noted, its admissibility will be considered.

This proffered testimony does not go to the merits of the altercation at the prior meeting. It does not disclose why the intention to publish was formed, or whether such action was justified; but it tended to show the feeling of the parties towards each other at the close of the previous interview, and was admissible as tending to explain the attitude of each at the fatal meeting as to which the defendant testified. Any circumstances tending, "even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination, probably founded in truth," of the defendant's testimony as to the attitude and action and words of the deceased at the fatal meeting, are admissible under the rule announced by this court as quoted above. This testimony, taken with other evidence, might be a basis for legitimate argument favorable to the defendant; the credibility and probative force of it being primarily for the jury to determine. Under the broad rule above quoted, and over the defendant's objection, the court had admitted testimony that after the first meeting, and not in the presence of the defendant, the deceased had asked a person where the friend of defendant, who was at the first encounter, lived; and it was shown that he lived near the place where the homicide occurred. From this the state could urge an inference by the jury that the deceased was at the place of the homicide on a peaceful mission, though he had not often been seen there, and though the defendant lived in the immediate vicinity.

Every circumstance not inherently improper that would tend to prove or to disprove the defendant's testimony of an assault by the deceased, that appeared to defendant to

endanger his life, is admissible. Although in fact the deceased had only an umbrella in his hand when shot, the defendant is allowed to justify, if under all the circumstances he had reason to believe, and did believe, an assault was made by the deceased with a weapon that endangered his life. These circumstances include the defendant's knowledge of the feeling and attitude of the deceased towards him; and, in passing upon the reasonableness of the defendant's belief of his danger, the jury may be informed of the apparent attitude of the deceased towards the defendant at the close of an altercation an hour before. This does not go to the merits of the first encounter. It cannot be said that the excluded evidence could not reasonably have affected the verdict under the facts of this case.

For the error indicated, the judgment is reversed, and a new trial awarded.

TAYLOR, HOCKER, and PARKHILL, JJ., concur.

PARKHILL, J. (concurring). I think the judgment of conviction in this case should be reversed because:

(1) The court erred in permitting the witness John Justice to testify that, upon the night of the homicide and a short time prior thereto, the deceased, not in the presence of the defendant, asked the witness where Malcolm Stephens lived, and that the witness, not in the presence of the defendant, gave the deceased directions to Malcolm Stephens' home.

(2) The court erred in admitting the testimony of George Farley as to what his sister told him the deceased said to her the night of and a short time before the homicide.

(3) The court erred in refusing to permit the witness Malcolm Stephens to answer the following question propounded by the defendant's counsel: "State whether or not during the conversation there was any personal difficulty between the defendant and Dr. Alexander"—referring to the deceased at a time shortly before the homicide.

(4) The court erred in sustaining the objection by the state to the following question propounded by the defendant to the witness Malcolm Stephens: "State whether or not in that conversation, or at any time, there was any statement made by the defendant to Alexander that he was going to publish him to the people of Marianna for making the assault upon his wife"—this being the night of the homicide and a short time prior thereto.

HOCKER, J., concurs in the above.

TAYLOR, J., concurs in the above.

COCKRELL, J. (dissenting). The only assignment of error which the majority opinion sustains is based upon the refusal of the court to admit evidence in response to a

question admittedly improper. In this I cannot concur. The relevance of the testimony is not so obvious, nor does the record as a whole, in my opinion, make such a case as to justify this court in overruling the well-established rule that a proper question must first be asked before the party is entitled to elicit evidence in response thereto.

SHACKLEFORD, J. (dissenting). My judicial Associates have been unable to concur in the opinion which I have prepared in this case, and have reached the conclusion that the judgment should be reversed. I have decided to file the opinion as originally prepared as a dissenting opinion, making only the necessary changes therein.

At the spring term, 1909, of the circuit court for Jackson county, the plaintiff in error, James V. White (hereinafter referred to as the "defendant"), was indicted for murder in the first degree, was tried at the same term, convicted of murder in the second degree, and seeks relief here by writ of error.

I find myself confronted with a transcript of the record containing 347 typewritten pages, 103 assignments of error covering 22 typewritten pages, and voluminous briefs. We have several times had occasion to express our disapproval of the practice of assigning an unnecessarily large number of errors. See *Hoopes v. Crane*, 56 Fla. 395, 47 South. 992, and authorities there cited. In the cited case we said: "That any one of the circuit judges in this state would commit 61 separate and distinct errors in the trial of a cause is rather a violent presumption, to say the least of it. Even if such should be the case, it would hardly be necessary to assign every one of such errors in order to secure a reversal from this court." Yet in the instant case we are asked to believe that 103 errors were committed. It is true that all of them are not argued before us, but most of them are. I now feel called upon to emphasize my disapproval of such practice. I would like to impress upon the members of the bar, if I may be so fortunate as to succeed in so doing, that I consider the practice unfair to the court, unfair to the plaintiff in error, and unfair to other litigants. If persisted in, I think we shall be forced to frame and adopt a rule regulating the matter, as has been done by the Supreme Court of Michigan and some of the other appellate courts. I would again like to call attention to the forceful language of Mr. Justice Cobb in *Kelly v. Strouse*, 116 Ga. 872, text 899, 43 S. E. 280, that "courts of last resort are human beings," which we quoted with approval in *Atlantic Coast Line R. R. Co. v. Beazley*, 54 Fla. 311, text 391, 45 South. 761, text 787. I also fully approve of what is said by this learned jurist as to the duties devolving upon members of appellate courts and the fact that they "are lia-

ble to make mistakes both in rulings and reasoning, and unguarded and ill-considered expressions are as apt to emanate from them as others." This must necessarily be so from the fact that they are human beings, therefore not infallible, but subject to like infirmities, weaknesses, and defects as other men. This being true, members of the bar as officers of the court should render them all the assistance in their power in properly discharging their arduous duties, and should be careful not to impose unnecessary burdens upon them. Squarely in line with our holdings upon the point under consideration, I would refer to the following authorities, with the suggestion that they will be found profitable and instructive: *Lockard v. Van Alstyne*, 155 Mich. 507, 120 N. W. 1; *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123; *Fowler v. Gilbert*, 38 Mich. 292; *Brewster v. Baxter*, 2 Wash. T. 135, 3 Pac. 844; *Dimes Savings Institution v. Allentown Bank*, 65 Pa. 116, text 123. In the last-cited case, Mr. Justice Agnew, referring to "indiscriminate allegations of error and useless discussion," has well said: "They distract our minds by diverting them to consider matters of no moment, and weaken the strong points, if any, by heaping upon them those that are feeble. Upon a writ of error it is much better to consider well the positions which seem to be fairly tenable, and to present them alone. Then the argument spends its concentrated force upon that which commands consideration, and the attention of the judges is not diverted to that which is immaterial. In this way real error is apt to be detected; while, in the other, the mind, wearied by unimportant exceptions and inconclusive discussion, is more likely to overlook material errors. I commend these remarks to those who practice before us." So, in *Fowler v. Gilbert*, supra, it was said: "Whatever may be the necessity of saving points in the hurry of a trial, there can be no such necessity after the interval of reflection occupied in preparing exceptions and maturing the case for argument. No assignments should be fairly made unless counsel has as least some plausible ground for insisting upon them." I would also call attention again to the language used by Mr. Justice Brewer in *Fidelity & Deposit Company v. L. Buckl & Son Lumber Company*, 189 U. S. 135, text 138, 23 Sup. Ct. 582, 47 L. Ed. 744, which we quoted in *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, text 432, 42 South. 706, text 708, and approvingly referred to in *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, text 476, 43 South. 318, text 341, which language was as follows: "It may be true, as the Scriptures have it, that 'in the multitude of counselors there is safety'; but it is also true that in a multitude of assignments of error there is danger." From what has already been said, it will be seen that there is much truth in this statement. The experience of

the writer hereof has been that wherever an unusually large number of errors have been assigned, as a general rule, an examination of them has disclosed the fact that there is but little, if any, real merit in any of them, so that he has come to view a large array of assignments with suspicion and distrust. We have pointed out the function or primary object of a writ of error. *Hoopes v. Crane*, 56 Fla. 395, text 421, 47 South. 992, text 1001, and authorities there cited. So we have frequently had occasion to discuss the proper course to pursue in preparing assignments of error. *Williams v. State*, 58 Fla. 138, 50 South. 749, and other cases cited therein. I would add that it was never intended that assignments of error should be made to "operate a dragnet," to quote the words used in *Chicago, R. I. & P. R. R. Co. v. Moffitt*, 75 Ill. 524, text 529, or to be fired at the appellate court in the nature of a "broadside challenge" to the various and sundry rulings of the trial court, if we may be permitted to borrow the forceful expression from *State v. Frizell*, 111 N. C. 722, 16 S. E. 409. I would also refer to 2 Ency. of Pl. & Pr. 921, 940, and authorities cited in notes. I have taken the time in this case to dwell somewhat at length upon the question of a multiplicity of assignments, and to collect authorities bearing thereon, hoping that the members of the bar will heed my admonitions, that I shall not have occasion to advert to the matter again, and that I shall be saved time and labor in the future.

I must respectfully but firmly decline the invitation of the defendant to discuss in detail all the assignments which are urged before us. To do so would almost require the writing of a legal treatise upon homicide, which we could hardly be expected to compass in one opinion. See *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. 922, text 933, and *Pensacola Electric Co. v. Blissett* (decided here at the present term) 52 South. 367. All points made will be considered, and those meriting it will be discussed. A number of other cases stand on our docket for disposition that are entitled to their due and proportionate share of the time and attention of the court, with as little delay as may be.

The first assignment is based upon the overruling of the defendant's motion for a change of venue. This may be briefly disposed of. A large number of affidavits were submitted both in behalf of and in opposition to the motion. It was clearly made to appear to the trial judge, even if he could not have taken judicial notice of the fact, that Jackson county was a large county, containing a population of about 30,000 people, of which about 6,000 are qualified for jury duty; such population being largely rural in its nature. The affidavits so submitted were very conflicting in the opinions expressed therein as to whether or not a

fair and impartial jury could be obtained in such county for the trial of the defendant. With such a condition of affairs existing, the trial judge evidently thought it advisable to exercise the judicial discretion vested in him by law, and put the matter to a test, thereby applying in a practical way the well-known proverb, "You never can tell till you try." The result would seem to have justified the wisdom of this course, for, so far as the transcript of the record discloses to us, a fair and impartial jury was obtained for such a trial. Section 3907 of the General Statutes of 1906 expressly provides that "whenever it shall be made to appear to the satisfaction of the presiding judge of any of the circuit courts of this state that the venue of any cause, then pending in such courts, should be changed," for any of the reasons therein stated, "it shall be in the power and discretion of such judge to change the venue of such case." An appellate court should not interfere with the exercise of this discretion so vested in the circuit judge, unless a plain and palpable abuse thereof is made to appear. See *Garcia v. State*, 34 Fla. 311, 16 South. 223; *Shiver v. State*, 41 Fla. 630, 27 South. 36; *McNealy v. State*, 17 Fla. 198; *Irvin v. State*, 19 Fla. 872; *Adams v. State*, 28 Fla. 511, 10 South. 106; *Leslie v. State*, 35 Fla. 171, 17 South. 555. The rule is the same in civil as in criminal cases; but we have cited only criminal cases. The discussion of the statute in *O'Berry v. State*, 47 Fla. 75, 36 South. 440, may also prove of service. No abuse of discretion having been made to appear, I think that this assignment must fail.

The third to the eighth assignments, inclusive, and the tenth and eleventh assignments, are based upon the sustaining or overruling challenges for cause to certain proposed jurors, or upon matters connected with the examination of jurors upon their *voir dire*. Suffice it to say that an examination of these assignments and of the defendant's brief in support thereof discloses no reversible error to me. I am not informed by the transcript by what jurors he was tried, though there is a recitation to the effect that, "there being 12 men in the jury box which had been accepted by the state, the said jury was tendered to the defendant, and the defendant, having exhausted his peremptory challenges, was forced to accept the same as a jury to try the said cause." I am not informed at what stage of the trial the defendant's peremptory challenges were exhausted, neither does it affirmatively appear that any objectionable or obnoxious jurors were forced upon him. See *Montague v. State*, 17 Fla. 662; *Andrews v. State*, 21 Fla. 598; *Denham v. State*, 22 Fla. 664; *Green v. State*, 40 Fla. 191, 23 South. 851; *Peadon v. State*, 46 Fla. 124, 35 South. 204; *Leaptrot v. State*, 51 Fla. 57, 40 South. 616. As we held in *Colson v. State*, 51 Fla. 19, 40 South.

183: "A defendant as a matter of right is not entitled to have any particular jurors impaneled to try his case. The right of peremptory challenge is a right to reject and not a right to select." This was approved and followed in *Melbourne v. State*, 51 Fla. 69, 40 South. 189. We have repeatedly held that it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist; every presumption being in favor of the correctness of the rulings of the trial court. *Putnal v. State*, 56 Fla. 86, 47 South. 864, and authorities there cited. This would seem to apply with peculiar force to an assignment based upon a ruling on a point resting within the discretion of the trial judge. All facts necessary to show a clear abuse of discretion to the injury of the plaintiff in error must be presented, and, wherever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling of which complaint is made. See *Ballard v. State*, 31 Fla. 266, 12 South. 865, and authorities therein cited. For the reasons already set forth, I think that it necessarily follows that these several assignments have not been sustained.

The fifteenth assignment is based upon the refusal of the court to permit E. J. Schell, one of the witnesses introduced on behalf of the state, to answer on cross-examination the question, "You were sworn to tell the truth and the whole truth?" I find that upon the propounding of this question the court stated: "That is not a proper way to interrogate the witness. You need not answer the question." The exception noted to this statement of the court forms the predicate for this assignment. The witness had previously stated that he had testified at the preliminary trial of the defendant, but had not stated at such trial that he had seen any of the flashes when the pistol was fired by the defendant; that he had answered the questions propounded to him. Thereupon this question was asked. Its relevancy and materiality have not been made to appear to us. We do not think that the two authorities cited by the defendant (*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, 28 Fla. 344, 7 South. 845, and *Wallace v. State*, 41 Fla. 547, 26 South. 713) are in point. As we held in *Wilson v. Johnson*, 51 Fla. 370, 41 South. 395, courts of justice exist for the administration and furtherance of justice and in the conduct of trials generally must be left to the discretion of the trial judge. This principle was followed and applied in *Adams v. State*, 55 Fla. 1, 46 South. 152. So, in *Mathis v. State*, 45 Fla. 46, 34 South. 287, we held that it is within the sound judicial discretion of the trial court to control the detailed examination of witnesses, and, unless an abuse of this judicial discretion is shown, an appellate court will not disturb the rul-

ing made concerning the same. In the light of these authorities, as well as of those previously cited, I think that this assignment fails.

The same witness was also asked on cross-examination, after it had been elicited from him by the defendant that a detective from New York had been to see him and since the preliminary trial and was with him for about 5 or 10 minutes, "Now didn't he tell you that money was no object?" An objection was interposed and sustained, which ruling is made the basis for the sixteenth assignment. I fail to see the pertinency or relevancy of this question. What I have said in treating the fifteenth assignment is sufficient to dispose of this one adversely to the contention of the defendant. I would also refer to *Wallace v. State*, 41 Fla. 547, 26 South. 713; *Adkinson v. State*, 48 Fla. 1, 37 South. 522; *Baker v. State*, 51 Fla. 1, 40 South. 673. The statement of the defendant's counsel that they expected to prove that such detective told the witness that money was no object in getting up testimony in the case of itself does not make the question a proper one.

The twentieth assignment has its basis in the overruling of an objection made by the defendant to a question propounded to A. W. Calhoun, a witness for the state. After he had testified that he was a member of the coroner's jury which had investigated how and in what manner and by whom the deceased came to his death, and that the defendant had appeared before the jury and made a statement, he was asked, "Did you hear him say anything about who killed Dr. Alexander?" The ground of the objection was that such evidence was stenographically reported, and that such report constituted the best evidence. It seems sufficient to say that the question was a preliminary one, and therefore not open to objection. *Ortiz v. State*, 30 Fla. 256, 11 South. 611; *Dickens v. State*, 50 Fla. 17, 38 South. 909; *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, text 444, 43 South. 318, text 331; *Golden v. State*, 54 Fla. 43, 44 South. 948; *Gainesville & Gulf R. R. Co. v. Peck*, 55 Fla. 402, 46 South. 1019. The case of *Golden v. State*, supra, will be found to be especially in point. The twenty-first assignment must also fall for like reasons, being based upon the sustaining of an objection to a preliminary objection. The twenty-second and twenty-third assignments are also founded upon the sustaining of objections to questions propounded by the defendant on cross-examination of the same witness. Such questions sought to elicit certain declarations made by the defendant in his statement before the coroner's jury. No error is made to appear here. They do not appear to be in cross of anything brought out on the direct examination, nor do I see wherein the answers thereto would have been competent or proper testimony. The declarations or statements of

the defendant so sought to be introduced were clearly of the nature of self-serving declarations, which we have several times held to be inadmissible. *Fields v. State*, 46 Fla. 84, 35 South. 185; *Thomas v. State*, 47 Fla. 99, 36 South. 161; *West v. State*, 53 Fla. 77, 43 South. 445; *Jenkins v. State*, 58 Fla. 62, 50 South. 582. The twenty-fourth assignment is based upon the sustaining of an objection to the following question propounded to Fred Watson, a state witness, "Did you make an affidavit in this case on the change of venue proposition?" There was no error in this ruling. It was not in cross of anything brought out on the direct examination and would not in itself tend to show any animus or bias upon the part of the witness. He might well have made an affidavit to the effect that in his opinion a fair and impartial jury could be obtained in that county for the trial of the defendant without having any feeling or animus toward the defendant whatever.

The twenty-sixth assignment is to the effect that the court erred in permitting J. B. Justis, a state witness, to testify concerning certain conversations between himself and the deceased. While the bill of exceptions shows that the defendant excepted to the calling of this witness to the stand, and also shows that the defendant objected to certain questions propounded to the witness, it does not disclose that the defendant excepted to the court's ruling on the objection; therefore this assignment is not before us for consideration. *Caldwell v. State*, 50 Fla. 4, 39 South. 188, and authorities there cited; *Maloy v. State*, 52 Fla. 101, 41 South. 791. After this witness had been examined and cross-examined, the defendant moved to strike out his testimony with reference to his conversation with the deceased, which motion was denied by the court, and which ruling forms the basis for the twenty-seventh assignment. Suffice it to say that the substance of the testimony of this witness, on the direct examination, was that, on the night of the tragedy, the deceased was attending an entertainment, at which the witness sat by him, saw him go out and come back, after which he had a talk with him, and also had a word with him after the entertainment. Then the witness stated: "He (meaning deceased) asked me the way to Malcolm Stephens' house. I directed him." On cross-examination the witness testified: "There was nothing said about the defendant, White. He was not present. Dr. Alexander did not say he was going to Malcolm Stephens'. He only asked where he lived. He expressed no purpose of going there that night. He expressed no intention of going or reason why he wanted to go, or no reason for wanting to know where Mr. Stephens lived. He stated nothing about the defendant, White, in that conversation." Then came the defendant's motion to strike out all this testimony about the conversation. The defendant has not pointed out to us wherein

this testimony was harmful to the defendant in any way and has cited no authorities in support of his contention. As I do not see wherein any reversible error was committed either in admitting this testimony or in refusing the motion to strike it out, I shall consume no further time in discussing the matter. See *Woldridge v. State*, 49 Fla. 137, text 153, 38 South. 3, text 8. We would also refer to the discussion in *Weightnovel v. State*, 46 Fla. 1, 35 South. 858.

The twenty-eighth assignment is to the effect that the court erred in permitting George Farley to testify, over the objection of the defendant, as to a conversation between his sister and the deceased upon the night of the tragedy, the defendant not being present, while the refusal of the motion to strike out such testimony constitutes the basis for the twenty-ninth assignment. Assuming that error was committed in these rulings, it was rectified, later in the trial, by the court of its own motion fully and clearly directing and instructing the jury that such testimony was withdrawn from their consideration, and that they were to disregard it. This disposes of these two assignments.

Malcolm Stephens, a witness called in behalf of the defendant, testified that the defendant lived right in front of him at the time of the tragedy, that he and the defendant came uptown together on the night the homicide occurred, that he saw the deceased for the first time that night at the schoolhouse, that the defendant and the deceased came together to the courthouse and went in the sheriff's office, as also did the witness, where a conversation took place between the defendant and the deceased, which the witness heard. He was first asked to "state what occurred and what was said between them at that time." The state interposed an objection, and the court ruled that the question was too broad. The witness then proceeded to testify that the first thing which transpired after they had entered the office was that the defendant said to him and the deceased, "Have a seat," and then pulled off his hat and hung it on the rack. The witness began to state what the defendant said to the deceased, when the state again interposed an objection; but no ruling seems to have been made thereon. The witness then testified that he heard the shooting that night, which took place "just about an hour" after they were at the courthouse. The following question was then propounded to the witness: "What was it Jim said to Dr. Alexander when they were first seated?" The thirtieth assignment is based upon the sustaining of an objection by the court to this question. Prior to the propounding thereof, a colloquy had taken place between one of defendant's counsel and the court in the course of which the court had made the following statement: "It does not follow that everything that transpired must come in to

explain the conduct of one or the other. If the defendant claims to have acted in self-defense, we will say for argument that he must justify that claim by occurrences that are a part of the *res gestæ*, or by threats, or the equivalent of threats, either made in his presence by the deceased, or communicated to him as coming from the deceased. There might be a hundred and one other transactions between them that would have no bearing on the situation. Therefore nothing should go to the jury except that which is relevant to the case. Unless it can be shown there was some relevancy in the conversation, the objection will be sustained."

I think that the trial judge was correct in this statement. The defendant's counsel then began to state to the court what he expected to prove by the witness, when, upon the suggestion of the state's counsel, the court directed that the jury retire from the courtroom. To this direction the defendant excepted and has assigned error thereon, forming the thirty-first. Other assignments are based upon similar directions for the withdrawal of the jury given at different stages of the trial. I dispose of them all by stating that this is a matter which must necessarily rest within the discretion of the trial judge, and, unless an abuse thereof is clearly made to appear, an appellate court will not interfere with such rulings. See authorities cited herein in my discussion of the fifteenth assignment.

As quite a number of assignments are based upon the sustaining of objections to questions propounded to this witness, and still other assignments are of like nature, I think it advisable to copy from the bill of exceptions all the proceedings from the time of the withdrawal of the jury, of which I have just spoken, up to the close of the testimony of this witness. Such proceedings are as follows:

"In the absence of the jury, counsel for the defendant made the following proffer: Mr. Price: Now, then, may it please the court, we proffer to prove by this witness, in answer to the question propounded to him, that the defendant stated to Dr. Alexander: 'Doctor, this is a very serious matter I have to talk to you about to-night.' Judge Liddon: We object on the grounds it is irrelevant and immaterial. The Court: Objection will be sustained. Mr. Price: Your honor will note an exception. Mr. Wilson: We object on the further ground that it is a self-serving declaration. The Court: Go ahead and make your proffer of what you propose to prove by this witness. Mr. Price: The next question I expect to ask in the presence of the jury. The Court: You cannot have the jury trot in and out. Mr. Price: We think the jury should be present. The Court: Go ahead and make your proffer of testimony and close the whole thing up. I will state that it would appear not within the rights of any party to attempt to get before the

jury something that the court decides should not go before them. That could be the only object of the counsel's procedure. Mr. Price: We object to that remark of the court, for the reason it is calculated to prejudice the rights of the defendant. The Court: No remark made out of the hearing of the jury is calculated to prejudice the jury; nothing out of the presence of the jury is calculated to prejudice anybody. Mr. Price: We except to that remark of the court. The Court: I don't think you can take exceptions to anything outside of the presence of the jury. Q. Did Mr. White state to Dr. Alexander what he wanted to see him about? Judge Liddon: We object to all matters of conversation and what transpired in the sheriff's office. The Court: I understand that the objection extends through the whole transaction, and I think it is good as to the whole transaction. Mr. Price: Defendant excepts. We offer to show by this witness at this time that the defendant, White, stated to the Doctor that he was informed by his wife that the Doctor had made an assault upon her that morning by putting his arms around her and kissing her while in his dental office as a patient of Dr. Alexander, and while she was in the chair in the dental office; that he also stated to the Doctor at that time that immediately after the assault made by Dr. Alexander upon his wife, his wife left the office in indignation; and that he had just been informed by his wife of such assault. Judge Liddon: We make the same objection. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. State whether or not Dr. Alexander at that time admitted to Jim White that he had made that assault. Judge Liddon: We object. The Court: Objection sustained. Mr. Price: The defendant excepts, and we proffer to prove by this witness that when Dr. Alexander was brought face to face with White, and the statement made to him that White had been informed by his wife that Alexander then and there admitted that he made the assault on his wife as claimed by her, and told to the defendant by the defendant's wife. Judge Liddon: We make the same objection. The Court: The objection is sustained. Defendant excepts. Mr. Price: State whether or not at that time Dr. Alexander offered any apology or excuse as to why he assaulted the wife of the defendant. Judge Liddon: We make the same objection. Mr. Price: The defendant excepts. We proffer to prove by this witness that Dr. Alexander stated at that time that he could not say to save his life why he had made the assault upon the wife of the defendant, and further stated: 'You know we are all men. We have our passions.' And that was the only reason he could give for doing as he had done, and he offered that as a palliation of his offense of making the assault upon the wife of the defendant and kissing her in his office while there as a patient. Judge Liddon: We object on the same grounds.

The Court: The objection is sustained. Mr. Price: The defendant excepts. Mr. Wilson: We object upon the further ground that there is no predicate at this stage of the case for such testimony. Mr. Price: State whether at that time Alexander promised he would never be guilty of the same offense as against the wife of the defendant. Judge Liddon: We object on the same ground. The Court: The objection is sustained. Mr. Price: The defendant excepts. We offer to prove by this witness that at that time Dr. Alexander stated to the defendant that if he would forgive him at this time he would not ever be guilty of a like offense. Judge Liddon: We object on the same grounds. Mr. Price: The defendant excepts. Q. State whether or not you had any conversation with Dr. Alexander at that time about what he had done towards the wife of the defendant. Judge Liddon: We object on the same grounds. The Court: The objection is sustained. Mr. Price: The defendant excepts. We expect to prove in answer to that question, by this witness, that he asked him, 'Doctor, how in the name of God did you come to do this?' and that the Doctor told the witness that to save his life he could not explain; that he was a human being, a man, and had passions similar to other men, and that was the only explanation he could offer; that he was ashamed of his actions, and that he would not ever be guilty of it again; and that he further stated: 'For the soul of me, I can't tell why I did this; it was one of those human weaknesses.' Judge Liddon: We object on the same ground. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. State whether or not during the conversation there was any personal difficulty between the defendant and Dr. Alexander. Judge Liddon: We object on the same grounds. The Court: The objection is sustained. Mr. Price: The defendant excepts. We proffer to prove by this witness in answer to this question that at that time there was a personal difficulty between the defendant and Dr. Alexander, and that in the difficulty the defendant struck Alexander one or two licks with his hand; that they were then separated by the witness. Judge Liddon: We object on the same ground. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. State whether or not in the room at the time spoken of, if you know, Jim White had a pistol on his person. Judge Reeves: We object on the same ground. The Court: The objection is sustained. Mr. Price: The defendant excepts. In answer to the above question we proffer to prove by this witness that during the altercation in the room that Jim White had a pistol in his pocket. Judge Liddon: We make the same objection. Mr. Price: The defendant excepts. Q. State whether or not at that time White made any offer or attempt to draw that pistol and present it on Alexander or shoot Alexander or

to throw any weapon in his face. Judge Liddon: We object on the same ground. The Court: The objection is sustained. Mr. Price: The defendant excepts. We proffer to prove by this witness, in answer to this question, that at that time White had a pistol in his pocket; that he simply struck at the deceased with his fists, made no effort or demonstration to draw that pistol upon Alexander. Judge Liddon: We object on the same grounds. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. State how long Dr. Alexander then remained in the office. Judge Liddon: We object on the same ground. Mr. Price: The defendant excepts. We proffer to prove by this witness that immediately after the difficulty Dr. Alexander stated that he wanted to go back to the schoolhouse, and then the defendant got up and opened the door and permitted him to leave; that the deceased then left for the schoolhouse so far as the witness was able to see. Judge Liddon: We make the same objection. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. State whether or not in that conversation, or at any time there, any statement was made by the defendant to Alexander that he was going to publish him to the people of Marianna for making an assault upon his wife, the next day? Judge Liddon: We object. The Court: The objection is sustained. Mr. Price: The defendant excepts. We proffer to prove by this witness that, when Alexander left, the defendant told him: 'Doctor, I am more surprised at you than any man I know of. I would have suspected any other man in town to have made this assault before I would have expected you. I can't afford, since you have made this assault, for you to remain in the town of Marianna, and I shall publish this action to the people of Marianna to let them know the character of man you are to make assaults upon women who visit your office for dental purposes.' Judge Liddon: We object on the same grounds. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. State whether or not the deceased, Alexander, begged the defendant at that time not to publish him for the assault he had made? Judge Liddon: We object on the same grounds. The Court: The objection is sustained. Mr. Price: The defendant excepts. We proffer to prove that Alexander said: 'For the love of God, Jim, don't publish me in the town of Marianna. It will ruin me, and I cannot afford to have it done. I have tried to live right. I have been living here in town a long time, and I don't want this thing to come out.' Judge Liddon: We object on the same ground. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. State whether or not in that conversation, or any part of it, there was any agreement or understanding between the defendant and Dr. Alexander that

they were to meet and discuss this matter later. Judge Liddon: We object on the same ground. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove in answer to this question that there was no agreement or understanding between the defendant, Jim White, and Dr. Alexander to meet any subsequent time to talk the matter over, or to take any further action between themselves with reference thereto. Q. State whether or not there was any agreement or understanding between you and Dr. Alexander that he was to go to your house or to see you or consult with you on the night of the homicide after leaving the courthouse. Judge Liddon: I suppose that would be in the same shape. The Court: Yes. Mr. Price: Do you object to it? Mr. Wilson: Yes, but the court has overruled our objection. Q. State whether or not there was any engagement of any kind whatever between yourself and Dr. Alexander for a meeting that night. Judge Liddon: Same objection. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. State whether or not there was an engagement or understanding between Jim White and the deceased entered into while you were present as to any subsequent meeting or conversation. The Court: You have asked that once. Mr. Price: It is a different question. Judge Liddon: Same objection. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. State whether or not you saw Alexander any more that night until after the homicide. The Court: I think that is a proper question. Mr. Kehoe: We now ask leave of the court to propound to the witness in the presence of the jury, and permit the witness to answer in the presence of the jury, each of the questions propounded during the absence of the jury, in the court's discretion. The Court: There are certain questions which can be asked. Mr. Price: This applies to each and every question. The Court: The motion is overruled. Mr. Price: Defendant excepts. We now ask the court to indicate to us each of the questions he will permit us to ask the witness in the presence of the jury. Mr. Kehoe: We will endeavor to propound those questions, if the court will permit us. At this point the reporter was requested to read the questions propounded in the absence of the jury, and which the court had ruled were admissible. (The jury return to the box.) The Court: The stenographer can read the questions. Q. State whether or not there was any agreement or understanding between you and Dr. Alexander that he was to go to your house or to see you or consult with you on the night of the homicide after leaving the courthouse. A. No; there wasn't. Q. State whether or not there was an engagement or understanding between Jim White and the deceased entered into while you were present as to any subsequent meeting or conversation. A. No;

there was not any engagement made. Jim told me it wasn't necessary to go down. Q State whether or not you saw Dr. Alexander any more that night until after the homicide? A. No, ma'am; I didn't. The reporter having read the questions, and the witness having answered them, the counsel then asked the following questions: Q. Now you say that Jim White told the deceased it wasn't necessary to come down to his house? A. I did. Q. For what purpose was he coming down there? A. He offered to come down there to apologize to his wife. Judge Liddon: We object on the same grounds. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove by this witness— Judge Liddon: We object to his stating what he proffers to prove in the presence of the jury. The Court: The jury will have to retire. Mr. Price: Your honor will note an exception. We proffer to prove by this witness, in answer to that question, that Alexander offered to come down to White's house and get down on his knees and beg Mrs. White's pardon for making an assault upon her, and that in answer to that offer Mr. White told him it wasn't necessary. We think it is admissible for the further reason that your honor has permitted the witness for the state to testify that Alexander said he had an engagement, and that the witness testified that Alexander had made inquiries as to the residence of Malcolm Stephens, and it is certainly admissible for the purpose of showing that Alexander could not have said that there was any engagement between himself and White or between himself and Stephens, or any obligation upon him to come down there at 10 o'clock at night and make any apologies to Mrs. White. Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts. (The jury returns to the box.) Dr. Alexander, Mr. White, and myself were together at the courtroom about 30 minutes. Alexander left first. There was no agreement or understanding between White and Alexander that there should be any subsequent meeting. I suppose White left in a minute after Alexander did, maybe two minutes; it was a very short time. I came downstairs with Mr. White. We walked down these steps and went uptown and I went home. The next time I saw Jim was after the homicide. I heard the shooting; I had not gone to sleep. I don't know how much time exactly had elapsed from the time White and Alexander had separated at the courthouse until I heard the shooting; I would fix the time anywhere from 15 to 30 minutes. I had been home some little bit, I suppose about three-quarters of an hour, refreshing my memory. I thought the first firing was the whole round, but I am convinced it wasn't. It was very rapid. (Witness indicated how the shots appeared to him by slapping his hands together.) The first three were rapid. There was a slight

pause between the third and fourth, and between the fourth and fifth. The first three were so rapid you could hardly distinguish one from the other. I was out on the streets that night after the homicide was committed. I know where a large oak tree stands. It was dark around that tree. Thereupon the following question was asked: 'Could a man coming down the street see a man about that tree in a distance?' Judge Liddon: We object. The Court: No, that would be an opinion of the witness. Mr. Price: Defendant excepts. The light from the electric light at the far corner showed very little light under that tree. It was dark there, and it was a cloudy night.

"Cross-examination:

"When I say there was no agreement for a meeting after they were here at the sheriff's office together, I mean there was none that I know of. I didn't stay with White any more after we left the courthouse. I know that Jim White went to the academy that night. I went with him. I suppose that Alexander came here to the courthouse at the request of Jim White. I did not come with them; I was on ahead of them. When I saw them coming out of the academy, I came on ahead. I heard some hollowing while the shooting was going on. It was screaming. I think between the fourth and fifth shots I heard him say, 'Jim, don't kill me.' I heard the screaming between the third and fourth shots. There were three shots fired rapidly, and immediately after that I heard the screaming. I couldn't tell anything that was said; it was just hollowing out loud. After the fourth shot I heard him say, 'Jim, don't shoot me,' or 'don't kill me,' one of those remarks. That was just before the last shot, and that was the last I heard of the hollowing or screaming.

"Redirect examination:

"I was ahead of Mr. White and Dr. Alexander coming back from the academy. I suppose I was 25 yards ahead. That is an estimate. There was nobody else along with White and Alexander. They came down by themselves. They came up in the sheriff's office. I heard some shooting, and I heard some hollowing down there where the shooting took place. I was just across the street from there, and I think the streets are 60 feet wide. 'If there was any remark made as, 'Men, please don't let them kill me,' I didn't hear it. I don't think the street is over 60 feet wide. I was sitting up at the time.

"Recross examination:

"I am related to the defendant. I am his brother-in-law."

The thirty-second to the forty-fourth assignments, inclusive, are all based upon the rejection of proffered testimony of this witness. I shall consider them all together, in that declining to follow the example of defendant's counsel, who have argued them all

separately. I shall not enter upon any extended discussion. Suffice it to say that, after a careful consideration thereof, no reversible error has been made to appear to me. Much of the proffered testimony related to self-serving declarations and acts of the defendant, as to which I refer to what I have already said in discussing the twentieth assignment. See the authorities there cited, especially *West v. State*, 53 Fla. 77, 43 South. 445. Some of such testimony was clearly immaterial and not pertinent to the case. I do not think that any of the conversations and acts which took place in the sheriff's office, as offered to be proved by the witness, could be properly said to form a part of the rest *gestæ*, so as to render the same admissible. I do not see their connection with the homicide. See *Stitt v. State*, 91 Ala. 10, 8 South. 669, 24 Am. St. Rep. 853; *Patterson v. State*, 156 Ala. 62, 47 South. 52; *Raines v. State*, 81 Miss. 489, 33 South. 19, which was approved and followed in *Hughes v. State*, 38 South. 33. I recognize the fact that there is some conflict in the authorities, and I have carefully examined those cited to us by the defendant, but, in the light of our own decisions, I am of the opinion that these assignments have not been sustained.

For like reasons, I think that the assignments numbered from 45 to 50, inclusive, must fail; all being based on the exclusion of certain testimony sought to be elicited by the defendant from Jim Lewis.

The fifty-first, fifty-second, and fifty-fourth assignments question the rulings of the court in refusing to permit W. A. Lewis, one of the defendant's witnesses, to answer certain questions propounded to him on his direct examination. The witness had testified to having had a talk with the defendant in front of Alderman's store on the night of the tragedy from 10 to 20 minutes prior to the time the witness heard the shooting, which resulted in Dr. Alexander's death. He was then asked to "state what was said in that connection." The objection was properly sustained. What I have said just after disposing of the twenty-eighth assignment, in discussing the assignments based upon proffered testimony of Malcolm Stephens, is alike applicable here. This also applies to the fifty-second assignment, which was based upon the court sustaining an objection to the question: "What was that conversation? What was said by White in that conversation about Dr. Alexander?" Prior to the propounding of that question, the witness had testified that the conversation with the defendant to which he referred was concerning Dr. Alexander. I think that each of these questions was too broad. I am all the more impressed with the correctness of the conclusion which I have reached after reading the statement of the defendant's counsel as to what they expected and proffered to prove by such witness. Much of it was

in the nature of self-serving declarations by the defendant, as to which I have already expressed my opinion and cited authorities. The jury had been withdrawn under the direction of the court, while the defendant's counsel stated what they expected the witness to testify to in response to the questions to which the state had objected. Certain proceedings then occurred which I think it advisable to copy from the bill of exceptions for the proper understanding of this opinion. They are as follows:

"(Thereupon the jury was recalled and the taking of testimony resumed.) In the conversation I had with Mr. White on the night of April 12th, in front of Alderman's store, he did say something about what he would do if Dr. Alexander didn't leave town. He said if Dr. Alexander didn't publish in the paper his apologies to the people of Jackson county, in the town of Marianna, that he had to leave town. He did not say anything to the effect that if Dr. Alexander didn't leave town that night there would be a dead man in Marianna next morning. Thereupon the following question was propounded: Did he or not say his apologies for what? Judge Liddon: We object. The Court: The objection is sustained. (Defendant excepts.) Mr. Kehoe: We proffer to prove— Judge Liddon: We object to his stating what he expects to prove in the presence of the jury. The Court: You have that already in the record. Mr. Kehoe: If the court please, we think not; we think it necessary to offer it now. The Court: This constant moving to and fro of the jury is a hardship. I don't think it is necessary. I can see how it can be avoided, and I don't see why counsel can't see it. Of course, the jury must retire again if you are going to make another proffer. Mr. Price: We except to the remark of the court that the court don't see any necessity for the jury retiring. We don't ask that they shall retire. Mr. Wilson: Then the state does ask that they retire. (Thereupon the jury retired.) The Court: I will say now that the remarks last made were not necessary, and were made evidently to create a false impression on the jury that the court was responsible for the situation existing; it is not exactly fair to the court. I have indicated a line of procedure that will obviate this and not sacrifice a single right of the defendant. Mr. Kehoe: Will the court permit me to address the court? I will assure the court that the remarks made were not for the purpose of getting anything improperly before the court and the jury, and we do not think it is a fair criticism in the presence of the jury or in their absence. We know that your honor has a broad discretion in matters of this kind. We have absolute confidence in the faith of your honor, but we do frankly believe that you are abusing that discretion, and in taking an exception to the ruling of the court, we do so in the knowledge that there will be an

opportunity for the Supreme Court to say whether or not your honor has abused this discretion. The Court: The court has no intention of depriving you of a single right, but counsel in their zeal for their client's interest—and it is a commendable zeal—ought to sometimes think of the rights of the court. Counsel make remarks, whether intended or not, which have the effect of reflecting on the court or the court's fairness. Sometimes it is in the manner; sometimes it is in the tone of the voice. Counsel have no right to forget that the court has rights as well as counsel; all the rights are not with the practitioner. Mr. Kehoe: I think the court will concede that everything we have said has been said in a respectful manner. The Court: Counsel owe it to the court to assist in facilitating causes. There are hundreds of cases pending in the courts, and litigants have a right to their fair share of the court's time, and it is the duty of counsel to save as much time as possible. It is for that purpose that the court has made suggestions. The weather is hot, everybody is tired out, and the court thinks it has not had as much assistance from counsel in the way of facilitating business as it ought to have. Mr. Kehoe: We have tried to be respectful; if we have failed, we regret it. We honestly believe the court is wrong. We would be false to our client and false to ourselves if we allowed an undue respect for the court to cause us to neglect our client's interests, to sleep over our rights. I will state, if at this time, or at any time, the court thinks I have failed in respect to the court, I will gladly apologize, but so far as not registering exceptions to the rulings of the court when we think the court is in error— The Court: I have not asked for apologies or claimed any were due. Mr. Kehoe: In response to the last question, we expect to prove that he said he must publish his apologies in the paper for having made an assault on his wife, White's wife, or leave town. That is the answer we expect to elicit. Mr. Wilson: We object to the question, and what they expect to prove. The Court: The objection is sustained. Mr. Kehoe: The defendant excepts. (The jury return to the box.)

The defendant earnestly contends that the proffered testimony was admissible by virtue of the fact that, as the state had introduced a portion of the conversation referred to by T. G. Alsobrook, therefore he was entitled to have go before the jury the other parts thereof, so that they would have the benefit of the entire conversation. I find that the witness Alsobrook had testified that he saw the defendant "shortly before the shooting took place," estimating the time at about 15 minutes, sitting on a bench in front of Mr. Alderman's store with Gus Lewis; that as the witness passed them he heard the defendant make a remark to the effect that

"If he didn't leave town to-night, there would be a dead man in town to-morrow"; but that he "didn't stop to hear to whom he was referring." On cross-examination he testified: "I didn't hear the first part of the conversation. That is all I heard; that if he didn't leave town there would be a dead man in town to-morrow. I didn't hear any name called. I don't know of my own knowledge who that remark had reference to." This is all that such witness testified to concerning that conversation. I fully approve of our holding in *Fields v. State*, 46 Fla. 84, 35 South. 185, upon which the defendant relies, that: "Where part of a conversation is given in evidence the defendant is entitled to have before the jury all that was said upon the subject upon the particular occasion, whether prejudicial or beneficial to him. The whole conversation should be given." Also, see *Thalhelm v. State*, 33 Fla. 169, text 199, 20 South. 933, text 947, and *Williams v. Keyser*, 11 Fla. 234, text 244, 89 Am. Dec. 243, both of which are cited in *Fields v. State*, supra. I am of the opinion that these authorities do not sustain the defendant's contention. I think that the trial judge did permit the witness W. A. Lewis to give in testimony all the portions of the conversation had between him and the defendant, to which Alsobrook had referred in his testimony, which related "to the subject-matter of the suit" and which were not violative of other well-established rules of evidence. This is in accordance with the cited decisions of this court and is the full extent to which they go. It will be readily seen from the admitted testimony of such witness, which I have copied in this opinion, that he was permitted to testify as to the remark which Alsobrook had testified that he heard the defendant make to the witness as he passed by them, which was that such remark did refer to Dr. Alexander, but that the defendant "did not say anything to the effect that if Dr. Alexander didn't leave town that night there would be a dead man in Marianna next morning," but that what the defendant did say was, "If Dr. Alexander didn't publish in the paper his apologies to the people of Jackson county, in the town of Marianna, that he had to leave town." I further find that the defendant as a witness in his own behalf was permitted to testify concerning the conversation he had with Gus Lewis, in which he denied having made the remark which Alsobrook had testified that he heard him make, and stated that what he did say was "that if he didn't leave town to-night or publish his apologies in the paper I would publish him myself to the people in this town and the surrounding country." He further went on to testify "that I thought it was a courtesy I was due to the people of the town, for the assault he had made on my wife." It is true that the state moved

to strike out this last-quoted portion of his testimony; but the court denied the motion, saying that he would "instruct the jury at the proper time." This disposes of the fifty-first, fifty-second and fifty-fourth assignments adversely to the contentions of the defendant. They have not been sustained.

The fifty-fifth assignment is based upon the statement made to counsel for the defendant by the court in the presence of the jury as to "this constant moving to and fro of the jury" being a hardship, which I have already copied herein in full. I set forth the full proceedings relating thereto in order to show just what did occur and what called forth the remark. I fully approve of our holding in *Mathis v. State*, 45 Fla. 46, 84 South. 287, as in both prior and subsequent cases, that "the utmost care should be used by the trial judges, especially in cases where human life is involved, not to let any expression fall, either by question or otherwise, that is capable of being interpreted by the jury as an index of what he thinks of the prisoner, his counsel, or his case." I would also call attention to our discussion of this point in the cited case. As was said there, I think that it would have been better if such statement had not been made; but, under the facts and circumstances disclosed in the bill of exceptions in connection therewith, in this case, as in that, "we do not think the error sufficient to warrant a reversal of the case." There was some justification for it, as appears in the explanation or statement of the trial judge, after the jury had retired, and as is also apparent elsewhere in the bill of exceptions. In their zeal and earnestness displayed on behalf of their client, we think it plainly appears that the defendant's counsel did repeatedly try to get before the jury certain testimony which the court had held improper and inadmissible. It would further seem that the trial had been somewhat unduly protracted by the course pursued by counsel, and that the trial judge had been forced to send the jury out oftener than should have been necessary. It was a hardship upon them, and that fact in itself may have had more of a tendency to prejudice them against the defendant or his counsel than the remark made by the trial judge.

The fifty-eighth to the sixty-eighth assignments, inclusive, must also fall for the reason that they are all based upon the exclusion of proffered testimony, which not only formed no part of the *res gestæ*, but for the most part related to the self-serving declarations and acts upon the part of the defendant. It was sought to show that on the night of the homicide the defendant had conversations with certain named persons in which he requested them to go that night and see Dr. Alexander for the purpose of discussing with him the matter of the assault which the defendant claimed Alexander had made upon his wife, but as a matter of fact no testi-

mony was proffered to the effect that any of such requested persons did see or have any conversation with Dr. Alexander on that night; on the contrary, it would appear that they did not. It was clearly inadmissible testimony to show these conversations by the defendant and such requests upon his part.

The sixty-ninth and seventieth assignments are based upon the refusal of the trial court to permit the defendant to prove by Miss Richardson, the stenographer who took down the testimony of the witnesses at the preliminary trial of the defendant, certain testimony given in thereat by Dr. N. A. Baltzell. I find that Dr. Baltzell had testified as a witness in this case on behalf of the state, and had stated in such testimony that he had occasion to examine the body of Dr. Alexander shortly after his death. Among other things, he had testified, in speaking of a certain wound which he found on the body, as follows: "I made only one examination of the body. I examined the body some little bit on that occasion, but I was there only a few minutes at the time. My opinion is that this wound in the abdomen was making its exit there in the front, coming from behind—forward. When I first saw the body of Dr. Alexander, the wound that presented itself first to my attention was this wound I first described. My first presumption was that it entered from the front. My first impression when I saw the wound in the abdomen, Dr. Alexander lying on his back at that time, the mental impress given me at that time was that the wound must have entered from the front. After that, when Mr. Calhoun was there, I suggested that we turn the body over so it might be further examined. We looked at it more carefully, and we could come to no definite conclusion as to whether it entered from the front or the rear. The significance of a wound entering and coming out of a body has a bearing upon the size of the hole made in going in and coming out. We got our opinion in that way. The rule is, and I don't know of any exception to it, that there would be a larger point of exit than of entrance. The tissues did not show a very great amount of difference on this occasion, and I could not swear positively at the time of my first testimony given in this case that it did go in there from the front or the rear, and I could not make up my mind positively if there was any very considerable difference; there was little, if any. Later on I had occasion to examine the clothes of Dr. Alexander, and my conclusions along the hypothesis I have mentioned as to the entrance being smaller than the exit was confirmed. I found, taking from the coat in the rear, a very small bullet hole. Then I traced the bullet hole through the lining of the coat, then into the lining of the vest, then through the shirt, then through the undershirt, then through the body of Dr. Alexander, then forward into the clothes as I have described—only forward, finally out, through the under-

shirt, the outer shirt, and through the vest and out. The vest was the last garment through which the bullet passed, since evidently the coat was not buttoned up. There was no bullet hole in the coat in front. There was a bullet hole in the coat in the rear. I examined these garments closely, and the most positive evidence I came to was, aside from the fact that the smallest hole was in the rear, a gradual increase in size, and more or less irregular, forward from behind, taking up the shirt, which was a pleated bosom shirt." Here counsel exhibits shirt to witness, and after examining same witness testified: "This is the shirt. As I say, seeing gathering up this shirt and making a careful examination of the shirt, I began to look at it very closely, following the range of these bullets, I noticed in one of the pleats that the hole made by the bullet was covered partially over, as is shown here by this pleat (indicating). The pleat covered the hole partially. My conclusion was this: It would have been practically impossible for this bullet to have gone in forward and the hole to be covered by this pleat or any part of the pleat; but it would have cut the pleat before making the hole; but coming this way, it would cut the shirt and brush the pleat out of the way, and not necessarily cut the pleat itself; that is the impression made on me—my conclusion for the direction of the bullet. I found the shirt in the vault at the First National Bank. I made the examination of these clothes perhaps about noon the following day after I examined the body of Dr. Alexander the night before. He didn't have any clothes on when I examined him the first time. (Here coat was exhibited to witness.) This is the same coat that I saw bullet holes in. (Vest exhibited to witness.) That is the vest. I didn't see anything at all that attracted my attention to the trousers. This is the undershirt. I don't remember making any examination of the underclothes."

On cross-examination the witnesses testified: "I only visited the body one time, one occasion, and all the examination I made was on that occasion. That was about 12:30 the night of the killing. The body was in Dr. Alexander's office at that time. I was from five to eight minutes perhaps making the examination. I was as deliberate in making the examination as one could be in a period of five or eight minutes. I had other business on hand. However, I don't know that I would have made a more careful examination if I had had more time. I satisfied myself as far as conditions presented themselves. I think I made the examination about 12 o'clock at night. I think I had some lamp lights. I don't think it was an electric light. I testified before the coroner in this case. I testified twice that day, once before I looked at the clothing and once in the afternoon after I had looked at the clothing. In the morning before I looked at the

clothing I referred to and described this wound in the abdomen. I think I made the remark that in my judgment the wound entered from the front and made its exit to the rear, or used the words, 'It is my presumption.' I will say just here, if you will allow me, since making that statement I have seen two copies of the testimony as taken. I didn't take them both and compare them to see. The signed copy, I signed in Judge Williams' court, and my recollection is that the word 'presumption,' 'It is my presumption,' or using the word 'presuming' in that connection—it came from the front and went to the rear, the back. I, however, here in court, saw some of the testimony taken and was looking over it, and that attracted my attention—it wasn't in there. Now, I wouldn't swear whether it was left out, but I thought at the time that the word 'presumption' was left out of one copy. I don't recollect whether Miss Allie Richardson was reporting that case stenographically or not; I could not swear it. This question was asked me in the morning examination: 'You said something about the wound in the back. You examined where the bullet was supposed to have entered. Was that wound, in your opinion, where the same went in, the upper part of the abdomen?' and I answered about this way: 'I am fairly sure that it was. I am not prepared to swear positively that the wound went in from the front or the rear. It didn't follow the usual descriptions of exits and entrances of wounds. To the very best of my ability I examined him three times I think and ascertained positively in my mind that fact. The rule following the entrance and exit of a wound is that the exit is almost invariably larger than the point of entrance. I found that if there was any difference at all it was very slight. I think that the mere eye would give you very little information on the subject. The presumption in my mind was that the wound was from the front rather than from the rear.' That was the impression I had the first time I testified after examining the body. On cross-examination I was asked this question by Mr. Price: 'I believe you stated that to your best judgment that wound went in here is the one that went out in the back.' And I guess I must have answered, 'Yes, sir.' I don't recall just that answer. I was called back in the afternoon, after I had examined the clothing. I suppose in the afternoon I was cross-examined by Mr. Price. In answer to the question, 'You are not willing to swear now absolutely that the wound was from the rear or the front?' I stated that I would not swear positively; that I couldn't swear that the evidence of the wound was greater of its coming from the rear than from the front. I also stated that I examined the clothing casually, only picked up one piece, that I was in a great hurry to leave there, and only looked at the wounds as Judge Williams asked me. I will swear that there is more

reason for believing that the wound, the wound that shows itself in the front and back, entered from the rear than there is for its having entered the front. I can't say I am positive. It would seem a practical impossibility to say. I would have said I was not in a position to swear positively whether it entered from the front or the rear if I had never seen any clothing at all. When I testified before the coroner in the morning part of the day, I said that it possibly could have come from the front, or words to that effect, and you will notice before that I said, 'it is my presumption.' I could not get my mind clear as to whether it was from the front or the rear. Before I examined the clothing I was in great doubt, and the burden of doubt, I am not sure on which side—I may have been impressed, first seeing the wound from the front—just as if seeing it on anybody or anything, first seeing it on the front, my first mental impression on my mind was that it must have come in that way. That was my first impression. Then Mr. Calhoun and I lifted the body and turned it over two or three times to see if we could see the direction of that bullet. We did not. I had no positive opinion about it, because I could not see the sign of which way it went. I made the examination assisted by Mr. Calhoun, and it was complete before I testified before the coroner's jury. The county judge was present when I made the examination. I was called in by him. It is possible that, in the presence of the coroner and the coroner's jury on that occasion when I made that examination, I stated to them, after having made that examination, that it was my opinion that the shot had entered from the front and made its exit in the back. I don't recollect. As I say, my first impression was, seeing it from the front, and not seeing it in the rear, I could not say; I don't recollect. It is a fact that the impression I have at this time is from an examination of the clothing rather than from an examination of the body. I arrived at that conclusion from the examination of the clothing I have identified here."

I now copy the following proceedings from the bill of exceptions in order to show clearly the basis for the two assignments I am now considering: "Q. Miss Richardson, was Dr. Baltzell a witness on the former trial of this case? A. Yes, sir. Q. You took down his evidence, did you? A. Yes, sir. Q. Will you state whether or not the following question was asked Dr. Baltzell: 'You said something about the wound in the back. You examined where the bullet was supposed to have entered. Was that wound in your opinion where the same went in the upper part of the abdomen?' Judge Liddon: We object. Dr. Baltzell didn't deny any of that testimony. The Court: No; he admitted that. I don't think it is necessary to go into it. Mr. Kehoe: I think he said that it might or might not be; that it entered from the rear. The Court: He admitted all that you read

from the transcript, and all you called his attention to; it is unnecessary to go over it again. Mr. Kehoe: I desire to offer in evidence that his answer was as follows: 'I am fairly sure it was, though I am not prepared to swear positively that it went in from the front or rear. It did not follow the usual description of entrance and exit wounds. To the very best of my ability I examined him three times I think, and ascertained positively in my mind that fact.' Mr. Wilson: We object to that testimony. Dr. Baltzell has not denied that. The Court: Objection is sustained. Mr. Kehoe: Defendant excepts. Q. Turn to page 11. Was Dr. Baltzell asked this question upon cross-examination: 'I believe you stated your best judgment was that the wound that went in here is the one that went out the back?' Judge Liddon: We object. The Court: I have already sustained the objection. Mr. Kehoe: We proffer to prove that Dr. Baltzell testified in his best judgment that the wound entered in the front and went out the rear. Judge Liddon: You offer to prove that by Miss Richardson? Mr. Price: Yes. Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts."

I am of the opinion that, as Dr. Baltzell did not deny having made these statements so sought to be introduced, but practically admitted that he had done so, no error was committed in excluding them. See *Myers v. State*, 43 Fla. 500, 31 South. 275, construing section 1102 of the Revised Statutes of 1892, now section 1511 of the General Statutes of 1906, under which such former testimony of the witness was claimed to be admissible. It would also seem to be doubtful whether any sufficient or proper predicate had been laid for the introduction of the proffered testimony. See *Simmons v. State*, 32 Fla. 387, 13 South. 896, and *Sylvester v. State*, 46 Fla. 166, 35 South. 142. Be that as it may, no error has been made to appear to me in the rejection of this testimony.

The seventy-first assignment is based upon the refusal of the trial court to let the defendant prove by Miss Richardson certain testimony given in by E. J. Schell, a state witness, at the preliminary trial. This assignment must fall with the sixty-ninth and seventieth, and for like reasons.

The seventy-first to the eighty-first assignments, inclusive, are all based upon proffered and rejected testimony of Mrs. Susan Bettie White, the wife of the defendant. Again I am forced to copy the proceedings, so as to show what actually occurred in order to make these assignments clear and my disposition thereof understood:

"My name is Susan Bettie White. I know the defendant J. V. White. I am his wife. I knew Dr. S. B. Alexander when I saw him. I recollect hearing of Dr. Alexander's death. The last time I saw him alive was in his office. It was on the same day that I heard of his death that night. His office was located

over Porter-Carroll Hardware store, in the town of Marianna. I was up in his office at that time. Thereupon the following question was propounded: Q. For what purpose did you go there? Judge Liddon: We object. It is irrelevant and immaterial, the purpose for which she went to his office. The Court: Objection sustained. Mr. Price: Defendant excepts. (Thereupon, upon the instructions of the court, the jury retired.) Mr. Price: We offer to prove by this witness that she had gone to the office of Dr. Alexander for the purpose of having some dental work done by him on the morning prior to his death that night. The Court: What else? Mr. Price: That is all I am proffering right now. Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts. The Court: Now, if you have anything else along the same line, it might be presented now in order to facilitate the trial. Q. Please state whether or not Dr. Alexander completed the work for you that you went there to have done that morning. Judge Liddon: Same objection. The Court: Objection sustained. Mr. Price: Defendant excepts, and in answer to that question we proffer to prove by this witness that Dr. Alexander did not complete the work that she went there to have performed on that morning. Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. If you state that Dr. Alexander did not complete the work that you went there to have him do, then state why he did not complete the work? Judge Liddon: We make the same objection. Mr. Price: We offer to prove by this witness in answer to that question that Dr. Alexander started to perform the work that she went there to have performed; that while in the course of his work he put some kind of medicine in her tooth; and that while waiting for the medicine to take effect he placed his arm around this witness and kissed her several times without her consent and against her wishes. The Court: The objection is sustained. Mr. Price: Your honor will note an exception. Q. Please state for what reason you left the office of Dr. Alexander. Judge Liddon: We make the same objection. Mr. Price: We proffer to prove by this witness that she left the office of Dr. Alexander for the reason that he assaulted her, and after such assault was made she immediately left the office in indignation. The Court: The objection is sustained. Mr. Price: The defendant excepts. Q. Please state where you went immediately after going to Dr. Alexander's office. Judge Liddon: We make the same objection. The Court: The objection is sustained. Mr. Price: Defendant excepts, and we proffer to prove by this witness that after the assault was made upon her she left the office and went at once to her mother's, who lived in the town of Marianna. Q. State whether or not you made any complaint to your mother as to the assault being made upon you by Dr. Alexander? Judge Liddon:

We make the same objection. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove in answer to that question that immediately after leaving the office of Dr. Alexander this witness went to the home of her mother, and that she then made complaint of the conduct of Dr. Alexander toward her. Q. Please state what else Dr. Alexander did towards you while you were in his office. Judge Liddon: We make the same objection. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove by this witness that immediately after making the assault by Dr. Alexander upon this witness that she started to leave the office, and that he intercepted her at the door with the intention of preventing her from leaving the office. The Court: Objection sustained. Mr. Price: Defendant excepts. That is all we proffer to prove by this witness that occurred at the office. I want to ask her where her husband was that day. The Court: Will you intimate to the court what questions you expect to ask? Mr. Price: If the court please, I cannot recollect the questions. After I ask a dozen questions I cannot remember what I have asked. The Court: Have you any more questions along this line to ask? Mr. Price: I have not, about Dr. Alexander. The Court: You know what the court means. If you have any other questions about that matter, you can propound them now. Mr. Price: I am not ready to propound these questions now. The Court: Then I will stay here until you are ready. Mr. Price: I expect later on to have some questions. I am not ready to propound them now. I expect to ask her as to her husband being in town. The Court: If you have any further questions about the matter you have been asking about, you can ask them. Mr. Price: I am not going to ask her any other questions about what I have asked her about. The Court: Then I expect we will have to adjourn. Mr. Price: I am not asking the court to adjourn. The Court: You can ask these questions now, or you will not be permitted to ask them. Mr. Price: I desire to take my own time. I have some other questions that I know are relevant to go before the jury. I have another question which I wish to ask her— The Court: I say anything else about this matter? Mr. Price: I am not going to ask anything about what occurred in that office. The Court: You understand what the court means. You understand that the court has read the transcript of the testimony taken before the coroner and is familiar with all of this testimony. The court knows and you know exactly what questions you have in mind. Mr. Price: I have told the court I expect to ask some further questions. I expect to ask her if she made complaint to her husband. The Court: It will be objected to; you may as well ask that question now. Mr. Kehoe: We have a line of questions which we desire to ask which are not objectionable, and then we have some

questions— The Court: You can ask those that are proper and omit the others. Mr. Kehoe: If the court please, we have some questions which we think are proper. Our position is this: We have some questions which are proper, and then we have some questions which would necessarily follow, which we think are proper, but which under your honor's ruling will be objected to and the objection will be sustained. We think if we ask these questions now, and they are objected to, and the court sustained the objection, it will be proper; but if we ask these questions after we have asked some other questions, after we have laid a predicate for them, we believe your honor will be in error to sustain the objections to them, and that is the reason and the only reason why we insist upon asking these questions after we have asked other questions. The Court: I say you can go ahead and ask all the questions you desire to ask, and the court will point out which are proper, and which are not proper, and then, the questions being in, the jury can return to the box, and the examination of this witness can be finished. The counsel have no right to try to control the court; it is the court's right to control counsel. Mr. Kehoe: It is not with any intention of controlling the court. I think this: I may be in error, but I would like to be heard; I may be in error, but I am honest in it. Suppose this case should go to the Supreme Court, suppose I should ask a question which appears to be irrelevant and immaterial, and it should be objected to on that ground, and the court should sustain it; then, in reviewing it, the Supreme Court would hold it irrelevant and immaterial; but if, after laying the proper predicate, I should ask this question in the proper order, it could then be viewed from the circumstances at the time the question was asked. The Court: The question can be asked now and go into the proper place in the record. Mr. Price: The defendant excepts. By the witness: My husband was deputy sheriff. He was not at home on the day I went to Dr. Alexander's office. He was absent from town on that day. The first time I had occasion to talk with him was that night at supper time. Thereupon the following question was asked: State whether or not you informed your husband when he came in that night as to what occurred in Alexander's office that morning? Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove in answer to that question that when Mr. White came home his wife, this witness, made complaint that Alexander had insulted her in his office and had assailed her while she was there having some dental work done. In offering this testimony, may it please the court, it is the view of the counsel for the defendant that any matter that would go to make a provocation for the commission or for the taking of human life is relevant and material to go be-

fore this jury, or any other matter that would be of such a nature or character as to greatly incense a person, and by reason of that to cloud his senses or obscure his reason, it is certainly relevant to go before this jury for their consideration. We also think it necessary upon this theory: He is charged with murder in the first degree, and any fact or circumstance which would have a tendency to show there was no intent on the part of the defendant would reduce it to manslaughter, by reason of being thrown into it by the assault upon his wife made by a person holding the position that Dr. Alexander did, is certainly relevant to go before this jury. The Court: I don't think it is relevant or material to go before this jury. It is unnecessary to explain why I don't think so. The objection will be sustained. Mr. Price: Defendant excepts. Q. What was your condition, Mrs. White, when your husband came home that night? Judge Liddon: We object. The Court: Objection sustained. Mr. Price: Defendant excepts. We expect to show in answer to that question that Mrs. White was in an intense nervous condition at that time. She was crying and in such condition as would naturally excite any husband or any man. The Court: Objection sustained. Mr. Price: Defendant excepts. Q. Did you see your husband any time from the time you left Dr. Alexander's office until you saw him that night after his return from the country? Judge Liddon: We object; we don't see the materiality. The Court: Objection sustained. Mr. Price: Defendant excepts. We proffer to prove in answer to that question that she did not see her husband from the time she left Dr. Alexander's office until after dark that night, and she then made complaint. The Court: I don't think she can answer that. (The jury having returned to the box, the reporter was directed to read the questions which were held to be admissible.) Q. Mrs. White, what official position did your husband hold? A. He was deputy sheriff. Q. On the day you went to Dr. Alexander's office was he at home? A. No, sir; he was not. Q. You say he was absent from town on the day you went to Dr. Alexander's office? A. Yes, sir. Q. Did you see your husband at any time from the time of your leaving Dr. Alexander's office until you saw him that night after his return from the country? A. No, sir. Q. Did you have any conversation with your husband when he returned from the country? Judge Liddon: We object. The Court: You have asked that question. Objection will be sustained. Mr. Kehoe: If the court please we ask leave to ask of this witness each of the questions that were propounded a few moments ago during the absence of the jury. The Court: You have given your questions and answers; there is nothing more to go into the record. Mr. Kehoe: We reserve an exception to the refusal of the court to permit us to ask the questions which were objected to and to which your

honor sustained the objection. The Court: No, you cannot do that. Mr. Kehoe: You will not permit us to do that? The Court: No. Mr. Kehoe: Defendant excepts."

I see no necessity for any extended discussion of these assignments, and, even if I did deem the same advisable, the length to which this opinion has already grown would preclude it. Suffice it to say that a careful reading of such proceedings, in connection with the defendant's brief and the authorities cited by him, fails to disclose any reversible error to me committed in any of the rulings upon which these assignments are based. Much of what I have said in disposing of other assignments is also applicable here. This discussion, together with well-settled principles of evidence, will show, I think, that the proffered testimony was properly excluded, and that these assignments have not been sustained. If the defendant had not presented such a multiplicity of assignments to us, I would have treated the questions here presented more fully. As it is, I can only declare that, as the same are presented to us, I have found no reversible error in the exclusion of such testimony.

The defendant also sought to introduce testimony along similar lines and to the like effect by Mrs. Lula King, the mother of Mrs. White, the exclusion of which forms the basis for the eighty-second and eighty-third assignments. They must fall with the preceding assignments.

The eighty-fifth to the eighty-ninth assignments, inclusive, are all based upon the sustaining of objections interposed by the state to certain questions propounded to the defendant, who had taken the stand as a witness in his own behalf. I now take up these in their order for treatment. The eighty-fifth assignment is that the court erred in refusing to permit the defendant to answer the question, "What commenced the altercation between you and him there, and caused the blow to pass?" The defendant had just testified as follows: "I had known Dr. Alexander for some little time. I had seen him that night before the difficulty occurred. I saw him at the schoolhouse, as he was coming outside. He came out of the schoolhouse because I asked Mr. Cephas Wilson to tell him to come out; I wanted to see him. He came out immediately. There was no one with me at that time. That was about 9 o'clock I think; I could not state exactly. He and I went from the schoolhouse to the sheriff's office in this building. No one was with us on the way. I, at that time, was deputy sheriff, and was in the habit of carrying a pistol. At the time I met Dr. Alexander at the academy I had a pistol. We had no dispute, or misunderstanding in the least, while we were going from the academy to the sheriff's office. I at no time between the academy and the courthouse drew my pistol, or attempted to

draw it. I did not threaten to do him any violence from the time we left the academy until we got to the courthouse. The sheriff's office is the back office on this side, upstairs. When Dr. Alexander and I came up the steps, Mr. Malcolm Stephens was right at the top of the steps. The office was locked. I unlocked the door, and we all went in, Mr. Stephens, Dr. Alexander, and myself. I asked them to have seats. I pulled off my coat and laid it on the table, and then I kind of sat on the table. I suppose we stayed in that room together 15 or 20 minutes, probably 25. Malcolm Stephens was present during the entire time. At that time I had my pistol with me. I did not draw it, or make any attempt to draw it. I did not assault or attempt to assault him at any time while we were in there with any pistol or any weapon. Dr. Alexander left before I did. I struck Dr. Alexander with my hands while he was in there. I struck at him once, and struck him once with my fist. He stayed five minutes after that, I should think. I made no further effort to strike him."

Then this question was propounded, whereupon objection was interposed by the state. The jury was withdrawn, and counsel stated that they proffered to prove by the witness, in response to the question: "That the altercation about which he testified came up in the sheriff's office when Mr. Malcolm Stephens was present, and that it immediately followed an admission made by Dr. S. B. Alexander that he had, on the morning of that same day in his dental office, while the wife of the defendant was there for treatment, put his arms around her and kissed her upon the forehead and upon the cheek; and upon his admission that he did not know why he did it, except that it is one of the human weaknesses, and that he had passions like other men. We further proffer to prove, in response to the same question, that he (Dr. Alexander) was leaving the office, having been let out of the office by the defendant, and the defendant told Dr. Alexander that it was his purpose to publish him to the people of Marianna publicly the next morning, and that the last thing that Dr. Alexander said before leaving and the last words that he said to the defendant before the meeting just preceding the shooting, was: 'Jim, for God's sake don't do that. It will ruin me here in Marianna.'"

The court sustained the objection. No error is made to appear here. What I have said, in treating former assignments, concerning self-serving declarations, and evidence of a former difficulty not being admissible, unless shown to form part of the res gestæ, applies with equal force here. While the jury was still out, the defendant testified that on the evening of April 12th he first went to my house about 5 or 5:30, and that he first talked to his wife about 7:30. Thereupon the following question was

propounded to him: "At that time did she or not tell you or say anything to you about or concerning Dr. Alexander?" The state objected thereto. The defendant's counsel stated: "We proffer to prove by this witness, in response to the question just propounded, that at that time his wife told him that on the morning of that same day she had gone to Dr. Alexander's office to have some dental work done, and that while in the chair, against her will and without her consent, that Dr. Alexander made an assault upon her; that he forcibly put his arms around her and kissed her upon the forehead and twice upon the cheek; that she immediately got up from the chair and attempted to leave the office; that he stopped her at the door and tried to prevent her going away from the office; that at that time this was in the upstairs part of what is known as the Dekle Building; that there was no person there except Dr. Alexander and the defendant's wife; and that the adjoining room in which she was for the purpose of having this dental work done was Dr. Alexander's bedroom."

The court sustained the objection, and upon this ruling is based the eighty-sixth assignment. This question was then propounded to the defendant: "Now, Mr. White, I will ask you this question: You have stated that just before Dr. Alexander came up into the courtroom here, the sheriff's office, with you, that you had gone to the academy for the purpose of seeing him there when he came out. What was your purpose in going to see him there at that time, and did you speak to him about the matter that you wanted to speak to him concerning?"

The defendant's counsel then made the following statement: "In response to the question just propounded, we proffer to prove by this witness that he went to the academy at that time for the purpose of asking Dr. Alexander about having made an assault upon his wife the morning of the same day, and that he did, as a matter of fact, before parting with Dr. Alexander after the meeting at the schoolhouse, ask him about said matter."

The sustaining of an objection to this question forms the basis for the eighty-seventh assignment.

This question was then propounded: "After you had seen Dr. Alexander at the academy, did he or not admit to you that he had on the morning of that same day in his dental office make an assault upon your wife by hugging her and hissing her?"

Counsel for the defendant made the following statement: "In response to the question just propounded, we proffer to prove by this witness that, at the meeting of the defendant and Dr. Alexander, Dr. Alexander admitted to him at that time that he had on the morning of that same day, in his dental office in Marianna, hugged and kissed the wife of defendant."

This question was objected to and the objection sustained, which ruling furnishes the predicate for the eighty-eighth assignment.

This question was then propounded: "After Dr. Alexander had left the courthouse, and after you had left the courthouse, state whether or not there was any understanding between you and any other parties to the effect that they—that is, the other parties—should go and see Dr. Alexander in your behalf and insist that he either leave town or publish his apologies that he had made to you publicly in the Marianna paper."

Defendant's counsel made the following statement: "We proffer to prove by this witness that he did request Mr. Joe Davis, Mr. Ellis Davis, and Jim Lewis, and that he had an understanding with the three named parties, that they would go and see Dr. Alexander and tell him that the defendant, Jim White, insisted and would be satisfied if Dr. Alexander would either leave the town of Marianna, or publish in the Marianna paper publicly the same admission and apology that he had offered him (the defendant) orally."

The court sustained the objection interposed to this question, and this ruling forms the basis for the eighty-ninth assignment.

It is obvious from what I have said, in disposing of preceding assignments, that I do not think that any error was committed in any of these rulings; therefore it becomes unnecessary for me to comment upon these assignments, so I content myself with stating that they have not been sustained.

The ninetieth assignment is as follows: "The court erred in refusing to permit the defendant to prove separately each of the propositions that were proffered to be proven by the witnesses Malcolm Stephens, Mrs. J. V. White, W. A. Lewis, and Mrs. Lula King, which were proffered to be proven by each of said witnesses prior to the testimony of the defendant, J. V. White, as though each of said questions were propounded to each of said witnesses subsequent to the testimony of the defendant."

It is readily apparent, in view of what I have already said, that this assignment must fail, so I pass it without any discussion.

Next comes the ninety-first assignment, which is as follows: "The court erred in instructing the jury as follows: 'The other point is the question and answer of the defendant, White, the question being, "What was the remark you made at that time?" and that part of the answer which gave a reason for the action he proposed to take will be excluded from the consideration of the jury, and they are directed and instructed not to consider it in considering the case; this will leave the question, "What was the remark you made at that time?" and the answer, "I told Gus Lewis that if he did not leave town to-night, or publish his apology in the paper, I would publish him myself

to the people in this town and the surrounding country"—the balance of the testimony being stricken from the answer on motion of the state."

In treating the fifty-first, fifty-second, and fifty-fourth assignments, all based upon the exclusion of certain testimony proffered by the witness Gus Lewis, concerning a certain conversation which had taken place between him and the defendant, from 10 to 20 minutes before the homicide occurred, in front of Alderman's store, I had occasion to refer to the fact that the defendant himself had also testified as to the remark which he had made to Gus Lewis, as to which the witness Alsbrook had testified on behalf of the state. I further stated in connection that the defendant had denied making the remark attributed to him by Alsbrook, had stated what the remark was which he did make, and had further said, "That I thought it was a courtesy I was due to the people of the town for the assault he had made on my wife." The state moved to strike out this last statement, which motion was denied; the court saying that he would instruct the jury concerning it at the proper time. I find that, at the close of all the testimony, just prior to delivering his charge to the jury, the court stated that there were two points of the testimony that he wanted to make a ruling on. He then proceeded to instruct the jury not to consider certain portions of the testimony of George Farley as to certain remarks he heard Dr. Alexander make to his sister, on the night of the homicide, to which I have previously referred in this opinion. The other point was as to this statement of the defendant. It seems hardly necessary to say that it was not admissible testimony for the defendant to state as to what he thought at the time he made the remark to Gus Lewis or his reasons for making it. The court was clearly right in ruling it out and instructing the jury not to consider it. Therefore this assignment fails.

The next assignment urged before us is the ninety-seventh, which is based upon the giving of the special instruction numbered 8, at the request of the state, which is as follows: "When from the evidence the jury is satisfied of the previous existence of malice in the slayer, its continuance down to the perpetration of the homicide, if a homicide was committed, must be presumed unless there is evidence to rebut it and show that the wicked purpose has been abandoned."

It is obvious that this instruction relates to and is applicable to murder in the first degree.

As the defendant was acquitted of this charge by the jury returning a verdict finding him guilty of murder in the second degree, it becomes unnecessary for me to pass upon this assignment. *Mathis v. State*, 45 Fla. 48, 34 South. 287, and *Vickery v. State*, 50 Fla. 144, 38 South. 907.

The ninety-ninth assignment is based upon the refusal of the court to give the following instruction requested by the defendant: "If you believe from the evidence beyond a reasonable doubt that the defendant shot and killed Alexander, but you have a reasonable doubt as to whether the defendant acted unlawfully, then you will find him not guilty."

As the court had already fully and correctly instructed the jury upon the legal principles embodied in this requested instruction, no error was committed in refusing it. *Bass v. State*, 58 Fla. 1, 50 South. 531.

The one-hundredth assignment is based upon the refusal to give the following requested instruction: "If you should believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully killed Alexander, but have a reasonable doubt as to whether or not he is guilty of murder in the first degree, murder in the second degree, or manslaughter, then, in such event, you should give the defendant the benefit of such reasonable doubt, and find him guilty of manslaughter; but if you should have a reasonable doubt in your mind as to whether or not the killing of Alexander by the defendant, if he did kill him, was unlawful, then, in such event, you should give the defendant the benefit of such doubt and find him not guilty."

What I have just said, in treating the ninety-ninth assignment, is alike applicable here. Also, see *Maloy v. State*, 52 Fla. 101, 41 South. 791.

The one hundred and first assignment is based upon the refusal of the court to give the following requested instruction: "If you have a reasonable doubt as to the guilt or innocence of the defendant, whether such doubt arises from evidence that has been submitted to you, or from the lack, want, or absence of evidence as to any material fact or facts in this case, you should find the defendant not guilty."

The one hundred and second assignment is based upon the refusal to give this requested instruction: "If, after a fair and careful consideration of the evidence in this case, you should still feel that there was any material fact or facts necessary to establish the guilt of the defendant, unproven by the evidence, or that you had a reasonable doubt in your mind as to whether any material fact or facts necessary to be proved in order to establish the guilt of the defendant had been proven by the evidence beyond a reasonable doubt, then you should find the defendant not guilty."

What I have just said, in disposing of the other refused instructions, upon which error is predicated, applies with full force to these two assignments.

I wish to call attention to the fact that, although the charge given by the court of its own motion was of some length and would

seem to have covered pretty fully and fairly all the legal points involved in the trial of this case, and had also given nine instructions, at the instance of the state, the defendant presented 30 separate special instructions which he requested the court to give. We have had occasion several times to express our disapproval of requesting an unnecessarily large number of instructions to the jury. See *McCall v. State*, 55 Fla. 108, 46 South. 321, and prior decisions of this court there cited. I would also refer to what is said upon this point in *Kinney v. City of Springfield*, 35 Mo. App. 97.

This brings me to the one hundred and third assignment, which is the last, and is based upon the overruling of the motion for a new trial. The only ground thereof urged before us is as to the sufficiency of the evidence to support the verdict. Although this motion contains 33 grounds, it has no ground questioning the sufficiency of the evidence to sustain the verdict. This being true, the trial judge was never afforded an opportunity of passing upon this question. Therefore I am precluded from considering it. *Davis v. State*, 47 Fla. 28, 36 South. 170, and *Manatee County State Bank v. B. F. Wade Packing Co.*, 56 Fla. 492, 47 South. 927, and other decisions of this court therein cited. Having failed to discover any reversible error, I think that the judgment must be affirmed.

MCMILLAN et al. v. WARREN.

(Supreme Court of Florida, Division A. May 20, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 900, 901*)—REVIEW—PRESUMPTIONS—CORRECTNESS OF RULINGS—ASSIGNMENTS OF ERROR.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3667, 3668, 3670; Dec. Dig. §§ 900, 901.*]

2. APPEAL AND ERROR (§ 956*)—TAKING PROOFS—EXTENSION OF TIME—DISCRETION OF COURT.

The matter of extending the time for the taking of testimony in an equity suit is for the court below to decide, resting within the sound judicial discretion of such court, and the determination of this question will not be disturbed by an appellate court, unless an abuse of such discretion is plainly made to appear.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3810; Dec. Dig. § 956.*]

3. APPEAL AND ERROR (§ 736*)—ASSIGNMENTS OF ERROR.

In preparing assignments of error, each error relied upon should be clearly and distinctly specified and separately assigned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.*]

4. APPEAL AND ERROR (§ 736*)—ASSIGNMENTS OF ERROR.

A single assignment of error attacking a plurality of rulings of the trial court, whether upon the pleadings, the admission or rejection of evidence, or the granting or refusing of instructions to the jury, will be unavailing, unless all of such rulings so grouped en masse are erroneous, and the determination by an appellate court that one of the rulings so attacked is correct disposes of the assignment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8028, 8029; Dec. Dig. § 736.*]

5. APPEAL AND ERROR (§ 740*)—ASSIGNMENTS OF ERROR.

Where an assignment of error is "that the said judge of the said court severally erred in overruling the several exceptions of the defendants to the several findings and conclusions of the special master's report in said case, to wit," and then follows a copy of the several exceptions taken by the defendants to such report, the determination by an appellate court that one of such exceptions so attacked was correctly overruled is sufficient to dispose of such assignment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3028; Dec. Dig. § 740.*]

6. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that "the master erred in the report which he made to the court" cannot be considered by an appellate court, as the appellate court reviews the action of the trial judge on such report and not the report itself.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3020; Dec. Dig. § 731.*]

7. INTEREST (§ 45*)—RECOVERY IN EQUITY SUITS.

Interest may be allowed in a suit in equity upon the amount of money found to be due from the defendant to the complainant from the date the same became due and payable.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 94; Dec. Dig. § 45.*]

8. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF CHANCELLOR.

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3973; Dec. Dig. § 1009.*]

Error to Circuit Court, Duval County; R. M. Call, Judge.

Bill by Godfrey S. Warren against Julia L. McMillan and another. From the decree, defendants appeal; complainant assigning cross-errors. Affirmed.

M. C. Jordan, for appellants. W. M. Bostwick, Jr., and Julian Hartridge, for appellee.

SHACKLEFORD, J. The appellee filed his bill in equity against the appellants, by which he sought to charge and subject to sale certain described property therein, alleged to be the separate property of Julia L. McMillan, a married woman and one of

the appellants, for the payment to appellee of certain amounts alleged to be due him for work performed upon and materials furnished to him in the construction of certain additions to a certain building situated upon such property, with the knowledge and consent of each of the appellants. Demurrers were interposed and sustained to the original and first and second amended bills, while a demurrer was interposed and overruled to the third amended bill; but, as no error is assigned upon any of these rulings, we need not consider them. The defendants then answered the third amended bill, specifically denying the material allegations thereof by which it was sought to charge such property; but we deem it unnecessary to set forth even the substance of the pleadings, since no point is made thereon. Exceptions to the answer were overruled, a replication then filed thereto, and the case then referred to a master to take the testimony therein, with directions to make a report of his findings both of law and of fact. Such master took and reported a large volume of evidence and also filed a lengthy report, wherein he found as a matter of law and fact that the complainant was entitled to recover from the defendants the sum of \$1,195.59 as damages, together with costs to be taxed, and that the property described in the bill was liable for the payment thereof and subject to sale for that purpose. Both the complainant and the defendants filed exceptions to the master's report, all of which were overruled and a final decree rendered by the court based upon and in accordance with such report. From this decree the defendants have entered their appeal, assigning certain errors, and the complainant has also assigned cross-errors.

The first two assignments urged by the defendants are based upon an order of the court dated December 23, 1908, extending the time for taking testimony to January 15, 1909. We find that on the 14th of November, 1908, the defendants filed a petition, seeking an order extending the time for taking testimony for reasons therein set forth, and an order was made extending such time for a period of 80 days, and within such time the defendants had the testimony of a number of witnesses taken, closing their testimony on the 15th day of December, 1908. It further appears in the transcript of the record that on the 23d day of December, 1908, the court made the order complained of wherein the time for taking the testimony upon the part of the complainant was extended until the 15th day of January, 1909. The petition upon which such order was based does not appear in the transcript. Within such time the complainant proceeded to take further testimony before the master, and we find that the counsel for the defendants was present thereat, and, though objecting thereto, proceeded to cross-examine the witnesses offered by the complainant.

It is not made to appear that the defendants desired to offer any additional testimony, or that they sought an order from the court further extending the time for that purpose.

We are of the opinion that there is no merit in these two assignments. In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge. *Sarasota Ice, Fish & Power Co. v. Lyle & Co.*, 58 Fla. —, 50 South. 993. We have also repeatedly held in both civil and criminal cases that it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear. See *Lewis v. State*, 55 Fla. 54, 45 South. 998, and authorities there cited. We have also held that the matter of extending the time for the taking of testimony in an equity suit is for the court below to decide, resting within the sound judicial discretion of such court, and the determination of this question will not be disturbed by an appellate court, unless an abuse of such discretion is plainly made to appear. See *Tuten v. Gazan*, 18 Fla. 751; *Magbee v. Kennedy*, 28 Fla. 158, 7 South. 529; *Long v. Anderson*, 48 Fla. 279, 37 South. 216, 5 Am. & Eng. Ann. Cas. 846; *Braxton v. Liddon*, 55 Fla. 785, 46 South. 324.

The third assignment is "that the said judge of the said court severally erred in overruling the several exceptions of the defendants to the several findings and conclusions of the special master's report in said case, to wit." Then follows a copy of the several exceptions taken by the defendants to such report, only instead of being designated by numerals they are referred to by letters from "a" to "i" inclusive. We have repeatedly held that, in preparing assignments of error, each error relied upon should be clearly and distinctly specified and separately assigned. *Williams v. State*, 58 Fla. 138, 50 South. 749. We further held in the cited case that a single assignment of error attacking a plurality of rulings of the trial court, whether upon the pleadings, the admission or rejection of evidence, or the granting or refusing of instructions to the jury, will be unavailing, unless all of such rulings so grouped en masse are erroneous, and the determination by an appellate court that one of the rulings so attacked is sufficient to dispose of the assignment. Other decisions of this court will be found collected in the cited case. We have also held that the appellate court reviews the action of the trial judge on the report of a master in equity causes, and not the action of the master per se; therefore an assignment of error that "the master erred in the report which he made to the court" cannot be considered. *Braxton v. Liddon*, 55 Fla. 785, 46 South. 324. In the assignment under consideration, each subdivision thereof is prefaced with the statement "that the said master has erred"; the supposed error then being

pointed out. We are of the opinion that the decisions of this court which we have cited are sufficient to dispose of this assignment adversely to the contention of the defendants. No error is made to appear to us in the overruling of the exceptions of the defendants to the master's report.

The fourth assignment questions the correctness of the final decree in allowing the complainant interest upon the sum of \$1,086.90 from the 23d day of October, 1906, at the legal rate. We find that \$1,086.90 was the amount found by the master to be due from the defendants to the complainant, exclusive of the amount of solicitor's fees, which the master fixed from the testimony taken before him at the sum of \$108.69, which solicitor's fee is not included in the final decree and evidently was not allowed by the court. We are of the opinion that no error is made to appear here. The evidence shows that the work was completed and notice to that effect was served on the defendants by the complainant and a demand made for the balance due. The case of *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, would seem to be conclusive upon this point. This case will also be found reported in 53 Am. St. Rep. 239, with an instructive note appended thereto, wherein a number of authorities are collected.

The fifth and last assignment by the defendants is that the "court erred in making said final decree," while the two cross-assignments by the complainant are based upon the overruling of his exceptions to the master's report. We find that upon a number of points there was decided conflict in the testimony and in some respects it is not entirely satisfactory, all of which the master frankly states in his report. The complainant did not recover all he claimed, therefore he is dissatisfied; while the defendants contend that he is not entitled to the amount the master found to be due him. A careful examination of the evidence convinces us that the decree seems to be warranted thereby, and we think substantial justice has been done between the parties litigant. For these reasons we must refuse to disturb the decree. See *Sarasota Ice, Fish & Power Co. v. Lyle & Co.*, 58 Fla. 517, 50 South. 993, and authorities therein cited. We would add that this suit was brought under section 2 of article 11 of the Constitution of Florida. See the case of *McGill v. Art Stone Construction Co.*, 57 Fla. 498, 49 South. 539, and prior decisions of this court there cited.

No error having been made to appear to us, the decree must be affirmed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

TENNESSEE COAL, IRON & R. CO. v. HARMES.

(Supreme Court of Alabama. Feb. 26, 1910.
Rehearing Denied June 30, 1910.)

1. MASTER AND SERVANT (§ 278*)—PERSONAL INJURIES—SUFFICIENCY OF EVIDENCE.

Where plaintiff averred defects in the works, machinery, or plant of the master, and there was evidence that a coupling link was defective, but no evidence of negligence in the failure of the defendant master to discover or remedy that defective condition, or that it arose from negligence for which the master was accountable, the servant could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 286*)—PERSONAL INJURIES—QUESTION FOR JURY.

Where there was no tendency of the evidence to prove facts from which it could be inferred that the injury complained of by a servant resulted from any other source than the existence of a defect in a coupling link, and the trial was had on several counts, which ascribed the injury to defects in the drawhead, the coupling link, and coupling pin of a car, a general affirmative charge on the whole case should have been given.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Thomas Harmes, by his next friend, against the Tennessee Coal, Iron & Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Percy, Benners & Burr, for appellant. W. T. Edwards and J. M. Chilton, for appellee.

McCLELLAN, J. Counts 1, 2, and 6, were those upon which the trial was had. They ascribe the injury to defects in the condition of the ways, works, machinery, or plant of the defendant. In their order they aver that the defect existed in the drawhead, the coupling link, and the coupling pin of a car—hot-pot—about which plaintiff was engaged when injured. While there was evidence that the link was defective, there was no evidence of negligence in failure of the defendant, or of others, to whom that duty was committed, to discover or remedy that defective condition of the link, or that it arose from negligence for which defendant was accountable. Proof to that end is essential to a recovery under such a count. *L. & N. R. R. Co. v. Lowe*, 158 Ala. 391, 48 South. 99; *L. & N. R. Co. v. Davis*, 91 Ala. 497, 8 South. 552; *Tuck v. L. & N. R. Co.*, 98 Ala. 152, 12 South. 168; *L. & N. R. Co. v. Binlon*, 98 Ala. 574, 14 South. 619; *Birmingham, etc., Co. v. Rockhold*, 148 Ala. 126, 42 South. 96—among others.

There was no tendency even of the evidence from which it could be inferred that the injury complained of resulted from any other source than the defective link, thus

leaving the counts ascribing the injury to defects in the drawhead and pin without any support in the evidence. Accordingly the general affirmative charge on the whole case, requested by the defendant, should have been given. Its refusal was error.

Reversed and remanded. All the Justices concur.

CITY OF BIRMINGHAM v. ARMOUR PACKING CO.

(Supreme Court of Alabama. Feb. 3, 1910. Rehearing Denied June 30, 1910.)

LICENSES (§ 32*)—SUBJECTS OF LICENSE—PAYMENT.

Under an ordinance authorizing a city to impose an occupation tax on the sale of packing house products, not including green meats, of \$150, and a tax on each wholesale dealer selling green meats on commission or otherwise of \$250, a packing house paid the city's license tax collector the sum of \$150, which was accepted by him, and a receipt issued to the company, reciting the payment, and purporting to authorize it to do business in packing house products during the remainder of the current year. Subsequently, by an amendatory ordinance, the license tax on each wholesale dealer selling green meats on commission or otherwise, where other packing house products are not handled, was made \$250, and the tax on each wholesale dealer in packing house products generally, including green meats, was made \$400, while each wholesale dealer in packing house products, where no green meats are handled, was made \$50. *Held*, that the language of the receipt issued by the license tax collector, in so far as it was a departure from the law, was not binding upon the city, and that the dealing in green meats is not properly included in the business carried on by packing houses, and therefore the city was justified in imposing an additional tax of \$250 upon the packing houses which dealt in green meats.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. § 32.*]

Appeal from City Court of Birmingham; O. C. Nesmith, Judge.

Action by the Armour Packing Company against the City of Birmingham, to recover \$250, paid under protest, as a part of the license to do business in the city of Birmingham. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

R. H. Thach, for appellant. Tillman, Bradley & Morrow, for appellee.

SAYRE, J. It is asserted, on the authority of *Mefford v. Sheffield*, 148 Ala. 539, 41 South. 970, and cases of like tenor there cited, that, when a license to do a general business has been exacted and paid, a municipality cannot, in the absence of statutory authorization to that effect, subsequently, and during the term covered by the license, construct out of the constituent elements of the business licensed two or more taxable privileges, so as to increase the burden of taxation upon the business originally licensed; and this, not because the issue of a license constitutes a contract of indefeasible obliga-

tion, but because a licensee should not be subjected to the uncertainties that would constantly arise if limitations of which he could have no notice in the beginning should be imposed to meet every change in sentiment or every shift of view upon questions which should have been examined and determined by the taxing power before the license was issued. *Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458; *Lantz v. Hightstown*, 46 N. J. Law, 102. The Legislature is, of course, competent to deal with the subject as it deems best. The asserted doctrine in respect to the taxing power of municipal corporations is conceded; but we think the appellee's application of the principle to the facts of the case in hand cannot in reason be sustained.

It is stated in the bill of exceptions that in February, 1908, the appellant municipality, through its authorized license tax collector, accepted the sum of \$150 from appellee, which thereupon received a receipt, reciting the payment aforesaid, and purporting to authorize it to do business in packing house products during the remainder of the current year. At that time an ordinance of the city of Birmingham imposed occupation taxes as follows:

"183. Green meats. Each wholesale dealer selling on commission or otherwise, \$250.00."

"311. Packing house products, not including green meats. Each dealer or broker for, \$150.00."

In March subsequent the city adopted an amendatory ordinance, so much of which as seems to be of concern in this connection we quote:

"183. Green meats. Each wholesale dealer selling on commission, or otherwise, where other packing house products are not handled, \$250.00."

"311. Packing house products. Each wholesale dealer in packing house products generally, including green meats, or broker for, \$400.00. Each wholesale dealer in packing house products, where no green meats are handled, and where principal business, or broker for, \$50.00."

The comprehensive language of the receipt, which seems to have been issued and received as a license, was the language of the license tax collector, rather than the language of the municipal law, and was, to the extent of its departure from the law, of no consequence. By that law the appellee was advised that the license to which it was entitled upon the payment of \$150 was a license to deal in packing house products, not including green meat, and so its case must fall outside of the influence of the reason underlying the cases referred to.

But it is agreed between the parties that green meat is a packing house product, that all dealers in packing house products sell

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

green meat, and that its sale is an essential and necessary part of the business of dealers in, or brokers for, on commission or otherwise, packing house products. On a review of the ordinances mentioned, and of the facts agreed, it is seen that appellee's position must be resolved into this: The business of selling packing house products and the business of selling green meat are necessary parts of but one business, which by nature is incapable of being separated into constituent parts for the purposes of municipal taxation. We are perhaps constrained to accept the agreement made. But it is not agreed, nor could it well be agreed, in keeping with facts of common knowledge, that the selling of packing house products in general is an essential and necessary part of the business of selling green meats. The fact is otherwise. Green meats are, from the packing house point of view, a raw material. Butchering, without more, has never been considered a manufacture. On the other hand, the business carried on by packing houses is a highly organized form of industry, which converts slaughtered animals into many shapes, and utilizes products of which the mere business of dealing in green meats takes no notice. Packing house products, generally so called, are the manufactured products of the packing house business. Most frequently we understand by them the cured, or cured and packed, products of the industry, products capable of indefinite transportation and preservation, without the aid of artificial cold. Some of them are to be found in every grocery store. Green meats, on the other hand, must be sold soon after slaughter or be preserved in cold storage. We do not doubt, therefore, that there is a substantial distinction between the two businesses, affording a just basis of discrimination between the two in the matter of taxation.

It results that the judgment of the trial court must be reversed, and a judgment will be here rendered for the defendant (appellant).

Reversed and rendered.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

POLLAK v. WINTER.

(Supreme Court of Alabama. Jan. 18, 1910.
On Rehearing, June 30, 1910.)

On rehearing. Former opinion affirmed.

For opinion on former hearing, see 51 South. 998.

Brown & Kyle and Smith & Smith, for appellant. Gunter & Gunter, for appellee.

Note by ANDERSON, J. After this case was put out, it was again carefully considered upon rehearing, the opinion was consid-

ered as sound, and the application was overruled. After this one of the concurring judges put it back on the rehearing docket, and the question was considered en banc; and while Justice EVANS withdrew his concurrence, and dissents, the opinion is concurred in by DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., who, with the writer, constitute a majority of the court. Justice SIMPSON was absent, and Justice MAYFIELD did not wish to dissent or concur.

WOODWARD IRON CO. v. BROWN.

(Supreme Court of Alabama. June 16, 1910.)

1. JUDGMENT (§ 337*)—PROCEEDINGS TO SET ASIDE—STATUTES.

Code 1907, §§ 4142-4145, embodied in chapter 85, entitled "Executions and Judgments," and article 7 entitled "Satisfying, Annulling or Setting Aside of Judgments," which provide for motions to satisfy judgments or to set aside judgments or entry of judgments, and for a bill of exceptions and an appeal within 30 days, etc., refer to motions made to set aside judgments for irregularities, and do not refer to the ordinary motion for a new trial.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 337.*]

2. NEW TRIAL (§ 1*)—POWER OF COURT.

Common-law courts have inherent power to grant new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

3. NEW TRIAL (§ 117*)—MOTION—TIME FOR APPLICATION.

While at common law the judgment was not rendered until the motion for new trial was disposed of, the usage in Alabama is to enter the judgment when the verdict is returned and the defeated party has, during the term of the court, to move for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-241; Dec. Dig. § 117.*]

4. APPEAL AND ERROR (§ 345*)—DECISIONS REVIEWABLE—PENDENCY OF MOTION FOR NEW TRIAL—EFFECT.

A motion for new trial suspends the judgment until disposed of and until then the judgment does not become effective for appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

5. APPEAL AND ERROR (§ 867*)—REVIEW—RULINGS ON MOTION FOR NEW TRIAL—REVIEW.

Where a new trial is granted, only such errors as affect the granting of the motion can be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

6. APPEAL AND ERROR (§ 839*)—TIME TO APPEAL—STATUTES.

A judgment granting a new trial is the final action of the court in the case, and an appeal therefrom is governed by Code, § 2368, as amended by Acts 1909, Sp. Sess. p. 165, authorizing appeals within 12 months, except where a different rule is prescribed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 839.*]

7. NEW TRIAL (§ 39*)—GROUND—ERROR IN INSTRUCTIONS.

The court granting a new trial on the ground of errors in instructions cannot be plac-

ed in error where any of the instructions is erroneous.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57, 58; Dec. Dig. § 39.*]

8. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSONS — RELATION OF PARTIES — FELLOW SERVANTS.

A servant, though paid by defendant, is a servant of an independent contractor where he is under the management and control of the contractor, and defendant is not liable for injuries to an employé of the contractor caused by the negligence of such servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

9. MASTER AND SERVANT (§ 329*)—FELLOW SERVANTS—EVIDENCE.

Where, in an action for a personal injury, the complaint alleged that plaintiff was in the employ of an independent contractor, and that the negligence of an employé of defendant caused the injuries complained of and the evidence showed that the negligent party was not the servant of defendant as to the act causing the injuries, but was a servant of the independent contractor, defendant was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 329.*]

10. TRIAL (§ 253*)—INSTRUCTIONS—DIRECTION OF VERDICT.

A charge which requires a finding for defendant on one count is improper where there are several counts based on different acts of negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

11. NEW TRIAL (§ 39*)—GROUNDS—MISLEADING INSTRUCTIONS.

The court may in its discretion grant a new trial for the giving of a charge which should not have been given.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Walter Brown against the Woodward Iron Company. There was an order granting a new trial after judgment for defendant, and it appeals. Affirmed.

The following are the charges referred to in the opinion: "(A) If the jury believe from the evidence that the cause of the derailment of the first car was a collision between that car and another car following it, and that all of plaintiff's injuries were proximately caused by the second car, and that the second car got loose and ran down on plaintiff as a result of the negligence of Lonnie Chamblee, they must find for the defendant. (B) If the jury believe the evidence, they cannot find for the plaintiff under the fifth count of the complaint. (C) If the jury believe from the evidence that the condition of the track in said heading at the place of the accident, which caused the wreck of the first tram car, was not such that the plaintiff was likely to suffer injury, or said condition of track was such that a reasonably prudent man would not have been called upon to put the track in a better state of repair, because of the fact that it was

apparently in good condition, you must find for the defendant under the second count."

Chas. A. Calhoun and Cabaniss & Bowie, for appellant. V. L. Allen and James M. Hanby, for appellee.

SIMPSON, J. The appellee makes a motion to dismiss this appeal, on the ground that it is not taken within the time prescribed by law. In the original case of *Walter Brown v. Woodward Iron Company* a verdict was rendered for the defendant on March 9, 1909; on a subsequent day of the term a motion was filed to "set aside the verdict and judgment" and to grant a new trial. This motion was regularly continued until June 12, 1909, when the verdict of the jury was set aside and a new trial was granted; and it is from this judgment that the appeal is taken.

The contention of the appellee is that, under section 4145 of the Code of 1907, this appeal should have been taken "within thirty days from the rendition of the judgment or order," and the appeal, as a matter of fact, was not taken until November 22, 1909. Said section is a part of article 7 of chapter 85 of the Code, the title of the chapter being "Executions and Judgments," and the title of the article, "Satisfying, Annulling, or Setting Aside of Judgments."

Section 4141 relates to "motion to enter satisfaction of judgment or decree"; section 4142, to "motion to set aside judgment or decree, or to set aside entry of satisfaction"; section 4143 provides that "no judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contained a substantial cause of action"; section 4144 provides that if the motion is not contested the costs shall be adjudged against the applicant, and if contested, against the unsuccessful party; and section 4145 provides that a bill of exceptions may be taken and an appeal must be in 30 days. It is evident that these sections do not refer to the ordinary motion for a new trial, but to motions which may be made for setting aside judgments, for irregularities, imperfections, etc. This is made more evident by the fact that section 4142 provides that notice of the motion must be served on the adverse party for 10 days, if he is within the state, or by advertisement for 3 weeks, if the party be out of the state, while notice of 1 day is sufficient on a motion for a new trial. Rule 22, p. 1522, Code.

Common-law courts have inherent power to grant new trial, and at common law the judgment was not rendered until the motion for new trial was disposed of (29 Cyc. 722, 727), but the usage in our courts and others is to enter the judgment when the verdict is returned, and the party has during the term of the court to make the motion for a new

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trial. The effect of the motion is to suspend the judgment until the motion is disposed of, and if it is granted, it "wipes out the verdict; no judgment can be rendered on it." Hilliard on New Trials, p. 59. Hence our courts hold that the judgment, having been suspended, does not become effective for appeal until the motion for a new trial is disposed of (*Florence C. & I. Co. v. Field*, 104 Ala. 471, 16 South. 538; *Barron v. Barron*, 122 Ala. 194, 25 South. 55; *State ex rel. Hamilton v. Kitchens*, 148 Ala. 385, 41 South. 871), but that, when the new trial is granted, only such errors as affect the granting of the motion can be considered. *Karter v. Peck & Bro.*, 121 Ala. 636, 25 South. 1012; *Chambers v. Morris*, 144 Ala. 626, 39 South. 376. This necessarily follows, for if the verdict and judgment on it are wiped out there is no judgment in the case to appeal from, and the judgment on the motion for a new trial becomes the final action of the court in the case. This appeal is governed by the statute in regard to appeals from final judgments. Section 2868 of the Code, as amended by Acts 1909, Sp. Sess. p. 165, also provides that all appeals under that chapter, except where a different rule is prescribed, must be taken within 12 months. The motion to dismiss the appeal is overruled. The application for a new trial was based entirely on the rulings of the court, which are claimed to be erroneous. If either of said charges was erroneous, the court cannot be placed in error for granting the new trial, but, if neither was erroneous, the new trial should not have been granted.

All of the counts of the complaint allege that the plaintiff was an employé of Smith Tally, or of Tally & Shores, independent contractors. The first, second, and third counts rest upon the breach of duty on the part of the defendant to provide a safe place for defendant to work, the defects claimed being in the track on which the car was running.

The fourth count claims that it was the duty of defendant's servants "to chock or block the car on said track," and that the injury was received as a proximate consequence "of the negligence of defendant's servant, a mule boy," who failed to chock or block the car, thereby "allowing or causing said car to run down, upon and against the plaintiff."

The fifth count claims that the injuries resulted from the negligence of defendant's servant, Lonnie Chamblee, who was in charge of a car, and who "negligently caused or allowed the said car to run down upon, or against the plaintiff." The plaintiff testified that the track at this place had been in bad condition for some time, on account of rotten cross-ties, the rails being of different sizes, and two rails having a surface bend at the end where "due to be spiked down"; that he had reported the matter; that they ceased work one day for the re-

pairs to be made and he heard them working there, but did not know whether the repairs had been made; that the cars had been derailed there several times; that just as he got to this part his car was "wrecked," and he, while standing on the bumper of his car, which was the first one (that is, the one farthest from the heading), was thrown to the ground, and the second car came on and cut off his leg; that, at the time of the wreck he could not see in front, but knew that two wheels were off the track because one of his legs was saved. Dick Shores testified that he examined the track the morning after the accident; that his best recollection is "that it was the rear end of the first car, coming from the heading, and the front end of the second car" that were off the track; that the track was bad, not surfaced, and had surface kinks on the rails, but said afterward that he could not be positive just what wheels of the two cars were off the track, and again, that he did not know just how the cars were off the track. Ed Brown (also witness for plaintiff) testified that as soon as he heard the noise of the wreck, he went to the place and found "the rear car straddle of the rail, and the front wheels of the front car off the rail the same way, and the rear end kicked up." The testimony of defendant's witnesses was, in effect, that only the front wheels of the rear car, and the rear wheels of the front car, were off the track, the rear of the rear car being tilted up, and the cars locked together. One of the plaintiff's witnesses had testified that he saw the cars when they started down the incline, that plaintiff's car moved down properly, but that the man in charge of the rear car let it get away from him and it proceeded rapidly down the track, towards the other car, which had preceded it. Expert witnesses, on the part of defendant, testified that the accident was evidently caused by the rear car coming violently in contact with the front car; that if a car is derailed by a rock on the track the front wheels would go off; if derailed by spreading rails the wheels would drop in between the rails; and if derailed by collision from a car in the rear the rear wheels would be off the track.

The first ground stated in the motion for a new trial is that the court erred in giving the charge A. While there is evidence tending to show that Lonnie Chamblee was paid by the defendant, yet the evidence is without conflict that he was under the entire management, orders, and control of the independent contractors, which, under the authorities, made him the servant of the independent contractors, and not of the defendant. 26 Cyc. p. 1285, and notes; *Dallas Mfg. Co. v. Townes*, 148 Ala. 146, 151, 152, 41 South. 988, and authorities cited. The case of *Standard Oil Company v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 490, does not in the least militate against this

position. In that case the stevedore was loading the vessel, but the hoisting and lowering were being done by the defendant, and, as the court said, "for reasons satisfactory to it, the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman, were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control." There was no error in giving charge A.

There was no error in giving charge B. The count itself alleges that the plaintiff was "in the employment of Smith Tally, an independent contractor," and charges the negligence to Lonnie Chamblee "in the employment of the defendant." Even if that were true, said Lonnie Chamblee would not be a fellow servant of the plaintiff, but the evidence, as before stated, shows that said Chamblee was not the servant of the defendant in moving said car. Consequently there was no error in giving charge B.

The appellant claims that charge C was, in effect, a charge that the plaintiff could not recover under the second count. It is evident that, according to the defendant's testimony, the accident was not caused by any defect in the track, in which case the plaintiff could not recover, while the testimony for the plaintiff, though not clear and satisfactory, might afford an inference that the defect in the track brought about the wreck. The expressions in charge C are not the equivalent of stating that the track was in a reasonably safe condition, and, in addition, the charge requires a finding for the defendant on that count, which is improper where there are several counts. The charge is more than misleading. Consequently, said charge should not have been given, and the court, in the exercise of its discretion, was authorized to grant the new trial.

The judgment of the court is affirmed. Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

COLLEY v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

1. CRIMINAL LAW (§ 1109*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for sale of liquor in violation of law, though evidence as to the arrest and trial for the same offense of a clerk at the place managed by defendant was clearly erroneous, error in its admission was subsequently cured by the court's limiting it to the purpose only of fixing the time and occasion, and of identifying the sale relied on to support a conviction; there

being evidence from which the jury might conclude that defendant was as much liable for the sale as his clerk, who sold and delivered the beverage and was convicted for this sale.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. § 1169.*]

2. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUESTS—CHARGES IN BULK.

If some of the charges asked in bulk are clearly bad and properly refused, that would justify the court in refusing all.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

3. JURY (§ 83*)—COMPETENCY OF JURORS—EXEMPTION FROM JURY DUTY.

That one may be exempt from jury duty does not ipso facto render him subject to challenge for cause.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 400; Dec. Dig. § 83.*]

4. JURY (§ 110*)—OBJECTIONS TO JURORS—FAILURE TO PEREMPTORILY CHALLENGE.

If a juror were subject to challenge for cause on account of exemption from duty, no injury could have resulted, if the objecting party failed to eliminate him by a peremptory challenge, as he could and should have done.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520; Dec. Dig. § 110.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Joe Colley was convicted of violating the prohibition law, and he appeals. Affirmed.

Goodwyn & Ross, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. Defendant was charged with violating the prohibition law. He and one Mack Hasson were operating a soft drink place in Bessemer. They were not owners, but were clerks; the management of the place being in the charge of the defendant on this occasion. Mack Hasson was a negro, and was under the control of defendant. Mack sold to the negro customers, and defendant to the whites. Defendant would place the bottles out on the counter, and Mack would deliver them to the customers, and collect the price, and pay it over to the defendant.

The place was suspected of violating the prohibition laws, and was watched by two policemen; and one of the bottles so sold by Mack to a customer was taken from the customer on the spot, and one of the policemen testified that it was lager beer. The defendant did not handle this particular bottle, but Mack got it from the same place or receptacle from which defendant had been getting other bottles and delivering to Mack and customers. Mack was convicted in the mayor's court for violating the prohibition laws, or an ordinance of the city of Bessemer, as to this particular sale.

A great deal of evidence as to this arrest and trial was offered by the state, and admitted by the court over defendant's objections. Some of this evidence was clearly erroneous; but the error in its admission was subsequently cured by the court's limiting it to the purpose only of fixing the time and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

occasion, and of identifying the sale relied upon to support the conviction. There was sufficient evidence from which the jury might conclude that defendant was liable for this sale—as much so as Mack Hasson, who sold and delivered the beverage. If so, of course, he was equally guilty with Mack; but the mere fact that Mack was convicted in the mayor's court as for this sale was not evidence against defendant, except for the purpose of fixing the date and occasion, and it was so limited by the court for this purpose only.

While the proof in this case is far from being necessarily conclusive of guilt, it was sufficient to carry the question to the jury; and the court did not err in refusing the general affirmative charge for defendant.

The other charges were asked in bulk. Some of these were clearly bad, and were properly refused, and this would justify the court in refusing all.

The fact that a person may be exempt from jury duty does not ipso facto render him subject to challenge for cause. We do not decide that the juror in question was exempt on account of the fact that he was a notary and ex officio justice of the peace, because it is not necessary. Even if so, it would not be ground for challenge for cause; and, if so, the record fails to show that the defendant exercised any of his peremptory challenges. Consequently no injury could have resulted. The questionable juror could and should have been eliminated by a peremptory challenge.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

RAYFIELD v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

1. INTOXICATING LIQUORS (§ 167*)—UNLAWFUL PURCHASE—AIDING.

Mere aiding in the unlawful purchase of liquor, though defendant did not himself sell the liquor to the purchaser, constituted a violation of Code 1907, § 7363, declaring that any person who aids and abets in the unlawful purchase of liquor shall be punished, etc.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 182, 183; Dec. Dig. § 167.*]

2. CRIMINAL LAW (§ 773*)—PLEAS—INSANITY.

Where accused pleaded not guilty, and not guilty by reason of insanity, an instruction that, if the jury believed the evidence beyond a reasonable doubt, they could not acquit defendant, did not conclude him on his plea of insanity; the court having also specially charged on the issue of insanity, and predicated his acquittal on that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828; Dec. Dig. § 773.*]

3. CRIMINAL LAW (§ 331*)—INSANITY—BURDEN OF PROOF.

The burden is on accused to sustain a plea of not guilty by reason of insanity by evidence

to the reasonable satisfaction of the jury, as required by Code 1907, § 7175.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 331.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Tom Rayfield was convicted of violating the liquor law, and he appeals. Affirmed.

Tate & Walker, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. In any possible view of the evidence in this case the defendant could not be acquitted under his plea of not guilty. If he merely aided, etc., in the unlawful purchase, etc., of the liquor in question, and did not himself sell the liquor to Bailey, he violated Code 1907, § 7363. That statute provides for a conviction of its violation under an indictment in the usual form. *Darlington v. State*, 50 South. 396. If he sold the liquor to Bailey, he was, of course, guilty beyond question.

There was a plea of not guilty by reason of insanity. The charge, given at the request of the state, instructing that, if the jury believed the evidence beyond a reasonable doubt, they could not acquit the defendant, did not conclude against defendant on his plea of insanity. As was proper, the defendant asked, and the court gave, special charges submitting, in appropriate form, the issue of his insanity vel non to the jury, and predicated his acquittal on that issue. Under such plea the burden is on the defendant, and the requisite measure of certainty of proof to sustain the plea is set down in Code 1907, § 7175.

There is no error in the record, and the judgment is affirmed.

Affirmed.

SIMPSON, MAYFIELD, and EVANS, JJ., concur.

JOS. ROSENHEIM & SONS et al. v. LACEY et al.

(Supreme Court of Alabama. June 2, 1910.)

COSTS (§ 277*)—PAYMENT AS CONDITION TO PROSECUTION OF OTHER ACTION.

Where suit of the trustee in bankruptcy to set aside sales of the property of the partnership of which bankrupt was a member and to subject the property to the claims of the partnership creditors was dismissed on the ground that he could not maintain it, the creditors may not, as a condition to prosecuting their suit for the same relief, be compelled to pay the costs adjudged against the trustee; they in no event being liable for them, and Code 1907, § 2490, providing that, where suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record, and section 3667 providing that, when judgment is rendered against plaintiff, in a suit brought in the name of a nominal plaintiff for the use of another,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment for costs must be against the beneficiary, having no application.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048, 1054; Dec. Dig. § 277.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by Jos. Rosenheim & Sons and others against Ollie V. Lacey and others. Bill dismissed, and complainants appeal. Reversed and remanded.

C. L. Odell, for appellants. Pinckney Scott, for appellees.

MAYFIELD, J. There was a partnership in Jefferson county, the firm name of which was Lacey & Massey, composed of Steve Lacey and George Massey. Lacey was adjudicated a bankrupt, and A. S. Cowan was appointed receiver of the bankrupt's estate. He, as such receiver, filed a bill to set aside certain sales of the partnership property and to subject the property to the claims of the partnership creditors. It was ruled by this court, on appeal in that case (50 South. 281), that he could not maintain such bill, and it was dismissed without prejudice. The creditors then filed this bill, seeking the same relief which was sought in the other suit. The chancellor, on motion of respondents, ordered the complainants to pay the costs of the first suit by the assignee before allowing them to proceed with this suit. The respondents failed or declined to pay such costs within the time specified in the order of the chancellor, and the chancellor subsequently, to wit, on the 20th day of November, 1909, rendered a decree dismissing complainants' bill for the failure to comply with such previous order of the court; and it is from this decree that complainants appeal.

Though the assignee in the first suit sought to subject the identical property, the subject of this suit, to the claims of the creditors of the partnership, who are the complainants in this suit, yet these complainants were not liable for the costs of the original suit, and are not now liable therefor. It would, indeed, be strange if they could be made to pay costs for which they were never liable as a condition precedent of asserting their rights in a court of equity. While they might have been beneficiaries of the proceeds of the first suit, had it succeeded, yet they did not institute that suit. Indeed, they could not have prevented the suit, nor have controlled the assignee in the matter. He, as assignee, was primarily liable for the costs of the first suit, and he, individually, was secondarily liable; but in no event could these complainants have been made liable for such costs. Consequently the chancellor erred in requiring them to pay such costs as a condition precedent to prosecuting this their own suit, and also in dismissing their bill upon their failure and refusal to comply with such order.

Sections 2490 and 3667 of the Code of 1907, as to nominal and real parties, do not apply.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

TAPIA v. BAGGETT.

(Supreme Court of Alabama. June 2, 1910.)

1. BILLS AND NOTES (§ 523*)—ACTIONS—EVIDENCE.

In an action on a note, where plaintiff introduced the note, with an indorsement transferring it to him, and testified that he bought it in due process of business, before maturity, for its face value, he made out a prima facie case.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.*]

2. INSURANCE (§ 187*)—ACCEPTANCE OF POLICY—PAYMENT OF PREMIUM.

Where insured received a life policy, and retained it three or four months, without objection and without making any effort to reject it, he is liable on his note for the initial premium.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 187.*]

Appeal from Circuit Court, Conecuh County; J. C. Richardson, Judge.

Assumpsit by J. R. Tapia against Jesse T. Baggett. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The action was on a note given by the defendant Baggett to J. C. Hogue for the initial premium on an insurance policy. The pleas were: (1) The general issue; (2) want of consideration; and (3) that the policy was to be made payable to defendant's wife according to the agreement, but was in fact made payable to the defendant, and that defendant declined to accept this policy, and that the same is now in the hands of the plaintiff. The plaintiff introduced the note, with the indorsement transferring it to him, and testified that he bought it in due process of business, before maturity, for the face value of the note. The note is negotiable. As to the length of time that the policy was kept, it seems to be agreed that it was retained by the insured three or four months before it was returned.

The court refused the following charges to the plaintiff: (1) "If the jury are reasonably satisfied that the defendant received the policy and kept the same for four months, then your verdict should be for the plaintiff." (2) "The court charges the jury that, if the evidence of Baggett shows that he kept the policy three or four months without objection, you should find for the plaintiff." (3) "The court charges the jury that, if they are reasonably satisfied from the evidence that the defendant kept such policy for a period of four months before

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

returning the same to Hogue or Tapia, you must return a verdict for the plaintiff." (4) General affirmative charge to find for plaintiff.

Edwin C. Page, for appellant. John D. Burnett and James A. Stallworth, for appellee.

ANDERSON, J. The plaintiff introduced the note, containing an assignment thereof, and made out a prima facie case. The defendant failed to prove his second plea, "want of consideration." There was a consideration, whether the policy should have been made payable to him or his wife. He also failed to establish his third plea, which, among other things, averred that he did not accept the policy. The undisputed evidence shows that he not only accepted it, but retained it for three or four months, without objection or making any effort to return it. Had the defendant died while in possession of the policy, during the three or four months after the issuance thereof, having made no objection or protest, the company could not have defeated the payment of same upon the ground that it had not been accepted.

The plaintiff was entitled to the charges requested, and which included the general charge. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and SAYRE, JJ., concur.

JACKSON v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

1. HOMICIDE (§ 168*) — ADMISSION OF EVIDENCE.

In a prosecution for murder, claimed to have been committed by accused and other miners who were on a strike by dynamiting the mining company's house No. 158, a state's witness, a nonstriking employé, who knew accused, was properly asked whether accused lived in house No. 159, which was next to 158, before he moved off the company's premises.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 304; Dec. Dig. § 168.*]

2. CRIMINAL LAW (§ 365*)—EVIDENCE—RES GESTÆ.

In a prosecution for homicide by dynamiting house No. 158, belonging to a mining company, claimed to have been done by accused and other strikers, in which the evidence tended to show that a number of the company's houses were blown up at the same time by the same persons as a part of a common design, a witness who testified that he went to two houses that were blown up, and that persons were then living in all the houses, including No. 158, could testify as part of the res gestæ that there were persons injured in the other houses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

3. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS—SILENCE IN FACE OF ACCUSATION.

In a prosecution for murder, claimed to have been committed by accused and other

striking miners by dynamiting the mining company's house in which decedent was, the officer who arrested accused could testify that immediately after he did so he called accused's attention to the condition of his pants, and told him that he had done what he said he was going to do, and what they had him in jail for threatening to do; that his pants were wet at the knees and showed that he had been out in the grass, and that he was the guilty party, to which accused did not reply, though not under restraint at the time; that one accused of guilt remained silent when he had an opportunity to deny the accusation, being admissible as a circumstance tending to show guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

4. HOMICIDE (§ 325*)—APPEAL—EVIDENCE—PRESENTATION OF OBJECTION IN LOWER COURT.

In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house, the court will not be put in error for overruling a general objection to a question to a witness, whether another who was arrested with accused made any statement in accused's presence, the answer to which was that he stated in accused's presence that accused and several others were with the crowd that left the striking miners' tents the night before the dynamiting and came back thereafter; the question being capable of eliciting competent evidence, and no motion having been made to exclude the answer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 693; Dec. Dig. § 325.*]

5. CRIMINAL LAW (§ 531*)—CONFESSIONS—LAYING PREDICATE.

In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house, a witness was asked if accused about an hour or two after the dynamiting did not make a statement as to the dynamiting as persons were passing, and answered that he did, and that such statements were voluntary, and was then asked what accused said and did at that time. *Held*, that the questions and answers laid a proper predicate for proving a confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. § 531.*]

6. WITNESSES (§ 287*)—EXAMINATION—REDIRECT EXAMINATION.

In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house, a state's witness who was asked on cross-examination if he did not meet and converse with some persons while he was going through the camps where the explosion occurred, who told him that the strikers had gone toward the Dagos' camps, could be asked on redirect examination what such persons told witness as to the way the people ran, confining himself to the same conversation about which accused inquired; the state being entitled to have the witness state the whole of the conversation, a part of which accused had brought out on cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1002; Dec. Dig. § 287.*]

7. CRIMINAL LAW (§ 363*)—EVIDENCE—RES GESTÆ.

In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house in which decedent was, a witness who

testified that after he heard the explosion he heard pistol and gun shots in the direction where the last explosion occurred, could be asked if he could tell from the sound whether they were pistol or gun shots or both; the question calling for res gestae evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 863.*]

8. CRIMINAL LAW (§ 383*)—EVIDENCE—CERTAINTY.

In a prosecution for homicide, claimed to have been committed by accused and other striking miners by dynamiting a house belonging to the mining company, the sheriff, who testified that he knew accused, who had been in jail before, could be asked as to a conversation between accused and other persons (negroes), who were all in one cell in the jail on a certain night after they were arrested for the homicide, and when they did not know that witness was present and within five feet of them, in which he was sure that he recognized accused's voice, the question calling for admissions or statements made by others in accused's presence tending to implicate accused with the crime charged, and the answer was admissible that accused said that they must stick together; that another said that when they got out they would go right back, and another jointly indicted with accused said it would be like some of the negroes to turn state's evidence, when accused said if he ever got into anything else he did not want such a damn big crowd; it being for the jury to determine whether it was in fact accused's voice, and the weight of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 849, 851; Dec. Dig. § 883.*]

9. CRIMINAL LAW (§ 406*)—ADMISSIONS—IMPLIED ADMISSIONS.

A statement by one charged with homicide, committed by dynamiting a house, that if he ever got into anything else he did not want such a damn big crowd was an implied admission that he participated in the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 406.*]

10. JURY (§ 67*)—SUMMONING—JURY OFFICERS—DISQUALIFICATION.

That the sheriff actively assisted in working up evidence against an accused was not contrary to his official duties, so as to disqualify him from summoning jurors to try the case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 299; Dec. Dig. § 67.*]

11. CRIMINAL LAW (§ 1043*)—APPEAL—REVIEW—GENERAL OBJECTION.

A state's witness, who testified that he was in the room when accused and others arrested with him for committing the crime were brought into the room, was asked whether he overheard a conversation while one of those arrested was there, and if that was the only conversation participated in by such person, and answered that it was, and that he was present during the whole conversation, and was then asked to state the whole of the conversation occurring while such other was in the room. *Held*, that the question could have been answered by competent evidence, and the court will not be put in error for overruling a general objection thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2854, 2855; Dec. Dig. § 1043.*]

12. HOMICIDE (§ 174*)—ADMISSION OF EVIDENCE.

In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house, a question to a witness who had affirmatively answered a question whether he

went as a deputy sheriff to the tent where accused was, could be asked who else was in the tent with accused; the evidence tending to show that accused and another jointly indicted with him had been together at the time and place of the dynamiting, and that each was dressed in a particular way at that time and were still so dressed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

13. CRIMINAL LAW (§ 683*)—RECEPTION OF EVIDENCE—REBUTTAL.

Where, in a homicide case, accused's witness had stated who was at the place where accused was arrested at that time, and named accused and another, the state could inquire into the same matter on rebuttal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

14. CRIMINAL LAW (§ 686*)—TRIAL—ADMISSION OF EVIDENCE—TIME OF OFFERING.

The trial court could in its discretion allow additional evidence concerning a matter already testified to by witnesses for the state before the state first rested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1619; Dec. Dig. § 686.*]

15. HOMICIDE (§ 174*)—ADMISSION OF EVIDENCE.

Where, in a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house in which decedent was, the state's theory was that accused and others arrested at the time were co-conspirators, and that on the night of the dynamiting they went through wet grass and dew, evidence was admissible that their shoes were wet, and that their pants were wet up to the knees when arrested shortly after the dynamiting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

16. CRIMINAL LAW (§ 683*)—REBUTTAL—SCOPE.

Where accused had denied remaining silent when charged with committing a crime, the state could offer evidence in rebuttal tending to show the contrary; the state being entitled to offer testimony rebutting that introduced by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

17. CRIMINAL LAW (§ 686*)—TRIAL—RECEPTION OF EVIDENCE.

While it is usually the better practice to compel the state to offer all its evidence upon a given matter, in making out its case in the first instance, it is within the trial court's discretion to admit it afterwards.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1620; Dec. Dig. § 686.*]

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

Ed Jackson was convicted of murder in the first degree, and he appeals. *Affirmed*.

Frank S. White & Sons and Peters & Wallace, for appellant. Alexander M. Garber, Atty. Gen., and Borden H. Burr, Sol., for the State.

EVANS, J. The defendant was indicted and tried for the murder of James Wright. He was convicted of murder in the first degree and sentenced to imprisonment in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

penitentiary for life. The undisputed evidence showed that the said James Wright was killed in Acton, Shelby county, in house No. 158. This house belonged to the Alabama Fuel & Iron Company, a corporation. Dynamite was exploded under this house (No. 158) and as a result thereof the said James Wright was killed. He and a man by the name of Tom Hudson were asleep in the house at the time of the explosion. There was, at the time, a strike among the union labor employes of the said Alabama Fuel & Iron Company, and defendant was vice president of the union. Defendant was jointly indicted with several others. The theory of the state was that the murder was the result of a conspiracy of defendant and several others. The evidence connecting defendant with the crime was circumstantial except that tending to show his confession. On the trial the only exceptions reserved were to the rulings of the court on the admission of evidence. The boy James Wright and the man Tom Hudson refused to go out on the strike and were, at the time, in the employ of said Alabama Fuel & Iron Company. The defendant had worked with said company before he went out on the strike. House No. 159 was next to and very near house No. 158. Among other things state's witness, Tom Hudson, testified that he knew defendant, Ed Jackson—he worked there and went out on the strike. State then asked the following question: "Had he lived at number 159—had he lived at house number 159 before he moved out of the company's house and off their property?" Defendant objected to the question, the court overruled the objection, and defendant duly excepted. The court was without error in its ruling as the question called for matter entirely relevant and proper, as tending to show that defendant was familiar with the location where the crime was committed, having lived in the adjoining house.

Dr. Strock, a witness for the state, testified among other things that he went to two houses that were blown up; that the house where the boy was killed was No. 158; that persons were living in all of the houses at the time. The state then asked the question: "Were there any other persons injured in the other houses?" Defendant objected to the question; the court overruled the objection, and defendant excepted. Witness answered, "Yes," and defendant moved to exclude the answer. The court overruled the motion to exclude, and defendant duly excepted. In the light of the evidence which tended to show that the blowing up of all the houses was done upon the same occasion, by the same persons, and was all part of a common design, the ruling of the court was proper. Upon this theory of the case, the matter testified to was part of the res gesta.

On examination of W. F. Fallon, a witness for the state, he stated among other

things: "I arrested Ed Jackson and General Lee and handcuffed them together, and arrested them for the dynamiting that had killed the boy." The state then asked the witness if he (witness) made any statement in the presence of Ed Jackson, the defendant, at the time in reference to the dynamiting. The witness stated that he did. Thereupon the solicitor asked him if at the time any threats were made toward Ed Jackson, any force used of any kind against him, any hope of reward or inducement held out to him, or any fear of punishment of any kind extended to him. Witness stated there was not. Thereupon witness was asked to state what he said to Ed Jackson in connection with the dynamiting for which he had him under arrest. Defendant objected to this question and duly excepted to the court's overruling his objection. The witness answered as follows: "I called his attention to the condition of his pants, and I said, 'Well, Ed, you have done what you said you were going to do, and what we had you in jail for making threats to do. Look at your pants there, they are wet to your knees, and show that you have been out in this grass, and shows that you are guilty. It looks as if you had just come in.'" The state then asked the witness, "Did he make any reply or say anything to this accusation?" The defendant objected to the question; the court overruled the objection, and the defendant duly excepted to the action of the court. The witness responded "He did not state anything at all, just stood mum." As is said in Bishop on Criminal Procedure, vol. 1 (8d Ed.) § 1264, "Where one, in the presence of the accused, makes a declaration involving or implying his guilt, and there is opportunity for reply, and the surroundings and persons are such as render it ordinarily expedient and proper, yet he remains silent, the entire fact may be shown with the other evidence to the jury. The weight of such fact will vary with the circumstances." Or as stated in 12 Cyc. on page 421, "Where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or deny is relevant as tending to show his guilt. His silence alone, however, raises no legal presumption of guilt. Its effect is for the jury; and from it, in connection with other facts and circumstances, they may infer that he is guilty." From a consideration of the foregoing authorities, we hold that the court properly ruled in admitting the evidence. But the evidence being admissible the weight to be given it was for the jury to determine.

The state asked the said witness W. F. Fallon if Will McDade, who was shown to have been one of the parties arrested for this dynamiting, made any statement in the presence of defendant. Witness stated that he did. Thereupon the state asked the witness to state what was said by McDade in the presence of defendant at this time. The defendant objected, the court overruled the

objection, and defendant excepted to the ruling of the court. The witness answered that "Will McDade stated in the presence of defendant that he, Ed Jackson (the defendant), and several others, whom he pointed out and named, were with the crowd that left the striking miners' tents that night before the explosion and came back after the explosion." There was no motion to exclude this answer, and as the question was capable of eliciting evidence both competent and legal, the court will not be held in error for overruling the general objection to the question. If the answer was, for any legal reason, objectionable, the defendant could have moved to exclude it, and thereby have protected himself from the effects of it.

The same criticism is applicable in the following, which was asked of the same witness. Witness was then asked if, an hour or two after the time, the defendant, Ed Jackson, made a statement in reference to the dynamiting in front of Walker's store as the men were going along, and witness answered that he did. The state then asked the witness if the statements there made or what was there done by Jackson were said and done by him without any force or threats of any kind being used, or without any reward or hope of reward or inducements of any kind being held out or offered to him, and if the statements were voluntary, and witness replied that no threats or force were used, or reward or hope of reward or inducements held out, and that the statements were voluntary. State then asked witness what defendant, Ed Jackson, said and did on the occasion in front of Walker's store. The defendant objected to the question, the court overruled the objection, and defendant excepted to the ruling of the court. The above questions and answers laid a proper predicate to prove a confession by defendant, and the question asked could have been answered by stating a confession. The court therefore was without error in overruling a general objection. No motion was made to exclude the answer, and therefore it need not be considered.

On cross-examination of this witness, defendant asked him if, while he was going through the camps where the explosion occurred, he did not meet some parties, and did not have a conversation with them, in which they told him that the parties who did the striking had gone toward the camps of the Dagos. On redirect examination the state asked the same witness the following question: "Now I will ask you to tell the jury what those parties did tell you in reference to the way the people ran, confining yourself to the same conversation the defendant asked you about." The defendant objected to the question, the court overruled the objection, and defendant excepted. The defendant having called for a part of the conversation, the state was entitled to have the witness state the whole conversation.

German v. Brown, 145 Ala. 364, 39 South. 742; Drake v. State, 110 Ala. 9, 20 South. 450; Dodson v. State, 88 Ala. 60, 5 South. 485; Williams (Hudson) v. State, 137 Ala. 60, 34 South. 854. The same witness for the state further testified on redirect examination that "after he heard the explosion in the negro quarter he heard pistol shots and gun shots going off in the direction where the last explosion occurred." The state asked the witness if he could tell from the sound whether or not they were pistol or gun shots or both. To this question defendant objected, the court overruled the objection and defendant reserved an exception to the ruling of the court. The question was properly allowed as it called for evidence of a part of the *res gestae*—what was done on the occasion and with what.

J. H. Fulton, witness for the state, who was sheriff of the county, testified that he knew the defendant, Ed Jackson; that he had been in jail some time; that the negroes arrested for the offense for which defendant was on trial were all in one cell in the jail; no one made any threats against defendant or any of the others in the cell. It was night, and witness heard a conversation which took place between them; he being in the dark, and they not knowing he was present. The state then asked the witness to state what was said in said conversation. To this question defendant objected, the court overruled the objection, and the defendant duly excepted. The question was such as could well be answered by stating admissions made by him of facts tending to show his guilt, or by stating what others said in his presence and hearing tending to implicate him in the crime of which he was charged, to which he assented or did not deny. The court could not therefore be held in error for overruling the objection to the question. The witness had already stated that he knew Ed Jackson, having had him in jail for some time. In response to the question the witness stated: "A few seconds after I stopped at the door some one spoke up, and my judgment is that it was Ed Jackson," and stated "that there is one thing damn certain, we have all got to stick together," and some one else spoke up and said "Yes, and when we get out of here we are going right back there." Then General Lee (who was one of the inmates of the cell jointly indicted with defendant) said "Its going to be just like some of these negroes to turn state's evidence." Then Ed Jackson said, "If I ever get into anything else, I don't want such a damn big crowd." Witness stated that he was pretty positive that it was Ed Jackson's voice, and that in his best judgment it was Ed Jackson's voice; that he had known Ed Jackson before this time, as he had been in jail before on another charge. Thereupon the defendant moved to rule out this evidence upon the ground that the defendant was not sufficiently identified. The

court overruled the objection and defendant excepted. We are of opinion that the ruling of the court was without error. The witness having stated his knowledge of Ed Jackson, that he was within five feet of him at the time of the conversation, and that he was pretty positive that it was Ed Jackson's voice, which was saying, "If I ever get into anything else I don't want such a damn big crowd," which was an implied admission that he was one of the participants in the crime with which he was charged, it became proper evidence to go to the jury and for them to determine whether it was Ed Jackson's voice and what weight they would give it in determining his guilt or innocence.

The same witness, J. H. Fulton, who was sheriff of the county, after testifying to matters showing that he was active in getting up the evidence against defendant, stated that he was the man who summoned the jurors to try this case. Defendant then asked him if he told the court anything about the part he was playing when he went out and summoned these men (jurors). The state objected to the question and the court sustained the objection, and defendant excepted to the ruling of the court. We do not think that the fact that a sheriff has been active in getting up the evidence against one charged with a crime is contrary to the duties of his office, or in any way disqualified him for the summoning of jurors to try the case. It was his duty to summon them, and there was no duty resting on him to notify the court of what he had been doing with reference to getting up testimony. The objection was therefore properly sustained.

J. E. Bumgardner, a witness for the state, testified: "I am freight agent for the L. & N. Railroad Company at Acton. My office is in the adjoining room to the timekeeper. On the morning they had these negroes arrested and brought over there, I was in the room when General Lee, Ed Jackson, and Jos. Green were in there." Here the state asked the witness if he overheard the conversation that took place while Jos. Green was in there during the portion of the time Dr. Strock was in there; and if this was the only conversation in which Jos. Green took part in the office. Witness stated that it was, and that he was present during the whole conversation. The state then asked the witness to state the whole of the conversation, stating only what occurred while Jos. Green was in there. The defendant objected to the question, the court overruled the objection and defendant excepted. The question could have been answered by competent, material, and relevant evidence, and the court will not be held in error for overruling the objection. The question was answered, and no motion was made to exclude the answer.

After defendant rested his case, the state introduced a witness, Chester Taylor, and

asked him, "Did you go with Fallon as a deputy sheriff to the tent where Ed Jackson was?" Witness answered, "Yes, sir." The state then asked, "Who else was in the tent with him?" Defendant objected to the question, the court overruled the objection and defendant excepted. This question was relevant and proper for the reason that there was evidence tending to show that defendant and General Lee had been together at the time and place of the crime, and that each was dressed in a particular way at the time of the dynamiting and was still so dressed. Besides the whole matter had been testified to by other witnesses. The defendant's witness, General Lee, had stated who was there at the time of the arrest and named Ed Jackson and Henry Ross. The state, on rebuttal, had the right to inquire into the same matter. State asked witness to state whether or not he noticed Ed Jackson's pants when he went in. Defendant objected on the ground it was not in rebuttal, and the court overruled the objection and defendant excepted. It was within the discretion of the trial court to allow additional evidence of a matter which had already been testified to, by witnesses for the state, before the state first rested its case. State asked the witness, "Did you notice the condition of the pants and shoes of the others you arrested?" There was objection to this question by defendant, court overruled the objection, and defendant excepted. It was the theory of the state that all who were arrested were co-conspirators and participated in the crime; that in going to the places they went to that night, they went through grass wet with dew; and it was competent to show, in connection with the other evidence offered in the case, that as a fact, when arrested a short while after the dynamiting, their shoes were wet and their pants were wet up to the knees. It was competent for the state on rebuttal, after defendant, Ed Jackson, had denied remaining silent when accused of the crime, to offer evidence tending to show the contrary. It is usually the better practice, when practicable, to require the state to offer all of its evidence upon a matter testified to by its witnesses in making out its case in the first instance; but, if it does not, it is within the discretion of the trial court to allow it afterwards.

All the other questions raised by objection to the introduction of testimony by the state, were to testimony offered strictly in rebuttal to testimony that had been introduced by defendant, and the court was without error in overruling the objections thereto.

There being no error committed by the trial court, the case is affirmed.

Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

JAMES v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. CRIMINAL LAW (§ 418*)—EVIDENCE—RELEVANCY.

Where the state claimed that defendant shot deceased because of his opposition to the marriage of defendant's niece to decedent's son, by whom the niece was enceinte, evidence of conversations and statements made in defendant's presence, relative to the author of the niece's pregnancy and to an attempted amicable solution of the matter, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 968-972; Dec. Dig. § 418.*]

2. CRIMINAL LAW (§ 465*)—EVIDENCE—INSANITY—NONEXPERT OPINION.

To authorize a nonexpert to give his opinion of the existence of an insane condition of mind on the part of accused, the witness must have not only had an opportunity to form a judgment, but must state the facts on which the opinion is based.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1057; Dec. Dig. § 465.*]

3. CRIMINAL LAW (§ 406*)—EVIDENCE—STATEMENTS BY ACCUSED.

Where it was affirmatively proved that no word or act improperly induced or invited statements testified as having been made by accused after shooting deceased, including a statement that defendant was satisfied, after she was informed that deceased was dead, such statements were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 785; Dec. Dig. § 406.*]

4. HOMICIDE (§ 158*)—EVIDENCE—ANTECEDENT THREATS.

Where it was claimed that defendant's killing of deceased arose through deceased's opposition to the marriage of his son to defendant's niece, defendant was properly required to answer whether she did not make a threatening remark to deceased prior to the homicide while discussing the alleged wrongs of defendant's son to the niece.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

5. HOMICIDE (§ 193*)—SELF-DEFENSE—EVIDENCE.

Where accused claimed self-defense, evidence of a search of deceased's body shortly after he was killed, and while he lay where he died, and that deceased had no weapon, was admissible as bearing on the issue of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.*]

6. HOMICIDE (§ 151*)—SELF-DEFENSE—BURDEN OF PROOF.

An instruction on the issue of self-defense in a prosecution for homicide that the burden was on accused to show that she was in danger or apparent danger of losing her life or of suffering great bodily harm, and that she had no reasonable mode of escape at the time she killed deceased, and that if she proved such elements the burden was on the state to show that she was in fault in bringing on the difficulty, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 278; Dec. Dig. § 151.*]

7. CRIMINAL LAW (§ 673*)—EVIDENCE—INSANITY—LIMITING EFFECT.

Since proof of sexual intercourse between defendant's niece and decedent's son could afford no justification for defendant's killing deceased, evidence of such relation was properly

limited to its effect on the issue raised by defendant's plea of insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1874-1876; Dec. Dig. § 673.*]

8. CRIMINAL LAW (§ 570*)—DEGREE OF PROOF—INSANITY—"REASONABLE SATISFACTION."

Under Code 1907, § 7175, fixing the degree of proof of the affirmative on an issue of insanity, in a criminal case to the "reasonable satisfaction of the jury," an instruction requiring accused to establish insanity "to the satisfaction of the jury" was erroneous as requiring too high a degree of proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. § 570.*]

For other definitions, see Words and Phrases, vol. 7, p. 5976.]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Willie James was convicted of murder in the first degree, and appeals. Reversed and remanded.

The following charge was given at the instance of the state: "(2) When insanity is set up as a defense in a criminal case, the insanity must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of defendant's sanity, raised by all the evidence, does not authorize an acquittal by reason of insanity." The charge set out in the twenty-ninth assignment of errors is as follows: "The burden is upon the defendant to show that she was in danger or apparent danger of losing her life or suffering great bodily harm, and that she had no reasonable mode of escape at the time she killed Dan Austin. If she proves these two elements, the burden is then on the state to show that she was at fault in bringing on the difficulty."

Kirk, Carmichael & Rather, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The defendant, a woman, was convicted of murder in the first degree and sentenced to life imprisonment. On the trial she pleaded not guilty by reason of insanity, in addition to the usual general denial of guilt. That defendant killed the deceased, Dan Austin, by shooting him with a pistol was conceded. Aside from the exoneration sought under the plea of insanity, the defendant undertook to justify the act under the doctrine of self-defense. The prosecution, on the other hand, pressed, in the evidence, the theory that while the deceased was engaged in uncoupling the air connection of an engine and a train of cars, while he was in a kneeling posture between the engine tender and the next car, and when he was making no hostile demonstration and uttering no word of menace or offense toward defendant, she first shot him, and when he arose and advanced upon her with outstretched, weaponless hands she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

continued to shoot him until both fell, the deceased immediately dying. The trial court took and effected the view that tendencies of the evidence made the issue on the plea of insanity a matter for the jury's consideration.

Twenty-five of the 42 errors assigned on the record as in civil cases relate to rulings in respect to the admission and exclusion of evidence. Many of these rulings related to the phase of the evidence tending to show that Beatrice Norwood, an unmarried woman, was with child by Tom Austin, a son of deceased; that Beatrice, who had been reared by defendant, was a niece of defendant, and that a strong attachment existed between Beatrice and defendant; that Tom Austin admitted his responsibility for the niece's condition and was willing to marry her, but that deceased interfered with or forbade the marriage; that this action, the facts being known to her, angered defendant toward deceased; and that the fatal shooting was either the result of insanity induced by the alleged wrong or of justifiable defense, by defendant, of her person from a menacing assault upon her by deceased to whom she had gone to try to arrange a solution of the matter indicated. This phase of the evidence rendered admissible, beyond doubt, those conversations and statements, made in defendant's presence, relative to the author of the niece's pregnancy and to the attempted amicable solution of the matter. The evidence, in this connection, was so confined by the court, and no error resulted therefrom.

The issue of insanity *vel non* was submitted to the jury. A number of nonexpert witnesses were examined with a view to supporting the plea of insanity. The rule with respect to the admission of the opinion of such witnesses that the person was insane is thus well stated in *Burney v. Torrey*, 100 Ala. 157, 173, 14 South. 685, 45 Am. St. Rep. 33: "To authorize a nonexpert to give his opinion of the existence of an unsound condition of mind, he must not only have had the opportunity to form a judgment, but the facts should be stated upon which it is based." See, also, *Parrish's Case*, 189 Ala. 16, 38 South. 1012.

It was affirmatively proven that no word or act, by any one, improperly induced or invited the statements testified as having been made by defendant after the shooting of Austin. Accordingly, no error was committed by the court in permitting the rehearsal of those statements by the witnesses on the trial. The statement by Sanders that Austin was dead, in defendant's presence, was admissible as explanatory of defendant's alleged reply thereto, that she was satisfied, etc.

It appears from tendencies of the evidence that defendant, several days before the shooting, had had an interview with deceased in regard to the alleged wrongdoing of deceased's son. Touching this interview

the prosecution was allowed to ask the defendant if she did not, on that occasion, make to deceased a remark of a threatening nature. The question was patently proper.

There is no merit in the several assignments based on rulings admitting evidence of a search of the body of deceased shortly after he was killed and while he lay where he died. The defendant's evidence tended to show that deceased advanced, without provocation, upon her with his hand in the direction of his hip pocket. The state was well entitled, as bearing on that issue, to adduce evidence that deceased had no weapon of any kind. Such was the purpose and effect of the evidence tending to show a search of the body. It was well admitted.

The charge as to the burden of proof on the plea of self-defense, set out in the twenty-ninth assignment, conformed to law as it prevails in this state. 1 May. Dig. pp. 810, 811.

Those parts of the oral charge of the court having reference to the substantive law as to "cooling time," under the facts and circumstances hypothesized in them, had apt authority in *Jarvis' Case*, 138 Ala. 17, 34 South. 1025. They were free from prejudicial error.

Since the criminal relations claimed, by defendant, to have theretofore existed between defendant's niece and the son of deceased was a matter in no view affording justification for the killing of the deceased, and since the criminal relations indicated did not involve deceased (one feature, among others, distinguishing the case at bar from *Gafford's Case*, 122 Ala. 54, 25 South. 10, in the particular that evidence of such relations, with other evidence of threats by deceased, has a legitimate bearing on the issue of who was the aggressor under the pleas of self-defense), the court properly confined the admissibility and the effect of evidence of the relations mentioned, and of deceased's alleged interference with the marriage of his son to the niece, to the issue made by the plea of not guilty by reason of insanity.

The substantive law of the case, under the issues made by the pleas of *not guilty* and *not guilty by reason of insanity*, needs no reiteration at this time. It has been often accurately announced here. On the latter issue, the rules stated in the recent decision in *Parrish v. State*, 139 Ala. 16, 38 South. 1012, among others, will be serviceable on the retrial to which we must remand the case because of the error to be pointed out.

The solicitor requested, and the court gave, special instruction numbered 2. This instruction attempted to state the measure of proof requisite to establish the plea of not guilty by reason of insanity. Therein it was declared that the burden assumed, under that plea, by the accused was to establish the pleaded fact to the "satisfaction"

of the jury. The statute (Code 1907, § 7175) fixes the measure of certainty of proof of the affirmative of that issue to be the "reasonable satisfaction" of the jury. Special instruction 2 exacted of the accused too high a degree of proof in order to establish the plea indicated.

For the error stated, the judgment is reversed and the cause is remanded.

Reversed and remanded.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

BENTON, Judge, et al. v. STATE ex rel. CITY OF GIRARD.

(Supreme Court of Alabama. June 2, 1910.)

1. MUNICIPAL CORPORATIONS (§ 647*)—PUBLIC ROADS—STREETS.

When certain territory is incorporated into a city, it is for the city to determine whether the public roads shall or shall not become thoroughfares in the city, and if they so determine the public roads become streets of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1420; Dec. Dig. § 647.*]

2. MUNICIPAL CORPORATIONS (§ 406*)—STREETS—SPECIAL ASSESSMENTS.

A street is under the dominion and control of the city, and is subject to the rights of the city to assess abutting owners for its improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1001; Dec. Dig. § 406.*]

3. MUNICIPAL CORPORATIONS (§ 265*)—COMMISSIONERS' COURT—STREETS—DUTY TO REPAIR.

The commissioners' court is not charged with the duty of laying out and keeping in repair the streets of a city in the county.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 714; Dec. Dig. § 265.*]

4. STATUTES (§ 123*)—SUBJECTS AND TITLES—HIGHWAYS AND BRIDGES.

Act Dec. 8, 1890 (Acts 1890-91, p. 42), entitled "An act to incorporate the city of Girard, Russell county," provides in section 21 that all bridges, public roads, and streets within the city shall be kept in repair by the city, and all new bridges within the city shall be established and kept in repair by the city, provided that all bridges within the city which have heretofore been kept in repair by the county shall be continued to be kept in repair or rebuilt, if necessary, by the county. Held, that the proviso is not included in the title of the act and is invalid under Const. 1901, § 45, providing that the subject of a statute shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

Appeal from Circuit Court, Russell County; M. Sollie, Judge.

Mandamus by the State, on the relation of the City of Girard against H. T. Benton, as judge, etc., and others to compel them to take cognizance and jurisdiction of the matter of repairing and maintaining a certain bridge known as "Windham Bridge" in the

city of Girard, and to do all things necessary to restore it to a condition of safety. From an order granting an alternative writ of mandamus, defendants appeal. Reversed and rendered.

Glenn & De Graffenried and Tyson, Wilson & Martin, for appellants. J. E. Henry, for appellee.

SIMPSON, J. This appeal is from an order granting an alternative writ of mandamus to the judge of probate and members of the commissioners' court of Russell county, commanding them to take cognizance and jurisdiction of the matter of repairing and maintaining a certain bridge known as "Windham Bridge," in the city of Girard, and to do all things necessary to restore said bridge to a condition of safety. The act of December 8, 1890 (Acts 1890-91, p. 42), entitled "An act to incorporate the city of Girard, Russell county," incorporates said city, and its twenty-first section is as follows: "Be it further enacted, that all bridges, public roads and streets, within the limits of said city of Girard shall be kept in repair and in order by said city; and all new bridges which may hereafter be established within the limits of said city, shall be established by said city, and kept in repair and in order by said city; provided, that all bridges within the limits of said city of Girard which have heretofore been kept in repair by the county shall be continued to be kept in repair or rebuilt, if necessary, by said county." The question raised by argument is whether or not the proviso in said section is valid, or is it invalid by reason of the fact that it is not included in the title of the act, in accordance with section 45 of the Constitution of 1901. This section of the Constitution has been much discussed, and it is unnecessary to recapitulate the many decisions bearing upon it.

While we will not undertake to say that the Legislature may not, in incorporating a city, except certain territory within the boundary lines of the city, leaving the same under the control of the commissioners' court of the county, yet it is familiar law that the city government and the county authorities have separate and distinct functions; also, that when a certain territory is incorporated into a city the general rule is that it is for the city to determine whether the public roads in that city shall or shall not become thoroughfares in the city, and if they so determine, said public roads then become streets of the city. If a street, it is under the dominion and control of the city, subject to the rights of the city to assess abutting owners for its improvement, and for building sidewalks, etc. If it is a public road, it is the duty of the commissioners' court to have it worked under the county system, without

any sidewalks, and to build and keep in repair such bridges as are needed.

It is undoubtedly true, also, that as a general rule, when a certain territory is organized into a city, all of the land within its bounds becomes subject to the city's control and subject to its responsibilities, and that the commissioners' court is charged with the duty and responsibility of laying out and keeping in repair the public roads of the county, but not the streets of any city in the county.

It necessarily follows that when the title of the act refers only to the incorporation of a city, no one would suppose that a provision would be made by which the county would be required to keep up the streets or any portion thereof.

While it is true that the case of *State v. Miller*, 158 Ala. 59, 48 South. 496, and others therein cited refer to the payment by the county authorities of a portion of the money collected by taxation to the city, yet the principle is the same when the act requires the county authorities to use a certain part of the money of the county in building and repairing the bridges in the streets of the city. It will be noticed also that said section 21, is inconsistent, in providing, first, that "all bridges, public roads and streets, within the limits of said city of Girard shall be kept in repair and in order by said city," and afterwards including the proviso therein. If the duty rests on both the city and the county, it is difficult to see how the city could mandamus the county to do the work. However, on the authorities cited, we hold that the proviso is not included in the title of the act, and is therefore invalid. We are not to be understood as intimating an opinion as to whether mandamus would be the proper remedy if the act were valid.

The judgment of the court is reversed, and an order will be here entered, denying the writ and dismissing the petition.

Reversed and rendered.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

BIXBY-THEISON LUMBER CO. v. EVANS.
(Supreme Court of Alabama. June 2, 1910.)

1. DAMAGES (§ 23*)—BREACH OF CONTRACT—SPECIAL DAMAGES.

Where the special and ulterior purpose of a party in making a contract is disclosed to the adverse party at the time, they become an element of the duty imposed on the adverse party, and afford a substantial basis for special damages in case of a breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.*]

2. DAMAGES (§ 125*)—CONTRACTS—MEASURE OF DAMAGES.

The measure of damages for the breach of a contract to pay money is ordinarily the prin-

cipal with interest, unless the obligation to pay money is special and refers to other objects than the mere discharge of a debt, in which case special damages may be recovered according to the actual injury suffered.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 338-343; Dec. Dig. § 125.*]

3. DAMAGES (§ 62*)—CONTRACTS—MEASURE OF DAMAGES.

Where a party contracting to advance to the adverse party money with which to construct a dam of stone and concrete, in place of a wooden dam furnishing power for a mill, and to furnish logs, by sawing which at a specified price the borrower would be enabled to repay the money advanced, and to furnish logs by sawing which at a stipulated price the borrower would saw at a profit, failed to advance necessary money after advancing part of it, thereby causing loss to the borrower of a material advantage, the borrower was not required to take up the burden of going into the market for money or to expend money in hand to complete the dam in the manner contemplated by the contract, but he was entitled to such damages as would restore him to his status quo.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 128; Dec. Dig. § 62.*]

4. DAMAGES (§ 40*)—CONTRACTS—MEASURE OF DAMAGES.

The measure of damages for the failure of a party to advance money to another to construct a dam to create power for a mill does not include such profits as the borrower might have expected to realize from the operation of the mill, and which the parties contemplated as a result of the contract, because the profits were speculative and remote.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 75; Dec. Dig. § 40.*]

5. DAMAGES (§ 23*)—CONTRACTS—MEASURE OF DAMAGES.

Where a party, who contracted to advance money to another with which to construct a dam in place of an existing dam, contemplated the expenditure by the borrower of his own money only in case the sum agreed to be advanced was insufficient to complete the dam, on the failure of the lender to advance the money the borrower could not recover as special damages the sums expended by him in the work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by M. H. Evans against the Bixby-Theison Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

John A. Lusk, for appellant. Street & Isbell, for appellee.

SAYRE, J. Plaintiff in the court below, appellee here, recovered judgment for the breach of a contract by which defendant agreed to lend him sufficient money, in no event to exceed \$2,000, with which plaintiff was to construct a dam of stone and concrete across Town creek where he then had a wooden dam which furnished power for the operation of a grist mill. Plaintiff undertook, also, with the money to be advanced, to purchase and set up in readiness for operation a turbine wheel and band sawmill, guar-

anteering that the sum named would be sufficient for the improvements specified, and that he would complete them out of his own purse in the event it proved insufficient. To secure the loan defendant was to have, and did get, a mortgage upon plaintiff's water power and surrounding tract of land. The contract also contained a provision that for a fixed period after the completion of the improvements plaintiff was to saw logs for defendant at a fixed schedule of prices, giving preference to defendant's logs at any and all times. Defendant was to furnish logs enough to make the bill for sawing equal to the amount of money advanced. Payment was to be made in that way. After defendant had furnished money to an amount between \$400 and \$500, it refused to furnish more or to go further with the performance of the contract. Defendant, however, contended that it had fully complied with its contract by purchasing a mill for plaintiff by plaintiff's direction, the price of which, along with the money furnished, made up the sum agreed upon. Meantime plaintiff had torn away the wooden dam and a waterhouse, which constituted a part of the plant, and had expended several hundred dollars of his own money in procuring and preparing stone for the proposed dam. He claimed damages on account of the diminished value of his property, loss of time, labor, and money expended in tearing away the old structure preparing for the erection of the new, and for loss of profits.

Notwithstanding Judge Stone's criticism of the leading case of *Hadley v. Baxendale*, 9 Exch. 341, in *Daugherty v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, and his refusal to apply the doctrine of that case to the peculiar facts of the case he had in hand—a case in which the defendant company had failed to correctly transmit a cipher telegram—he assented, and the courts generally assent, to the proposition that if the plaintiff's special, ulterior purposes in making the contract are disclosed, they then become an element of the duty thereby imposed upon the defendant, and afford a substantial basis for the assessment of special damages. The rule is clearly stated by the Supreme Judicial Court of Massachusetts in the following language: When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with references to which the parties acted. In such cases the larger damages may be recovered as having been in the contemplation of both parties and as naturally resulting, under the special circumstances, from the breach itself. *Loneragan v. Waldo*, 179 Mass. 135, 60 N. E. 479, 88 Am. St. Rep. 365. The rule here stated re-

quires that both parties shall have contracted with reference to the special circumstances. In New York it is held that bare notice of special consequences which may result from a breach of contract will not suffice, unless under circumstances involving the implication that it formed the basis of the agreement. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487. In *Daugherty's Case* it was said that if the special circumstances are communicated, they become an implied element of the contract. And in *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333, it was held, in effect, that the engagement must have been entered into with reference to the special damages. Money, like the staples of commerce, is, in contemplation of law, always in the market and procurable at the lawful rate of interest. For the breach of a contract to pay, the principal with interest is the measure of damages. Such is the invariable measure in a creditor's action against his debtor. 1 Suth. Dam. § 76. It seems to follow, as was noted in *Gooden v. Moses*, 99 Ala. 230, 13 South. 765, that ordinarily the damages for the breach of a contract to lend money cannot be more than nominal. Recognizing the rule just stated, plaintiff invokes an application of the principle of *Hadley v. Baxendale* for the recovery of special damages by alleging in the third count of his complaint his inability to get from other sources money with which to replace his dam, and that defendant knew the fact, and knew that plaintiff was to use the money for the purpose of tearing away the improvements then on the land and erecting others in their stead. And special damages for the destruction of his improvements under these circumstances, and other special damages, as we have already noted, are claimed.

The principle on which special damages are recoverable for breaches of contract have been applied on correct theory and evident justice to cases in which the contract was for the loan of money. In *Gooden v. Moses*, supra, *Moses* sold *Gooden* a lot upon the installment plan, and as part of the contract agreed to advance money with which the purchaser might build a house. *Gooden* sued for a breach in failing to advance the money. It was conceded by the court that plaintiff might have recovered special damages but for the fact that she failed to show that she might not have protected herself against loss, as she was bound to do, if she could. The following authorities will be found to support the proposition that where the obligation to pay money is special, and has reference to other objects than the mere discharge of a debt, special damages may be recovered according to the actual injury suffered. *Lowe v. Turple*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Turple v. Lowe*, 114 Ind. 37, 15 N. E. 834; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571; *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478; *New York Life Ins.*

Co. v. Pope (Ky.) 68 S. W. 851; 1 Suth. Dam. § 77; 3 Page Contr. § 1593.

In *Lowe v. Turple and Western Union Tel. Co. v. Hearne*, supra, it was held that the plaintiff suing for the breach of a contract to lend money, and seeking to recover special damages, must allege, not only the peculiar facts causing the damages and notice of the same to the party guilty of the breach, but that all reasonable means within the power of the plaintiff had been adopted to prevent loss. In *Baxley v. Tallassee & Montgomery R. R. Co.*, 128 Ala. 183, 29 South. 451, this court held that the complaint should contain an averment of the special circumstances and that defendant had notice. Further the court did not go because the exigencies of the case did not require it to do so. There may be good reason for the rule of the Indiana and Texas cases requiring an allegation of plaintiff's inability to prevent loss where the breach is of a contract to lend money. But, however that may be, there is in the contract in the present case a feature which it would seem ought to relieve the plaintiff of the burden of proving that he was unable to go into the market and borrow the money with which to complete the contemplated improvement or that he had not in hand the funds necessary for that purpose. Such a course would not have made him whole. The contract provided, not only that defendant was to advance money with which plaintiff was to construct a dam of stone and concrete in place of the wooden dam he already had, but that defendant was to furnish logs by sawing which at a stipulated price plaintiff was to be enabled to repay the money advanced, and that defendant would furnish other logs which, we will assume, the plaintiff might saw with a profit. It does not appear that but for the last-mentioned stipulation plaintiff would have entered upon the contract. Presumptively he would not. Defendant's breach of the contract to advance money, unless it were excusable on some ground set up in special pleas, involved by necessity a breach of the collateral agreement in respect to manner of repayment and the furnishing of other logs. After the breach alleged plaintiff owed defendant no duty to take up the additional burden of going into the market for money, or to expend money in hand, in order to complete the dam in the manner contemplated by the contract when it already appeared that he would lose in any event a material advantage for which he had contracted. Thereupon he was entitled to be made whole, to compensation, to such damages as would be the equivalent of a restoration of his status quo ante.

Profits such as the plaintiff may have expected to realize from the operation of the mill in its improved form, and which the parties doubtless contemplated as one result of the contract, were nevertheless speculative,

remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages. *Reed Lumber Co. v. Lewis*, supra; *Moulthrop v. Hyett*, 105 Ala. 493, 17 South. 32, 53 Am. St. Rep. 139; *Nichols v. Rasch*, 138 Ala. 372, 35 South. 409; *Southern Ry. Co. v. Coleman*, 153 Ala. 266, 44 South. 837. The contract speaks for itself, and conclusively, as to the expenditure by the plaintiff of money other than that to be advanced by defendant. It contemplated such expenditure in the event only that the sum agreed to be advanced was insufficient to complete the dam. Plaintiff was not, therefore, entitled to recover as special damages under the evidence sums so expended.

There are many assignments of error. We do not think the occasion demands a separate treatment of each of them. By reference to the opinion herein advanced it will be seen that the trial court in a number of rulings on the evidence and in some special instructions to the jury misconceived in part the measure of recoverable damages, and for those errors the judgment will be reversed, and the cause remanded for another trial. In other respects, the record shows no error.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

EVANS v. WILHITE et al.

(Supreme Court of Alabama. June 2, 1910.)

1. JUDGMENT (§ 460*)—VACATING—SUFFICIENCY OF BILL.

In a suit to set aside a judgment plaintiff alleged in his bill that the judgment was obtained by fraud, that the cause was continued for the term by agreement of parties, and that after plaintiff and his attorney had left court defendants by fraudulent representations induced the court to set aside the order of continuance and to proceed to trial, and thus by fraud procured the judgment. *Held*, that the bill on demurrer was sufficient to entitle plaintiff to have the judgment set aside and to enjoin its enforcement pending the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 591; Dec. Dig. § 460.*]

2. EQUITY (§§ 239, 363*)—DEMURRER—MOTION TO DISMISS—ADMISSION BY DEMURRER OR MOTION.

On demurrer to a bill and motion to dismiss for want of equity the averments of the bill must be treated as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 494, 766; Dec. Dig. §§ 239, 363.*]

3. JUDGMENT (§ 407*)—VACATING—EXISTENCE OF OTHER REMEDY.

Equity has original jurisdiction to vacate a judgment obtained by fraud and restrain enforcement pending suit, and it is not deprived of such jurisdiction by Code 1907, § 5372, providing that when a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, he may apply for a rehearing at any time within four months from the rendition of the judgment, as the remedy given in the Code is not ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clusive, but is concurrent and cumulative with that of equity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-774; Dec. Dig. § 407.*]

4. EQUITY (§ 44*)—EXCLUSIVE JURISDICTION. The original jurisdiction of a court of equity is not affected by a statute conferring similar jurisdiction upon courts of law unless the statute so provides but the statute confers a concurrent and cumulative remedy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 141-145; Dec. Dig. § 44.*]

5. JUDGMENT (§ 336*)—VACATING—NATURE OF REMEDY.

The remedy provided in Code 1907, § 5372, authorizing a party who has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, to apply for a rehearing at any time within four months from the rendition of the judgment, is not a continuation of the original suit, but is a new suit to set aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 664, 724; Dec. Dig. § 336.*]

6. JUDGMENT (§ 436*)—VACATING—NECESSITY FOR SHOWING WANT OF NEGLIGENCE.

A party who seeks relief in a court of equity against a judgment obtained in a court of law by fraud, etc., must show that he was without fault or neglect in the matter, and that he was ignorant of the fraud not only at the time the judgment was rendered, but also during the term of rendition, when the court, under its plenary power, could have set aside the judgment, or that he was prevented from making his motion for a new trial by accident, fraud, etc., unmixed with negligence on his part, but he is not required to acquit himself of negligence in failing to apply to a court of law for relief under Code 1907, § 5372, authorizing a party prevented from making his defense by fraud, etc., to apply for a rehearing within four months from the rendition of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 823-826; Dec. Dig. § 436.*]

Appeal from Chancery Court, Cullman County; W. H. Simpson, Chancellor.

Action by Charles M. Evans against J. D. Wilhite and others. A demurrer to the bill was sustained, and a motion granted to dissolve an injunction, and the bill was finally dismissed for want of equity and plaintiff appeals. Reversed and remanded.

Brown & Kyle, for appellant. F. E. St. John, for appellees.

MAYFIELD, J. Appellant filed his bill to set aside a judgment against him in a court of law, and to enjoin its enforcement pending the suit.

The theory and allegations of the bill, in short, were that the judgment was obtained by fraud on the part of appellee; that the cause was continued for the term by agreement of parties, and that after appellant and his attorney had left court, appellee, by fraudulent representations, had the court to set aside the order of continuance and to proceed to trial, and thus by fraud procured the judgment. Appellee demurred to the bill and moved to dissolve the injunction. His demurrer was sustained, and motion granted as to the original bill and the amended

bill; and the bill as amended was finally dismissed for want of equity. This was error. If the averments of the bill were true—and on demurrer and motion they must be so treated—the complainant was entitled to the relief prayed; hence, the bill should not have been dismissed, nor the injunction dissolved. Equity has original and independent jurisdiction for the purposes for which this bill was filed.

The probable theory upon which the chancellor proceeded was that the bill failed to aver that complainant was ignorant of the judgment being taken against him, until after the expiration of four months, within which time he could have obtained the relief desired by application to the circuit court which rendered the judgment; in other words, that the bill in this respect failed to show due diligence, and therein failed to show that complainant did not have a complete and adequate remedy at law. If this be the theory upon which the chancellor dismissed the bill, it is untenable. While the four months (section 5372 of the Code of 1907) may have afforded the necessary relief in a court of law, from any judgment such as the one here sought to be vacated, yet it is not the exclusive mode of relief, but is concurrent and cumulative with that of equity. *Nixon v. Clear Creek Co.*, 150 Ala. 604, 43 South. 805, 9 L. R. A. (N. S.) 1255; 23 Cyc. 978. The original jurisdiction of a court of equity is not affected by a statute conferring like or similar jurisdiction upon courts of law, unless the statute so provides, but it is held to confer a concurrent and cumulative remedy. *Stewart v. Stewart*, 31 Ala. 213; *Rose v. Gunn*, 79 Ala. 415.

This case is clearly distinguishable from the case of *Roebing & Sons v. Stevens*, 93 Ala. 39, 9 South. 369. In that case the judgment of the lower court was affirmed on certificate by this court, in violation of an agreement. In that case the complainant had an adequate remedy at law, by motion in this court to set aside the affirmation. And that motion would be a continuation of the original suit by appeal. In the case at bar, the motion, under the four-month statute, is not a continuation of the original or main suit, but is the institution of another suit in a court of law, which would otherwise require the aid of a court of equity. It is a separate and independent suit; but is cumulative and concurrent with that of equity, and is in no sense exclusive of chancery jurisdiction for relief against judgments at law, which are obtained by fraud and without fraud on the part of the complainant.

The four-month statute, as has been held by this court, was intended to provide a more speedy and less expensive remedy in courts of law, against judgments obtained in such courts by accident, mistake, or fraud, when unmixed with negligence on the part of com-

plainant. When a rehearing is applied for under this statute, courts of law proceed upon the same principles adopted by courts of chancery in granting relief, and the movant must acquit himself of negligence and bring himself within the operation of the statute; but, as stated above, the remedy in the court of law is not exclusive, and it is not a continuation of the original suit, but is a new suit to set aside the judgment formerly obtained by accident, mistake, or fraud. *Renfro Bros. v. Merriman & Co.*, 71 Ala. 196; *Martin v. Hudson*, 52 Ala. 279. And it is true that a party who seeks relief in a court of equity, against a judgment obtained in a court of law against him by fraud, accident, etc., must show that he was without fault or neglect in the matter, and that he was ignorant of the fraud not only at the time the judgment was rendered but also during all the time allowed him for a new trial, or that he was prevented from making his motion for a new trial by accident, fraud, etc., unmixed with negligence on his part. The new trial here referred to is the trial grantable under the plenary powers of all courts to set aside their own judgments, upon proper cause, at any time before the adjournment of the term at which they were rendered. After the adjournment of a term of court, neither the court nor the judge has any such power or control over the judgments of the court, unless the motion was made before adjournment and continued for future action thereon.

When a party proceeds under the four-month statute, he thereby institutes a new proceeding, but, of course, its object is to relieve him against another judgment, and it may have the effect to award a new trial. He is not, however, required to acquit himself of negligence in failing to apply to the court of law for relief, under the four-month statute, before going into equity to obtain the same relief, as he is, in applying to the court for a new trial, when he knew of the fraud before the adjournment of the term at which the judgment was rendered.

In the one case the two remedies are concurrent; in the other they are not. One is an original and independent proceeding; the other is a mere continuation of the original suit. Failure to proceed in the latter case, if there be knowledge or notice of the fraudulent judgment, is negligence; while it is not negligence to fail to move for a rehearing under the statute, because the party may prefer to proceed in a court of equity. The remedies are cumulative, and not exclusive.

It was therefore error to dismiss the bill for want of equity, and to dissolve the injunction.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., concur.

(126 La.)

No. 17,864.

KNOBLOCK & RAINOLD v. POSEY.

(Supreme Court of Louisiana. May 9, 1910.
Rehearings Denied June 28, 1910.)

(Syllabus by Editorial Staff.)

1. HUSBAND AND WIFE (§ 270*)—COMMUNITY PROPERTY — MORTGAGES — FORECLOSURE — PLEADING—AMENDMENT.

Where, in a suit to foreclose a mortgage on an interest in land, defendant wife filed first a general denial, and then by leave of court, filed a supplemental and amended answer that the purchase of the land on which the mortgage debt was incurred was by and for the community, and that the debt was a community debt of her husband for which she could not bind herself, such answer, though ordinarily improper as changing the substance of the issue in violation of Code Prac. art. 419, was allowable under the rule that a married woman occupies a favored position in resisting liability for a debt alleged to be that of her husband, and cannot estop herself from setting up the defense.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 979; Dec. Dig. § 270.*]

2. HUSBAND AND WIFE (§ 254*)—"COMMUNITY PROPERTY"—PURCHASE IN WIFE'S NAME.

Property purchased in the name of a wife during the existence of the community becomes community property, unless the purchase is made by way of investment of paraphernal funds, or by way of administration of paraphernal property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 897-899; Dec. Dig. § 254.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1843-1844; vol. 8, p. 7608.]

3. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—LIENS—FORECLOSURE.

Where a wife purchased community property with community funds, and mortgaged the same to secure money obtained to pay part of the price, she was the agent of the community to secure the loan and mortgage the property which was therefore subject thereto, though she was not personally liable for the debt.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 938; Dec. Dig. § 267.*]

4. HUSBAND AND WIFE (§ 270*)—COMMUNITY PROPERTY—MORTGAGES—FORECLOSURE.

Where a married woman purchased and mortgaged community property, and, in a suit to foreclose, sought to have the property released from the mortgage, she would be regarded as litigating as the representative of the community.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 969; Dec. Dig. § 270.*]

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; W. P. Martin, Judge.

Suit by Knoblock & Rainold against Mrs. Frank E. Posey. Judgment for plaintiff, and defendant appeals. Modified.

Lloyd Posey and Harris Gagne, for appellant. Beattie & Beattie, for appellee.

PROVOSTY, J. The defendant, Mrs. Posey, and her brother, Edward Gueno, and the children of her deceased brother, Ovide Gueno, owned their old family plantation

named Presqu'île, except an interest of 6/64. This outstanding interest was for sale at \$12,000, whereof 1/3 cash and balance in two equal payments in one and two years, and the brother of the defendant, Mrs. Posey, urged her to buy it. She had no property or money except an interest of 6/64 in the plantation; but it was expected she could borrow the \$4,000 with which to make the cash payment, and could pay the debt thereby created and the credit portion of the price out of her share of the future revenues of the plantation which had theretofore been sufficiently revenue producing to justify this expectation. Accordingly she, her brother, and her husband came together to the office of Bush & Sons, the commission merchants of the plantation, in New Orleans, and obtained the loan of the \$4,000 on her note at one year, her brother agreeing verbally that, if she found herself unable to meet the note at its maturity, he would pay it for her, and she made the purchase, using the \$4,000 thus obtained from Bush & Sons for making the cash payment, and executing her notes for the credit part of the price. In the act of sale was inserted the following:

"The present purchase is made by the said Mrs. J. G. Posey, with her own separate paraphernal funds and not with the funds belonging to the community existing between her and her said husband, and the said property shall be her separate property and not form part of said community; the notes herein described are to be paid by her with her separate funds."

In all these acts Mrs. Posey was assisted and authorized by her husband, who signed the notes and acts to authorize her. Within the year the brother died, leaving one-half of his estate of some \$47,000 to Mrs. Posey; also within the year the affairs of the plantation were transferred from Bush & Sons to the plaintiff firm. At the maturity of the \$4,000 note given to Bush & Sons the plaintiff firm paid it, and took Mrs. Posey's demand note for the amount, with interest added. Some months later, June 11, 1908, this demand note was retired by the execution in its place of the note and mortgage for \$4,397.28 upon which the present suit via ordinaria has been brought. This note and this mortgage were executed by Mrs. Posey with the authority of her husband and of the judge. From beginning to end the affairs of Mrs. Posey were administered by her husband, and everything she did was on his advice.

Mrs. Posey first filed a general denial, and then, some days later, with leave of the court, filed a supplemental and amended answer, in which she set up that as the community of acquêts and gains existed between her and her husband at the time of said purchase, and as said purchase was not made by way of investment of her paraphernal funds, it was a purchase by and for the community, and that consequently the debt created for making the cash payment was a debt of the community, or, in other words,

of her husband, for which she could not bind herself.

To the filing of this amended answer plaintiff objected on the ground that it changed the substance of the demand, and cited Code Prac. art. 419; *Calvert v. Tunstall*, 2 La. 207; *Babcock v. Shirley*, 11 La. 74; *Bemis v. Dwight*, 3 La. Ann. 337; *Aregno v. Fosdick*, 28 La. Ann. 109; *Boagin v. Anderson*, 32 La. Ann. 920.

There is no doubt that for the reason here stated such a changing of the issue could not be allowed to an ordinary litigant; but married women have always occupied a favored position in our courts when it has come to resisting liability for a debt alleged to be not their own, but that of their husband. It has repeatedly been held that they cannot estop themselves from setting up this defense.

We agree, further, with the defendant that the purchase in question was not made by way of investment of paraphernal funds or by way of administration of paraphernal property, and that it must therefore be held to have been made by and for the community; it having been made during the existence of the community. Property purchased in the name of the wife during the existence of the community falls into the community, unless made by way of investment of paraphernal funds. *Boulligny v. Fortier*, 16 La. Ann. 209; *Burns v. Thompson*, 39 La. Ann. 377, 1 South. 913.

Nor do we think the plaintiff firm stands in the position of an innocent third person who, having loaned money to a married woman on the faith of the authorization of the judge, without knowing what use it is to be put to, is protected by the authorization of the judge. We think the plaintiff firm was fully advised of the whole transaction from beginning to end. In fact, they do not pretend otherwise.

Mrs. Posey's property cannot therefore be made liable for this debt. But we do not see how the property which the money was borrowed to pay for can escape liability. If she was the agent of the community for buying the property, and for borrowing the money to pay for it, she must be held to have also been the agent of the community for mortgaging the property to secure the loan. The legal situation is that throughout the matter the community acted in her name.

In like manner, in the present suit, in so far as she has sought to have the mortgaged property released from the mortgage on that part of the property belonging to the community, she must be held to have been litigating as the agent and representative of the community. How far it would be possible for a wife to stand in judgment for the community in this manner in the absence of the husband from the suit is a question not arising in the present case, since the husband has joined her and aided her throughout in the defense of the present suit.

The judgment of the lower court granted plaintiff's demand in full. It will have to be modified so as to conform with the views hereinabove expressed. For doing this, we set it aside, and frame our own decree.

It is therefore ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, the commercial partnership of Knoblock & Rainold, composed of Earle Knoblock and Emile Rainold, and against Mrs. Josephine Gueno, wife of Frank E. Posey, in her capacity as agent representing the community of acquêts and gains existing between her and her husband, Frank E. Posey, in the purchase from J. Cyrille Dupont and Clifford P. Smith, on the 25th day of January, 1907, by act before Edwin Clarence Wurzlów, clerk of court, of a 6/64 interest in the Presqu'île plantation, described in the act of mortgage sued on in the present case, and in her same capacity as agent representing the same community in consenting to and executing the note and act of mortgage sued on in this case, in the sum of \$4,397.28, with 8 per cent. per annum interest thereon from June 11, 1908, until paid, and 10 per cent. on the aggregate of said principal amount and interest as attorney's fees and costs of these proceedings.

And that in so far as the judgment appealed from condemns Mrs. Posey individually to pay said debt or holds her separate property liable for said debt the same be set aside and annulled.

And it is further ordered, adjudged, and decreed that in so far as the judgment appealed from recognizes and enforces the mortgage granted by the said Mrs. Posey on the Presqu'île plantation described in said judgment by act before Frank Edward Rainold, notary public, parish of Orleans, on June 11, 1908, the same be and is hereby affirmed, except that the undivided interest in said plantation upon which the said mortgage is thus recognized and ordered enforced is hereby reduced to a 6/64 of said plantation, and that the said 6/64 interest in said plantation be seized and sold to satisfy the present judgment.

(126 La.)

No. 18,359.

STATE ex rel. REID v. LE BLUE, Registrar.
(Supreme Court of Louisiana. June 30, 1910.)

(Syllabus by the Court.)

1. ELECTIONS (§ 115*)—DESTRUCTION OF REGISTER—RIGHTS OF REGISTERED VOTERS.

The registered voter is not disfranchised because of the destruction by fire of all the registrar's records.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 115.*]

2. ELECTIONS (§ 115*)—DESTRUCTION OF REGISTER—RIGHTS OF REGISTERED VOTERS.

He may have his name placed on the new book of the registrar by application at any time

before the 48 hours preceding the opening of the polls.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 115.*]

3. ELECTIONS (§ 115*)—DESTRUCTION OF REGISTER—RIGHTS OF REGISTERED VOTERS.

The voter who has registered, and whose registration papers are destroyed, is not in the category of a voter who has not registered.

He cannot be made to register anew, as if he had never before been a registered voter.

The registrar has authority to protect his office from imposition, and at the same time he may permit registered voters to have their names placed on the new poll book.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 115.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Mandamus by D. J. Reid against P. D. Le Blue, Registrar of Voters. Judgment for relator, and respondent appeals. Affirmed.

Joseph Moore, Dist. Atty., E. F. Gayle, and T. Arthur Edwards, for appellant. Robert R. Stone and David Rosenthal, for appellee.

BREAUX, C. J. This was an application for a writ of mandamus, filed by David J. Reid in the district court, against the registrar of voters, for the parish of Calcasieu, to compel him to place his (plaintiff's) name on the registration book as a qualified elector.

The registrar had refused to grant plaintiff's application to carry his name on the roll, and this application is to compel him to enter his name on that roll.

The plaintiff is a citizen of the United States and a resident of the parish of Calcasieu.

The registration book, containing the names of voters, was destroyed by fire on the 23d of April, 1910.

A few days thereafter the registrar gave official notice in the local papers to all voters to come forward and register anew.

This was done in order to afford an opportunity to the voters to register their names anew.

Some time after his office had been opened, he gave notice that in 30 days prior to a special election he would close his office.

The special election referred to is to be held on the 14th day of July, 1910.

The parties to this litigation seek an interpretation of the statutes in order, so far as possible, to avoid all illegalities and irregularities.

If the majority of the voters called upon to vote at the special election of July 14, 1910, so elects, bonds are to be issued, as a result of the election, aggregating \$360,000.

Other elections are to be held, primary and general, in the near future.

It is probable that other voters, who had registered before the fire before mentioned,

will also seek to exercise their franchise rights.

The district court made the mandamus peremptory, and directed the registrar to enter the name of the relator.

The registrar appeals.

The first objection urged (in argument only) by the respondent is one regarding the asserted failure of relator to make the required affidavit and take the required oath.

Our answer to the contention of respondent is that he has not alleged these asserted grounds in his answer. The answer contains the general averment that relator came to respondent's office and applied to place his name on the roll of registration, which was refused.

Furthermore, the case is before us on an agreed statement of facts. No mention is made in this agreed statement of facts of a refusal on the part of the relator to take an oath or to comply with any direction of the registrar.

As this objection is raised only in the written argument, it has every appearance of an afterthought.

Relator must have taken the first registration oath at the time that he registered; i. e., any oath required at the time that he registered originally.

As to any oath required of him (if any was required) when he appeared before the registrar the last time, the pleadings and the facts are silent on the subject. It is only mentioned in the brief.

There is really no issue before us as to either the failure to take an oath or to satisfy the registrar that he had previously registered at the time that he made his application to have his name placed on the roll.

Respondent admits that relator registered.

It must, in consequence, be held that he duly registered, in the absence of any showing to the contrary.

The next proposition of respondent is that a voter who fails to avail himself of the right to register cannot vote at an election held in accordance with Act No. 98 of 1908.

That is true.

It does not apply to the case at bar. Relator did not fail to register. We have seen that he was duly registered, only the destroying flames burnt the written evidence of registration.

The next proposition of respondent is substantially to the same effect.

Respondent, in support of this last proposition, urges that relator was negligent, indifferent, and for that reason he must be held to have voluntarily disfranchised himself.

This proposition is not sustained, for the right sought is public.

We will further state, in answer, the rule established should apply to all voters, without regard to laches or negligence, as there cannot be degrees of excellence in this matter

or of indifference. It cannot reasonably be said to a voter, "Your right to have your name placed on the roll will be recognized, because you have been active enough," but to another, less active, or who may be guilty of laches, "You cannot register."

That would not do. All must be treated alike—the active, or the lame, the halt, and the blind. All have the right, or none have it.

If they have it, it should be recognized, after reasonable inquiry in regard to the right of the voter to vote.

We may as well state here the office of registrar is not to be imposed upon, as respondent seems to apprehend (if decision should be against him), by all who may apply to place their names on the registration book, without regard to whether they have previously registered or not. That officer should certainly be equal under the law to the duty of protecting his office from imposition.

We are decidedly of the opinion that relator has the right to have his name carried on the registration book.

The next contention of the respondent registrar is that the name of the voter cannot under the statute be placed upon the precinct register or voting list by the registrar or voter within 30 days of an election, citing Act No. 98 of 1908, in support of the contention.

We will begin by stating that the condition brought about by the destruction of the records is abnormal.

Still a voter who has previously registered should not be disfranchised, nor should the rule laid down tend to exclusion rather than inclusion of the voters who in good faith seek to exercise their rights as voters, although they may be a little tardy in their application.

There is no question of registration, as we have before stated.

But, having secured the right to vote, he should be permitted to retain the right.

Another ground of respondent is that, although the registration record had been totally destroyed by fire, no person ought to be permitted to vote under the statute on an oath or written affidavit on the day of the election.

That question is not before us. We have naught to do with acts on the election day.

We have no objection to state that in our opinion the contention that the precinct registration, or poll books for each precinct, must be furnished within 48 hours before the time fixed for the opening of the poll is sufficiently before us to justify us in expressing an opinion upon the subject.

We are inclined to the opinion that the names of voters who had previously registered cannot be placed on the registration books within the 48 hours preceding the opening of the polls.

This is rendered necessary, in order that the registrar may comply with the statute

and send the necessary books and papers from his office to the different polls and precincts, or wherever they are needed under the law.

In conclusion: A voter who has duly registered cannot be disfranchised on the ground that he has not had his name placed on the registration rolls 30 days before the election.

He is not to be treated and considered as one who had not registered at all—as in this instance the relator had registered and secured the right which the statute provides.

He cannot, under the statute, have his name carried on the registration roll within the 48 hours just preceding the opening of the polls.

If he complies with the statute as now interpreted, he has all the rights on the day of the election of a voter who had had his name placed on the registration rolls 30 days before the day preceding the election.

For reasons stated, the judgment appealed from is affirmed.

(126 La.)

No. 18,104.

**MERCANTILE FIRE & MARINE INS. CO.
CUMBERLAND TELEPHONE &
TELEGRAPH CO.**

(Supreme Court of Louisiana. May 9, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by the Court.)

PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

An amended petition, setting forth that the destruction of a house was due to the contact of defendant's wires, not properly insulated, with other heavily charged wires on the outside of the house, does not state the same cause of action as the original petition, which charged that the destruction was due to the improper installation of defendant's wires and apparatus on the inside of the house.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Appeal from Civil District Court, Parish of Orleans; Geo. H. Theard, Judge.

Action by the Mercantile Fire & Marine Insurance Company against the Cumberland Telephone & Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Clegg, Quintero & Gidierre, for appellant. Denegre & Blair and Victor Leovy, for appellee.

BREAUX, O. J. Plaintiff conducts a fire and marine insurance company.

It issued a policy of insurance to Louis Paysse against loss or damage by fire in the sum of \$5,000 on his dwelling house.

In November, 1906, a fire occurred, and the damage was \$2,249.50.

The loss was adjusted, and to the insured, Paysse, the last-stated amount was paid.

Thereupon Paysse assigned and conveyed to plaintiff his right of action and all claims

and demands against any person or corporation liable in damages for the amount on account of the negligence charged.

Plaintiff's contention, as set up in its petition, is that the loss was the result of a negligent and defective installation of the telephone wires, and that defendant's wires and apparatus installed by it in the dwelling house were so constructed and installed that they could not bear the voltage to which they were subjected, and that in consequence the electricity was not safely conducted through the dwelling. The sparks from the electric current escaped and set fire to the house, causing damage in the amount last stated.

In the November following the defendant filed an exception on a number of grounds—among others, that plaintiff had failed to allege with sufficient particularity in what respects the installation and switchboard were deficient or inefficient, and, further, that plaintiff had failed to allege which apparatus other than the switchboard was defective.

Plaintiff then filed a supplemental and amended petition, setting forth details in the matter of the installation in the house.

To this supplemental petition an exception was filed and an answer setting up the general denial.

The suit remained in abeyance. Nothing was done with it until November, 1909, at which time plaintiff filed another supplemental and amended petition, in which it averred that the telephone installations and apparatus put in the residence of the insured were unable to bear pressure by reason of their contact with an adjacent wire carrying a high and intense voltage; that in consequence the electricity escaped to the woodwork of the building insured and thereby caused the fire; that the defective installation was due to the fault and negligence of defendant; that defendant's wire was not insulated.

The defendant filed another exception, and averred plaintiff attempted to vary the cause of action, alleging facts not before alleged; that five years had elapsed since the first supplemental and amended petition had been filed; and that plaintiff was seeking to introduce a new cause of action.

This exception was overruled.

The trial was proceeded with.

Defective switch block and contact of a line owned by another company, and the uninsulated wire:

As to the defective switch block: An expert electrician testified that when safety devices are properly installed in the house, and are kept in good order, they are absolutely a safety device against the entering in to the building of heavy and dangerous currents.

There is no question but that defendant's

wire came in contact with a wire of the electric company carrying a heavy voltage.

The contention of plaintiff that defendant's wire was not properly insulated is sustained, if sustained at all, by inference.

The plaintiff in the first petition alleged that the device was deficient and inefficient.

In the first supplemental petition the plaintiff alleged that one of the faults of the telephone apparatus was its weakness or inability to bear the stress of the electric current to which it was subjected by defendant without arcing or without escape from the wires or boxes of the electric current.

Defendant's telephone current is not over 24 volts. It is neither dangerous to life nor to property. It requires no protection from the electric current which is necessary to its operation.

It is absolutely certain that the low current of the defendant company did not set fire to the building. This, we understand, is conceded by plaintiff.

The foregoing is the only issue presented by plaintiff in its first petition and in its first supplemental petition.

In neither of these petitions does plaintiff allege that defendant's wire came in contact with other wires, nor does it charge that defendant is accountable for any negligence on account of want of insulation, or in any other respect outside of the dwelling. The only fault set forth by plaintiff is that the installations and apparatus, put in the house by defendant company, were subjected by defendant to a current of electricity which they could not and did not safely dispose of or endure.

There is no proof of this; for it is manifest that defendant could safely dispose of or endure all the electricity it used.

The gravamen of the complaint is that the company by its own negligence in the use of its own current made itself liable in damages.

From this point of view the defendant is not liable. The facts necessary to fix liability are not disclosed.

It is well settled that there must be a clear statement of the substance of the relief sought.

We do not for an instant question but that the telephone company must guard against the harmful effects to persons and property from the electricity which may be conducted over its lines and to its instruments.

In order to render it liable, however, when its wires are overcharged by contact with another wire, the fact necessary to admit the proof must be alleged.

This, we have seen, has not been done.

We would not be justified in enlarging the pleadings to enable plaintiff to recover for another cause of action, particularly in view of the fact that the court a quo excluded the testimony.

Learned counsel for plaintiff cites Griffith

v. Telegraph Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 921.

We do not consider that decision pertinent, for the reason that there was no allegation made, as in the case in hand, limiting the action against the telephone company and failing to allege the true cause of the accident.

When the pleader fails to plead the cause of action, it cannot be considered.

There was no evidence admitted of negligence as the cause of the overcharge with electricity of defendant's wire. This, as before stated, was only alleged in the second supplemental petition, filed some five years after the first petition and first supplemental petition had been filed.

Exceptions were filed to both of the supplemental petitions, and bills of exceptions were reserved to the admissibility of the testimony to prove up either.

A plea of prescription of one year was filed against the second supplemental petition on the ground that it pleaded a new cause of action.

No cause of action had been previously alleged. The grounds set forth in the second supplemental petition were entirely new, separate, distinct, and different from the first ground.

The petition was subject to the objection that it contradicted the first petition and alleged a new cause of action, which was prescribed at the time it was filed.

The plaintiff has cited several decisions as sustaining his contention that it has a cause of action.

Plaintiff may have had such a cause, but it was not alleged. Plaintiff would, perhaps, have had such a cause, had it not alleged in effect that it was defendant's act. There was an outside agency controlling the current, as alleged many years after the suit had been brought.

Plaintiff did not admit error. The second supplemental petition sought to amplify, not to correct, the first petition, and in seeking to amplify it contradicted the first and alleged a new cause of action.

In attempting to introduce this new ground of complaint, plaintiff is forced into the inconsistent position just before stated.

We might go on further, and discuss this case at some length. The facts on the merits, to which we have given some attention, for the reason that the whole case was considered by the district court, have given us no reason to conclude that the judgment rendered on the merits is erroneous.

The weight of the testimony shows that the wires sparkled and burned on the outside of the building.

It remains as a fact that the apparatus in question was on the inside of the building. The apparatus if properly installed would not have prevented the fire.

The engineering expert, who was plaintiff's witness, testified that outside fires could have no connection with interior defects.

The fact is, also, that there was some laxity in the matter of the inspection, it seems.

The rule as laid down by the company was good; but the local inspection was not what it should have been at times.

In the Burke Case, 50 South. 551, the duty of interior protection against outside current was not presented in the light it is presented in this case.

It was not found in the cited case that interior fixtures need be safeguarded against trolley currents.

For reasons stated, the judgment of the district court is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(126 La.)

No. 18,067.

WILL v. SALMEN BRICK & LUMBER CO., Limited.

(Supreme Court of Louisiana. June 6, 1910. Rehearing Denied June 25, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY.

Plaintiff sues defendants for damages for personal injuries received by the bursting or breaking of an endless belt operating a blow fan in the mill of the defendant company, on the ground that it was an old belt, worn and rotten and improperly spliced, and that the accident was caused entirely by the fault of the defendants, or those for whose acts it was responsible. The issues were tried before a jury, which returned a verdict in favor of the plaintiff. Defendant appeals from the judgment rendered in conformity to the verdict. On appeal the judgment is reversed.

The belt was not old, worn, and rotten, nor improperly spliced. It was a comparatively new belt, of good material, and had been inspected the day before the accident. Having become somewhat stretched, it was taken up, spliced by an expert beltman in the employ of a belt company, sent by it to do the work of shortening and tightening the belt, who had for years before done such work skillfully and successfully.

The court was of opinion that the defendant company had done everything incumbent on it as the employer of the plaintiff; that the accident was unavoidable, and arose from latent defects of some kind, for which it was not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Jacob Will against the Salmen Brick & Lumber Company, Limited. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

P. M. Milner and Gustave Lemle, for appellant. Armand Romain, for appellee.

NICHOLLS, J. The plaintiff sues for the use and benefit of his minor son, Nicholas Will. He alleged: That on February 22, 1909, at about 7:30 o'clock a. m., the said minor, Nicholas Will, was in the employ of the defendant herein as an assistant or aid at the planer operated and owned by the defendant herein at their sawmill on Carrollton avenue in the city of New Orleans. That his said son was in the actual performance of the work for which he had been employed at the time of his accident, and was being paid at the rate of \$1.15 per day. That, while his said minor son was performing his work around and near the planer hereinabove referred to, a certain leather belt used and operated in the sawmill, and situated near the place where petitioner's son was standing in order to perform his work, suddenly broke or split in such a way that one of the ends of the said heavy leather belt struck said Nicholas Will with violence upon the left arm, between the elbow and the shoulder, thereby crushing the bone of said arm, and subjecting petitioner's son to intense mental and physical sufferings, and to serious permanent disability.

That said belt was old, worn, and rotten, and improperly spliced, and that said accident was caused entirely by the fault of the defendant herein, or of those for whom said defendant is responsible, and that petitioner's son in no way contributed to said injury. That in consequence of said injury to his son's left arm said minor was subjected to three distinct, serious, expensive, and painful operations to said arm, in order to save said arm. That in consequence of said operations he had suffered and is suffering intense physical agony. That his arm is now permanently weakened. That said arm, by the removal of several pieces of bone, has been shortened by about three inches, thereby permanently disfiguring said minor, and that said minor has been subjected to considerable expense for the treatment of said arm, and that his earning capacity has been permanently reduced.

Petitioner claimed for the intense mental and physical suffering suffered by his son the sum of \$2,000; for the permanent injury to said arm, including disfigurement, inconvenience, etc., the sum of \$5,000; for the loss of his earning capacity the sum of \$5,000; and for expense incident to the treatment of said arm, the exact amount of which is yet unknown to petitioner, as said arm is still under treatment, he claimed the further sum of \$500—making a total of \$12,500 herein claimed.

He prayed for citation upon the defendant herein, and, after all due delays and legal proceedings, for judgment in his favor, for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the use and benefit of his minor son, Nicholas Will, and against the defendant herein, in the full sum of \$12,500, with legal interest from the date thereof, and for all costs of suit, and legal, general, and equitable relief. He further prayed for trial by jury.

Defendant answered, pleading first a general denial. Further answering, it denied that the belt by which plaintiff was injured was old, or rotten, or improperly spliced, but averred, on the contrary, that the belt had not been long in use, was good and sound in every particular, and the ends of same had been properly put together by a mechanic skilled in his business.

That the accident in this case was purely unavoidable, and was due to no negligence of respondent, and that plaintiff's son necessarily assumed all of the ordinary risks of the hazardous occupation of work in a sawmill. Respondent prayed that this suit be dismissed, at his costs. The case was tried before a jury, which returned a verdict in favor of the plaintiff against defendant for \$3,000.

Defendant applied for a new trial, on the ground that it was contrary to the law and the evidence; that

(1) The plaintiff failed to make out his case; the allegation of the petition being that the belt was old and worn, and improperly spliced, and no evidence being offered to show that the belt was either old or worn or improperly spliced.

(2) The plaintiff assumed that, because the belt parted at the splicing, the splicing had been improperly done.

This assumption or prima facie case was met by the defendant establishing the following facts:

(1) That regular inspections were made of the belts in the mill.

(2) That the belt in question was a new belt, in use only 15 months; whereas the life of a belt is 8 or 10 years.

(3) That the belt had stretched, as all new belts will, and needed taking up.

(4) That an expert of one of the best known belt houses was employed to do the work, a man who has had 16 years of experience, and who had never put a belt together that had not stuck.

(5) That the belt was in first-class condition. That he did the work in a first-class, workmanlike manner, in the customary way, splicing the belt at the mill, as is done by all sawmill houses, and used the best waterproof cement on the market.

(6) That the foreman of the mill was present during this work, and testified that he knew of no reason why this belt parted where it was spliced, and that it was an unavoidable accident.

(7) That the boy was not employed in any dangerous occupation, and only a short time each day was in the passageway in the yard near this belt, which was 8 or 10 feet above his head, passing from the second floor up to

the fan or blower. That he had worked there 15 months, and knew and appreciated the danger of being hurt if the belt broke, and never made any complaint.

This motion was overruled, and defendant has appealed.

Plaintiff has answered the appeal, praying that the judgment be amended up to the amount claimed in the petition.

The evidence shows that plaintiff's son was very severely injured while employed as a laborer at the mill belonging to the defendant company, without any fault or negligence on his part. The injury was caused by the bursting or breaking of an endless eight-inch leather belt, by which a blow fan on the second floor of the mill was operated. The belt was made of sections glued together at every four feet. It was made an endless belt by bringing its two ends together and gluing them with what is known as "belt cement."

It was not old, worn, and rotten, as alleged in the petition, but was a comparatively new belt. It was shown that the usual duration of such a belt was 10 or 20 years; that it and all the other belts in the establishment were inspected every Sunday morning, while the mill was not running. A regular inspection of belts was made on the day before the accident occurred. It was noticed that this particular belt had stretched and needed to be taken up—shortened and made tighter. The Manhattan Rubber Company was accordingly called on to send one of its expert beltmen to do the work. It sent its beltman, a Mr. Thompson, to do the work. He was the workman who had been usually sent to the defendant to do work of that character. He inspected the belt, shortened it to the extent he deemed necessary, glued the ends together with cement, placed the ends so glued under pressure, and left it to dry out, some time on Sunday morning. The mill was not started up until the next day, when this particular fan was then put again into use. About 8 or 9 o'clock on Monday the belt came apart with force and struck plaintiff's son, who was working on the ground, in the arm, breaking and fracturing the bones between the elbow and the shoulder. What cause brought about this bursting of the belt was not shown. The breaking of the belt was undoubtedly the proximate cause of the injury. Counsel for plaintiff in his brief says: That the mere happening of an accident does not prove negligence on the part of anybody, but that the nature of the accident and the presumption it raises may suffice. That where a thing is shown to be under the management of the defendant, or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. That in the case of Snyder

v. Wheeling Electric Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, it was held that the breaking of a live electric wire and its fall to the ground presumes negligence. He cites in this position 39 L. R. A. 499, 502; Abbott's Trial Evidence, 719-720; Abbott's Trial Brief (2d Ed.) p. 215; 1 Labatt's Master & Servant, p. 330-337; 1 Bailey on Personal Injuries, p. 73, and authorities; Puget Sound Iron Co. v. Lawrence, 8 Wash. T. 223, 14 Pac. 869; Williams v. Lumber Co., 114 La. 806, 38 South. 567; Budge v. Railroad Co., 108 La. 350, 32 South. 535, 58 L. R. A. 333; Johnson v. Christie and Lowe, 117 La. 911, 42 South. 421. Counsel insists that defendant company should not only have made an inspection of the belt on Sunday, but should before using the belt on Monday morning, have made an inspection of the same, and tested its condition.

That it was the duty of the company to have warned the boy of the probable danger of the belt's bursting after having been spliced as it was, and it did not do so.

He says that it is admitted that if the belt was cut too short, or, in other words, made too tight, it would break at the weakest point, and that it is significant that the belt broke exactly at the point where it had been spliced and weakened the day before.

He suggests, also, that having been made too tight, the engine was made to run too fast under the circumstances; also that the belt should have been taken down to be repaired, and not spliced while it was still in place in the mill.

The defendant urges: That, as shown by the evidence, he has done everything in the premises which it was his duty to do. That the work of inspecting and repairing the belt was done by an employé of the Manhattan Rubber Company. That he was an expert in the business, and had done work faithfully and well, and that the accident in question was unavoidable, and arose from latent defects of some kind, for which it is not responsible.

We are of the opinion that the defendant performed all the obligations incumbent on him as an employer of the plaintiff's son; that it was not, and is not, chargeable with any fault or negligence in connection with the breaking or bursting of the belt, which caused the injury received by him; that the accident referred to in plaintiff's petition was unavoidable, and due to some unknown cause, for which defendant cannot be held responsible. The verdict of the jury and the judgment thereon rendered are erroneous and cannot be sustained.

It is therefore ordered, adjudged, and decreed that they are hereby set aside, annulled, avoided, and reversed, and plaintiff's demand is hereby rejected, and his suit dismissed, with costs in both courts.

(126 La.)

No. 17,571.

HANNA v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 30, 1910.)

(Syllabus by Editorial Staff.)

1. STREET RAILROADS (§ 81*)—CARE REQUIRED—NOISES.

Where a street railroad company had created a confusion of noises and car tracks at a crossing, it was bound to use extraordinary care in handling its cars there to prevent injuries to pedestrians.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172, 176; Dec. Dig. § 81.*]

2. STREET RAILROADS (§ 103*)—INJURIES TO TRAVELERS—NEGLIGENCE—LAST CLEAR CHANCE.

Where a street railway motorman, approaching a crossing, had the last clear chance of stopping the car and preventing the striking of plaintiff, a pedestrian, from the rear, had he been looking, but did not see plaintiff until it was too late to prevent a collision, his lack of care was the proximate cause of the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

3. DAMAGES (§ 98*)—PERSONAL INJURIES.

Plaintiff, an old lady, was struck by a car. There was a fracture of the fourth rib and of the metacarpus bone of the right hand, and contusions about the body and limbs. The shock affected her nervous system and heart, and she was confined to bed for two or three months, and it was four months before she could go out, even for a carriage ride, and the fracture of the rib superinduced pneumonia. She had permanently lost the use of one hand, and was unable to go about at the time of the trial without the use of a stick. The actual expenses in doctor's fees, nurses, drugs, etc., amounted to \$1,799.69. Held, that she was entitled to \$3,000 permanent damages, in addition to the expenses so incurred.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 235, 236; Dec. Dig. § 98.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mrs. Sarah Hanna against New Orleans Railway & Light Company. Judgment for plaintiff, and defendant appeals. Increased and affirmed.

Dart, Kernan & Dart, for appellant. George J. Untereiner, for appellee.

PROVOSTY, J. Plaintiff, an old lady, was crossing the neutral ground on Canal street going down town, along the line of the prolongation of the woods side sidewalk of Camp street, out of which street she had come, when she was struck and knocked down by one of the Prytania street cars of the defendant company, which had come out of Camp street behind her, following the curve by which the cars from that street come upon the neutral ground on Canal street. There are at that place on this neutral ground, within a space of 60 feet, four straight tracks going up and down Canal street, and two curved tracks going in and out of Camp

street. A pedestrian, following the line which plaintiff was following, crosses, first, the curved track used by the cars that go from Canal into Camp. He steps from this curved track upon the first straight track. Then 5 feet 9 inches further he comes upon the next curved track, or that used by cars going from Camp into Canal, which connects at that point with the second straight track. Plaintiff says that before venturing upon the tracks she looked to see whether any cars were so near as to prevent her crossing, and that she saw none. She says she looked "every way." Had she looked behind her, over her right shoulder, she would have seen the car which eventually struck her. This car was at that moment either at a stop on Camp, or was moving out of Camp into Canal. Plaintiff was 79 years old, but active; and her sight and hearing were good. Her occupation necessitated her going about in the streets and using the cars a great deal. Cars are constantly passing upon the straight tracks on Canal street, and all of them, more or less, sounding their gongs. So great and constant is the noise that about an even number of the bystanders did not hear the car that injured plaintiff sound its gong. The police officer, stationed at this crossing because of its dangerous character, aptly describes the situation when he says:

"I can't say whether he was ringing his bell or not, because there are always several cars around there, and there were bells ringing, and there were other cars on the crossing. I don't know which one was ringing the bell, though."

Having created this confusion of noises and car tracks at this crossing it behooved the defendant company to be extraordinarily careful in the handling of its cars along there. Instead of this, the testimony satisfies us the motorman was not even looking ahead. Two disinterested witnesses so testify. One of them says:

"An outsider attracted his attention, and when he noticed he was about to run over the lady he quickly applied the brakes."

This outsider was Mr. Numa Jordy, who testified that in the direction in which the motorman was looking he could not have seen plaintiff.

"He must have been looking over her head. He made no movement, either on the brake or on the power lever, that I saw, until I made the exclamation. The car could not then have been more than three or four feet from Mrs. Hanna."

These two eyewitnesses, both of them intelligent men, found that the accident occurred as the result of the inattention of the motorman; and we discover nothing in the record to disturb that conclusion. The mo-

torman testifies that he saw the old lady, but thought she would stop before reaching the track, and that he did all in his power to stop the car as soon as he saw her step upon the track. Guilbeau, the employé of the defendant company stationed at this corner for shifting the tracks, says that the motorman was looking. This witness says that he saw that the old lady was not paying attention to the car behind her, and that he whistled to her to attract her attention. If this man thus realized the danger in time, as he thought, to give plaintiff warning, a fortiori should the motorman have done so. But the testimony of this man does not impress us favorably. We prefer to rest the case upon the testimony of the two witnesses who say positively that the motorman was not paying attention.

So far as contributory negligence is concerned, we are not sure that the old lady did not stop and look, as she says she did, and that the reason why she was overtaken by the car was not that the car came on faster than she thought it would, and faster than it should have done.

At all events, she was entirely unconscious of the danger, and the motorman had a clear chance of averting the accident. He was coming behind her, and should have taken sufficient care not to run upon her. His not doing so was the proximate cause of the accident.

The immediate injuries of plaintiff were a fracture of the fourth rib and of the metacarpus bone of the right hand, and contusions about the body and limbs. The shock affected her nervous system and her heart. She was confined to her bed from two to three months, and it was four months before she could go out, even for a carriage ride. The fracture of the rib superinduced pneumonia. Her sufferings were great. The permanent injuries are the loss of the use of one hand, and inability now to go about without the use of a stick, and her nervous system more or less affected. The actual expenses in doctor's fees, trained nurses, drugs, etc., amounted to \$1,799.69.

The jury allowed plaintiff \$1,000. We fix the damages for suffering and permanent injuries at \$3,000, which, with the \$1,799.69 of actual expenses, makes an aggregate of \$4,799.69, for which plaintiff is entitled to judgment.

It is ordered, adjudged, and decreed that the judgment appealed from be increased to \$4,799.69, with 5 per cent. per annum interest on \$1,000 thereof from March 2, 1909, and like interest on the balance from this date. Defendant to pay all costs.

(126 La.)

No. 18,272.

STATE v. OWEN et al.

(Supreme Court of Louisiana. May 23, 1910.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 968*)—TRIAL—MISCONDUCT OF JURORS—TIME FOR OBJECTION.**

Defendant (Sylvester Owen), indicted for murder, was found "guilty as charged without capital punishment," and sentenced for life to the state penitentiary. He moved in arrest of judgment on the ground that four jurors who had been examined on their voir dire, and accepted by both sides, but who had not yet been sworn, were left in charge of the sheriff by reason of the adjournment of the court for the night, and during that time had conversed with outside parties beyond the hearing of the sheriff. That on the next morning on motion of the district attorney these four persons were discharged as jurors by the court for misconduct, but nevertheless they were again tendered as jurors and served as such upon the jury. The court overruled the motion and sentenced the defendant, and he has appealed. There was no error in the court's action. The parties named were not discharged for misconduct as jurors. The court simply replaced the situation with respect to those parties as if they had never been examined on their voir dire, nor been accepted, and matters quoad them were started de novo. They were again sworn on their voir dire, examined as to their fitness by both sides, and accepted. If defendant had any legal objection to this proceeding, he should have urged it at the time. It was too late after verdict to raise the objection.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 968.*]

Appeal from Seventh Judicial District Court, Parish of West Carroll; John R. McIntosh, Judge.

Sylvester Owen was convicted of murder, and appeals. Affirmed.

Eugene McBain, Allan Sholars, and Henry D. Briggs, for appellants. Walter Guion, Atty. Gen., and C. J. Ellis, Dist. Atty. (R. G. Pleasant, Clyde Turner, and Robert V. Reeves, of counsel), for the State.

Statement of the Case.

NICHOLLS, J. Alfred Owen and Sylvester Owen were charged with the murder of Clarence Compton under an indictment found against them by the grand jury for the parish of West Carroll. On the motion of the district attorney, a severance was granted, but prior to this a motion for a change of venue on the part of both defendants jointly had been filed. After the severance had been granted, the case as to Sylvester Owen was set for trial. The motion for a change of venue as to him was partially tried and abandoned by his counsel. The case was then taken up and tried on its merits as to Sylvester Owen. The jury on the trial of the case against Sylvester Owen returned a verdict against him of "Guilty as charged without capital punishment." He was sentenced by the court to be confined at hard labor in the state penitentiary at Baton

Rouge during the remainder of his natural life. He has appealed. Appellant relies upon the alleged error of the trial judge in refusing to order an arrest of judgment upon the following grounds which he assigned:

"State v. Sylvester Owen.

"Now comes Sylvester Owen, the accused herein, and with respect shows that after four jurors had been examined and accepted as jurors on March 22, 1910, and had been placed in care of one not a sworn deputy sheriff, after the adjournment of court, and had been guilty of misconduct as jurors, and after the filing of a motion by the district attorney asking that the said jurors be discharged, and upon which motion, the presiding judge entered an order discharging the four jurors, then directed that they be again examined on voir dire, which was done, and three of the four were again accepted and sworn as jurors and participated as such in the trial and verdict—

"Shows that the action of the court in the premises was error in allowing and ordering incompetent and once discharged jurors to again be presented for examination and to be accepted on the jury. That the facts and allegations herein set forth appear from the face of the record in this case, and especially from the minutes of the court and the motion of the district attorney which are hereto annexed and made part of this motion.

"Wherefore the accused prays and moves the court to suspend and arrest judgment herein and that the verdict of the jury be set aside."

The trial judge having overruled the motion in arrest of judgment, accused reserved the following bill of exceptions:

"Be it remembered that during the trial of this case, and while a jury was being impaneled for the same, and on the 22d day of March, A. D. 1910, as is fully shown by the minutes of the court, a copy of which is hereto annexed and made a part hereof, four jurors of the regular venire, after being sworn upon their voir dire, and examined by the district attorney and counsel for the accused, were accepted as jurors by both the state and defense and were returned to the jury box, but not sworn as jurors. That thereupon, the regular venire having been exhausted, the court ordered that talesmen be summoned and an adjournment of the court until the following day, directing that the four accepted jurors be taken in charge by the sheriff or a deputy and sequestered.

"The said four jurors, who were Geo. Cawthorn, Dave Crow, J. W. Jackson, and J. R. Fleming, were placed in charge of D. L. Barmore, who was not the sheriff of the parish nor a sworn deputy, and were by said Barmore allowed to accompany him to a cold drink stand in the town of Floyd, remain there for some time, distribute themselves promiscuously among quite a number of parties who had congregated at said cold drink stand, and converse with them without restraint, and out of the hearing of the said Barmore. That this continued for some time before the said parties were taken in charge by a sworn officer as is fully shown by the motion of the district attorney filed in court on March 23, 1910, asking that the said four jurors be discharged for their misconduct and a new panel ordered, a copy of which is annexed hereto and made a part hereof.

"The trial judge in deciding and ruling on the said motion, which was tried on the same day, sustained the same to the extent of discharging said jurors, but ordered that they (the four accepted jurors) be again examined on their voir dire, before examining any tales-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

men,' as is shown by the minutes of the court of March 23, 1910, a copy of which is hereto annexed and made a part of this bill.

"The said four jurors were brought into court and regularly examined on their voir dire, and from their number Dave Crow, J. W. Jackson, and J. R. Fleming were accepted as jurors. The accused exhausted the 12 peremptory challenges allowed him by law.

"The accused, through his counsel, objected to the order of the judge that the four accepted jurors who had been by order of the court, on motion of the district attorney, discharged for their misconduct, and because of their having been in charge of one who was not a sworn deputy sheriff for the reason and on the ground that, having been held disqualified, and having been discharged by the court, for the reasons shown, the said persons were incompetent to act as jurors in the case; that the action of the court in having the said discharged jurors again presented and examined on their voir dire, without being again sworn, was improper; that their incompetency, flowing from their misconduct, attached, and remained, even after the re-examination and presentment, and was not affected thereby.

"Which objection was overruled by the court for the reason recited and as shown by annexed per curiam. To which ruling the accused excepted and reserved a bill of exceptions and presents this bill of exceptions for signature this March 31, 1910."

In the per curiam accompanying the bill, the judge made use of the following language in the statement:

"The only exception taken by Mr. McBain, counsel for the accused, was as to the discharge of the four jurors. Upon the trial of this motion presented by the district attorney asking for the discharge of the four jurors, the court considered the testimony of Mr. R. J. Herring, chief deputy sheriff, and the only witness introduced upon the trial of this motion, whose testimony was, in effect, that the four jurors herein named had been in the custody of Mr. D. B. Barmore, an unsworn officer, for a short time (see his testimony), was a sufficient irregularity as to authorize the court to presume misconduct on the part of said jurors, though none had been shown, and therefore said motion was in part sustained.

"These four jurors were brought into the courtroom, after the trial of said motion, in the custody of the sheriff, were resworn upon their voir dire, and all accepted, except the juror Cawthorn, who was excused on the part of the state.

"The court was unable to see where any harm or injury could have resulted to the accused in these proceedings.

"Reference is hereto made to the minutes of the court and the testimony taken upon the trial hereof.

"Dated and signed this 31st day of March, A. D. 1910."

The minutes of March 22d show that, in the case of State v. Alfred and Sylvester Owen, a motion for a change of venue was filed by the defendants, and that the district attorney made a verbal motion, and that during the time required to summon witnesses, on trial of motion for a change of venue, the case proceeded to the extent of examining on voir dire the jurors summoned for the present week; the jurors selected not to be finally sworn to try the case till the question of change of venue had been tried and decided. The attorney for defendants objected to that course of proceedings, whereupon the court

ruled that, if accused parties had no other cause for refusing to proceed with the trial, the jurors present should at once be examined on voir dire, but that time would be allowed to obtain witnesses on the change of venue; that they should be summoned to appear instantan; and that the question of whether or not a change of venue should be granted would be tried and decided before defendants were regularly placed on trial. It being announced that no attachments were desired on the part of either the state or defendants, it was ordered that the swearing and examination of jurors on voir dire proceed. The district attorney then filed a motion for a severance, which was tried and sustained. On verbal motion of the district attorney, the selection of jury to try Sylvester Owen was ordered to proceed. Attorney for defendants reserved a bill of exceptions to the order of the court ordering the selection of jury to proceed and to the ruling of the court allowing a severance. The court then took a recess until 1 o'clock.

The selection of jurors under the ruling of the court was proceeded with. The accused and his attorney being present in open court, jurors from the regular panel summoned to appear for the present week were then sworn on voir dire, when came George Cawthorn, Dave Crow, J. W. Jackson, and J. R. Fleming, all of whom were sworn on voir dire, examined by counsel for state and defense, and accepted by both parties. The regular panel being then exhausted, the court ordered the sheriff to summon 30 persons having the legal qualifications to act as tales jurors in case to appear to-morrow morning at 9 o'clock and act as such, also that in selecting said tales jurors no one be taken from the neighborhood of the killing. The court then gave the usual instructions to the jurors already examined and accepted, and to the sheriff.

Court adjourned until to-morrow morning at 9 o'clock.

Floyd, La., March 23, 1910.

State of Louisiana v. Sylvester Owen.

The district attorney filed a motion to have the four jurors who were selected on yesterday discharged. This motion was tried and sustained to the extent of discharging the said jurors, but it was ordered by the court that they again be examined on their voir dire before examining any talesmen, but the said four jurors were kept in charge of the deputy sheriff out of the courtroom. They were then brought into open court, resworn, and regularly examined on voir dire, and from their number the following names were accepted viz.: Dave Crow, J. W. Jackson, and J. R. Fleming. The regular panel being then exhausted, and the 30 tales jurors ordered by the court on yesterday being in attendance, the formal examination of these was ordered, when came J. D. Murphy, J. A. Chapman, W. T. Lang, Ben Griffin, W. T.

Smith, J. M. Vincent, G. C. Hedrick, W. P. Tarwater, and J. D. Shaw, all of whom, after being formally examined on voir dire, were accepted by state and defense. The court then called upon attorney for accused to know if he wished to proceed to the taking of testimony on motion for change of venue, and upon the announcement of said attorney in open court that he waived any further proceeding with said motion as to Sylvester Owen, the said 12 jurors were regularly sworn to try the case, and the taking of testimony was continued till the hour of adjournment. With proper instructions from the court, the jury were placed in charge of the deputy sheriff, and the court adjourned until to-morrow morning at 9 o'clock.

Floyd, La., March 24, 1910.

State of Louisiana v. Sylvester Owen.

The accused was brought into court, the trial proceeded with, and the taking of testimony proceeded with in the hour of adjournment; the accused being present during the entire proceedings. The jury were placed in the custody of the deputy sheriff under the usual charge, and the court was adjourned till to-morrow morning at 9 o'clock.

Floyd, La., March 25, 1910.

State of Louisiana v. Sylvester Owen.

The trial of this case was resumed, testimony concluded, argument presented by counsel for state and defense, after which the charge was delivered by the court, and the jury instructed to retire to their room for deliberations. Having considered the case for some time they came into court and returned the following verdict:

"We, the jury, find the accused guilty as 'charged' without capital punishment."

At the request of attorney for defendant, the jury was polled, and each one of them affirmed the said verdict. The accused and his counsel were present in open court during the whole of the proceedings above related. Court was adjourned until to-morrow morning at 9 o'clock.

The motion of the district attorney in respect to the four jurors referred to was as follows:

"Now comes O. J. Ellis, district attorney, who respectfully represents that he has been reliably informed that immediately after the adjournment of your honorable court on March 22, 1910, p. m., the four jurors examined on voir dire and accepted by both plaintiff and defendant but not sworn as jurors were placed in charge of D. L. Barmore, who was not a sworn deputy sheriff, and were by said Barmore allowed to accompany him to a cold drink stand in the town of Floyd, remain there for some time, distribute themselves promiscuously among quite a number of parties who had congregated at said cold drink stand, and converse

with them without restraint, and out of the hearing of the said Barmore; that this continued for some time before the said four parties were taken in charge by a sworn officer.

"Apparar therefore suggests to your honorable court that this was improper handling of said jurors; that the presumption of misconduct and of improper communication between said jurors and other parties might be assumed. He therefore prays that the said four jurors be now discharged, and that an entire new panel be selected for trial of this case; all of the rights of the state and defendant to challenges being reserved to them."

The action of the court on this motion is shown by the minutes.

Opinion.

We do not regard the motion of the district attorney nor the action of the court thereon in the same light as counsel of defendant does. Having ascertained what had taken place with reference to the four jurors, the district attorney was evidently afraid that the defense might at a later stage of the trial take advantage of it in some way, and therefore deemed it prudent to place that matter outside of the possibility of harm to the prosecution. He merely said in his motion that "the jurymen had been improperly handled," and that "the presumption of misconduct and improper communication between said jurors and other parties might be assumed," and that therefore he prayed that the four jurors be discharged, and that an entire new panel be selected for trial of the case; all of the rights of the state and defendant to challenges to be reserved to them. He did not charge the jurors with misconduct. The judge evidently did not attribute misconduct to the four men. What he did was simply to replace matters himself as they were before the men were examined on their voir dire, and to let proceedings as to the jury start de novo; both sides having the opportunity afforded them to deal with the men thereafter in the light of what had just taken place. Neither side raised objections when the four men were brought in and again placed under oath on their voir dire; both sides exercised their rights of questioning them; both could have refused to accept them until they had ascertained to their satisfaction through testimony everything which had occurred before they were resworn. No objection was made to the men; they were accepted by both sides as good jurors. If the defendants had any objections to make, then was the time to urge them. Neither side after accepting them and allowing them to serve on the jury could postpone objections to be raised after verdict.

We are of the opinion that there was no error on the part of the court in overruling the motion in arrest, and that the judgment is correct. It is therefore affirmed.

(126 La.)

No. 18,272.

STATE v. OWEN et al.

(Supreme Court of Louisiana. May 23, 1910.
Rehearing Denied June 20, 1910.)

(Syllabus by the Court.)

1. JURY (§ 83*)—COMPETENCY.

Defendant (Alfred Owen) indicted for murder was found "guilty of manslaughter" and sentenced to 20 years' imprisonment in the penitentiary. He has appealed.

He urges that the trial court erred in overruling his objection to the competency of certain persons to serve as jurors in the case.

Held, that there was no error in the court's action.

None of the parties objected to were connected by marriage nor related by blood to either the deceased or the accused; none had any bias for or prejudice against either; none knew of the matters involved in the litigation other than by rumor and hearsay. All testified that if selected as jurors their minds were in such a condition that they could go into the jury box and render a fair and impartial verdict according to the law and the evidence, laying aside any preconceived opinion on the case and disregarding what they had heard before; that they knew of no reason which would preclude them from rendering such a verdict. Some of the parties on their first answers used expressions from which it appeared that they had allowed the rumors which they had heard to find a lodgment in their minds to the extent that, until they would receive testimony bearing on the facts, the impressions they had received from the rumors would remain; but these answers were subsequently modified.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 83.*]

2. COMPETENCY OF JURORS.

The court was guided in its course by the rule announced in *State v. George*, 8 Rob. 537, and repeated later decisions of the Supreme Court as that properly to be followed by judges in testing the competency of jurors.

Appeal from Seventh Judicial District Court, Parish of West Carroll; John R. McIntosh, Judge.

Alfred Owen was convicted of manslaughter on a charge of murder, and appeals. Affirmed.

Eugene McBain, Allan Sholars, and Henry D. Briggs, for appellant. Walter Guion, Atty. Gen., and C. J. Ellis, Dist. Atty. (R. G. Pleasant, Clyde Turner, and Robt. V. Reeves, of counsel), for the State.

Statement of the Case.

NICHOLLS, J. The defendants were jointly indicted for the murder of Clarence Compton. On motion of the district attorney a severance was granted. Before this a motion for a change of venue on the part of both defendants jointly had been made. After a severance had been granted, the case as to Sylvester Owen was set for trial. The motion for a change of venue as to him was partially tried and abandoned by his counsel. The case was then taken up for the trial on the merits as to Sylvester Owen. On the trial he was found guilty as charged without

capital punishment, and sentenced by the court with imprisonment at hard labor in the state penitentiary for the balance of his natural life. The case was subsequently tried on the merits as to Alfred Owen, and he was found "guilty of manslaughter" and sentenced by the court to imprisonment at hard labor in the state penitentiary for 20 years. He has appealed.

One transcript contains the proceedings in the cases of both Sylvester and Alfred Owen, and both cases were argued at the same time. Counsel waived consideration of many of the bills of exception, and it is difficult to remember on which bills the appellant in this particular case relies. Those involving the correctness of the action of the trial judge in overruling the objection of the defendant to allowing various persons to serve as jurors in the case on the ground that they had formed or expressed an opinion as to the guilt of the accused are certainly relied on. There are three bills of exceptions relating to that action. They refer to the jurors Crow, Lester Erskine, Haley, Settoon, and the two Fowlers (Transcript, pages 60 to 78).

Crow, examined on his voir dire, testified that there was a good deal of talk at the time of the killing of Compton. Nearly every one was talking about it. From what he heard at the time he had formed an opinion as to the guilt or innocence of the accused. Had heard the matter discussed since. He had not changed the opinion which he had formed at the time of the killing. He had expressed that opinion at one time to one or two persons. He had not expressed a very positive opinion. It was just based on what he had heard. Those who did express themselves seemed to be of one opinion. The opinion which he had expressed agreed with that of the majority of those who did express themselves. He felt that the opinion which he had expressed was correct. From what he had heard his opinion was a fixed one. It would take different evidence to remove it. He did not know that it would take so much evidence. He had just heard hearsay and nothing further. He did not know that what he had heard were facts or not. He believed they were. He was a brother of Mr. Crow who had served as a jurymen on the jury which had convicted Sylvester Owen. His brother had not gone over the facts of the case in his presence since the trial of Sylvester Owen. He lived about half a mile from where his brother lived. On examination by the court, Crow said he was not a relative of the accused; that he had never discussed the case with any of the witnesses; that the opinion he had formed was from the mere community gossip; that opinion would yield to the testimony; that he had no bias or prejudice in any way for or against the accused. Asked whether, "if selected as a juror to try this case, he thought

that his mind was in such a condition that he could go into the jury box and render a fair and impartial verdict according to the law and evidence, totally disregarding anything that he had heard heretofore about the case," he replied "that he did." Asked whether the fact that his brother was a juror in the case against Sylvester Owen would have any weight or effect whatever in his own consideration of the case, he replied "that it would not"; that he knew of no reason whatever which would preclude him from making a fair and impartial juror in the case.

Lester, examined on his voir dire, said that he had expressed sometimes his opinion about the case very positively, because he had felt very positive about it; that he did not (when being questioned) feel so very positive about it; that he would have that feeling if he went on the jury unless the evidence was right the other way; that, feeling as he did, and having expressed himself as he did, he believed that he could give the accused a fair and impartial trial.

Ersakine testified on his voir dire that he had expressed his opinion about the case on numerous occasions to different persons. Had heard the case discussed quite a number of times in the neighborhood where he lived, by persons who had heard of it from rumors. He had himself expressed his opinion, though not frequently. He could lay that opinion aside and decide the case according to the law and the evidence if taken as a juror. He had no bias nor prejudice whatever against accused; was not related to him by blood or marriage. His opinion would yield readily to testimony. It was not at all a fixed opinion. It was an opinion fixed so far. It was not a serious opinion. He attached no importance to it. He had no right to know that his opinion was correct. He expressed it only from what he had heard.

Asked by the court whether "he knew the condition of his mind and feeling in this case, and whether if accepted as a juror he could try the case absolutely and exclusively upon the testimony produced upon the trial and according to the law, given to him by the court," he replied "that he could."

Haley on his voir dire testified: That he had heard of the killing through rumors. That he was not acquainted with the deceased and had seen the accused that morning for the first time. He was not connected by marriage nor related to either of them. He had no bias nor prejudice which would influence him. He had formed an opinion, but did not know whether he had expressed it or not. That he could try the case as a juror as fairly and impartially as if he had never heard of it. Had heard no one discuss the matter by any one claiming to know the facts of the case. Had read the account of the killing given in the "Pioneer Enterprise." There was not any more in that paper than he had heard before. Had not heard discussion about the case many times. The reports

which he heard and read did not make any serious impression upon him. He had expressed an opinion two or three times. Did not know whether he had expressed himself seriously or lightly at the time, but he expressed his opinion. He merely stated what he thought. Nothing had occurred since he had expressed the opinion to change his opinion, nor had he heard anything to do so. He had heard very little about it since. He did not know whether the opinion was right or wrong because he knew nothing about it beyond what he had heard. He thought it was right (he supposed) at the time. That opinion would have no weight whatever with him nor any effect nor influence upon him in considering the testimony and arriving at a verdict.

L. P. Fowler testified on his voir dire: That he was not acquainted with the deceased. That he had only met the accused a few times. That he was not connected by marriage nor related by blood to either. That he had no bias nor prejudice in the matter. That he was prepared to sit in the jury box and try the case fairly and impartially on the testimony which might be introduced at the trial and without reference to anything he may have heard. Had not formed nor expressed an opinion about the guilt or innocence of the accused. He had heard nothing except by hearsay and did not know who the witnesses were. He had formed an opinion from hearsay; a good many persons had discussed it. Supposed that his own opinion was that of the majority's expression of opinion, as it was based on the same evidence—hearsay. His own opinion was formed from his confidence in the reports he had heard. He believed the reports he had heard. He had no right to disbelieve until he was convinced by evidence. Evidence would convince him. It would require evidence to convince him. The opinion which he said would require evidence to convince him he was wrong would have no weight with him in arriving at a verdict. Asked whether he would the more readily accept and believe evidence that agreed with that opinion and the information on which the opinion was based than evidence that did not agree with the opinion and reports, he replied that he did not think he would if he were a juror. The opinion which he had formed was not such an opinion as would weigh with him or affect him upon the trial of the case. That he would go according to the evidence. That nothing he had heard would affect him whatever. That he knew of no cause why he would not make a fair and impartial juror upon the trial of this case.

Settoon on his voir dire testified: That he had not heard any of the witnesses relate the facts bearing on the case. He had heard the case discussed by outside parties. He had not formed an opinion as to the guilt or innocence of the accused parties from what the people said. He was not connected by

marriage nor related to the accused parties. Was not acquainted with the deceased. Had met the accused a few times. Had no bias for nor prejudice against him which would influence him if he were taken as a juror. He did not know any reason why he could not give this party a fair and impartial trial.

On cross-examination, being asked whether he had not told Mr. Ellis (the district attorney), before the stenographer began to take down his answers, he said that he had formed an opinion, but had not expressed it, he replied that he had formed an opinion all right, but had not told any one what it was; that he had formed that opinion when he first heard of the case; that it would require evidence to change that opinion. Asked whether he would not be more apt to believe testimony that agreed with his opinion than testimony that did not, he replied that if it agreed with what he thought he could not help but believe it.

On redirect examination by the state, he was asked, "If the testimony did not agree with the opinion he then had, would he decide the case according to what he thought about it or according to the testimony?" To this question, he answered that he would decide by the testimony in the court as the testimony that he knew was just everybody talking about it.

He was then questioned by the court and asked, "Did he think that he could go into the jury box and try the case exclusively upon the evidence introduced upon the trial?" To this question he answered, "he thought so."

He was then asked, "Would what you have heard have any weight or effect whatever with you upon the trial of this case?" He replied that he did not know that it would. He was then asked, "Do you know of any reason why you could not give the accused party a fair and impartial trial?" His reply was that "he did not."

Chambliss testified on his voir dire: That he had not heard any of the witnesses relate the facts of the case. That he knew nothing of the case except through hearsay. That he was not acquainted with either of the parties and had no bias or prejudice which might influence him in trying the case. That he had formed an opinion as to the guilt or innocence of the parties. Asked whether "that opinion was of a fixed nature, so that it might weigh with you on the trial of this case, or could you disregard it and try the case entirely upon the testimony introduced here?" he answered that he believed he could disregard it "and try it entirely upon the testimony." On cross-examination by the defendants' counsel, he said that the opinion which he had formed would have no weight with him in deciding the case; that he thought if taken as a juror that he could listen to the testimony and reach a conclusion just the same as if he had never heard of the case. Ask-

ed whether "he would the more readily believe testimony that agreed with his opinion and the information on which his opinion was based, or testimony that did not agree with what he thought or what he had heard," he answered, "Well, if there was a good deal of conflicting testimony on either side, I think I would believe the testimony that agreed with my opinion."

Counsel of defendant stating, "The case you state is apt to happen," asked him, "In that event your opinion would have some weight with you in arriving at a verdict, would it not?" To this he replied, "I do not know that it would." On re-examination by the state, he was asked, "If the testimony was different from the reports which you have already heard, would you try the case on your testimony or on the reports?" To this he answered: "I would try the case entirely upon the testimony." When asked by the court, "Is your mind in such a state that you can exclude any testimony or anything you have heard about the case and try it exclusively upon the testimony that you hear upon the trial of the case?" To which he answered, "I can." He was then told by the judge:

"It is the law that all jurors must try a case solely and alone upon the testimony introduced, and in their deliberations their minds must be in such a condition about the case as to be able to disregard anything that they have previously heard.

"If the court should charge you to that effect, do you think, under such instructions, you can make a fair and impartial juror in this case."

To this question he answered, "I think I can."

Opinion.

J. C. Fowler's answers on his voir dire were such as to clearly entitle him to serve as a juror.

In the per curiam to the bills of exception, the judge said you cannot well judge the qualification of a juror by culling out a few of his answers. The examination in chief by the state was not transcribed, but all of the juror's testimony thoroughly satisfied the court that he was a competent and qualified juror.

The trial judge, in passing upon the qualification of the four jurors as proper persons to serve as jurors upon the trial of the appellant, was guided and controlled by the decisions of this court for many years declaring the test to be applied in dealing with that question.

None of the four were connected by marriage or related by blood with either the accused or the deceased; none had bias or prejudice influencing them; none knew of the matters involved further than by rumor and hearsay; all testified that, if selected as jurors, their mind was in such a condition that they could go into the jury box and render a fair and impartial verdict according to the law and the evidence, laying aside any preconceived opinion on the case, and

disregarding what they had heard before; that they knew of no reason which would preclude them from rendering such a verdict. It is true that some of these parties had in the first answers given by them used expressions from which it appeared that they had allowed the rumors which they had heard to gain lodgment in their minds to the extent that, until they could receive testimony bearing on the facts, the impressions that they had received from the rumors would remain.

Theoretically the minds of persons tendered as jurors should be absolutely free from even impressions in regard to the case about to be submitted for decision. Referring to that matter this court said, in *State v. George*, 8 Rob. 537:

"However desirable it may be to procure jurors whose minds are prepared to receive their impressions alone from the testimony submitted to them, yet the experience of almost every term of a district court held in the country parishes teaches that this is often impracticable. The ends of justice require that such offenders should be brought to punishment, and they will not be permitted to shield themselves from the consequences of their crime by perpetrating crimes of such heinousness as to excite universal inquiry, which inquiry leads to the formation of an opinion; yet such would be the result if jurors could be rejected merely because from vague and floating rumors they had formed some indefinite opinion which upon inquiry often proves to be merely hypothetical. To disqualify the juror, the opinion should have been deliberately formed, as is commonly the case where he has heard the evidence before the examining justice or upon a former trial of the same case, or has heard the statements of the principal witnesses. These become proper subjects of inquiry when the juror is presented to the prisoner. Much must necessarily be left to the judgment of the trial judge in ascertaining whether the mind of the juror be open to receive impressions from the evidence, or whether his opinion has been so deliberately formed as to resist those impressions."

On the trial of Aaron Burr, when the same question arose, Chief Justice Marshall said:

"Were it possible to obtain a jury, without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is that light impressions which may be fairly supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule." *Burr's Trial*, p. 416, 25 Fed. Cas. 50.

The trial judge, after the consideration of the examination of the parties as a whole, came to the conclusion, under the rule announced for the guidance of judges in the 8 Rob. Case, and in repeated decisions since that time, that those parties should not be rejected as jurors. They were ultimately ac-

cepted by the accused, and the case went to trial. That trial resulted in the conviction of appellant for manslaughter. He applied for a new trial on the ground that the verdict was contrary to the law and the evidence. The district judge held that this was not the case. He had full knowledge of all the testimony given in the case and the benefit of his knowledge of the condition of mind of the jurors as exhibited on their voir dire, and nevertheless he reached the conclusion that there was no judicial ground for interference. We are, in the face of that condition of things, asked to reverse the verdict and set aside the judgment on the ground that he was not tried by a fair and impartial jury. This we would not be justified in doing.

We do not think that the accused was prejudiced by the refusal of the court to grant a change of venue. There was, of course, considerable feeling in the parish at the time of the homicide; but there was no difficulty in obtaining a fair and impartial jury. *State v. George*, 8 Rob. 537. We do not think that appellant was prejudiced by the refusal. Defendant in his motion for a new trial did not refer to it as a ground of complaint, and the verdict rendered of manslaughter against the appellant under an indictment for murder does not indicate the existence of any strong feeling against him.

The fifth bill of exceptions recites that after the state had offered all its evidence in chief, and after the accused in presenting his defense had offered three witnesses, John Maddox, John Horseworth, and Mrs. Maguire, to prove dying declarations made by the deceased on two separate occasions, which testimony was received and heard by the jury, and after the accused had closed his defense, the state in rebuttal caused Bob Guler, H. L. Lawton, and E. M. Atkins to be sworn for the purpose of testifying that the deceased had subsequently to the tragedy, and prior to his death, made dying declarations contradictory of and inconsistent with the declarations testified to by the three witnesses for the accused, to which testimony offered by the state the accused excepted for the reason that the same was irrelevant, immaterial, and not in rebuttal, and for the further reason that the state should have offered the said testimony in chief, which objections were overruled by the court for the reason that the said testimony was in rebuttal and tended to impeach the testimony of the three witnesses for the accused. To this bill the judge made the following per curiam:

The reason of the court in overruling defendants' objection is not correctly stated. The dying declaration as given by Lawton and others was not tendered to impeach "other witnesses," but tended to contradict the version of the dead man's declaration as related by Maddox and others, and for that

reason was in rebuttal in the showing made by them in their testimony. The word "impeach," in the sense used here, is technical and misleading, because there was no attempt to impeach with declarations made by Lawton and others, except in so far as they rendered it improbable that Maddox was correctly relating what the dead man had actually intended to say.

The defense witnesses testified that on a certain evening Compton, the deceased, stated that he (Compton) made the first and last shot. The state then offered to introduce witnesses to show that Compton on the same evening stated that Owens made the first two shots. The court considered this strictly rebuttal testimony and not the line of testimony the state should have brought out in making its case in chief under the line of testimony that was introduced upon the trial. There were seven witnesses present at the scene of the homicide and who testified in this case. Compton's statements were first brought out by the defense and then rebutted by the state.

We find no error in the ruling of the trial judge in the matter covered by the bill of exceptions.

On the whole case, we find no legal ground for reversal. The judgment appealed from is therefore affirmed.

(126 La.)

No. 18,313.

STATE v. STELLY.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW (§ 1158*)—APPEAL—REVIEW—SCOPE—QUESTIONS OF FACT.

The Supreme Court, being limited in its jurisdiction of a criminal appeal to questions of law, cannot review a question of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3074; Dec. Dig. § 1153.*]

2. CRIMINAL LAW (§ 154*)—LIMITATIONS—POWER TO DIRECT PUBLIC PROSECUTION.

Under Rev. St. § 3541, requiring a sheriff to preserve the peace and apprehend public offenders, his deputy, as his alter ego, is an officer "having the power to direct a public prosecution," as affecting the bar of prosecution by prescription.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 154.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; W. P. Campbell, Judge.

Antoine Stelly was indicted for obtaining money under false pretenses, and the State appeals from a judgment quashing the indictment. Affirmed.

Walter Guion, Atty. Gen., and John J. Robira, Dist. Atty. (R. G. Pleasant, of counsel), for the State. Percy T. Ogden, for appellee.

PROVOSTY, J. The defendant moved to quash the indictment against him for obtaining money under false pretenses, on the ground that the offense was barred by prescription. The indictment negated the prescription by an allegation that the fact of the offense having been committed had been "made known to a public officer having the power to direct a public prosecution" only within the prescriptive period. On the trial of the motion to quash, evidence was taken, and it showed that the victim of the offense was a deputy sheriff, but that only within the prescriptive period he had learned that the pretense on which the money had been obtained from him was false. The court quashed the indictment, and the state has appealed.

This court, being limited in its jurisdiction to questions of law, cannot consider the question of fact as to when the deputy sheriff became informed of the falsity of the pretenses.

The question of whether a deputy sheriff is an officer "having the power to direct a public prosecution" is submitted without argument. We have no hesitation in saying that he is; for one of the prescribed duties of the sheriff is "to preserve the peace and apprehend all disturbers thereof, and other public offenders" (Rev. St. § 3541), and the deputy is his alter ego.

Judgment affirmed.

(126 La.)

No. 13,629.

STATE v. LEWIS.

(Supreme Court of Louisiana. Aug. 3, 1900.)

Action by the State against J. Vance Lewis, for disbarment. Judgment of disbarment.

Walter Guion, Atty. Gen., and E. T. Merrick, for the State.

PER CURIAM. This case having been submitted to the court upon the papers on file, and the law and the evidence being in favor of the plaintiff, and against the defendant:

It is therefore ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, the state of Louisiana, and against the defendant, J. Vance Lewis, forever disbarring him from practicing in this state as an attorney and counselor at law, and that his license as such, issued to him by this court on November 9th, A. D. 1899, under the provisions of section 113 of the Revised Statutes, be, and it is hereby, revoked, annulled, and avoided.

It is further ordered and decreed that the costs of this case be paid by said defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGLIN v. BROADNAX et al. (No. 14,581.)
(Supreme Court of Mississippi. June 20, 1910.
Suggestion of Error Overruled
July 4, 1910.)

1. DOWER (§ 114*)—CONVEYANCE IN FEE BY
WIDOW AS TENANT IN DOWER—ADVERSE
POSSESSION BY GRANTEE—ACCRUAL OF
RIGHT OF ACTION BY REMAINDERMAN.

The conveyance by a widow of the lands of which she is endowed passes only her life estate, though expressed to be in fee, and the grantee will not hold adversely to the remainderman until the widow's death.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 377, 378; Dec. Dig. § 114.*]

2. LIMITATION OF ACTIONS (§ 72*)—COMPUTATION OF PERIOD—EFFECT OF INFANCY.

An heir who was only 15 years old when the interest of a dowress ceased on her death in 1893 was not barred by the 10-year statute from suing for partition in December, 1907.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390, 392; Dec. Dig. § 72.*]

Appeal from Chancery Court, Lincoln County; G. G. Lyell, Chancellor.

Bill by Sarah A. Anglin against Mrs. C. A. Broadnax and others. From a decree for defendants, complainant appeals. Reversed.

The bill in this case was filed by the appellant in the chancery court by appellee December 27, 1907, and its purpose is for a partition of the land in controversy. At the time of the filing of the bill the appellant was under 31 years of age. Appellant's grandfather, one Lewis Dunn, died intestate in the year 1861, seised and possessed of a fee-simple estate in the land which he had entered from the United States government in 1855, and which he was occupying as a homestead at the time of his death. He left surviving him as his heirs the following named children, to wit: William Dunn, Hamilton Dunn, Elizabeth Dunn, and Sarah Anne Dunn, all of whom were minors, and a widow, Rebecca Dunn. The appellant is the only child of Sarah Anne Dunn, who, at the age of 14 years, married one John Dyas, and who died in Texas intestate in 1881, leaving the appellant, who was then 8 years old, as her only heir, and appellant afterward married one G. T. Anglin, when she was 14 years of age. The appellant's grandmother, Rebecca Dunn, at the time of the death of her husband, Lewis Dunn, had a dower interest in said land which, however, was never allotted or assigned by decree of the court. On November 28, 1865, while said Rebecca Dunn was occupying said land with her minor children, she executed a deed to W. D. Moore, through whom appellees claim title. Rebecca Dunn, the dowress, died in the year 1893, and the property in controversy was then and has since been claimed by the appellees, who seek now to establish their claim by adverse possession on the ground that the statute began to run against the heirs of Louis Dunn on November 28,

1865, the date of the execution by his widow of the deed to W. B. Moore. Appellant contends that Rebecca Dunn had only a dower interest in said property at the time of her attempted conveyance to Moore in 1865, and that she could convey nothing more than this dower interest, which ceased on her death in 1893 when appellant was only 15 years old; and that then appellant continued under the disability of minority for six years longer, or, until 1899; and not until that time, when she arrived at the age of 21, could the statute of limitations of 10 years commence to run against her. The chancellor held that appellees had acquired title by adverse possession, and entered a decree awarding them possession, from which this appeal is taken.

A. C. & J. W. McNair, for appellant. Jones & Tyler and T. Brady, for appellees.

WHITFIELD, C. Under our statutes and decisions, the deed of Rebecca Dunn, dowress, executed on the 28th day of November, 1865, was effective to convey just the title she had, no more, and no less. It is utterly immaterial what she attempted to convey, or that the deed purported to convey the whole fee simple. Her grantee stood exactly in her shoes as to this complainant, and this complainant never had a right of action until the death of Rebecca Dunn in 1893. This has long been the established law of this state on the state of facts in this record. The complainant was not barred by the 10-year statute of limitations. See *Lyebrook v. Hall*, 73 Miss. 509, 19 South. 348; *Harvey v. Briggs*, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646. The distinction ingeniously sought to be drawn between these cases and the case at bar is not maintainable.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein stated, the judgment is reversed, and the cause remanded.

ADAMS, State Revenue Agent, v. WILLIAMS et al. (No. 14,112.)

(Supreme Court of Mississippi. June 6, 1910.)

1. LEVEES (§ 11*)—OFFICERS—BONDS—ACTION—JURISDICTION.

Under Const. 1890, § 161, and Code 1906, § 556, providing that the chancery court shall have jurisdiction of suits on bonds of public officers for failure to account for money or property received, the chancery court had jurisdiction of a suit on the bond of the secretary and treasurer of a board of levy commissioners.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 11.*]

2. LEVEES (§ 11*)—OFFICERS—BONDS—ACTIONS—PARTIES.

Under Code 1906, § 4739, prescribing the duties of the revenue agent, and requiring him to investigate the accounts of levee board officers and to maintain suits against them, such agent is the proper party to maintain a suit

on the bond of the secretary and treasurer of the board of levee commissioners for a certain district.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 11.*]

3. OFFICERS (§ 126*)—BONDS—ACTIONS.

Under Rev. Code 1880, § 403, providing the condition of official bonds, but that a failure to observe the form prescribed therein shall not vitiate any official bond, now Code 1906, § 3463, that the secretary and treasurer of the board of levee commissioners for a certain district failed to sign as principal, the bond, having been executed by the surety and the premium thereon collected, did not vitiate the bond.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 220-222; Dec. Dig. § 126.*]

4. LEEVES (§ 10*)—OFFICERS—BONDS—SUFFICIENCY.

Under Laws 1884, c. 168, providing for the creation of the levee board, and fixing the condition of the bond of the treasurer, and providing that the same should be conditioned for the prompt, efficient discharge of the duties required by him, to be performed under the provisions of this act, etc., for the safe-keeping, accounting for, and paying over of moneys that may come into his custody, where a bond substantially complied with such provision, that it contained another condition exonerating the surety from liability by reason of public moneys deposited with any bank or depository did not invalidate the bond; and such added condition might be regarded as mere surplusage.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 10.*]

5. LEEVES (§ 10*) — BONDS — "OFFICIAL BONDS."

Under Code 1906, § 3463, relating to official bonds, the bond of the treasurer of a levee board is an "official bond."

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 6, p. 4952.]

6. LEEVES (§ 10*)—LIABILITY OF PRINCIPAL FOR INTEREST.

Under Act Feb. 28, 1884 (Laws 1884, c. 168) § 6, requiring the treasurer of a levee district to safely keep, account for, and pay over all moneys coming into his custody, etc., interest on moneys deposited by the treasurer of a board of levee commissioners comes into his hands by virtue of his office, and he and the sureties on his bond are liable therefor.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 10.*]

7. LEEVES (§ 10*)—BONDS—LIABILITY OF PRINCIPAL FOR INTEREST—RELEASE OF SURETY.

Though Act Feb. 28, 1884 (Laws 1884, c. 168) § 29, makes it a misdemeanor for any one intrusted with the custody of money confided to his care by virtue of his office to use such money for his own benefit, that the secretary of a board of levee commissioners, on depositing public moneys in a bank as he was entitled to do, wrongfully contracted to have the interest paid to himself, did not release the surety on his bond.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 10.*]

8. LEEVES (§ 10*)—OFFICERS—BONDS—LIABILITY OF PRINCIPAL FOR INTEREST.

Even though the treasurer of a board of commissioners of a levee district is an insurer of public moneys received by him, he is not

entitled to retain interest thereon; the same belonging to the state.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 10.*]

Appeal from Chancery Court, Coahoma County; M. F. Denton, Chancellor.

Action by Wirt Adams, State Revenue Agent, for the use of the Board of Levee Commissioners, against F. I. Williams and another. From a decree sustaining a demurrer by each defendant to the bill, complainant appeals. Reversed and remanded, with directions.

O. G. Johnston, for appellant. J. W. Cutrer, D. A. Scott, and W. A. Alcorn, for appellees.

WHITEFIELD, C. The facts in this case are as follows: F. I. Williams was duly elected secretary and treasurer of the board of levee commissioners for the Yazoo-Mississippi Delta levee district, on the 13th day of March, 1906, and thereafter on the 17th day of May, 1906, the said Williams qualified to act as such treasurer in the following manner, to wit: The said F. I. Williams applied to the Aetna Indemnity Company of Hartford, Conn., to become surety for him on his official bond, which the indemnity company did. The condition of said bond, amongst other things, provided for the faithful performance and discharge of the duties pertaining to the office of the treasurer. The said indemnity company became surety on the said bond, at the instance of said Williams, and was paid a valuable consideration by the board of levee commissioners, to wit, the sum of \$300 per annum, for which sum the said surety company presented its bill, which bill was duly approved and allowed and regularly paid from the funds belonging to said board of levee commissioners, and the receipt warrant duly filed, and the payment of said sum audited and approved by the said levee commissioners. Said bond was delivered to said Williams, who was both the secretary and the treasurer of the said board, by the Aetna Indemnity Company. The said F. I. Williams failed to sign the bond, but he accepted the same as his official bond, and in compliance with an act of the state Legislature, entitled an act to amend an act to incorporate the board of levee commissioners for the Yazoo-Mississippi delta and for other purposes, approved February 28, 1884, and an act to change the domicile of said board and for other purposes, approved January 19, 1886, said Williams filed said bond for record with the clerk of the chancery court of Coahoma county, and after the said bond had been regularly recorded he, as secretary of the said board, received said bond and kept the same in his possession, among other records and papers belonging to said board, until the expiration of his term of office.

The original bill further alleged that by

virtue of said bond, which was ratified, accepted, and adopted by himself, he entered upon the discharge of the duties of the treasurer, and received the salary and compensation provided by law, and did not disclose to the board of levee commissioners the fact that his said bond had not been signed by himself; that said bond served as his official bond during his entire term of office, and was recognized and treated as such, by both Williams and the *Ætna Indemnity Company*, and the board of levee commissioners. The original bill further alleged that the said F. I. Williams deposited the money or funds belonging to said board of levee commissioners with various banking institutions; that the money was placed to his credit as treasurer of said board; that said banking institutions, with whom the said money was deposited or to whom it was loaned, paid to the said F. I. Williams interest on the public money so deposited; but, while the said Williams accounted to the said board for all moneys paid to him as treasurer by order of the board, he failed, neglected, and refused to account to the levee board for the money paid him as interest or commissions on the public funds. This interest he appropriated to his individual personal use, making no entry of the receipt thereof on the books of account, making no report thereof to the board of levee commissioners, and concealing from the said board the fact that he had received said interest. He never accounted to the board for the money so received, by him, and now fails, neglects, and refuses to pay the sum over to the said board, or in any way to account for the same. These are the allegations of the bill which was demurred to; the demurrer of course admitting all the allegations of fact. The object of this suit was, of course, to compel Williams to pay the board the moneys received by him as interest. To this original bill, Williams and the *Ætna Indemnity Company* filed separate and distinct demurrers. These demurrers were both submitted to the court below on one hearing, and are to be so considered by this court.

The questions presented for decision by these demurrers are as follows: First, are the matters involved in this allegation properly cognizable by a court of equity? Second, has the said revenue agent a right to maintain this suit, suing for the board of levee commissioners? Third, does the fact that the principal, Williams, failed to sign his official bond, render the instrument void as to the *Ætna Indemnity Company*, which did sign it? Fourth, if the bond in the case is void, does the chancery court lose its jurisdiction, or has it the power to determine the question as to the liability of the principal, without regard to the bond? Fifth, is the surety on this official bond liable for interest received on the public funds by the principal, Williams? Sixth, is the treasurer of the levee board required to pay into the treasury money received by him as interest

on the funds intrusted to his keeping? We entertain no doubt whatever that under section 161 of the Constitution the chancery court had jurisdiction to try this case; it being a suit on the bond of Williams, a fiduciary and a public officer. Section 556 of the Code of 1906 is a rescript of section 161 of the Constitution of 1890. The proposition that the revenue agent is not the proper party to maintain this suit is answered completely by section 4739 of the Code of 1906, in which the duties of the revenue agent are described, and by which it is made the duty of the revenue agent to investigate the accounts of levee board officers and to maintain suits against them. This power has been recognized by this court already. *State v. Hill*, 70 Miss. 106, 11 South. 789.

Turning to one of the propositions now most seriously urged by the appellee to sustain the action of the court below, which sustained the demurrers and dismissed the bill, to wit, that the bond was void because Williams never signed it, we are clearly of the opinion that this contention cannot be maintained successfully under our statutes and decisions. It is to be noted that the surety in this case became such for a valuable consideration, \$300 per annum. The case mainly relied on by the appellee is the case of *State v. Martin*, 56 Miss. 108. The case was decided in 1878 under the Revised Code of 1871. The Revised Code of 1880 materially changed the law regarding liability on official bonds. Section 403 of the Revised Code of 1880 provided the condition of official bonds, and then added that this provision was declaratory only, and that a failure to observe the form therein prescribed should not vitiate any official bond, but that all official bonds should be valid and binding in whatever form they might be taken, whether in the proper penalty or without any penalty, whether correct or incorrect in their recitals of any kind, whether properly payable or not, and whether approved by the proper officer, or not approved at all, and whether irregular in any other respect whatever, if only such bonds should be delivered as the official bond of the officer and serve as such. This section expressly provided that such bonds should be obligatory on every one who should subscribe them as such. This provision was not in the Revised Code of 1871. Section 403 of the Code of 1880 is section 3463 of the Code of 1906, and was section 3055 of the Code of 1892. The obvious purpose of the Legislature, in the passage of this section of the three Codes of 1880, 1892, and 1906, was to make an official bond binding on all who subscribed it without regard to any irregularity whatever, and whether the instrument should be signed by the principal or not. This last point, which is conclusive of the contention here, was expressly held in *Gloster v. Harrell*, 77 Miss. 793, 23 South. 520, 941, 27 South. 609. This case is much stronger for appellants than

the Gloster Case, in which also there was a demurrer, because in the Gloster Case it was admitted that the bond was not signed or adopted by the principal Ratcliff, and that he did not request the sureties to sign it, and that he did not even know that any of the sureties had signed it; whereas, in this case, the allegation, admitted by the demurrer, is that the Aetna Indemnity Company signed at the instance and request of Williams, and that Williams ratified and adopted the bond, and that he, himself for the board, paid the surety \$300 per annum. The fact, therefore, that Williams failed to sign the bond is of no avail to the appellees.

It must be kept in mind that the bond in this case is a joint and several obligation, and this is an answer to several cases cited in brief of learned counsel for appellees; as, for example, *Sacramento v. Dunlap*, 14 Cal. 421, and *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758. The bonds in those two cases were joint and not several, nor is the statute of California identical at all with our statute. Section 3463 of the Code of 1906. The liability of Williams as treasurer was fixed by the law, and was not affected by his failure to subscribe the bond. Under our statutes, the plain purpose of section 3463 in the Code of 1906 was to hold both the principal and the sureties on the official bonds liable without any regard to irregularities whatsoever, if only the bond served as the official bond during the term for which it was given. The purpose of the law was to declare, emphatically, that no official, and no surety on any official bond, should be relieved of liability thereon, provided only that such bond was accepted, and that such bond served as the official bond intended by law. The statute is grounded in the highest possible considerations of justice and right. It is not to be tolerated that Mr. Williams, or the surety here, shall come into a court of conscience, when this official bond had served the same purpose precisely that the bond would have served had he signed it, and quibble about liability with the state or the levee board, whose treasurer he was and whose funds he handled. It comes with poor grace from the Aetna Indemnity Company—this technical quibbling—when it knew, or had every reason to know, that the bonds had not been signed by Williams, and when it was scrupulously careful to collect every year its \$300 paid to it for its signature to the bond. There was not the slightest obstacle to its ascertaining the fact that Williams had not signed, by the exercise of the very slightest degree of care. We said, in the case of *Gloster v. Harrell*, and we reiterate now, that "it is not for the treasurer or his sureties, the money of the levee board being traced to his hands by competent evidence, to find shelter in the fact that his bond was not approved by resolution; neither he nor they can be heard to make such defense."

Another contention of learned counsel for

appellees is that the bond is void because it contains conditions not prescribed by the statutes. In other words, because it contains the following conditions: "And it is further provided that the said surety shall not be liable to the obligee by reason of public moneys being now deposited, or hereafter placed or deposited with any bank depository, or depositories; it being the true intent and purpose of this bond to indemnify said obligee from any loss by reason of the personal acts only of said principal to the extent of the penalty of this bond subject to the terms, covenants, and conditions thereof." But the bond had the proper condition, that said Williams "should properly account for and dispose of the money coming into his hands for the Yazoo-Mississippi Delta levee board and should faithfully perform all other duties devolving upon him as such treasurer." The act of 1884 (Laws 1884, c. 168), providing for the creation of the levee board, and fixing the condition of this bond, provided that the treasurer should give bond "conditioned for the prompt and efficient discharge of the duties required by him, to be performed under the provisions of this act for the safe-keeping, accounting for and paying over all moneys, property or effects that may come into his custody." It is perfectly obvious that the condition of the bond as written is a substantial compliance with the condition prescribed above by the said act of 1884. The bond as executed had the condition the law required, and the addition to the condition of the bond, which we have hereinbefore set out, is mere surplusage. If the bond contained, as executed, the conditions which the law required, the sureties can neither add to, nor detract from, those conditions by anything they may choose to insert. The law fixed the liability of the treasurer, and of the sureties, and the law prescribed the exact conditions on which liability should attach, and it is not for the principal nor for the sureties, nor for both, by any evasions or subterfuges or adroit efforts to escape the law, to add anything that should have any effect on the conditions in the bond required by the law. The law declares all such surplus conditions absolutely void, and this is expressly laid down in the case of *Johnson v. Erskin*, 9 Tex. 1, cited by learned counsel for appellees. This case was decided after the case of *Mays v. Lewis*, 4 Tex. 1, and *Lawton v. State*, 5 Tex. 270. And in addition to all this, the express language of the section 3463 of the Code of 1906 ends all controversy along this line. So as the conditions in the bond do not provide for the performance of an act in violation of the law, the form of the conditions is immaterial, provided only the bond served its office as his bond. In the case of *State v. Smith*, 87 Miss. 551, 40 South. 22, we said: "When one signs what purports and is intended to be an official bond, whether as principal, obligee, or surety, the law writes in all necessary recitals.

No other interpretation of the statute can subsist without disturbing the whole governmental system and ignoring the plain intentment of the Legislative Department." We think section 3463 applies to the bond of the levee treasurer as well as to all other official bonds, and it is immaterial as to whom the bond of the treasurer was payable, the state or the levee board. We held that this statute applied to a municipal treasurer, although his bond was payable to a municipality. *Gloster v. Harrell*, supra. There can be no sort of doubt, on any rational view, that this section 3463 of the Code of 1906 does apply to the bond of the treasurer of the levee board, and that such bond is an official bond, within the meaning of that section. See, in this connection, *U. S. Fidelity Company v. Union Trust Company*, 142 Ala. 532, 38 South. 177.

Consider for one moment the preposterousness of the claim of Williams and of his surety. This surety received the \$300 per annum every year through Williams himself, as the secretary and treasurer of this board. Williams drew his salary regularly as such treasurer. He exercised full authority and control of the funds of this board which were committed to his charge by virtue of this bond. In other words, from the beginning to the end of his term of office, he exercised in all respects the same authority and control over these funds, and in all other respects as treasurer, that he could possibly have exercised had he signed the bond, and had it been in absolutely perfect technical harmony with the statutes. He was bound to have known that he had not signed the bond, and, under the facts of this case, this surety company was also bound to have known that this bond had not been signed by Williams. To argue to the contrary is superficial to the last degree, and will not bear analysis.

Williams was both secretary and treasurer of this board. As secretary, he was the lawful custodian of all records, bonds, etc., belonging to said board. At his election, he applied to the *Ætna Indemnity Company* to become his surety. That company did so for a valuable consideration, and properly executed and delivered to Williams the bond. Upon receipt of this bond, Williams had it filed and recorded by the clerk of the chancery court of Coahoma county. When it was recorded, it was returned to him as secretary of the board, and was held by him until the expiration of his term of office. By authority of this bond, he collected his salary, received and controlled hundreds of thousands of dollars of the people's money, and enjoyed all the privileges of the office. Never once did he indicate to the board that he had failed to sign this bond. In the face of these facts, it is worse than idle for either Williams, or the surety company, to attempt to escape liability on the ground that the bond was not signed by Williams. No such de-

fenses will be tolerated in a court of conscience, on the facts in this record.

Since we hold that the bond was not void, it is, of course, unnecessary to discuss the question whether, if it had been void, and surety released, equity would have had any jurisdiction.

We come now, after disposing of these preliminary matters, to the real point in this case, the soul of the whole controversy, and that question is: Can Williams and his surety be held for the interest he received for the use of this money by the bank? The duty which the law—Act 1884, § 6—put upon Williams was, amongst other things, "to safely keep, account for and pay over all moneys, property or effects that might come into his custody as treasurer, under that act and by direction of said board, as said board might require or direct." This obligation the law wrote into his bond. In addition to the condition just above recited, it is further provided by section 6 of the act of 1884 (*Laws 1884*, p. 140, § 6) as follows: "In addition to the duties herein specifically required of him, it shall be the duty of the treasurer to receive, safely keep and account for all moneys required to be paid to, or received by, him, by the provisions of this act, or by the direction of said board; and all other moneys, property and effects for which he is properly accountable as such treasurer." We think the necessary intentment of this concluding clause was to hold the treasurer liable for everything that might come into his hands by virtue of his office. The act first made accountable for any money paid to him by virtue of any act of the Legislature. It then made him accountable for all moneys which might come into his hands in the usual way, and then, out of abundance of caution, this last clause was added, providing that he should be liable for all other moneys for which he, as such treasurer, might be accountable.

The appellees contend that the interest collected by Williams came into his hands *colore officii*, that he got it as a result of wrongdoing, and that the surety cannot be held liable therefor, any more than the surety could be held liable for the act of the treasurer in robbing a bank or holding up a train. This court disposed of this contention as applied to the facts in this case in the following language in *Lewis v. State*, 65 Miss. 468, 4 South. 429: "There has been much quibbling in the books in behalf of the sureties on official bonds, who are sought to be held responsible for the misconduct of their principals as to whether the act of the officer was done '*colore officii*,' or '*virtute officii*.' While the liability of the surety is not to be extended beyond the terms of his agreement, the public is entitled to some consideration as well as the sponsors of unfaithful public officers, and it must be remembered that if an official, under bond to faithfully discharge the duties of his office,

does an act as such officer injurious to the county or to others in regard to a subject over which he has jurisdiction and control, his sureties cannot escape liability for the act, no matter by what technical name it may be called."

In the same case, it is said, at page 472 of 65 Miss., at page 430 of 4 South., speaking of the circuit clerk: "Construed according to its manifest scope and legal import and with reference to the subject-matter to which it relates, the bond was a contract by which Bracy and his sureties covenanted and agreed, in effect, not only that he would faithfully perform the duties enjoined by law, but that he would not, by virtue or under color of his office, commit any legal act to the injury of the county or others. Indemnity to this extent is within the terms of the bond, and the contemplation of the law which required it to be given." Again, in the same case, at page 473 of 65 Miss., at page 430 of 4 South., the following passage is quoted with approval from the case of the *People v. Treadway*, 17 Mich. 490: "If such an officer is to be regarded as acting unofficially whenever he violates his duty, it is not easy to see what object there can be in requiring official bonds. They are not meant to be mere formalities, and they can only be made to secure against the consequences of some sort of misdoings. Their object is to obtain indemnity against the use of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit except from its appearing to be a regular official act, is within the protection of the bond and must be made good by those concerned." We think this quotation states the principle, which is the soul of the whole controversy on this subject. Neither the officer nor his sureties can be liable while he has violated no law; and if it is to be held that the mere fact that he has, in his official capacity, violated some law, constitutes the release of the sureties, then the very object for which the bond was given fails, and there had just as well be no bond at all.

The argument here, in large part, is that because section 29 of the acts of 1884 approved February 28, 1884, made it a misdemeanor for any one intrusted with the custody or disposition of any money intrusted to his care by virtue of his office to use such money for his own benefit, therefore the sureties are not liable if the treasurer violates this section; and this contention has two branches: First; that the condition of the bond itself is, as provided by law (section 3463 of the Code of 1900) that official bonds shall be valid except "so far as they may be conditioned for the performance of acts in violation of the laws of the state"; and, second, "that it never could have been within the contemplation of the sureties that they should become liable for the acts of Williams, the treasurer, which amounted to

a violation of any law." So far as the first proposition is concerned, it has no application to the condition of the bond involved. Of course, if there was a condition in the bond providing for the violation of some law, the condition would be utterly illegal, and sureties would not be bound for a violation of such condition. This is not that sort of case. There is no statute prohibiting the treasurer from depositing the funds in a bank, nor was there any statute prohibiting his contracting for interest, provided he had done what he ought to have done, contracted for the interest to be paid to the levee board, which owned the money. The treasurer, in depositing the money in the bank, deposited it by virtue of his office, under authority of his office, and was fully within the right and law of his office, in so doing. His wrong consisted in abusing that power, by making the interest payable to himself instead of to his principal, whose money he had loaned. The *Renfro Case*, *infra*, decided in Georgia, is wholly unlike this case in this respect, on its facts, though we do not desire to be understood as approving the principle of that case in any respect.

As to the second proposition above, that it was not within the contemplation of the sureties in this case that it should become liable for an act of Williams in violation of the law, the answer is that the surety company accepted it with the knowledge of the law as set forth in section 6 and section 29 of the act of 1884 (Laws 1884, p. 140). Section 6 provided that the treasurer should execute a bond "for the faithful performance of the duties of his office, and also conditioned for the prompt and efficient discharge of the duties required of him to be performed under the provisions of this act, and for the safe-keeping, accounting for, and paying over all moneys, property, and effects that may come into his custody and possession under this act, and by direction of said board, as said board might require; and it contained this further provision: "In addition to the duties herein specifically required of him, it shall be the duty of the treasurer to receive, safely keep and account for all moneys required to be paid to, or received by him, by the provisions of this act, or by the direction of said board; and all other moneys, property and effects for which he is properly accountable as such treasurer." The surety knew, when it signed the bond, that this was the law of the bond, and that Williams was, by the conditions aforesaid last recited, especially required to account for all other moneys for which he was properly accountable as treasurer, and to pay over to the board all moneys required to be paid over by the law. These moneys coming into his hands were the money and property of the board, and not his money, and the interest, which was a mere accretion on this money, was payable, like the property to which it was an accretion, to the board, whose property the same

was. Because thereof, the surety knew of these conditions in the bond, and because these conditions required the treasurer to pay over all increments on the fund to the levee board as well as the principal, this defense is unsound. The act of Williams in depositing the money in the bank was legal, and an act done "virtute officii"; the abuse being his applying the interest to his individual use in violation of section 29. The case of *State v. Harney*, 57 Miss. 863, and of *Adams v. Saunders*, 89 Miss. 784, 42 South. 602, are direct authorities in support of this proposition; that the act of Williams in taking this interest for his own use was an illegal act, done, however, by virtue of his office, and an act that could not have been done except by virtue of his office, and because he was such treasurer and handled this vast sum of money. What all the world knew, this court certainly knows, to wit: That the moneys which Mr. Williams deposited in the bank came from and through the levee board whose property the money was.

One of the authorities chiefly relied on by the counsel for the appellees to show that the act of Williams in this case in taking the interest payable to himself was done *colore officii*, but not *virtute officii*, is the case of *State v. Conover*, 28 N. J. Law, 224, 78-Am. Dec. 54, in which it was gravely held that a sheriff, who, having an execution against A., levied upon the property of B., was not thereby guilty of a breach of his official bond, and that his sureties were not liable. Such nonsense as this has long since been exploded by the march of modern jurisprudence. Mr. Freeman, in his note to this case, at pages 64 and 65, states "that the weight of authority clearly shows the contrary proposition" from that laid down in the principal case to be the law. There can be no rational doubt, on the allegations of this bill, that this money of the levee board was loaned by Williams, as treasurer, under and by virtue of his office, and because he was such officer, and the argument that it was not so done is wholly unsatisfactory on principle or sound authority. But the learned counsel for the appellees have two other contentions upon which they earnestly insist: First, "that Mr. Williams was an absolute insurer of all levee board money which came into his possession or under his control, by virtue of his office, and therefore was not liable to account to his principal for this interest." And second, that the legal title to all moneys which thus came into his possession vested in him, as an individual, and that, being an insurer of such money, the relationship of debtor and creditor immediately arose between him and the levee board, and therefore he was only legally liable to account for the exact amount so received by him, and not for any interest.

The leading authority in support of these views is the case of *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456. In

deed, this is the only case directly in support of these views. The states of Indiana, Kentucky, Colorado, and the territory of New Mexico, in effect, sustain this doctrine, resting their decisions, however, not on general principle wholly, but upon their particular statutes. The Georgia case (*Renfroe v. Colquitt*, 74 Ga. 618) rested in part upon a special statute, but may be classed as substantially supporting this view. All the authorities along this line are reviewed in the case of *McFetridge*, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223, and this whole line of reasoning repudiated as utterly unsound. The courts of the states of New York, Ohio, and the territory of Oklahoma, and Wisconsin hold the direct opposite of the Colorado Supreme Court, and, after a most careful examination and comparison of these conflicting authorities, we announce our approval of the doctrine of the *McFetridge* case, and our repudiation of the doctrine of the court of Colorado as announced in the *Walsen* case. See *Richmond County Supervisors v. Wandell*, 6 Lans. (N. Y.) 33; *Eshelby v. Cincinnati Board of Education*, 66 Ohio St. 71, 63 N. E. 586; *Thompson v. Territory of Oklahoma*, 10 Okl. 409, 62 Pac. 355; *McFetridge* case, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223. And see also specially *U. S. v. Mosby*, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625, in which the United States Supreme Court approves the doctrine of the *McFetridge* case. The Supreme Court of the United States said that the moneys in that case were public moneys, and that any interest on them was an increment belonging to the owner of the funds, the government, and it expressly stated that, whilst the counsel in that case was not required to put the funds out at interest, yet, if in fact he did, the accretion belonged to the government. The Supreme Court of New York, in the *Wandell* case, *supra*, said very pertinently: "The motion that a public officer might keep back interest which he has received upon a deposit of public money as a prerequisite of office is an affront to law and morals, and such act is nothing more than an embezzlement." The great underlying principle here is that the interest on this money logically, legally, and necessarily belongs to whoever owns the money. The use of that money earns the interest. The interest is a mere increment to the principal fund, and it is impossible, on any clear thinking in logic, or in law, to escape the conclusion that the interest is necessarily payable to the owner of the principal fund. Whenever, therefore, the question is settled as to who owns the principal fund, all the rest follows without difficulty. Nothing more is necessary to show who is the owner of this fund than a reading of our statutes. Always and everywhere, public money is referred to and treated as the property of the state, or the county, or the levee board, etc., etc. In no just legal sense can it be possible to say that the treasurer, Wil-

liams, was the owner of this money; that he had the legal title to this money in the sense that the money was his absolutely. He is the custodian of the money. He handles the money, he deals with it, but he has the custody, he handles it, deals with it for, and on account of, his principal, the levee board. The money is the money of the levee board. If Williams died, the money did not go to the administrators of his estate as Williams' money. It would pass into the hands of his administrator, temporarily only; but it is made the statutory, legal duty of his administrator to promptly pay over the money to the proper authorities. Sections 3485 and 3486 of the Code of 1906. See *Bank v. Fogg*, 80 Miss. 750, 32 South. 285, a case which supports the appellant, not the appellee, and shows that the money is the property of the levee board.

It is a very singular confusion of mind into which some courts have fallen, when they say, as is argued for appellee, that, if an officer is absolutely bound as an insurer, therefore any interest which he receives on the money is his, and not the state's. As well remarked by Judge Newman, quoted in the *McFetridge Case*: "Nobody ever heard of the claim that a common carrier, by reason of its absolute liability, became the owner of the goods it carried." And in the main case (84 Wis., at page 517, 64 N. W., at page 11, 20 L. R. A., at page 237) the court says: "While such absolute liability of the treasurer will be assumed, for the purposes of the case, it seems to us that no such conclusion necessarily results therefrom. The treasurer may well be held liable absolutely for all money of the state coming into his hands, and be held liable also for interest on deposits. As stated in another form, such absolute liability does not estop the state to maintain that such interest was received by the treasurer, by virtue of his office, and belongs to his office." And this we think is plainly sound. It is a complete non sequitur to say that, because Williams was an absolute insurer, therefore the interest belonged to him. The two principles have no relation whatever to each other. Once settled clearly and definitely whose money the principal sum was, and the interest necessarily belongs to that person as an increment to the principal fund, and to argue to the contrary is simply to lose one's self in a metaphysical fog of sophistry, failing to give effect to the central principle of right and justice, making the interest the property of the party who owned the principal sum. As said by the court in the case of *McFetridge* again: "It has already been held herein that the public funds were lawfully deposited by Treasurer *McFetridge* with the banks, and that he lawfully received from such banks compensation by the way of interest for the use of such deposits." Under those circumstances, and in the absence of any statute separating the interest from the funds and di-

verting it to other uses, such interest was an accretion or increment to the fund, thus becoming a part of it, and logically and necessarily belongs to the owner of the fund, to wit, the state.

It is immaterial that the treasurer stipulated for interest on the deposits, or that the banks paid him such interest, or that both the treasurer and the banks thought he should retain the interest as his own, believing that he was entitled thereto. Such intention and belief cannot affect the ownership of the interest, or its essential character as a portion of the public funds in the hands of the treasurer. Notwithstanding such intention and belief, the interest was, in fact, paid to the said treasurer, and belonged to his said office, within the meaning and intention of the bond in suit. A lawful act cannot be rendered unlawful merely because the actors intended to follow it by an unlawful act. So when the treasurer lawfully received money, which of right belonged to his office, he receives it by virtue of his office, and cannot, by forming and executing an intention to retain the money as his own, divest the act of receiving the money of its official character. It remains that he received it "virtute officii." In the light of these principles, the contentions above referred to by the learned counsel for the appellee all fall to the ground. In the *Furlong Case*, 58 Miss. 717, the act was illegal. The act there of depositing the money was not illegal, and the citation of the *Furlong Case* is beside the mark. In the *Eshelby Case*, supra, it was said: "It does not follow from the absolute liability of the treasurer that the funds coming into his hands are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between himself and the district. On the contrary, it is quite clear that, instead of being the debtor of the district, he is its treasurer, the custodian of its funds, and that he acquires control of the funds, without acquiring title to them."

Speaking of its own statutes, which for this purpose are just as our own, the court, in the *McFetridge Case*, 84 Wis. 473, 64 N. W. 1, 998, 20 L. R. A. 223, says: "From beginning to end, they are entirely inconsistent with the theory that the Legislature intended by the enactment of any of them to vest the said treasurer with the legal ownership of the public moneys which come into his hands, thus making him merely the debtor of the state in respect thereto. If such were his relation to the state, it would be difficult to show that such funds were not subject to be seized for his debts, or, in case of the death of the treasurer in office, that the same would not go to his administrator as part and parcel of his estate; the state being, perhaps, a preferred creditor. It is inconceivable that any Legislature intended such results, and there is nothing in any statute which forces the conclusion that they did so

say. A close analysis of the above statutes, or any extended discussion of them, is quite unnecessary. A perusal of them is sufficient to carry conviction to the mind that the Legislature never intended to divest the state of its title to the public funds, in the hands of its treasurer, and the consequent control over these funds which results from ownership thereof."

The learned counsel on both sides in this case have filed briefs of signal ability, showing the most exhaustive research. It follows that the court below erred in sustaining the demurrers of the defendant Williams, and the defendant the *Ætna Indemnity Company*. These decrees are therefore both reversed, both demurrers overruled, and the cause remanded, with leave to answer within 30 days from the filing of the mandate in the court below.

PER CURIAM. The above is adopted as the opinion of the court.

Reversed and remanded.

FULLER v. CITY OF JACKSON (two cases).
(Nos. 14,306, 14,307.)

(Supreme Court of Mississippi. May 30, 1910.
On Suggestion of Error, June 20, 1910.)

1. INTOXICATING LIQUORS (§ 122*)—STATUTES—CONSTRUCTION.

Code 1906, § 1746, prohibiting the sale of any vinous, alcoholic, malt, intoxicating, or spirituous liquors or intoxicating bitters or other drinks which if drunk to excess will produce intoxication, prohibits the sale of vinous, alcoholic, malt, intoxicating, or spirituous liquors or intoxicating bitters, without reference to whether they in fact intoxicate because such class of liquors are known to be of an intoxicating character and also prohibits the sale of any other drink which if drunk to excess will produce intoxication.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 122.*]

2. INTOXICATING LIQUORS (§ 122*)—STATUTES—CONSTRUCTION.

The sale of malt ale, which is a malt liquor, and which contains 2.71 per cent. of alcohol by volume and 2.12 per cent. by weight, is prohibited by Code 1906, § 1746. (Per Mayes, C. J., and Smith, J.)

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 122.*]

3. INTOXICATING LIQUORS (§ 122*)—STATUTES—CONSTRUCTION.

A sale of a beverage which is not shown to be a vinous, alcoholic, malt, intoxicating, or spirituous liquor or intoxicating bitter, and which contains .18 per cent. of alcohol by volume and .13 per cent. by weight, is not prohibited by Code 1906, § 1746. (Per Mayes, C. J., and Anderson, J.)

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 122.*]

Appeal from Circuit Court, Hinds County;
W. H. Potter, Judge.

Charles N. Fuller was convicted in two cases for unlawfully selling intoxicating liquors in violation of an ordinance of the city

of Jackson, and he appeals. Judgment of conviction in one case affirmed, and judgment of conviction in the other case reversed, and accused discharged.

These cases, being governed by practically the same principles, are considered together. The defendant was convicted in two cases for the unlawful sale of intoxicating liquors under the ordinances of the city of Jackson, and appeals to this court.

As authorized by section 3410, Code 1906, the municipal authorities adopted a general ordinance making all offenses against the criminal laws of the state, occurring within the limits of the city, not amounting to a felony, violations of the city ordinances and punishable as such. In each case the affidavit charged the defendant, Fuller, with selling "vinous, malt, alcoholic, intoxicating, and spirituous liquors," etc., in violation of section 1746, Code 1906, which had become an ordinance of the city as above set forth. There was an agreed state of facts in each case. In case No. 14,306 the facts agreed on are as follows: "The defendant did sell in the city of Jackson, Hinds county, Miss., a beverage known as 'Brewett' on the date mentioned in the affidavit filed herein. He sold it for cash and received the money for it. The said beverage sold by the said Fuller contained by volume .18 of 1 per cent. of alcohol, and by weight .13 of 1 per cent. of alcohol. The said beverage did not contain enough alcohol to make it intoxicating to any extent when drunk to excess. The said beverage so sold was not in fact an intoxicating liquor."

In this case the court gave the following instruction for the plaintiff: "The court instructs the jury for the plaintiff that if you believe from the evidence beyond a reasonable doubt that the defendant did on the date named in the affidavit sell a beverage known as 'Brewett,' and that the said liquor contained some alcohol, although not a sufficient amount of alcohol to make the said beverage intoxicating to any extent when drunk to excess, you should find him guilty as charged." And refused instructions Nos. 1, 2, and 3 on behalf of the defendant, as follows: "No. 1. The court instructs the jury to find the defendant not guilty. No. 2. The court instructs the jury for the defendant that a liquor is not, within the meaning of the statutes of this state, alcoholic, unless it contains a sufficient amount of alcohol to make it intoxicating to some extent when drunk to excess. No. 3. The court further instructs the jury for the defendant that if you believe from the evidence that the defendant did on the date named in the affidavit sell a certain beverage known as 'Brewett,' and that the said beverage contained the small per cent. of alcohol shown by the evidence, and that the said percentage of alcohol was too small to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

make the said liquid intoxicating to any extent even when drunk to excess, then you should find the defendant not guilty."

In case 14,307 the agreed facts are as follows: "The said defendant did on the date laid in the affidavit herein sell for cash, in the city of Jackson, Hinds county, Miss., as a beverage, a certain liquor known as 'Malt Ale.' The said beverage sold by the said defendant on the said date contained by volume 2.70 per cent. of alcohol and by weight 2.12 per cent. of alcohol."

The court gave the following instruction for the state: "The court instructs the jury for the plaintiff that if you believe from the evidence, beyond a reasonable doubt, that the defendant on or about the date named in the affidavit sold a certain liquor known as 'Malt Ale,' and that the said liquor was sold as a beverage and contained 2.12 per cent. of alcohol or 2.70 per cent., then you will find the defendant guilty as charged." And refused the following instructions asked on the part of the defendant: "The court instructs the jury for the defendant that the burden is upon the city of Jackson to prove that the liquor charged to have been sold is intoxicating to some extent when drunk to excess; that it is not sufficient merely to show that the said liquors contained a small amount of alcohol. The court further instructs the jury that, unless you believe from the evidence that the said liquor sold by the defendant contained a percentage of alcohol large enough to make the same when drunk to excess intoxicating to some extent, then you will find the defendant not guilty."

The giving of the charges asked for the state, and refusing those asked on behalf of the defendant, are assigned as error.

Flowers, Fletcher & Whitfield, for appellant. Jas. R. McDowell, Asst. Atty. Gen., for appellee.

ANDERSON, J. (after stating the facts as above). The paragraph of section 1746 of the Code of 1906, which is the ordinance of the city under which the defendant was convicted, is as follows: "If any person shall (a) Sell or barter, or give away to induce trade, or keep for sale or barter, or to be given away to induce trade, any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, in any quantity less than one gallon, without having a license therefor in pursuance of this chapter." etc. The language, "which if drunk to excess will produce intoxication," qualifies the terms "vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks." There are alcoholic drinks which are known to the law to be intoxicating. Within this class are alcohol, wine, beer, ale, porter, whiskey, brandy, gin, rum, and perhaps others. Such liquors, according to the common understanding, are

intoxicating. The courts take judicial notice of the fact that they are alcoholic liquors, and will produce intoxication when drunk to excess. 23 Cyc. 61, 62, 63; 17 A. & E. Encyc. of Law (2d Ed.) pp. 198, 199, 200, 201. There will be found collated in these two authorities the cases on this subject. In a case where the liquor in question belongs to this class, it is not necessary for the state to prove that it will intoxicate when drunk to excess; while, on the other hand, if it is not within this class which the court judicially shows are intoxicating, it is necessary for the state to prove that if drunk to excess it will cause intoxication. The term "alcoholic" is a general term which seems to have been thrown in rather for good measure than for any purpose. The statute is directed against alcoholic intoxicants. The sale of alcoholic liquors is prohibited provided they contain sufficient alcohol to intoxicate when drunk to excess.

The history of what is commonly known as the "prohibition movement" in this state, which resulted in the enactment of the statutes on this subject now in force, shows that it was directed against the sale of intoxicating liquors. Construing all these statutes together, it is apparent that the object of the Legislature was to prohibit the sale of intoxicating liquors. This is clearly demonstrated by sections 1747, 1748, 1749, 1750, 1752, 1755, 1758, 1759, 1765, 1767, 1773, 1776, 1791, 1794, 1797, and 1798 of Code 1906, and also chapter 117 of the Laws of 1908, which is a memorial to Congress, to enact a law to prevent the issuance of United States revenue license to any person selling "intoxicating liquors" in any locality where the sale is prohibited by local laws.

It is contended that the case of *Edwards v. City of Gulfport*, 49 South. 620, is authority for the instructions given in these cases for the state. The liquor sold in the *Edwards Case* was "Pabst Mead," containing 4.6 per cent. alcohol to each bottle; and the testimony showed that two bottles of it would intoxicate an average man. The court charged the jury that, if the liquor sold was a malt or alcoholic liquor, they should find the defendant guilty, whether shown to be intoxicating or not. Judge Whitfield uses this language in that case: "This case falls squarely within the case of *Reyfelt v. State*, 73 Miss. 415, 18 South. 925. On the evidence in this case it is perfectly manifest that a conviction is proper on either one of two grounds: First, that the liquor was shown to be both alcoholic and malt liquor; and, second, that it was shown to contain enough alcohol to make an average man drunk if he drank two bottles." *Marks v. State*, 159 Ala. 71, 48 South. 864, is referred to as authority for the *Edwards Case*. It is true that in the *Marks Case* (reviewing the statute substantially the same as section 1746, Code 1906) the Alabama court held that the lan-

guage, "which if drunk to excess will produce intoxication," did not relate to each and all the liquors preceding it. However, the court held further in that case (exactly contrary to what was held in the Edwards Case): "Whether a beverage containing 1.46 per cent. of alcohol by weight, and 1.88 per cent. by volume, and .20 per cent. maltose, making $2\frac{1}{2}$ teaspoonfuls of alcohol per pint, is an alcoholic, spirituous, vinous, malt, or intoxicating liquor, or whether if drunk to excess will produce intoxication, is a question of fact for the jury." The Reyfelt Case is not authority for the Edwards Case. In the former the liquor sold was home-made wine; and the court held it was unlawful to sell it regardless of the opinion of witnesses that it would not intoxicate. The decision of the court was manifestly correct, because wine is one of the liquors which has an accepted judicial meaning, and judicially known to be intoxicating when drunk to excess.

It is contended on behalf of the state that the purpose of the Legislature was to prohibit the sale of all drinks as beverages containing alcohol in any quantity, however small; the object being not alone to lessen drunkenness, but to put out of reach of the people drinks which have a tendency to create a thirst for intoxicants. There is nothing in our statutes, nor in the history of the "prohibition movement," to indicate such purpose.

If the charges complained of in the instant cases, and which were authorized by the Edwards Case, are the law, then if a person should sell, as a beverage, a barrel of water with a teaspoonful of alcohol in it, he would violate this statute; and so would the owners of soda fountains, selling the usual cold drinks, using various extracts in the same, containing a small portion of alcohol for their preservation.

These views necessitate, in my judgment, the overruling of so much of the Edwards Case as holds that the charge in question in that case was a correct statement of the law. That case stands alone, unsupported, and is unsound.

In both of these cases the court should have instructed the jury peremptorily to find a verdict for the defendant, because neither of the drinks sold were shown to be intoxicating when drunk to excess. In case No. 14,307, if the "Malt Ale" sold had been proven to be ordinary ale, then the jury would have been authorized to convict, whether the ale was shown to be intoxicating or not when drunk to excess; ale being in the class of liquors which are judicially known to be intoxicating.

Both of these cases are, therefore, reversed and remanded.

SMITH, J. (dissenting). I feel constrained to differ with both of my Brethren in the construction put by them upon the statute

in question. When this statute was under review in Reyfelt v. State, 73 Miss. 418, 18 South. 925, this court said: "The statute, for a violation of which the appellant was convicted, makes it unlawful to sell, inter alia, any 'vinous or alcoholic' liquor. The defendant sold home-made wine made from the grape and from blackberries, which wine he and his witnesses swore would not intoxicate. He asked the court to instruct the jury to acquit, if it believed from the evidence the wine would not produce intoxication. This the court declined to do, but charged the jury to convict if the sale of wine was proved. This action of the court was correct. The Legislature, believing in chemistry, and that the process of fermentation of the juice of the grape will produce alcohol, has seen fit to prohibit the sale of such product, and, regardless of the opinion of the witnesses that this prohibited article would not intoxicate, the sale was unlawful, for the Legislature prohibited such sales because it thought that alcoholic wines would, in some instances, intoxicate."

This was a square adjudication that the words, "which if drunk to excess will produce intoxication," did not qualify the terms "vinous, alcoholic, malt, intoxicating, or spirituous liquors." The court in its opinion said nothing about judicial notice, but held that it was unnecessary to prove that vinous or alcoholic liquor was intoxicating for the sole reason that the Legislature had so ordered. The same argument with reference to the qualification of these words by the words, "if drunk to excess will produce intoxication," was made in that case by counsel for appellant, as was made in the case of Edwards v. Gulfport, 49 South. 620. This latter case announced no new construction of the statute, but simply followed the Reyfelt Case. The Legislature has adopted the construction put upon this statute in the Reyfelt Case by twice re-enacting it. I do not think, therefore, that these cases should be overruled; neither do I think they should be qualified to the extent of saying that: "When the beverage sold contains a sufficient quantity of alcohol to constitute the dominant quality of the beverage, and is the thing on account of which it is sold, there is then a violation of the law, even if it be conclusively shown that the beverage will not intoxicate." The statute does not provide that alcohol must be the "dominant quality of the beverage," but in express terms prohibits the sale of alcoholic liquor without reference to its intoxicating quality and irrespective of the amount of alcohol which it contains. Gilbert v. Husman, 70 Iowa, 241, 41 N. W. 3; Sawyer v. Botti (Iowa) 124 N. W. 787.

The words "alcoholic liquor" have a plain and definite meaning; that is, a liquor containing alcohol, and, since the Legislature has not limited the amount of alcohol such liquor must contain in order to come within

the prohibition of the statute, this court has no right to do so. The Legislature meant to establish and fix a certain guide for the courts in administering this statute, and did not intend to leave it to the juries to say when alcohol was, or when it was not, the dominant quality of the liquor.

On Suggestion of Error.

MAYES, C. J. The same appellant is here on appeal in two cases; one being No. 14,306 and the other No. 14,307. For convenience I follow the method adopted by Justice ANDERSON, and discuss the two cases in this opinion. Both cases charge the unlawful sale of "vinous, malt, alcoholic, intoxicating, and spirituous liquors." Both originated in prosecutions conducted for a violation of the ordinance of the city of Jackson in the court of the police justice of the city. The ordinances of the city prohibiting the sale or barter of intoxicating liquors are rescripts of chapter 115 of the Acts of 1908. In discussing these cases, therefore, I shall deal with them as though they arose under the act.

The facts in both cases are agreed to, and on the trial in the circuit court the agreed facts constituted all the testimony. In case No. 14,306 it was agreed that the beverage sold was "Brewett," and contained .18 of 1 per cent. of alcohol by volume, and .13 of 1 per cent. of alcohol by weight. There is no proof in the record as to how this "Brewett" is made—that is to say, whether or not it is a malt liquor—nor is it proven to be vinous, or spirituous. The agreed facts show only that it contains a small quantity of alcohol. Under the agreed facts this beverage, therefore, if a prohibited liquor, must be such a prohibited liquor as falls within the class designated as "alcoholic liquor." Case No. 14,307 charges the same offense; but the agreed facts show that the beverage in that case was "Malt Ale," and contained 2.71 per cent. of alcohol by volume and 2.12 of alcohol by weight. In this last case the agreed facts concede that it is a malt liquor.

It may be also stated that I take judicial notice of the fact that any liquor containing more than 2 per cent. of alcohol by weight will intoxicate, as a matter of fact, if drunk to excess. See full report of case of *United States v. Cohn*, 2 Ind. T. 474, 52 S. W. 41. In the *Cohn* Case, in the proof found in the report of the case, it is shown by expert witness that beverages containing more than 2 per cent. of alcohol will intoxicate, and the trial court in that case took judicial notice of it. It is also shown in that case that the government fixed 2 per cent. of alcohol, by weight, as in truth constituting an intoxicating liquor. I feel, therefore, that I am safe in saying that I shall take judicial notice of a fact so well established by proof and legislative action.

Chapter 115, p. 116, Laws 1908, enumer-

ates certain classes of liquors which cannot be sold, or bartered, under any condition. The statute prohibits the sale of such liquors as it expressly names, without regard to their intoxicating or nonintoxicating quality, and without reference to what quantity of alcohol may be contained in them. If a party is charged with merely selling an "alcoholic liquor," and such liquor is neither vinous, malt, or spirituous, if the quantity of alcohol is so negligible as not to constitute the beverage sold an "alcoholic liquor," of course there can be no conviction of a sale of such liquors, even if it be shown that in truth there is some alcohol in the beverage. There must be enough alcohol in it to make it "alcoholic" as the statute says; but I shall discuss this particular subject later.

The liquors expressly named which the law prohibits from being sold are "vinous, alcoholic, malt, or spirituous liquors, or intoxicating bitters." The sale of these liquors is prohibited without reference to whether in fact they intoxicate, but because it is well known that this class of liquors are of an intoxicating character. After expressly prohibiting the sale of the character of liquors named above, the statute then prohibits the sale of another class not enumerated, which are "all other drinks which if drunk to excess will produce intoxication." If a beverage be sold which does not fall within the first class named, then, only, is it necessary for such beverage to intoxicate before there can be a successful prosecution for a violation of the liquor laws. I confess that it is difficult to conceive of a drink that will intoxicate, which would not be included in the description of the expressly forbidden liquors; but the Legislature, knowing the evasions resorted to by the violators of the law and their activity in devising concoctions for this purpose, thought it safe to put a general prohibition on the sale of all other drinks which would intoxicate. In the *Reyfelt* Case, 73 Miss. 415, 18 South. 925, it was held that, where a party was charged with selling any one of the expressly enumerated liquors prohibited to be sold, it was not necessary to go further and show that the liquor was intoxicating. In the case of *Edwards v. City of Gulfport*, 49 South. 620, it was again held that, wherever the liquor fell within the classes expressly prohibited by the statute, it was not necessary to prove that it was of an intoxicating character, and the court further held that the clause in the statute, which prohibited the sale of "other drinks which if drunk to excess will produce intoxication," stood alone in the statute, having no reference to, or in any way qualifying, the preceding portion of the statute which prohibited the sale of any "vinous, alcoholic, malt, or spirituous liquors," etc. This holding of the court is supported by the cases of *State v. Auditor*, etc., 68 Ohio St. 635, 67 N. E. 1062; *U. S. v. Cohn*, 2 Ind. T. 474, 52 S. W. 38, 44.

In the last of the above cases, the court, construing a statute similar to this, very pertinently asked: "If it were intended that only such of these as could be shown to be intoxicating should be included, why name them at all? Why not simply say that all intoxicating liquors and drinks should be prohibited?" In brief, the statute says that "vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters," cannot be sold at all, and then it says that it shall be lawful to sell all other drinks except such "other drinks which if drunk to excess will produce intoxication." If there is any beverage that can be conceived of by the ingenious violators of the law, not falling within the class named above which will not intoxicate, and which yet proves a desirable beverage for those inclined to purchase same for its character as an intoxicant, its sale may continue. I confess that I can conceive of no drink that can be devised not covered by the broad terms of the statute. It is not only held by this court that, where the laws expressly name and prohibit the sale of certain beverages as constituting beverages of an intoxicating character, it is immaterial that such beverage does not in fact intoxicate; but there is much authority elsewhere for this proposition. In the case of *State v. York*, 74 N. H. 125, at page 126, 65 Atl. 685, at page 686, it is said: "Where an act expressly prohibits the sale or keeping for sale of a particular liquor or class of liquors, it is not necessary to allege in the indictment thereunder, or to prove upon the trial, that the particular liquor or class of liquors, the sale of which is forbidden, is intoxicating." In the case of *State v. Frederickson*, 101 Me. 37, at page 43, 63 Atl. 535, at page 537, 115 Am. St. Rep. 295, at page 299, it was shown in that case that the statute prohibited the sale of "wine, ale, porter, strong beer, lager beer or other malt liquors and cider," and the court said: "In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in *State v. O'Connell*, 99 Me. 61, 58 Atl. 59: 'It is not for the jury to revise the judgment of the Legislature and determine whether liquor is or is not in fact intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its nonintoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute." In the cases above cited will be found multiplied authority for this statement of the rule. See, also, *State v. Auditor*, 68 Ohio St. 635, 67 N. E. 1062, *supra*.

I do not think the constitutionality of statutes of this character can be successfully controverted. The police power of a state is broad enough to prohibit the sale of those things which it considers destructive of the

health, the good morals, and the peace of its citizens. If the state has this power, it is necessarily vested with the authority to make its laws effective, and the subterfuges and disguises resorted to by the ingenious violators of the liquor laws are as well known to the legislator and the judges as to those who violate the law. Knowing the schemes resorted to by those who would destroy the prohibition laws and make them farcical by their failure to give that protection from the evil of intoxicants which is their design and purpose, the Legislature has met all schemes of those who would evade, by prohibiting the sale of all subterfuges. It has prohibited the sale not only of intoxicants, but of that character of liquors that go hand in hand with intoxicants; that is, have the character of intoxicants, though in truth they do not intoxicate. The police power of the state is not so impotent and restricted as that it cannot combat and repel all evasions. We hear much of the constitutional rights; but no man's rights are infringed upon by this act of the Legislature, and the construction which I give it, and which this court has given it, unless such person desires to engage in the traffic of intoxicants. Surely the state can say to such person that you cannot profit in the sale of this contraband article of merchandise, no matter how small the quantity sold, or by what name you call it. If this great power of the state could be thus thwarted by those engaged in criminal acts, it would indeed be an impotent thing. In criminal and in civil law, fraud, disguise, and pretense, whatever form it has assumed in an effort to subvert the good faith of the law, has not been subtle enough to evade the Legislatures and the courts for long.

I have no hesitancy in saying that the sale of "Malt Ale," no matter what the quantity of alcohol in same may be, is expressly prohibited by the statute, and any person selling same has violated the law. The agreed facts in case No. 14,307, where the appellant agrees that he was selling a liquor known as "Malt Ale," constitute a violation of the law. Not only does he violate the law in the agreement by stating that he is selling "Malt Ale," but the facts in that case show that this liquor contains 2.70 per cent. of alcohol by volume, and 2.12 per cent. of alcohol by weight, which is an intoxicating liquor. I have more difficulty in applying the law to the second case, No. 14,306, because the agreed facts do not show that "Brewett" is a malt drink. I do not feel warranted, in the absence of proof of this fact, in assuming that it is a malt drink. If it were proved that "Brewett" was a malt drink, I would unhesitatingly be in favor of an affirmation of this case, because no malt drink can be lawfully sold. Therefore "Brewett," if a prohibited liquor, must be classed under that section of the statute which prohibits the sale of any alcoholic drink. In this view of it I cannot make up

my mind to declare, as a matter of law, that a beverage which contains only .18 of 1 per cent. of alcohol by volume, and .13 of 1 per cent. by weight, is, under the law, an alcoholic drink. It seems to me that the quantity of alcohol in this drink is too negligible to be classed as an alcoholic drink. In many states where the sale of "alcoholic drinks" is prohibited, the Legislature has fixed a standard by which courts may be governed in determining whether a drink is alcoholic or not. Some of the states provide that a drink shall be such when it contains 1 per cent. of alcohol; some have raised the percentage higher. If the Legislature had said what per cent. of alcohol should constitute an alcoholic drink, the statute would be free from any doubt; but, since they have not done so, I do not feel warranted in saying that so small a quantity as is agreed to be contained in "Brewett" can be said to make the drink an alcoholic drink. The Legislature has not prohibited the sale of any drink containing alcohol; but it has prohibited the sale of an "alcoholic drink." When can a drink be said to be "an alcoholic drink"? It seems to me that any beverage containing one-half of 1 per cent. of alcohol has no longer a merely negligible quantity of alcohol, and any beverage having this percentage of alcohol, by whatever name called, is an "alcoholic drink" within the meaning of the statute.

I concur with Justice ANDERSON in the reversal of case No. 14,306, but think that case No. 14,307 should be affirmed both because it is shown that appellant sold "Malt Ale," expressly prohibited from sale by the statute, and further because the liquor is an intoxicating liquor.

It follows from these views that the former judgment in case No. 14,307, reversing same, shall be vacated, and a judgment of affirmance now entered. In case No. 14,306 the suggestion of error is overruled, and on retrial the court below is directed to give a peremptory instruction to discharge defendant on the agreed facts in same.

ANDERSON, J., concurs in the order reversing cause No. 14,306, but dissents from the reasons assigned therefor. In cause No. 14,307, ANDERSON, J., dissents in toto, adhering in both cases to the view expressed in his original opinion.

SMITH, J. As I must adhere to the views expressed by me when these cases were first before the court, it follows therefrom that I concur with Brother MAYES in holding that the liquor sold in cause No. 14,307, known as "Malt Ale," containing 2.71 per cent. of alcohol by volume, and 2.12 per cent. of alcohol by weight, is both a malt and an alcoholic liquor, and therefore its sale is prohibited by the statute. It also follows that I

dissent from the view expressed by him that the liquor sold in cause No. 14,306, which contained .18 of 1 per cent. of alcohol by volume, and .13 of 1 per cent. of alcohol by weight, is not an alcoholic liquor. In my opinion the amount of alcohol which a beverage contains is immaterial. Its sale is prohibited by the statute if it contains any alcohol.

MOBILE, J. & K. C. R. CO. v. WINGO. (No. 14,299.)

(Supreme Court of Mississippi. July 4, 1910.)

Appeal from Chancery Court, Pontotoc County; J. Q. Robins, Chancellor.

Action by M. J. Wingo against the Mobile, Jackson & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Flowers, Fletcher & Whitfield, for appellant. Mitchell & Roberson, for appellee.

PER CURIAM. Affirmed.

ROBINSON v. YAZOO & M. V. R. CO. (No. 14,522.)

(Supreme Court of Mississippi. June 27, 1910. Suggestion of Error Overruled July 4, 1910.)

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by Louis Robinson against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Shannon & Jones, for appellant. C. N. Burch and Mayes & Longstreet, for appellee.

ANDERSON, J. Railroad Co. v. Brooks, 85 Miss. 269, 38 South. 40. Railroad Co. v. Landrum, 89 Miss. 399, 42 South. 675, and Easley v. Alabama Great Southern Ry. Co., 50 South. 491, are decisive of the question here involved, for the appellant. The court below therefore erred in excluding appellant's testimony and directing the jury to return a verdict for the appellee.

Reversed and remanded.

BOGGS v. ALABAMA CONSOL. COAL & IRON CO.

(Supreme Court of Alabama. Feb. 3, 1910. Rehearing Denied June 30, 1910.)

1. MASTER AND SERVANT (§ 216*)—ASSUMPTION OF RISK—NATURE AND EXTENT.

Except where the relations between master and servant are modified by the employer's liability act (Code 1907, §§ 3910-3913), a servant assumes the risk of injury caused by the negligence of a fellow servant acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

2. MASTER AND SERVANT (§ 179*)—LIABILITY OF MASTER FOR INJURIES—EMPLOYER'S LIABILITY ACT.

The employer's liability act (Code 1907, §§ 3910-3913) does not codify the whole law as to the liability of employers, or destroy any com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

non-law right of servants, and all servants are entitled to maintain actions against their employers in all cases where they formerly have done so, as it will not be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely requires; but the statute in question is remedial and will be construed so as to advance the remedy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.*]

3. MASTER AND SERVANT (§ 180*)—MASTER'S LIABILITY—LIABILITY FOR ACT OF ANOTHER EMPLOYÉ.

The employer's liability act (Code 1907, §§ 3910-3913), providing that, when a personal injury is received by a servant in the service of the master, the latter is liable to such servant as if he were a stranger when such injury is caused by the negligence of any person in the service of the master who has the charge or control of any signal, points, locomotive, engine, electric motor, switch, car, or train upon a railway, or of any part of the track of a railway, does not bar recovery for the negligence of an engineer in defendant's employ, though the engineer and the intestate were not fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

4. MASTER AND SERVANT (§ 180*)—WHO ARE FELLOW SERVANTS—RAILROAD EMPLOYÉS.

Employés engaged in or about a railroad, including therein employés who by their employment are brought into such close relation with the operation of the road that the danger from the operation constitutes an ordinary danger of the service in which they are engaged, though they are not strictly railroad employés, are fellow servants with those operating signals, locomotives, trains, etc., on the railroad, and are within the purview of the employer's liability act (Code 1907, §§ 3910-3913), making a master liable for injuries received by a servant as if he were a stranger, when the injury is caused by the negligence of any person in the service of the master who has charge or control of any signal, points, locomotive, engine, electric motor, switch, car, or train upon a railway, or any part of the track of a railway.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 367; Dec. Dig. § 180.*]

Mayfield, J., dissenting.

Appeal from City Court of Birmingham; C. O. Nesmith, Judge.

Action by Lawrence P. Boggs against the Alabama Consolidated Coal & Iron Company. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed and remanded.

Collier & Scrivner and Allen & Bell, for appellant. Tillman, Bradley & Morrow, for appellee.

SAYRE, J. There were 12 counts in the complaint to all of which, in their final shape, demurrers were sustained. The complaint alleges that plaintiff's intestate and the engineer of whose negligence he complains were both in the employment of the defendant and engaged at the time of the injury in the discharge of duties imposed upon them by their employment. No doubt the

effort of the pleader was to state a case within the fifth subdivision of the employer's liability act (Code 1907, § 3910). No doubt, also, the court below felt constrained by the decision of this court in *Alabama Steel & Wire Company v. Griffin*, 149 Ala. 423, 42 South. 1034, subsequently approved by a majority of the court in *Woodward Iron Company v. Curl*, 153 Ala. 215, 44 South. 969, and in *Pear v. Cedar Creek Mill Co.*, 156 Ala. 263, 47 South. 110, to hold that the complaint stated no cause of action under the statute; this for the reason that the complaint showed that the plaintiff's intestate was employed as a carpenter in and about the defendant's mine, so that he was not of that class of railroad employés for whose benefit the statute was said in *Griffin's Case* to have been enacted. It is now insisted that the cases referred to were based upon a misconception of the meaning of the statute, and a formal dissent by one member of the court, and the reluctant acceptance of those cases by some members of the bar who appear to have given the question special attention, as well as the earnest protest of the appellant in this case, seem to justify some further examination of the subject.

It is familiar law that, except as modified by the employer's liability act, a servant undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of injury caused by the negligence of a fellow servant while acting within the scope of his employment. And this court, in *Central of Georgia v. Lamb*, 124 Ala. 172, 26 South. 969, held that the employé assumed also the risk of injury resulting from the wanton or willful wrongdoing of fellow employés except in the instances provided for in the act. The reason assigned for this rule is that the servant knows when he enters the service that he will be exposed to the hazard of injury from negligence on the part of his fellow servants, and he must be supposed to have contracted on the terms that as between himself and the master he would assume the risk. In *Smoot v. M. & M. Ry. Co.*, 67 Ala. 13, it is stated by the court that there is also a higher reason for relieving the master from liability for such injuries, founded in the policy of encouraging and compelling the servant to exercise diligence and caution in the discharge of his duties, which, while protecting him, affords protection also to the master; such diligence being properly esteemed a better security against injury from the negligence of a fellow servant than recourse against the master for damages, when the injury has been received. The cogency and sufficiency of the reason stated in the *Smoot Case* has been much doubted. It occurs to us that the assumption of risk by implied contract is the juristic basis of the doctrine

of common employment, while the encouragement and compulsion of the servant to the exercise of diligence, thus fostering industrial enterprises, constitute its justification as an economic policy. However that may be, the common-law doctrine of the contract assumption of risk, including the risk of injury from the negligence of co-employees, is too firmly established to be disturbed by the courts. But every legislative enactment on the subject implies an upturning of the supposed policy because not justified by experience, and compels a narrowed and restricted application of the juristic theory.

It is proper at this point to remark that the servant stands in the position of assuming the risk only when he has received injury while acting in his master's service by the act of a fellow servant also so acting. In other words, the injured and the negligent servants or employees must have been engaged in a common employment. If the injured person was not so acting, he was one of the public; if the act which caused the injury was not within the scope of the negligent servant's employment, the master is not responsible. The employer's liability act has wrought certain changes in the law stated. But it is well enough to remember that it was no part of the purpose of the act to codify the whole law as to the liability of employers or to destroy any common-law right of servants. All servants are entitled to maintain actions against their employers in all cases where they could formerly have done so. *Robts. & Wall. Duty & Liability of Employers*, 207; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 687; *Colorado Milling Co. v. Mitchell*, 28 Colo. 234, 58 Pac. 28. It is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely requires. Such has been the language of the courts in all ages. 1 Kent's Comm. 464. This court has repeatedly announced the general principle. The statute, however, is remedial and ought to be construed so as to advance the remedy. In *M. & B. Ry. Co. v. Holborn*, 84 Ala. 133, 4 South. 146, it is said that, while a narrow and restricted view of the statute should not be taken, the court, considering its objects, having regard to the intention of the Legislature, and taking a broad view of its provisions, commensurate with its proposed purposes, would not enlarge the term further than may be necessary to effectuate its manifest ends. In any view, there is no reason to suppose an intention to deprive servants injured by the negligence of other servants of any right of action they had at the common law. A servant injured by the negligent act of another servant acting for the common master within the scope of his employment cannot be denied the right of recovery in an action under the statute on the ground that he was not engaged in a com-

mon employment with the delinquent without conceding to him the right to recover under the common law as a stranger, for he must have a place in one category or the other. There can be no sufficient reason for marooning servants of the master who are fellow servants of the delinquent, but who do not engage in the operation of a railroad, in a class to themselves where, alone of all the world, they may not maintain a suit against the master for the injurious negligent act of another servant having charge or control of any special point, locomotive, engine, electric motor, switch, car, or train upon a railway, or of any part of the track of a railway. It seems, however, to be supposed, and the demurrer in this case asserts, that this has been the effect of the decisions to which we referred in the outset.

The statute deals only with those cases which at the common law were affected by the doctrine of common employment, for only in such cases was the servant denied the right to recover of the master for the negligence of another servant. Unless the negligent and the injured employees were engaged in a common employment, as affecting the master's liability, they stood to each other in the relation of strangers, although they may have been employed by a common master. "If the contract implied on the part of the servant is to bear the risk only of the business in which he is engaged, and not the risk of another business, he would not be prevented by his contract from maintaining an action against the master, if he were injured by the negligence of another servant of the same master, engaged in other business. His remedy would be restricted by the contract only as to the negligence of fellow servants engaged in the same general service, or those employed in the conduct of one common enterprise or undertaking, or those whose employment is such that, by their negligence in the usual line of their duty, he might reasonably expect to be endangered, or those whose negligence might be understood to be incident to his service." *Fisfield v. Northern Railroad Co.*, 42 N. H. 225. "As a laborer on a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply." *Northern Pac. Railroad v. Hamblly*, 154 U. S. 340, 14 Sup. Ct. 983, 38 L. Ed. 1009.

"The principle underlying those decisions which hold a master liable to a servant for the negligent act of another servant in a separate and distinct department of the service is that a servant only assumes the risk from the negligence of those so closely associated with him that he is presumed to have contracted with reference to such work." *L. & N. R. R. Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696. There are many other cases to the same effect. To state the proposition in the language of Mr. Labatt: "There may be a disconnection of duties so great that it would be wholly unreasonable to infer that the risk of the negligent servant's act was one which the injured servant contemplated and accepted." Section 490. Further, he says that there is a complete unanimity as to the points that, in order to let in the defense of common employment, it must appear that, at the time of the accident in suit, the negligent and injured servants were not only under the control of the same master, but were also engaged in the discharge of duties which may be said, in a reasonable sense, to have been directed to the attainment of the same end. Section 493. It is to be noted, also, that the statute does not make that negligence which was not negligence before; it does not make the master responsible for acts or things which do not constitute a breach of duty; it does not create a cause of action where none previously existed; it merely adds a remedy against a person other than the actual wrongdoer; it takes away from the master one defense, placing the employé, when the conditions of the statute have been satisfied, in the position of one of the public. *Robts. & Wall*, pp. 180, 242, 243. The result is that the position of an employé injured by the negligence of another employé of the same master, but not in the common employment, is unaffected.

In *Alabama Steel & Wire Company v. Griffin*, supra, speaking of those counts of the complaint in which recovery was sought under subdivision 5 of the employer's liability act, it was said: "Ex vi termini, in order for the plaintiff to recover under said subdivision, the pleading and proof must show that at the time he was injured he was employed in and about the railroad. It is not sufficient that he was employed at a plant by the same master, who also owned and controlled a railroad, which may be operated in furtherance of the business of the plant. His duties must be in and about the railroad." This ruling was based upon the finding that subdivision 5 of the act was enacted for the protection of those engaged in the hazardous business of operating a railroad only, and this finding, in turn, was based upon the proposition that to give it any other construction would render the subdivision unconstitutional, and in support of that proposition the opinion of the Supreme Court of Iowa in *Foley v. Chicago*,

etc., *R. R. Co.*, 64 Iowa, 644, 21 N. W. 124, is quoted, as follows: "The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." We will notice as briefly as may be the authorities cited to sustain the position.

In *Missouri Pac. Rwy. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, the Supreme Court of the United States held that the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The statute of Kansas there under consideration was in terms directed against railroad companies. In view of the later utterances of that court, it may well be that the statute of Kansas offended against the Constitution of the United States, for that, discriminating between corporations and natural persons operating railroads, it denied to the former the equal protection of the laws. *Smyth v. Ames*, 169 U. S. 466-522, 18 Sup. Ct. 888, 43 L. Ed. 197. As for the rest, that decision clearly recognizes the right of the states to legislate for the protection of employes as well as the public against the special dangers incident to the operation of railroads. The statute in that case was upheld.

Missouri Pacific v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, and *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, had to do, the one with a statute requiring railroad corporations to erect and maintain fences and cattle guards on the sides of their roads, and the other with a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits and within certain hours. So far as we are now able to see, these cases do not touch the question involved in the case at hand.

In the case of *Foley v. Chicago, R. I. & Pac. Railway Co.*, supra, the court had under consideration a section of the Code of Iowa which was in this language: "Every corporation operating a railroad shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or of omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." Consideration of the language of the statute seems to show that its purpose was to deny to railroad companies the defense of common employment only in the event both the

injured and the negligent employé are employed on or about the railroad. That also seems to have been the view of the court. The plaintiff sued as an employé. The decision was that he could not recover for the reason that he had nothing to do with the running of trains, and was therefore not engaged at the time of his injury in the service of the defendant in such capacity that he was entitled to recover under the statute damages for an injury by reason of the negligence of a co-employé. At an earlier time there had been in Iowa a statute in these words: "Every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employé of the corporation, to any person sustaining such damage." In speaking of this statute in *Deppe v. Chicago, R. I. & Pac. R. R. Co.*, 36 Iowa, 52, the court used the language quoted in *Alabama Steel & Wire Co. v. Griffin*, supra, as follows: "The manifest purpose of the statute was to give its benefits to employés engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." To illustrate its view the court said: "Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employés shall be injured by the negligence of a co-employé, and the employé of the railroad company can, under the statute, maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation." And the statute was held to be an effort at class legislation. In order to avoid that operation of the statute, it was held that it gave its benefits to employés engaged in operating railroads only. So far as concerns the result reached in that case, we have no need to quarrel with the decision. It might well have been put upon the ground that the statute, applied in strict accordance with its language, would work a discrimination against railroad companies as such, because natural persons operating railroads were not put in the same category. The statute of Iowa considered in *Deppe's Case* had been passed in 1862. The Legislature of that state seems to have been of the opinion that the real trouble with it was as we have suggested, for in 1872 it enacted a similar statute extending, however, its provisions to persons as well as to corporations owning or operating a railroad. 2 Labatt, § 758a. It is to be observed that our statute makes no discrimination in the class of employers or employés affected by it. It may be that only those persons, natural or arti-

ficial, operating railroads, make use of signals, locomotives, cars, and the like, upon railways, and hence that subdivision 5 affects employers only who are engaged in the operation of railroads; but the classification here is based upon the fact that the operation of railroads, by whomsoever operated, involves great and peculiar hazards. The statute is in part a police regulation.

No satisfactory brief quotation can be made from the case of *Indianapolis Railway Company v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, cited to support the *Griffin Case*. The case supports that view of the statute we now take. The argument concludes with the statement that the Alabama statute creates a liability for the negligence of those in charge of signals, engines, etc., in favor of all co-employés.

In *Ditberner v. Chicago, etc., R. R. Co.*, 47 Wis. 138, 2 N. W. 69, the doctrine of the Iowa cases is disapproved. Minnesota got its law from Iowa. Mr. Labatt refers to their decisions with evident disapproval in this language: "In order to save the Iowa and Minnesota acts from the imputation of being repugnant to the constitutional provision which prohibits class legislation, it has been deemed necessary to hold that, although the words employed by the Legislature were perfectly general, they should be construed as being applicable only to servants engaged in the actual operation of the road."

We do not doubt that our statute is entirely free from constitutional objection, and must receive a broader application in respect to the class of employés affected than it was permitted to have in *Griffin's Case*. That case is modified accordingly. We hold that employés engaged on or about a railroad, including therein employés brought by their employment into such close relation with the operation of the railroad as that it may be said, in a reasonable sense, that danger therefrom constitutes an ordinary danger of the service in which they are engaged, though they be not strictly railroad employés, as well as those engaged in the actual operation of the railroad, are fellow servants with those employés who operate signals, locomotives, trains, etc., on the railroad, and fall under the influence of the subdivision. Employés otherwise circumstanced are entitled to sue as members of the public having no particular relation with the railroad—as strangers.

Probably what has been said extends the influence of the statute in practical application to but few cases in which the injured employé is not immediately engaged in the operation of a railroad—the case considered with approval in *Alabama Steel & Wire Co. v. Griffin* being of the number—and it does not at all affect the fact that railroads are responsible in one form or the other for all injuries proximately caused by the negli-

gence of their employes operating locomotives, etc., along their tracks, as was the case here alleged. Where the negligence occurs in the operation of signals or points, the rule may be different, for possibly, as to them, a railroad company owes no duty to strangers. It affects only the framing of the complaint. It seems to have been the rule in dealing with declarations under the employer's liability act, to treat an allegation of employment by a common master as a sufficient allegation of an employment common in respect to the risk assumed under the common-law status, and it has been required that a complaint so framed must exclude the master's defense, arising at the common law out of the relation, by stating with some particularity a case falling under some subdivision of the statute. Community of employment is necessarily implied between an employe who inspects for use and one who uses the appliances inspected. So between a superintending employe and one superintended. So between an employe who gives orders and directions and him who must conform. Subdivision 4 is more difficult. But no such implication arises in respect to a servant injured by the negligent act or omission of another operating a railroad train. Where it is uncertain just what the relation between the plaintiff and the negligent employe was at the time of the injury complained of, or rather, how the facts will turn out, good practice would seem to require that, in order to avoid a variance, counts under the statute be joined with others on the common-law liability of the master as to a stranger. *Ryalls v. Mechanics' Mills*, supra. That seems to have been the effort of the pleader in the beginning. Later on, all counts were put in the same category.

As we understand the record, the demurrer to the various counts as amended, aside from some grounds which cannot be considered because they are merely general, asserted in varied phrases that the plaintiff should not be allowed to recover on the case stated for two reasons: (1) Plaintiff's intestate and the delinquent engineer were fellow servants, and therefore plaintiff cannot recover on any principle of general law; (2) plaintiff's intestate was not engaged in operating a railroad, and therefore plaintiff cannot recover under subdivision 5 of the employer's liability act. In other words, the demurrer sets up a class of fellow servants who are not entitled to the benefits of that subdivision of the statute. But, as we think we have shown, this proposition of the demurrer is untenable. And that is all we are undertaking to decide at this time. We do not affirm that plaintiff's intestate and the negligent employe were fellow servants. In dealing with the case we have assumed that relation to have existed between them because the demurrer does not question it. The demurrer does not question the sufficiency of the complaint for any other reason

than that we have indicated. It should have been overruled.

Reversed and remanded.

SIMPSON and EVANS, JJ., concur. ANDERSON and McCLELLAN, JJ., concur in the conclusion. MAYFIELD, J., dissents.

ANDERSON, J. While I concur in the conclusion reached by the majority that some of the counts were not subject to the grounds of demurrer interposed thereto, I do not wish to be understood as extending subdivision 5 of the employer's liability act any further than it was extended in the *Griffin and Curl Cases*, supra. In other words, I think the complaining servant must be a fellow servant with the one charged with the damifying act or omission, and, as the latter is charged with being an employe in and about a railroad, the former must of necessity have been engaged in the discharge of some duty in and about the same general or common business in order to be a fellow servant with the latter. If he was not he cannot be a fellow servant. The fact that they have the same common master does not constitute them fellow servants, as it must appear that their duties are in and about the same common or general business, and, unless such is the case, there is no field of operation for and no need of subdivision 5, and the injured servant would doubtless have his remedy under the common law. Independent of the statute, one who was injured through the misconduct of one other than a fellow servant had his recourse, and the statute was intended to modify the rigor of the common law in favor of one who was injured by a fellow servant. If they are not fellow servants, there is no need for the statute, and it does not and cannot apply. In order to invoke the statute, the plaintiff's intestate must have been a fellow servant with the one causing the death or injury. If the derelict servant is employed in and about the business of operating a railroad, how can the injured or complaining servant be his fellow servant, unless his duties also required him to be connected in some manner in and about the operation of a railroad? Here we have a case charging the dereliction to one engaged in and about a railroad, yet in some of the counts describing the plaintiff's intestate as a carpenter engaged in and about the defendant's plant. Could it be seriously contended that a carpenter employed to build or work upon houses and buildings situated upon defendant's premises, and which was a part of its plant, was a fellow servant with a person working on a railroad of the same defendant, simply because the defendant operated said railroad in connection with its plant? I think not. Can it be seriously contended that, if the defendant used mules and horses or oxen in connection with its plant and a railroad as well, the man who fed, watered, or drove the stock would be

a fellow servant with the one who fired or operated the engine upon the railroad track? Subdivision 5, if extended to a carpenter or blacksmith, unless his duties in some way required him to work in and about the railroad, could as well apply to the hostler or gardener. It is true, some of the counts in the case at bar made it the duty of plaintiff's intestate to work upon trestles on defendant's railroad, and while there he would doubtless have been a fellow servant with the trainmen and other employes of the railroad; but there are other counts which do not charge him with any duties in and about a railroad. To disturb the holding in the Griffin Case, supra, would, in effect, extend subdivision 5 to servants of the same master notwithstanding their respective duties would be disassociated from those of the others. It would make the railroad operatives fellow servants with the men who worked in the mine of the same master as well as those who built and repaired his houses, fed his mules and horses, drove his oxen, and cooked his breakfast.

All that was decided in the Griffin Case was that counts 5 and 6 were within subdivision 5, inasmuch as they averred that the plaintiff's intestate was killed while in the discharge of his duty in loading a car upon the defendant's railroad, and that counts 9 and 11 were not within said subdivision, as they merely stated that the intestate was engaged in the discharge of his duty in and about the defendant's plant and did not make it his duty to be engaged in and about a railroad. A careful reading of the counts, as well as what is said in the opinion in reference thereto, is earnestly invited. It was not insisted or considered as to whether or not counts 9 and 11 were or were not good under the common law.

I do not object to the criticism of the Griffin Case, in so far as it may quote approvingly from Mr. Reno and the Iowa case as to the constitutionality of the law, if not limited to railroad employes. It could have been well omitted from the opinion and was merely arguendo. The constitutionality of the act was not questioned in the Griffin Case, and the only question that should have been considered, and which was really decided, was whether or not counts 5, 6, 9, and 11 were good under subdivision 5. It was held that 5 and 6 were good, and that 9 and 11 were not, as they did not show that the plaintiff's intestate was killed or injured while in the discharge of any duty in and about a railroad. The said quotations can easily be eliminated from the opinion, and the result will be the same. On the other hand, extend subdivision 5 any further than it was extended in the Griffin Case, and the fellow-servant doctrine will be made to embrace all servants of a common master, whether there is or is not any identity or community of work or

duty. The Griffin Case simply holds that, as the negligence charged was to defendant's servants upon a railroad, in order for the plaintiff to sue under subdivision 5, his intestate must have been a fellow servant with the ones charged with the damning act or omission, and must therefore have been killed or injured while in the discharge of some duty in and about a railroad. If not so engaged or employed, he was not a fellow servant with the derelict one and could not come within the influence of subdivision 5.

I concur in the conclusion and in the opinion in so far as it may question the soundness of the quotation in the Griffin Case; but, if it modifies, in the slightest, the real holding in said case, I dissent.

PARK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Alabama. April 14, 1910.
Rehearing Denied June 30, 1910.)

TELEGRAPHS AND TELEPHONES (§ 65*)—PLEADING.

In an action against a telegraph company, a count of the complaint charged that defendant negligently failed to promptly deliver a message. The plea alleged that the contract contained a provision that for delivery beyond free delivery limits a special charge would be made, that the sendee resided beyond such limits, and that no special charge was paid or tendered. Held, that a demurrer to the plea, on the ground that defendant failed to allege that it transmitted the message promptly, was erroneously overruled.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 65.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Mattie E. Park against the Western Union Telegraph Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Denson & Denson, for appellant. Campbell & Johnston, for appellee.

SAYRE, J. There were two counts. The first charged that the defendant failed to transmit and deliver plaintiff's message within a reasonable time; the second, that defendant negligently failed to promptly deliver. The second plea interposed the defense that the contract for transmission contained a stipulation that the message would be delivered within the established free delivery limits of the defendant's terminal office, but that for delivery at a greater distance a special charge would be made, that the sendee resided beyond the established limits, and that no special charge was paid or tendered for delivery beyond. A demurrer to this plea was overruled. The demurrer was that the plea failed to aver that the company transmitted the message promptly as the contract and the law required it to do.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is conceded by appellee that the plea would have been improved by the incorporation of an averment that the sendee was not to be found within the free delivery limits by the exercise of reasonable diligence. But it is said the demurrer does not take that point. The contention is, of course, that since the complaint in the second count was of a negligent failure to promptly deliver—meaning thereby, as the argument runs, negligence in respect to the delivery of the message after it had reached the terminal office—there was no necessity of an averment in the plea that the message was promptly transmitted; the idea being that the defendant need not negative a default not charged. But the argument is based upon the assignment of too narrow a meaning to the word "deliver" in the complaint. Parties may, by pleading or otherwise, confine the issue as to breach of duty in failing to deliver to so much of the duty as remains to be performed after the message has reached the terminal office. It was said in *W. U. Tel. Co. v. Emerson*, 49 South. 520, referred to by appellee, that the parties had so narrowed the issues in that case. But that is not the case here. The contract was to deliver, and that included the duty to transmit. And necessarily a failure to transmit involved a failure to deliver.

Defendant tendered an issue which drew into question no more than its failure to use due care after transmission—a plea which might have been proved by evidence that it had not transmitted, nor attempted to transmit, the message over its wires, thus excluding the possibility of negligence after transmission. The demurrer asserted the futility of this contention. As we understand them, the authorities decide the precise point against appellant. It has been held that a failure to start the message is a breach of the entire contract. *W. U. Tel. Co. v. Way*, 83 Ala. 556, 4 South. 844. On that foundation was planted the decision in *W. U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66, where a plea substantially the same as the plea here was condemned; the court saying: "If the defendant wished to avail itself of the fact that the plaintiff's residence and place of business were beyond the free delivery limits, it should have shown by the pleas that it transmitted the message to its operator at Edwadsville promptly. Non constat the plaintiff was within the free delivery limits and his whereabouts known to its operator at that point."

The plea was defective, as pointed out by the demurrer, and the judgment will be reversed.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. ALBERTVILLE CANNING CO.

(Supreme Court of Alabama. June 9, 1910.)
PLEADING (§ 409*)—OBJECTIONS TO PLEA—WAIVER.

In an action against a telegraph company, a count of the complaint charged that defendant negligently failed to promptly deliver a message. A plea alleged that the contract contained a provision that for delivery beyond free delivery limits, a special charge would be made, that the sendee resided beyond such limits, and that no special charge was paid or tendered. Held that, though the plea was defective, issue having been taken upon it, and it having been proved without contradiction, defendant was entitled to the affirmative charge.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 409.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by the Albertville Canning Company against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

The special plea alluded to is as follows: "That as a part and parcel of said contract for the sending and delivery of said message it was provided that said message would not be delivered free at a greater distance from Pell City than the established free delivery limits of the defendant's office at Pell City, Ala., and that for delivery outside of said established free delivery limit a special charge would be made; and defendant avers that the said Maddox resided outside of the established free delivery limit at Pell City, Ala., and that plaintiff did not pay or offer to pay a special charge for the delivery of said message outside the city limits."

Campbell & Johnston and Street & Isbell, for appellant. E. O. McCord, for appellee.

SAYRE, J. The special plea was defective in substance (*Western U. Tel. Co. v. Merrill*, 144 Ala. 616, 39 South. 121, 113 Am. St. Rep. 66; *Park v. Western U. Tel. Co.*, 52 South. 884); but its legal sufficiency was not questioned. Issue was taken upon it. It was proved without contradiction, and the defendant should have had the general affirmative charge as requested.

Reversed and remanded.

SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

RED v. STATE.

(Supreme Court of Alabama. May 19, 1910.
On Rehearing, June 30, 1910.)

1. CRIMINAL LAW (§ 218*)—WARRANT—SUFFICIENCY.

The irregularity in a warrant returnable to the "judge of the criminal court of Jefferson

county," instead of returnable to the court, as required by Loc. Acts 1903, pp. 379, 381, is immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 444-451, 457; Dec. Dig. § 218.*]

2. CRIMINAL LAW (§ 217*) — WARRANTS — COURTS.

Though inferior courts, established in lieu of justice courts as authorized by Const. 1901, § 168, are merely substitutes for justice courts, the inferior court or its judge may be empowered to take affidavits and issue warrants in misdemeanor cases returnable to the criminal courts having jurisdiction of the offenses.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 217.*]

3. CRIMINAL LAW (§ 207*) — WARRANTS — COURTS.

Loc. Acts 1903, p. 379, creating inferior courts in the precincts of a county, and conferring on the judges thereof power to take affidavits and issue warrants in misdemeanor cases, returnable to any court having final jurisdiction, though dealing with justices of the peace, and not with an inferior court authorized by Const. 1901, § 168, does not increase the jurisdiction of a justice of the peace, in violation of section 104, subd. 21, since the justices have jurisdiction to take affidavits and issue warrants, and the only result of the statute is to broaden the effect of an exercise of that jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 207.*]

4. JURY (§ 25*)—TIME TO DEMAND JURY.

A demand by one charged with a misdemeanor for a jury trial, made after the expiration of the time fixed by law for that purpose, comes too late.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 159-165; Dec. Dig. § 25.*]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

Jim Red was convicted of crime, and he appeals. Affirmed.

Allen & Bell, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MCCLELLAN, J. By express provision of the act creating the inferior court in precincts 21 and 37 of Jefferson county, authority was conferred on the judges of that court to take affidavits and issue warrants in misdemeanor cases "directly returnable to any court having final jurisdiction thereof." Loc. Acts 1903, pp. 379, 381. In this instance a judge of that inferior court took an affidavit charging appellant with a misdemeanor, and issued a warrant thereon returnable before the "judge of the criminal court of Jefferson county." The accused was promptly arrested and made a bond for his appearance "at the present term of the criminal court of Jefferson county."

The improper direction for the *return* before the "judge" of the criminal court was an immaterial irregularity. *Carnley v. State*, 50 South. 302; *Pell City Man. Co. v. Swearingen*, 156 Ala. 397, 47 South. 272.

There is no constitutional inhibition against the taking of affidavits charging misdemean-

ors, and the issuance of warrants therefor returnable to criminal courts created by statute, by justices of the peace. *Walker v. State*, 89 Ala. 74, 8 South. 144; *Reeves v. State*, 116 Ala. 481, 23 South. 28; *Lee v. State*, 143 Ala. 93, 95, 39 South. 368. So that, if the argument that inferior courts, established in lieu of the tribunals called "justice courts," as provided may be done by section 168 of the Constitution of 1901, are, strictly speaking, substitutes only for the justice courts, be accepted as apt and correct, the conclusion does not follow that such a substitutionary court or its judges cannot be properly empowered to take affidavits and order the *return*, in misdemeanor cases, of warrants to the criminal courts of counties having those tribunals.

The act (Acts 1894-95, p. 498) considered, as presently pertinent, in *Lee v. State*, supra, was a restriction on the power of the justices of the peace therein described, and it was held on that appeal that the process was improperly made returnable, in that instance, to the criminal court instead of to the police court.

There is no merit in the insistence that the act creating the inferior court in precincts 21 and 37 (Loc. Acts 1903, p. 379 et seq.) is violative of subdivision 21 of section 104 of the Constitution of 1901, in that it increased the jurisdiction of the justices of the peace by local law. Aside from other probable reasons, this consideration is satisfactory: That the effect of the latter act was not to increase *jurisdiction*, even had it dealt with justices of the peace instead, as it did, of an inferior court (Const. § 168), since to take affidavits and to issue warrants the justices already had jurisdiction, and the only result of the amplification was to broaden the effect of an exercise of that jurisdiction previously possessed.

The defendant's demand for a trial by jury was attempted to be made after the expiration of the period allowed by law for that purpose. It came too late.

The affidavit was not subject to demurrer. Its words "A prohibition district and" were surplusage merely.

There is no error apparent on the record; so the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SIMPSON, JJ., concur.

On Rehearing.

Out of deference to the insistence of counsel for appellant, we add a few words of response to the argument for rehearing.

The point taken by counsel for appellant, on the original submission, and again on application for rehearing, was understood, and, we think, clearly ruled on, and so, without overruling *Lee v. State*, 143 Ala. 93, 39 South.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

368. There is no occasion to depart from it. *Jurisdiction* is defined, more amply for the present purpose, in our reports in *Vann v. Adams*, 71 Ala. 475; but it may well be added that Lee's Case did not formulate a different definition. The Lee Case pronounced the word *jurisdiction*, as employed in the title of the act, to be synonymous with *power or authority*; and so reading it—reading it as not being used in the sense of the “power to hear and determine,” because *courts* were not being dealt with in that connection—the title of the act was ruled to be sufficiently definite, as well as comprehensive, to embrace the *return* of process, issued by the justice of the peace, to the police court. While not now concerned with the title of an act, but with the term *jurisdiction* as employed in subdivision 21 of section 104 of the Constitution and its application to a broad statutory provision authorizing the *return* of process to certain courts, generally jurisdictioned to finally try misdemeanor cases, it was ruled, as appears in the opinion in chief, that the jurisdiction of the inferior judge was to take the affidavit and to issue the warrant thereon; and that the broader provision for the *return* of the process to courts jurisdictioned to finally try misdemeanants amplified the *power or authority*, but did not *increase* the jurisdiction of the inferior judge. *Vann v. Adams*, *supra*. Such is the distinction necessarily recognized in the Lee Case.

Application denied.

GEWIN et al. v. SHIELDS.

(Supreme Court of Alabama. June 2, 1910.)

1. EQUITY (§ 3*)—SUBJECTS OF RELIEF—FRAUD.

Ordinarily, equity will relieve against fraud, but does not relieve against every neglect of a moral or social duty.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 7-12; Dec. Dig. § 3.*]

2. FRAUD (§ 3*)—ACTS CONSTITUTING.

One commits actionable fraud where, with a view to influence the conduct of another, he willfully leads him into a false belief, and the other acts accordingly, to his injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

3. CANCELLATION OF INSTRUMENTS (§ 32*)—NATURE OF REMEDY.

While the facts which will authorize the cancellation of an instrument will often afford ground for another action at law, that remedy lies only in equity.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 32.*]

4. CANCELLATION OF INSTRUMENTS (§ 12*)—SUBJECTS OF RELIEF—CLOUDS UPON TITLE.

Instruments, though void, will be canceled in proper cases if they cast a cloud upon title to land.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 11, 12; Dec. Dig. § 12.*]

5. CANCELLATION OF INSTRUMENTS (§ 20*)—CLOUDS UPON TITLE—POSSESSION AS PRE-REQUISITE.

One in possession of land need not first test his title in an action at law before suing to cancel an instrument as a cloud.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 28, 31; Dec. Dig. § 20.*]

6. EQUITY (§ 239*)—ADMISSIONS BY DEMUR-REER.

Averments of a bill are taken as true on demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. § 239.*]

7. MORTGAGES (§ 536*)—FORECLOSURE—BONA FIDE PURCHASER.

A mortgagee purchasing at his own sale is not a bona fide purchaser if the mortgage was given to secure a pre-existing debt and there was no valuable consideration for the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1557; Dec. Dig. § 536.*]

8. CANCELLATION OF INSTRUMENTS (§ 4*)—DEEDS OBTAINED THROUGH FRAUD—RIGHT TO RELIEF.

That respondent, by intentionally deceiving complainant by promises not intended to be kept, induced him to execute a deed which he thought to be a mortgage, pursuant to respondent's intention to defraud complainant, and that respondent afterwards mortgaged the land for a pre-existing debt to co-respondent, who purchased under foreclosure, that co-respondent demands possession, and that complainant offers to do equity by paying any charge upon the land, the lifting of which may be necessary to the relief prayed, entitles complainant to a cancellation of the several instruments.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by G. W. Shields against W. O. Ge-win and another. From a decree overruling a demurrer to the bill, respondents appeal. Affirmed.

Francis M. Lowe and Nisbet Hambaugh, for appellants. Charles J. Dougherty, for appellee.

MAYFIELD, J. The case made by the bill is that appellee is an illiterate man of small means and business capacity; that prior to August 15, 1908, he owned a small house in Jefferson county, near Birmingham, Ala. On that date he was approached by the respondent Fortenberry, in Birmingham, who inquired of him what he was doing in Birmingham. Appellee replied that he was going to the bank to see if he could borrow some money which he needed, to which Fortenberry rejoined that appellee did not have to do that; that he (Fortenberry) would lend him all the money he needed. Thereupon, at the solicitation of Fortenberry, as the bill avers, they entered into the following agreement: “That your orator (appellee) would execute to the said Fortenberry a mortgage on his home, the aforesaid described property, for \$1,000, for which

the said Fortenberry agreed to pay one T. C. Cairns \$180, and one McLendon \$60, which orator was then owing, and was to make certain improvements on orator's home, the aforesaid described property; that orator was to execute promissory notes of \$10 each to the said Fortenberry, for the amount paid out in addition to what the improvements would cost, payable one on the 1st of each month thereafter until the entire indebtedness was paid in full. The above agreement was suggested to orator by said Fortenberry and assented to by him. Orator avers that the said Fortenberry has never paid the said Cairns nor the said McLendon any money whatever; that he has never made, nor attempted to make, any improvements on his (orator's) aforesaid premises; that he has never carried out any provisions of the aforesaid agreement; that on, to wit, the 22d day of August, 1908, orator, as agreed to, executed to said Fortenberry said mortgage, which now on its face appears to be an absolute deed on his aforesaid property; that the notes which said mortgage was to secure were never presented or executed by him. Orator avers that for several days immediately after he executed said mortgage he on divers occasions during said period of time requested the said Fortenberry to proceed to carry out the aforesaid agreement, but that on each occasion his request was met by some evasive or trifling excuse," etc.

The bill alleges that said Fortenberry never loaned appellee a cent, and never did anything which he agreed to do; that after declining and failing to perform his agreement, the said Fortenberry promised to destroy the mortgage, and told appellee that he need not worry about it any more, and that appellee thought his property was no longer incumbered; that Fortenberry, instead of destroying the document, had it recorded; that it was for the first time discovered by appellee's attorney to be an absolute deed and not a mortgage; that said Fortenberry, to further carry out his fraudulent scheme to get appellee's home, executed to the other respondent, Gewin, what purports on its face to be a mortgage on this land to secure a note for \$500 which Fortenberry owed Gewin; that, to further carry out this fraudulent scheme, Gewin foreclosed his mortgage and purchased at his own sale, and is now demanding possession of orator's home. The bill seeks to have these several instruments delivered up and canceled as a cloud on complainant's title, and to prevent the respondents from hereafter harassing appellee by means of these fraudulent deeds and mortgages. The bill, however, offers to pay any or all amounts, if any, that the court may find to be due from him to any one of the respondents, which may constitute a lien or incumbrance upon the property. The respondents demurred to the bill, assigning various grounds, but the court overruled the

demurrers; and from that decree this appeal is taken.

There is a no more common head of equity jurisdiction than to relieve against frauds, and whenever such are made to appear, in the various transactions between man and man, equity in most, if not in all, cases can and will relieve against them.

"Courts of equity have been liberal in protecting, against the consequences of fraud, those who from weakness and imbecility are most liable to imposition, and also those who from their relative situation are peculiarly liable to be influenced by artful and designing persons around them. In carrying out their healthful principles, they have proved themselves the guardian of infancy, the protectors of the innocent and unwary, and the fearless and successful expositors of hidden machination and secret fraud. If there has been a suppression of the truth, or the suggestion of a falsehood, whereby the party is circumvented and deceived, equity will relieve against it. Where an undue advantage has been taken of the weakness or necessity of the party, or of any situation in which he is placed, rendering him peculiarly liable to impositions, this court will interfere. It goes upon the safe principle of protecting those who are not able to protect themselves." *Crane v. Conklin*, 1 N. J. Eq. 356, 22 Am. Dec. 519.

Equity stands on the best and broadest basis when it does to enforce rights founded on moral and social duties, though every neglect of a moral or a social duty does not give rise to a right of action at law, or a suit in equity.

When one person, with the view to influence the conduct of another, willfully leads him into a false belief, and the other acts accordingly, to his hurt, the act is said to be induced by fraud, and the former is liable to the latter in a proper suit to right the wrong done. Fraud without damage, or damage without fraud, gives no right of action; but where these two concur an action lies. Both are shown in this bill.

Facts which will authorize equitable relief by cancellation will often afford ground for some other action at law, but cancellation is relief which, under our practice, can be afforded only by a court of equity.

Instruments, though void, if they cast a cloud upon title to land, in proper cases will be canceled.

It has been often reaffirmed by this court that a party, to maintain a bill to cancel a deed as a cloud upon title, must be in possession; otherwise he could by affirmative action first establish his title in a court of law, and be restored to the possession, and then have the cloud removed.

Where the complainant is in possession, he is not required to first test his title in a court of law.

The rule that prevails in English courts,

in cases like this, is that equity has jurisdiction in all cases of fraud. 6 Cyc. 291. In this state, however, it has been decided that "fraud is never a distinctive ground of equity jurisprudence; it is never of itself a foundation which will uphold a bill in equity" (Smith v. Cockrell, 66 Ala. 77), though we have decisions to the contrary. See cases cited in the majority and dissenting opinions in the above case.

Mr. Justice Story has said that a complainant ought not to be subjected to vexatious litigation at a distant time, when proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can bring to bear to the present moment. Delay may lose the benefit of important evidence of the fraud.

The reasonable inferences from the facts averred in this bill are that Fortenberry intentionally deceived complainant by promises which he had no intention of performing, and thereby procured complainant to execute a deed, when he thought he was executing a mortgage, and that it was done and carried out with the intention of defrauding complainant. Fortenberry's subsequently executing the mortgage to Gewin was probably a part of the scheme. The bill, however, does not show that Gewin was a party to the original scheme.

But this is not necessary to maintain this bill. If the averments of the bill are true—and on demurrer they must be so treated—Gewin was not a bona fide purchaser for value, even though he had no notice of the fraud. The bill shows that his mortgage was to secure a pre-existing debt which Fortenberry owed him. It does not show that Gewin parted with anything of value in consideration of the mortgage—not even with the grant of an extension of time for payment—but only that he took it to secure a note owing to him.

The bill furthermore offers to do equity by paying whatever charge upon this land (if any such there be) the lifting of which may be necessary to the relief prayed.

The bill clearly contained equity, and was not subject to the demurrer interposed; and the decree of the chancellor must be affirmed. Affirmed.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

BIRMINGHAM SOUTHERN R. CO. v. FOX.
(Supreme Court of Alabama. Feb. 26, 1910.
Rehearing Denied June 30, 1910.)

1. EVIDENCE (§ 122*)—ADMISSIBILITY—RES GESTÆ.

In an action against a railroad for the death of plaintiff's intestate by being struck by

one of defendant's engines, evidence whether the bell was rung, or the whistle blown, was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 339-350; Dec. Dig. § 122.*]

2. RAILROADS (§ 397*)—ACTION—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY OF—CONDITION OF ROADBED.

In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, while there was no duty on defendant to furnish decedent a good track to walk on, yet evidence as to its condition was admissible as a description of the locus in quo, as tending to show whether defendant's agents were negligent in their handling of the train, and if so, to what degree, and also whether decedent was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 397.*]

3. RAILROADS (§ 397*)—ACTION—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY OF—CUSTOM OF THE PUBLIC TO USE A PART OF THE ROADBED.

In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, while evidence of a custom of the public to use the roadbed at a certain point was not admissible to show a right of the public to be there on the track, yet it was admissible on the issue of the wanton or willful negligence of defendant's agent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1348; Dec. Dig. § 397.*]

4. RAILROADS (§ 355*)—INJURIES TO PERSONS ON TRACK—"TRESPASSER."

A person walking on a railroad track is a trespasser, unless it is where the track runs along a highway or public street, which the public have an equal right to use.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227; Dec. Dig. § 355.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7094, 7821.]

5. RAILROADS (§ 391*)—TRESPASSERS—LIABILITY FOR INJURIES.

If the engineer, conductor, or other agents in charge of a train are informed of the custom of the public to use a certain part of the roadbed, and, with such knowledge, they wantonly or willfully injure a person, the railroad company would be liable notwithstanding the person injured was at the time a trespasser on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1317, 1328-1330; Dec. Dig. § 391.*]

6. TRIAL (§ 139*)—DIRECTION OF VERDICT—EVIDENCE—INSUFFICIENCY.

Where, in an action, the evidence was sufficient to support a verdict for plaintiff as to a certain count in the complaint, the court properly refused to give a general affirmative charge for defendant as to that count.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341, 365; Dec. Dig. § 139.*]

7. APPEAL AND ERROR (§ 1001*)—CONCLUSIVENESS OF VERDICT—SUFFICIENCY OF THE EVIDENCE.

In an action against a railroad for the death of plaintiff's intestate by being struck by an engine, the Supreme Court on appeal could not pass on the weight or sufficiency of evidence tending to show wanton or willful injury by defendant's agent, incredible as the evidence may seem.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action for personal injuries by Cassie Fox against the Birmingham Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Percy, Benners & Burr, for appellant. Bowman, Harsh & Beddow, for appellee.

MAYFIELD, J. Appellee's intestate was killed by a train or locomotive engine of appellant's, while he was walking along its track. Intestate, on seeing the approaching train and his danger, attempted to leave the track by climbing a steep bank of ashes or coke braize, which refuse matter is left from the manufacture of coke. This matter is loose like ashes or sand, and it slipped or slid in his attempt to climb it, causing intestate to fall or roll back on the track or near enough to be struck by some part of the engine and killed.

Whether or not the bell was rung or the whistle was blown, at or about the time of the injury complained of, was a circumstance admissible in evidence, under the issues raised on the trial. Hence, there could be no error in allowing proof thereof. While the failure to do either, or both, would not alone render defendant liable, or excuse the defendant if otherwise liable, yet it was admissible, in connection with other evidence, to aid in making out plaintiff's case and probably the defendant's defense, or in rebutting it. Such evidence might have been shown to be a part of the *res gestæ*.

Evidence as to the condition of the track was also admissible, as a description of the locus in quo. While, of course, there was no duty on defendant to furnish intestate a good or safe track or right of way on which to walk, and no liability could possibly result from a failure to furnish, maintain, or keep such roadbed, track, or right of way, yet a description of the locus in quo, the scene of the accident or injury, was competent, as tending to show whether defendant's agents in charge of the train were guilty of negligence, and, if so, in what degree, and also whether intestate was guilty of negligence which proximately contributed to his death.

While evidence of a custom of the public to use the roadbed or track of a railroad at a certain point, as a footpath, is not admissible for the purpose of showing a right of the public to be there on the track, or to show that a person walking along the track of the railroad at such a point is not a trespasser by reason of such custom, because if a person walks along a railroad track he is a trespasser notwithstanding a custom or habit of the public to so walk along the track at such point, unless it be where the railroad is laid along a public street or highway which the public have equal right to travel or use, yet proof of such custom or

habit of the public to so use a part of the railroad's track is admissible in evidence, in connection with other evidence, as tending to show wanton negligence or willful injury. That is to say, if the engineer, conductor, or other agents in charge of the train, knowing of this custom or habit of the public to so use a portion of the track, and knowing that people are constantly on the track at such point, and, with such knowledge, so operate the train as to wantonly or willfully injure persons so upon the track, the railroad company would be liable notwithstanding the person injured was at the very time a trespasser on the track.

It is true that it is said in *Glass's Case*, 94 Ala. 586, 10 South. 215, that evidence of such custom or habit is not admissible; but what the writer evidently meant was that such evidence was not admissible for the purpose of showing that a person on the track, under such conditions, was a trespasser nevertheless. That is evident from the quotation which immediately precedes it, and from what the writer says immediately thereafter, in the same opinion. Such evidence is not admissible for the purpose of showing that the person on the track is not a trespasser—for he is notwithstanding the custom or habit still a trespasser—but it is competent and admissible, in connection with other evidence, to show wanton negligence or willful injury on the part of the engineer or persons in control of the train while passing such point. *Haley's Case*, 113 Ala. 640, 21 South. 357; *Guest's Case*, 136 Ala. 348, 34 South. 968; *Webb's Case*, 97 Ala. 308, 12 South. 374; *Meador's Case*, 95 Ala. 137, 10 South. 141; *Martin's Case*, 117 Ala. 367, 23 South. 231; *Brown's Case*, 121 Ala. 221, 25 South. 609; *Lee's Case*, 92 Ala. 262, 9 South. 230; *Robbin's Case*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153.

All counts of the complaint were eliminated by the general affirmative charge, except counts 1 and 5. Count 1 declared on wanton negligence, and count 5 on subsequent negligence.

There was evidence which, if believed, was sufficient to support the verdict of the jury as to the fifth count of the complaint, which charged subsequent negligence. It therefore follows that the court did not err in declining to give the general affirmative charge, as requested by the defendant, as to the fifth count.

There was evidence, also, from which the jury might infer wanton negligence or willful injury, on the part of the engineer, however incredible some of it may seem to the court (and we confess that some of it does so seem to us), but we cannot, on this appeal, pass upon the weight or sufficiency of such evidence.

Finding no reversible error, the judgment is affirmed.

Affirmed. All the Justices concur.

ALABAMA GREAT SOUTHERN R. CO. v. NORRIS.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

1. ACTION (§ 30*)—FORMS OF ACTION—"ASSUMPSIT"—"CASE."

The distinction between "assumpsit" and "case" is that the one is a breach of a contract, and the other a breach of a duty growing out of a contract express or implied.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 216-255; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 1, pp. 587, 588; vol. 8, p. 7584; vol. 1, pp. 991-993.]

2. PLEADING (§ 240*)—AMENDMENT.

Where, in an action by a shipper against a carrier for delivering the goods in a damaged condition, counts of the complaint were amended by adding to each after the wrong complained of "in breach of defendant's contract with plaintiff" the amended counts were thereby changed into counts in assumpsit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 710-729; Dec. Dig. § 249.*]

3. CARRIERS (§ 51*)—BILL OF LADING.

A bill of lading is of a dual character and effect; one is that of a receipt, and the other, that of a contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 149; Dec. Dig. § 51.*]

4. EVIDENCE (§ 407*)—PAROL EVIDENCE—BILL OF LADING.

A bill of lading as a receipt is open to explanation or modification by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826-1828; Dec. Dig. § 407.*]

5. EVIDENCE (§ 407*)—PAROL EVIDENCE—BILL OF LADING.

A bill of lading as a contract must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826-1828; Dec. Dig. § 407.*]

6. CARRIERS (§ 62*)—CONTRACT OF SHIPMENT.

A contract of shipment need not be in writing.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 190, 202, 203, 207; Dec. Dig. § 62.*]

7. EVIDENCE (§ 442*)—PAROL EVIDENCE.

In an action by a shipper against a carrier for delivery of the goods in a damaged condition, where the evidence was that the damage was caused by the negligence of defendant in reloading the goods into the car of the terminal carrier, evidence of the plaintiff that the agent of the defendant agreed with her that the goods should not be reloaded, but should be shipped on through, in the same car, was not inadmissible as modifying the contract of shipment; the bill of lading being silent in such respect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

Mayfield and Evans, JJ., dissenting.

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Action by G. C. Norris against the Alabama Great Southern Railroad Company. Judg-

ment in favor of plaintiff. Defendant appeals. Affirmed.

A. G. & E. D. Smith, for appellant. Henry A. Jones, for appellee.

MAYFIELD, J. This was an action by appellee, a shipper of freight, against the appellant, a common carrier of goods, to recover damages for failure to deliver, and for delivering in a damaged condition, a lot of household goods shipped from Ensley, Ala., to Kellermann, Ala. The appellant was the initial carrier who undertook the contract of shipment, carried the goods from Ensley to Tuscaloosa, and there delivered them to the Mobile & Ohio Railroad Company, another common carrier; which latter company delivered the goods to the shipper, who was the owner and consignee as well as consignor. The goods were in good condition when received by the initial carrier, and were damaged when delivered by the delivering carrier at Kellermann, their destination. As to this the evidence may be said to be without dispute.

The goods were transferred from the car of the initial carrier, at Tuscaloosa, to that of the delivering carrier, by the agents of the initial carrier, thus being reloaded by it at Tuscaloosa. The real contest in the case was whether the goods were properly or negligently reloaded by defendant at Tuscaloosa, and whether the injury to the goods proximately resulted from the manner of this reloading. We do not say that this was the only disputed issue, but that it was clearly the main one. The bill of lading contained the usual clause or stipulation limiting the liability of each connecting carrier to damages for injury, loss, etc., "occurring on its portion of the route."

The complaint contained 16 counts, to each of which many pleas were interposed, and to many of which special replications were interposed. Demurrers were interposed to each and all of the various counts, pleas, and replications, sometimes jointly, sometimes severally, and sometimes both ways, respectively.

The first 10 counts of the complaint were treated by the parties and by the trial court as counts in assumpsit, and ex contractu.

The last 6 counts—11, 12, 13, 14, 15, and 16—as originally filed, were evidently considered by the trial court as counts in case, and ex delicto; and this is borne out by the sustaining of defendant's demurrers to these counts, because of misjoinder.

The plaintiff then amended each of these counts by adding, after the wrong complained of, the phrase, "in breach of defendant's contract with the plaintiff."

To this complaint as thus amended the defendant again interposed its demurrers, which were overruled. This, in the opinion of the writer, was error under our decisions and under our statutes as they existed at

the time of this trial. These 6 counts as amended were in case—as much so as before they were amended. The gravamen of each was negligence, and it was not transformed into a count in assumpsit by the allegation that these negligent acts were in breach of a contract. While the definition of "assumpsit" and "case," or, rather (more accurately speaking), the distinction between the two actions, is that the one is a breach of a contract, and the other a breach of a duty growing out of a contract, expressed or implied, yet a count cannot be changed from one to the other, by adding that the acts complained of were in breach of a contract, or in breach of a duty growing out of the contract. This is a mere conclusion of the pleader; whether the facts averred constitute the one or the other is a conclusion of law to be determined by the court from the facts well pleaded. To say that the facts averred were in breach of a contract, or in breach of a duty growing out of the contract, is no more than to say that "this count is in assumpsit," or "this count is in case." Thus denominating the one or the other does not really make it so, if in fact and in law it is not so. Whether it is the one or the other depends upon the facts averred, and not upon the conclusion of the pleader—what he calls or denominates it. If the count in question is, without the allegation, one in assumpsit, for the pleader to say this is in case would not make it so.

The court, therefore, in the opinion of the writer, erred in overruling the demurrers to these counts as amended. But the majority of this court are of the opinion that the demurrers were properly overruled; that there was no misjoinder; that all the counts were in assumpsit.

A bill of lading is of a dual character and effect; one is that of a receipt, and the other, that of a contract. As a receipt, like other receipts, it is open to explanation or modification by parol evidence; as a contract it like other contracts must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc. *L. & N. R. R. Co. v. Fulgham*, 91 Ala. 555, 8 South. 803; *McTyer v. Steele*, 26 Ala. 487; *Wayland v. Mosely*, 5 Ala. 430, 39 Am. Dec. 335; *Tallassee, etc., Co. v. Western Ry. Co.*, 128 Ala. 167, 29 South. 203.

A contract of shipment need not be in writing—it can as well be oral—but if it is in writing the same law and the same rules of construction and proof apply to it as to other written contracts. And although a bill of lading is issued by the carrier, it may of course be shown that this was not the contract of shipment, but that the shipment was

under another and different contract, whether oral or in writing. Authorities *supra*; *Elliott on Railroads*, § 1415 et seq.

The writer is of the opinion that the evidence of the plaintiff that the agent of the defendant agreed with her that the goods should not be reloaded, but should be shipped on through in the same car, and that the best way to make the shipment was to charter a car, whereupon the goods would be shipped clear through in that car, etc., was in violation of this rule and law of evidence; that it was clearly an attempt to modify the terms of the written contract—to insert therein conditions not originally therein contained, and to counteract some of the conditions that were expressed in the contract; and that the trial court should not have allowed this evidence. The majority of the court, however, are of the opinion that this evidence was not in violation of the rules of law and of evidence above announced, and that it was not error to admit it, for the reason that the bill of lading was silent as to the manner of loading and reloading, and as to whether the shipment was to be by carload lot or otherwise.

We have examined all the other assignments of error insisted upon, and therein find no ground of error.

It results that the judgment of the county court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, and SAYRE, JJ., concur. MAYFIELD and EVANS, JJ., dissent

SAYERS et al. v. TALLASSEE FALLS MFG. CO.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

1. QUIETING TITLE (§ 13*)—RELIEF IN EQUITY—POSSESSION OF DEFENDANT.

A bill in equity alleging that defendant claims certain land and is in possession thereof, and that plaintiff is the owner in fee, and praying for the enforcement of his rights, was properly dismissed for want of equity, as there was a plain, adequate, and complete remedy at law.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 8; Dec. Dig. § 13.*]

2. DISCOVERY (§ 20*)—RELIEF IN EQUITY—GROUNDS.

Although the claimant of certain lands is ignorant of the territorial extent of the claim of one in possession, or of the source of his title, yet the jurisdiction of the chancery court cannot be sustained on the ground that the bill seeks discovery.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 27; Dec. Dig. § 20.*]

3. EJECTMENT (§ 19*)—EXTENT OF DEFENDANT'S CLAIM OR POSSESSION—COMPLAINT—WHAT LAND MAY BE INCLUDED.

Where the claimant of certain land is in doubt as to the territorial extent of the pos-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

essor's claim, or possession, he may include in his complaint at law all possible territory.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 65, 67; Dec. Dig. § 19.*]

4. QUIETING TITLE (§ 5*)—RELIEF IN EQUITY—PREVENTION OF MULTIPLICITY OF SUITS—NUMEROUS DEFENDANTS.

Where the proper action to recover certain land is ejectment, the mere fact that all the defendants cannot be joined in one action, and that a multiplicity of suits would result, will not give equity jurisdiction.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 13; Dec. Dig. § 5.*]

5. LANDLORD AND TENANT (§ 63*)—SUIT TO RECOVER LAND—TITLE IN TENANT—ESTOPPEL TO ASSESS TITLE—SURRENDER OF POSSESSION.

The tenants of land are estopped before surrendering possession from asserting an outstanding title which has been granted to them.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 161, 163; Dec. Dig. § 63.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Suit by the Tallassee Falls Manufacturing Company to recover land from J. R. Sayers and another. Decree for plaintiff, and defendants appeal. Reversed and bill dismissed.

James W. Strother, for appellants. J. M. Chilton, for appellee.

MCCLELLAN, J. The gist of this bill, by appellee against appellants, is that the respondents claim certain lands and are in possession thereof, and that the complainant, on the other hand, claims to own, in fee, those lands, and desires by this bill to have its rights declared therein and to enforce its rights thereto.

The remedy at law is plain, adequate, and complete, dependent in its selection upon the circumstances under which unlawful detainer or ejectment is appropriate. If the complainant is entitled to this property, to the exclusion of the respondents, that result can be readily obtained in one or the other forms of action. The complainant not being in possession, peaceable or otherwise, if those in possession are not still its tenants, the bill is without equity as an appeal to the remedy afforded by our statutes for the quieting of titles and claims to real estate, or, as an effort to remove a specific cloud from its title. *Lyon v. Arndt*, 142 Ala. 486, 38 South. 242; *Randle v. Draughdrill*, 142 Ala. 490, 39 South. 162; *Holland v. Coleman*, 50 South. 128; 4 Pom. Eq. § 1399; *Jones v. De Graffenreid*, 60 Ala. 145; *Daniel v. Stewart*, 55 Ala. 278; *Plant v. Barclay*, 56 Ala. 561. Nor can the bill be entertained in the aspect that it seeks discovery. No suit is pending to have determined and enforced any right, in respect to these lands, in or to the maintenance of which the matters sought to be discovered are material or are necessary to the enforcement of complainant's asserted rights. It

has not been thought that ignorance, by a claimant, of the territorial extent of the claim of one in the possession of lands, both asserted right or title to, or of the source of the possessor's title, is a subject upon which a bill for discovery could be well rested. If the unpossessed claimant be doubtful of the territorial extent of the possessor's claim or possession (if such, in practice, there could be), he may include in his complaint at law all possible territory, and, if he exceeded the fact in his description, he has suffered no real detriment.

It is evident from the averments of the bill that the matters desired to be discovered must be inimical to complainant's interest or claim, except it is probable that, were the information gained, it would show in solemn form the source and territorial extent of the respondent's claim and referred possession under the conveyances mentioned in the bill. If it is assumed that if relegated to the law court the complainant could not join all these respondents as defendants in one action, that fact would not support an insistence that to prevent a multiplicity of suits equity would lend its aid. Mere numerousness of suits will not suffice to invoke that aid even by numerous defendants impleaded, in ejectment, by one plaintiff. *Turner v. City of Mobile*, 135 Ala. 73, 121, 124, 33 South. 132; *Sicard v. Guylou*, 147 Ala. 239, 41 South. 474, involves a status entirely foreign to that shown in this bill. If these respondents are tenants of complainant, under familiar principles they are estopped before surrendering possession from asserting an outstanding title which has been granted to them. If they are not estopped on account of the relation indicated, then the complainant's remedy is ejectment. There is no equity in this bill in any possible aspect of it.

The decree appealed from is reversed, and a decree will be here entered dismissing the bill for want of equity.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

CLARK v. STATE.

(Supreme Court of Alabama. May 18, 1910.
Rehearing Denied June 30, 1910.)

INTOXICATING LIQUORS (§ 146*)—"BARTER OR EXCHANGE."

Proof that accused furnished prosecutor a quart of whisky under an agreement that he was to return other whisky shows a "barter or exchange" within the statute prohibiting the sale, barter, or exchange of intoxicating liquor, though prosecutor testified that defendant lent him the whisky.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

Mayfield, J., dissenting.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Henry County; A. A. Evans, Judge.

Pres. Clark was convicted of violating the liquor law, and he appeals. Affirmed.

H. L. Martin, for appellant. Alexander M Garber, Atty. Gen., for the State.

MAYFIELD, J. The indictment charged that the defendant "did sell, barter, or exchange" intoxicating liquor, and not that he gave or lent such liquor.

The only witness examined on the part of the state testified to only one disposition, which was a loan of one quart of whisky. The defendant testified to the same transaction, but testified that it was a gift and not a loan. There was other evidence tending to contradict the state's witness as to his returning the whisky, and, therefore, to corroborate the defendant's evidence as to a gift. None of this evidence tended to show any other transaction than that to which the state's witness and defendant testified, nor did it tend to show the transaction to be different from that to which the defendant testified.

The defendant requested the court in writing to charge that, if the jury believed from the evidence that the defendant loaned the witness Hutto the liquor in question, then the defendant must be acquitted. The court refused this charge, which was reversible error.

A loan is not included within the terms "sale, barter, or exchange," as used in the statute and in the indictment in question. This court has fully defined each of these terms, as applied to violations of the prohibition laws, and has clearly distinguished each from the other, except "barter" and "exchange," which are held to be almost synonymous. These terms are defined as follows by this court in the case of *Coker v. State*, 91 Ala. 94, 8 South. 875: "A 'sale' is defined to be a transfer of the absolute or general property in a thing, for a price in money. Benjamin on Sales, § 1. "'Sale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for the thing bought and sold." *Williamson v. Berry*, 8 How. 544 [12 L. Ed. 1170]. 'Sales include all agreements by which property is parted with for a valuable consideration, whether there be money payment or not; provided that the bargain be made, and the value measured in money terms, * * * contracts of sale, * * * do not extend to bargains of barter. Where one article, or set of goods, is intended to be exchanged for another, no price (premium) being attached, it is not a sale; for the transaction is, in the first instance, made by an exchange of goods, without reference to money payment.' *Gunter v. Lecky*, 30 Ala. 591; *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Woodford v. Patterson*, 32 Barb. (N. Y.)

680. 'Where goods have been delivered by one party, and the other party agrees to deliver other goods of similar quality, on demand, the transaction is not a sale of the goods, but an agreement for an exchange.' *Mitchell v. Gile*, 12 N. H. 390. 'A "sale" is an exchange of goods, or property, for money paid, or to be paid; "barter," the exchange of one commodity, or article of property, for another; "exchange of goods," a commutation, transmutation, or transfer of goods for other goods, as distinguished from a "sale," which is a transfer of goods for money.' *Cooper v. State*, 37 Ark. 418; *Meyer v. Rousseau*, 47 Ark. 460 [2 S. W. 112]. The difference thus clearly defined between a sale and barter, or exchange, is not more essential and distinct than that between these transactions, respectively, and a gift. Indeed, the former each have one important element in common, which is wholly lacking in the latter. Contracts both of sale and barter involve, *ex vi terminorum*, a consideration; and the absence of this element is of the very essence of a gift, which is 'the voluntary transfer of a thing without consideration.' *Schouler's Trans. Prop.* 254; 8 Amer. & Eng. Encyc. of Law, 1309. A loan, of course, differs essentially from each of these three contracts, or transactions, and cannot be covered by either of the terms 'sale,' 'gift,' or 'barter.' Except with respect to money, 'to loan' implies that a thing is delivered to another for use, without reward, and to be returned in specie. *Booth v. Terrell*, 16 Ga. 25; *Nichols v. Fearson*, 7 Pet. 109 [8 L. Ed. 623]."

Like definitions and restrictions have been given to each of these terms, when used in prohibition statutes, by the courts of other states, as well as by the Supreme Court of the United States. See Words & Phrases, under each phrase, "sale," "barter," "exchange," and "loan."

This court, in *Coker's Case*, supra, in speaking of prohibition statutes, further said: "The statute is a highly penal one, and cannot be extended beyond its letter by the result, necessarily more or less uncertain, of speculations into the realms of supposed legislative intent, or the supposed evils aimed at by the lawmakers. The alleged offender must be tried upon what the lawgiving power has said, and not by what it may be inferred, with greater or less assurance of safety, it has intended beyond the language employed. Thus, under the Illinois statute, which, like our own, prohibits the giving or selling of liquor to a minor, the indictment was for 'selling' alone, and conviction was had on proof of 'giving.' The judgment was held bad, on the ground that the statute was penal, and could not be liberally construed; that the word 'selling' had a well-known legal meaning, and, in the absence of anything in the act to the contrary, must be held to have been used in that sense alone; and that, the charge being of a sale, conviction could only

be had on proof of a 'sale' as that term is used in the law. *Siegel v. People*, 106 Ill. 94. And this doctrine has been recently fully adopted by this court, *Coleman, J.*, delivering the opinion of the court, and declaring that 'the statute (a local prohibition act) is penal, and cannot be made to embrace by construction any case not within its meaning. We have been unable to find any case where a person was convicted of selling liquor, upon proof of "giving away" the liquor merely.' *Williams v. State*, 91 Ala. 14 [8 South. 668]. And a like principle is recognized in the earlier case of *Young v. State*, 58 Ala. 359."

Chancellor Kent has defined a "loan" to be a bailment of an article for a certain time, to be used by the borrower, without paying for the use. 2 Kent's Com. Lecture 40, p. 573 (4th Ed.). And this language is copied, almost verbatim, from Sir William Jones. See *Treatise on Bailments*, pp. 118, 217. Ayliffe says: "It is a grant of something, made in a gratuitous manner, for some certain use and for a certain term of time, expressed or implied, to the end that the same species should be again returned or restored again to us; and not another species of the same kind or nature, and this in as good plight as it was delivered." *Pandects*, B. 4, tit. 16, p. 516.

The obligation of the borrower is to take proper care of the thing borrowed, to use it according to the intention of the lender, to restore it at the proper time, and to restore it in a proper condition. *Story on Bailments*, §§ 232, 254, 255.

Not only is the borrower to make a return of the thing, at the time, and in the place, and in the manner contemplated by the contract, but he must make a like return of all increments and offspring of the thing lent. *Id.* § 257.

The continuance of the loan rests upon the good pleasure and good faith of the lender, and is therefore strictly precarious. A loan being strictly gratuitous, the lender may terminate it whenever he pleases. *Story on Bail.* § 277.

Neither the statute nor the indictment can be extended by the courts to cover other cases not within its terms.

The defendant was not charged with lending liquors, but with selling, bartering, or exchanging, and, if the jury believed from the evidence that he only lent the liquor in question, he was not guilty as charged, and should have been acquitted. This was the effect of one of the charges refused to him, and its refusal was therefore error to reverse.

Under all the evidence, the jury might have found that the defendant did barter or exchange the liquor, and, if they did, of course the finding would justify a verdict of guilty; hence the general affirmative charge for the defendant was properly refused.

While some of the ingredients necessary to

a barter, exchange, or loan are common to all, yet there is a marked and well-recognized difference between a loan and a barter or exchange; and the former cannot be said to constitute, or to be the equivalent of, either of the latter. Yet where the evidence is in conflict—some tending to support the one and some the other phase—it is the province of the jury to say which, if any, is proven.

For the error pointed out, the judgment ought to be reversed, and the cause remanded.

The above are the views of the writer alone; but a majority of the court are of the opinion that the trial court did not err in refusing charge 3, requested by the defendant. They are of the opinion that it was abstract; that the proof shows a barter or exchange, rather than a loan; that it may be true that the witness stated that the defendant lent him the whisky; but it also appears that he was not to return the identical whisky, but other whisky, thus rendering it a mere exchange, rather than a loan.

Affirmed.

DOWDELL, C. J., and ANDERSON, McCLELLAN, and SAYRE, JJ., concur. MAYFIELD, J., dissents.

Ex parte SMITH.

(Supreme Court of Alabama. May 12, 1910.
Rehearing Denied June 30, 1910.)

1. COURTS (§ 189*)—CITY COURT—DISMISSAL—REINSTATEMENT—LIMITATION.

Under the practice act of the city court of Birmingham (Acts 1888-89, p. 992), that court cannot reinstate a suit dismissed, on motion made more than 30 days after the final judgment of dismissal.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 409, 412; Dec. Dig. § 189.*]

2. MANDAMUS (§ 4*)—IMPROPER SUBJECTS OF RELIEF—APPEALABLE JUDGMENTS.

Mandamus does not lie to review refusal to dismiss a cause or reinstate a dismissed cause; appeal being the proper remedy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

Application by Alfred Smith for mandamus, the writ to be directed to Hon. C. W. Ferguson, Judge of the Birmingham City Court. Mandamus denied.

Petition alleges that the petitioner entered suit in the city court of Birmingham against C. D. Smith & Co. for damages for personal injury; that on June 6, 1909, upon a jury trial, the cause resulted in a mistrial; that on the 9th day of June, 1909, motion was made to require plaintiff to give security for cost, and upon default to dismiss the cause; that on June 12, 1909, an order was made dismissing the cause unless the petitioner within 90 days from that date gave security for cost; and that on the 9th day of October, 1909, your petitioner avers an order was

made dismissing said cause, without notice to petitioner or his attorney. The petition to set aside dismissal was filed January 20, 1909.

London & Fitts, for petitioner. E. H. Dryer and Stallings & Drennen, for respondent.

ANDERSON, J. More than 80 days having expired from the rendition of the final judgment dismissing the plaintiff's case, when the motion to reinstate same was made, the trial court was powerless to grant said motion, under the practice act of the city court of Birmingham (Acts 1888-89, p. 992). Ex parte James, 125 Ala. 119, 28 South. 69; Ex parte Highland Ave. R. R., 105 Ala. 221, 17 South. 182; Ex parte Payne, 130 Ala. 189, 29 South. 622. It may be that the plaintiff proceeded under section 5372 of the Code of 1907 for a rehearing within four months; but whether he did or did not make out a case for a rehearing, under said statute, we need not decide, for, if the trial court erred in refusing to grant the motion, the plaintiff's remedy for reviewing the action of the court in refusing the said motion was by appeal, and not mandamus. O'Neal v. Kelly, 72 Ala. 559.

Neither is mandamus the proper remedy to review and revise the judgment of the trial court dismissing the plaintiff's case. It was a final judgment, and such a one as would support an appeal to this court. "To authorize the issue of the writ of mandamus, there must be a clear legal right, and no other remedy. The writ lies to compel the execution of ministerial duties, in all proper cases. As to judicial functions, the rule is different. The writ will be awarded to compel courts to entertain jurisdiction and pronounce judgment in the premises. It will not be awarded to order or direct what judgment shall be rendered in any given case; nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. The reason for this latter rule is that there is an adequate remedy in appeal, which lies from all final judgments or decrees of courts of record." Ex parte Schmit, 62 Ala. 254, and cases cited; Ex parte Gilmer, 64 Ala. 235; Ex parte Merritt, 142 Ala. 115, 38 South. 183. The case of Ex parte Hendree, 49 Ala. 360, is in point, that an appeal lies from a judgment identical with the one dismissing the plaintiff's case in the present instance, and against the awarding of a mandamus. A judgment has been rendered dismissing the case, and which said cause cannot be reinstated without reviewing and reversing said judgment, thus involving a determination by this court of the correctness vel non of the judicial ruling of the lower court.

It is true this court held, in the case of First National Bank v. Cheney, 120 Ala.

122, 23 South. 733, that mandamus would lie for a refusal to dismiss for want of security for cost, notwithstanding error could be assigned to said ruling upon an appeal from a final judgment, upon the theory that an appeal was not adequate to protect a citizen from further litigation with a nonresident as to indemnity against cost, the evil the statute intends to avoid. It must also be noted that the cases there cited, Ex parte Cole, 28 Ala. 50, Ex parte Robbins, 29 Ala. 71, and Ex parte Morgan, 30 Ala. 51, all relate to the right to mandamus for a refusal to dismiss for want of security for cost, and do not hold that mandamus will be awarded to review a judgment rendered dismissing the cause. Here we have a final judgment dismissing the suit, and the nonresident plaintiff with an adequate remedy by appeal to review the said judgment, conditions quite different from those existing in Cheney's Case, supra, and the ones there cited, but similar to those in Hendree's Case, supra.

The application for mandamus is denied, and the petition must be dismissed.

Mandamus denied.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

BUTTERWORTH & LOWE v. CATHCART.

(Supreme Court of Alabama. Feb. 3, 1910.
Rehearing Denied June 30, 1910.)

1. APPEAL AND ERROR (§ 123*)—EXECUTION AGAINST SURETIES.

An order directing execution against sureties of a nonresident plaintiff for costs is unappealable for want of a judgment against the sureties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 875-881; Dec. Dig. § 123.*]

2. APPEAL AND ERROR (§ 151*)—RIGHT TO APPEAL—PREJUDICE.

Plaintiffs could not appeal from an improvident order directing execution against plaintiffs' sureties for costs; such order not being prejudicial to plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.*]

3. APPEAL AND ERROR (§ 1057*)—RIGHT TO ALLEGE ERROR.

Plaintiffs were not entitled to complain on appeal of the improper exclusion of certain evidence because the witness had not personal knowledge of the facts testified to, where other competent testimony admitted without objection established the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1057.*]

4. EVIDENCE (§ 378*)—WRITINGS—LETTERS—AUTHENTICITY.

Letters alleged to have been received by defendant are inadmissible without some proof of genuineness and authenticity in addition to the contents thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648-1655; Dec. Dig. § 378.*]

5. EVIDENCE (§ 378*)—LETTERS—GENUINENESS.

Evidence that a letter alleged to have been written by plaintiff was received by defendant, in addition to its contents, without evidence that the letter was received in due course, through the mails, was insufficient to establish its authenticity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1643-1655; Dec. Dig. § 378.*]

6. APPEAL AND ERROR (§ 938*)—RECORD—BILL OF EXCEPTIONS—OMISSIONS—PRESUMPTIONS.

Where a bill of exceptions recited that plaintiff introduced a deposition of V. in its behalf, and the interrogatories and answers in such deposition were as follows, etc., followed by interrogatories and answers numbered from 1 to 37, with several numbers omitted, it would not be presumed from such omission that the bill of exceptions did not contain all the interrogatories offered and admitted at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.*]

7. SALES (§ 161*)—DELIVERY TO CARRIER—PREPARATION FOR SHIPMENT

If the seller fails to put the goods in proper course of conveyance by proper preparation for shipment if the goods need any preparation, so that in case of loss the buyer may recover indemnity against the carrier, delivery to the carrier would not operate as a delivery to the buyer in compliance with the contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

8. SALES (§ 364*)—ACTION FOR PRICE—DELIVERY TO CARRIER—INSTRUCTIONS.

Where, in an action for the price of certain cars and wheels, the buyer claimed that the goods were defective when they left the seller's possession or were injured in transit, and that they were not properly prepared for shipment, as to all of which there was a conflict of evidence, a request to charge that if plaintiff shipped the goods as ordered, and when delivered to the carrier they were in perfect condition and free from defects and were consigned to defendant and bill of lading issued and mailed to him, then title vested from the time of delivery to the carrier, was properly refused as premitting all consideration of plaintiff's alleged negligence in preparing the cars for shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

9. TRIAL (§ 253*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

While a request to charge need not deal with the whole case, but may present only a single phase thereof, if it does not make the whole case turn on such phase, the phase presented must be adequately stated without omissions which might lead the jury to erroneously infer that the omitted facts were of no consequence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by Butterworth & Lowe against John Cathcart. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The issues and evidence are sufficiently indicated in the opinion. The following is charge 6, refused to the plaintiff: "If the

jury believe from the evidence that plaintiff shipped the defendant such cars as defendant ordered, and if you further believe that at the time said cars were delivered to the railroad company they were in perfect condition and free from defects and other imperfections, and if you further believe from the evidence that said wheels were consigned to the defendant, and the bill of lading was issued to him, and mailed to him, then I charge you that, if you believe that, a delivery to said railroad was a delivery to the defendant, and title vested in the defendant from the date of such delivery to the railroad."

Lowe & Tidwell, for appellant. E. W. Godbey, for appellee.

SAYRE, J. Plaintiff, a corporation, being a nonresident, Messrs. Lowe & Tidwell became security for costs. Judgment having been rendered for the defendant, the court, without motion or judgment against the sureties, ordered that execution issue against them for the costs. Appellant, which was plaintiff in the court below, assigns that order for error. There are two equally conclusive reasons why that assignment cannot be sustained in this court. For one, there is no judgment against the sureties to support an appeal, but only an improvident order which the court below will correct on application. *Dow Wire Works Co. v. Engelhardt*, 136 Ala. 608, 33 South. 817. For the other, appellant cannot be heard to complain of an order, however erroneous, which is not prejudicial to it. *Eslava v. Farley*, 72 Ala. 214.

This suit was for the recovery of the contract price of the iron parts of two tram cars sold by the plaintiff to the defendant. Exceptions were reserved to several rulings excluding parts of the testimony of plaintiff's witness Vyn to the effect that defendant had given no instructions as to how the tram cars were to be shipped, and that they had been shipped by rail and bill of lading forwarded to defendant by mail. The ground of the exclusion was that witness' subsequent testimony disclosed that he had no personal knowledge of the facts in question. If the ground was not well taken, it was nevertheless true that evidence subsequently introduced and the further progress of the trial deprived these rulings of injurious consequences. There was other uncontradicted testimony, as to the competency of which no objection was taken, that the defendant gave no directions whatever as to the shipment of the tram cars, while the defendant, testifying for himself and through the mouths of other witnesses, unreservedly admitted that the articles had been actually received by him, though not delivered according to the contract because, as he contended, they were defective when shipped. Thus any issues up-

on which the testimony in question may have had a bearing were removed from the case.

Appellant complains that the court admitted the letter dated February 22, 1905, and purporting to have been written by it, without sufficient proof of its authenticity. Some proof of genuineness was requisite, of course. The language of the letter abundantly indicated that it had been written in reply to defendant's letter of two days before. But authentication by contents alone is insufficient. A rule permitting that would leave parties no safeguard whatever against fabrication. The authorities generally state that the receipt by due course of mail of a letter shown by its contents to be related to another of antecedent date and mailing is sufficient to warrant its introduction in evidence. Such was the case in *White v. Tolliver*, 110 Ala. 300, 20 South. 97. This rule depends upon the habitual accuracy and promptness of the mails, and the fact that the tenor of the letter as a reply to an antecedent letter indicates a knowledge of the tenor of the antecedent. It is formulated in 3 Wigmore on Evidence, as follows: "There seems to be here adequate ground for a special rule declaring these facts, namely, the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, are sufficient evidence of the reply's genuineness to go to the jury." It is there stated that such a rule—varying slightly in the phraseology of different judges—seems now to be universally accepted. Clearly, defendant failed to bring the offered letter within the rule. The statement of the bill of exceptions is that this letter was "received by defendant." The fact, of prime importance under the rule, that the letter was received through the mails in due course, is not stated. Appellee insists that, although the bill of exceptions contains a statement that the evidence therein set out was all the evidence, it affords indications that there was other evidence, and that this court, construing the bill most strongly against the party excepting, and indulging all reasonable presumptions in favor of the ruling of the trial court in order to sustain the judgment appealed from, will presume that there was evidence going to show the authenticity of the letter. After an examination of the bill of exceptions, we do not feel justified in adopting the proposed interpretation. Appellee's argument in this connection is based upon the following state of the statutory record, the bill of exceptions: "The plaintiff (it recites) introduced the deposition of one N. O. Vyn, in its behalf, and the interrogatories and answers in said deposition were as follows:" Then follow interrogatories and answers numbered from 1 to 37; several numbers being omitted. In order to assume that there were interrogatories and answers corresponding to the omitted numbers, it would be necessary to contradict the bill of exceptions in two particulars, viz., that part

of it which states that the evidence set out was all the evidence, and that part of it which states that the interrogatories and answers introduced were the interrogatories and answers set down in the transcript. We think rather that the statements of the bill of exceptions are unambiguous and must be allowed to stand, and that, if any presumptions whatever are to be indulged, we must presume that the interrogatories and answers were not consecutively numbered, or that all of them were not offered or received in evidence. The letter put forward, as coming from the plaintiff, what perhaps the jury was asked to consider as a lame and impotent account of how the wheels came to be defective, and afforded basis for the argument that the plaintiff, when delivering to the carrier, did not take the usual precautions for insuring safe delivery to the buyer, as it was its duty to do, and that the defects in the wheels were caused by this negligence on the part of plaintiff. Indeed, the appellee insists that it convicts the appellant of gross negligence. If the seller failed to put the goods "in such a course of conveyance (by proper preparation for shipment, if the goods needed any preparation) as that, in case of a loss, the defendant might have his indemnity against the carriers," such a delivery would not be the delivery contemplated by the contract. *Benj. on Sales* (7th Ed.) § 694. We cannot know judicially whether these articles required any preparation for shipment, nor will we be understood as intending any intimation in respect to the merit of this contention in fact. The letter was not properly authenticated, and its admission in evidence was prejudicial error for which the judgment must be reversed.

If we have not misconceived the record, it shows that the contested questions were whether the wheels which were a part of the shipment were defective when they left the possession of the plaintiff or were injured while in transit, and whether defendant had kept them an unreasonable time before returning them to the plaintiff. This last was, indeed, nothing more than a fact of evidential bearing upon the first. And, further, the question was whether the tram cars had been properly prepared for shipment. We think it cannot be said that there was no conflict in the evidence on these points. Charge 6, requested by the appellant, was properly refused because it did not adequately deal with this phase of the case. It omitted all consideration of the charged negligence in preparing the cars for shipment as the cause of the defects. A charge need not undertake to deal with the whole case. It may state the law applicable to a phase of the case, if it does not make the whole case turn upon it; but the phase stated must be adequately stated, and stated without omissions which may lead the jury to infer erroneously that the omitted facts are of no

consequence. This charge was defective for that the jury might have inferred from it that the question of delivery was not to be affected by the evidence of negligent preparation for the shipment and defects ensuing in consequence thereof.

We have said enough to indicate our views of those assignments of error which have been argued by counsel.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

SOUTHERN RY. CO. et al. v. JONES COTTON CO.

(Supreme Court of Alabama. Feb. 3, 1910.
Rehearing Denied June 30, 1910.)

1. CARRIERS (§ 118*)—CARRIAGE OF GOODS—AGENT OF CARRIER—NEGLIGENCE.

A railway company had an arrangement with a compress company, by which on delivery to the railway company by the owner of cotton of the compress company's warehouse receipts the railway company issued bills of lading for the shipment of the cotton. Plaintiff cotton company, after contracting for the sale and delivery of cotton which it had delivered to the compress company, delivered the warehouse receipts of the compress company to the railway company and bills of lading were issued by the railway company thereon. *Held*, that the railway company recognized the compress company as its agent to keep the cotton, pending its loading into the cars, and became responsible for the compress company's negligence therein.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 492, 517; Dec. Dig. § 118.*]

2. WORDS AND PHRASES—"RECONDITIONED."

Cotton in a bale is "reconditioned" by loosening the ties, removing the packing, and pulling or picking the damaged part of the cotton from the outside of the bale.

3. CARRIERS (§ 118*)—CARRIAGE OF GOODS—LIABILITY FOR DAMAGES.

Where the owner of cotton delivers to a railway company the warehouse receipts of a compress company, and the railway company accepts them and issues bills of lading thereon to the owner, and the cotton is injured by exposure to the weather after delivery to the compress company, both the railway company and the compress company are liable for the loss, the railway company because it occurred while in the hands of its agent, the compress company, and the compress company being liable as a bailee for the owner, and its liability to the owner could not be defeated by its accepting the cotton in bailment from the railway company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 492, 517; Dec. Dig. § 118.*]

4. CARRIERS (§ 76*)—CARRIAGE OF GOODS—DAMAGES—RIGHT OF RECOVERY—"LANDED."

Plaintiff, cotton company, delivered cotton to a compress company and subsequently delivered the warehouse receipts of that company to a railway company and received in exchange bills of lading. The cotton company shipped the cotton over the railway line to a purchaser under a contract requiring that the cotton should be delivered in good condition to the purchaser's mills "landed," and drafts for the purchase price with bills of lading attached

were drawn by the cotton company on the purchases and honored before the cotton was delivered at its destination. *Held*, that "landed" meant that the cotton company was responsible for the entire shipment of cotton and for damages to it until delivered at the point of destination, and therefore the right of recovery for damages to the cotton resulting from exposure to the weather while in the possession of the compress company was in the cotton company, although it had not been called on to repay any of the purchase price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 258-265; Dec. Dig. § 76.*]

For other definitions, see Words and Phrases, vol. 5, p. 3967.]

5. DAMAGES (§ 105*)—DESTRUCTION OF GOODS—MEASURE OF DAMAGES—ADVANCE IN PRICE.

In an action against a carrier for damages to cotton shipped, the bill alleged that, by reason of the loss of the cotton, complainant was unable to deliver, according to a contract of sale, except by furnishing other cotton which could be furnished at an advanced price only, and the bill attempted to make the difference between the contract price and the advanced price the basis of recovery. *Held*, that complainant was entitled to be reimbursed for the cotton destroyed, even though there was no evidence that it purchased other cotton with which to replace the cotton destroyed, and a decree which allows for the loss of cotton and which makes no allowance for the loss occasioned by advance in price is proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 266; Dec. Dig. § 105.*]

6. BAILMENT (§ 22*)—TERMINATION—DELIVERY TO CARRIER.

Where a shipper delivered cotton to a compress company and then, in accordance with arrangements between the compress company and a railroad company, delivered the compress company's receipts to the railroad company, and received bills of lading, neither the contract between the shipper and the railroad company for carriage nor the assignment of that contract to a consignee of the cotton, will affect the right of the shipper to have the compress company deliver the cotton to the railroad company, and a constructive delivery to the railroad company will not be sufficient to relieve the compress company of liability to the shipper.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 103; Dec. Dig. § 22.*]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Action by the Jones Cotton Company against the Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

See, also, 157 Ala. 32, 47 South. 251.

Paul Speake, for appellant Southern Ry. Co. Brown & Kyle, for appellant Gulf Compress Co. Callahan & Harris, for appellee.

SAYRE, J. When this case was here on a former occasion (157 Ala. 32, 47 South. 251) the equity and frame of the bill were settled in favor of the complainant. The present appeal raises only the question of the liability of the defendants for certain items charged against them in the decree. First, then, with reference to the two lots of cotton, 54 bales marked "O. S. T.," and 50 bales

marked "E. W. L." The decree was that the Southern Railway Company should respond to the complainant for the actual loss in weight sustained by this cotton while in the possession of the Gulf Compress Company as the agent of the said railway company, and that the Gulf Compress Company was liable for the diminution in value of 34 bales of the "O. S. T." cotton, and 21 bales of the "E. W. L." cotton on account of its being reconditioned and repacked while in storage with the compress company. This cotton had been stored by the cotton company with the compress company. The railway company had an arrangement with the compress company, evidenced by formal writing, by which, on delivery to it by the owner of warehouse receipts issued by the compress company, it issued bills of lading for the shipment of cotton whenever occasion arose. The compress company agreed to keep all cotton insured for the benefit of the railway company after the issuance of such bills of lading and until it should be loaded into the cars of the railway company, and to hold the railway company harmless against any damage which such cotton might sustain while in its possession pending shipment. The cotton company having contracted for the sale and delivery of the cotton in controversy to purchasers in North Carolina, and with the railway company for its transportation thither, delivered its warehouse receipts to the railway company and received bills of lading for the cotton. Thereby the railway company recognized the compress company as its agent to keep the cotton pending its loading into the cars and became responsible for the compress company's negligence therein.

Between the time when the railway issued its bills of lading and the time when the cotton was loaded on the cars for transportation to the consignees a considerable period elapsed, the delay in shipment being caused in part at least by the fact that when the compress company tendered the cotton to the railway company, it was found to have been damaged by exposure to the weather so that the railway company refused to receive it from the compress company. This made it necessary for the cotton to be reconditioned and in part repacked. Cotton is "reconditioned" by loosening the ties, removing the bagging, and pulling or picking the damaged part of it from the outside of the bale. Where the bales are much reduced by this process, as we gather, the reduced bales are combined into new bales by repacking. Mere repacking injures the quality of the cotton put into the repacked bales and affects its value in the market. The chancellor evidently found that the cotton had suffered damage by exposure to the weather subsequent to the issue of the bills of lading. The testimony has been closely scrutinized, and we find no sufficient reason to challenge the correctness of that conclusion. The reconditioning and re-

sue of the bills of lading by the railway company, and most certainly account for the loss in weight of the two lots. The processes here mentioned, after the cotton had been damaged by exposure, did not cause further damage to the cotton as a whole, but were resorted to, and had the effect, beyond doubt, to increase the value of the cotton as a whole although it diminished the value per pound of so much of it as was put into the repacked bales. But the loss in weight of the entire lot and the loss of value in the cotton repacked together represent the total loss suffered by the cotton, and these elements of loss must alike be referred to its damage by exposure as its proximate cause. For this loss the defendants were both liable to the complainant, the railway company for the reason already indicated, the compress company for the reason that it was bailee for the complainant, and by accepting bailment from the railway company could not defeat the rights of the true owner. The defendants were jointly liable to the complainant for the entire loss to the cotton, and a decree might well have been made against them both for the entire amount of the loss, though there could be, of course, one satisfaction only. Neither appellant is in a position to complain of a decree the error of which consists in charging each appellant with a lesser sum than its liability as measured by law. The appellee has contented itself with the decree in its present shape.

It is denied by appellants that the right of recovery resides in the cotton company. This denial is grounded upon the fact, itself not denied by appellee, that drafts with bills of lading attached were drawn by appellee company on the consignees and honored by payment before the cotton was delivered at its destination. These drafts were for the stipulated price of the cotton estimated at its original weight and quality. The cotton company does not appear in the evidence to have been called on for restitution of any part of the sum realized from the drafts. Prima facie the delivery of a bill of lading by the consignor to the consignee operates as a transfer of title in the goods shipped, and an action against the carrier for loss or damage while in its possession will lie only at the suit of the consignee; but if the consignee is not in fact the owner and the goods while in transit are at the risk of the consignor, the right of action resides in the latter. *Louisville & Nashville R. R. Co. v. Allgood*, 113 Ala. 163, 20 South. 986. Any proper rule must require that the suit be brought by that party at whose risk the goods are while in course of transportation. The evidence shows without dispute or contrary inference that the contract of purchase required that the cotton should be delivered in good condition to the mills in North Carolina "landed." In the terminology of the trade, "landed" meant that the consignor was responsible for the cotton and for damages to it until delivered

at the point of destination, meaning, of course, delivery at destination of the entire shipment in the stipulated condition. The appellant Gulf Compress Company contends that the cotton shipped was landed. And so some of it was in a way, but appellant will hardly contend that the cotton destroyed and cast away while in its hands, aggregating approximately 16 bales, was landed in any sense, or that the remainder was landed as it ought to have been. Thus the railroad company continued to be the agent of the consignor in caring for the cotton at the time of the loss, as it had been constituted in the beginning by the bill of lading in which plaintiff was both consignor and consignee, and with this status payment and delivery of the bills of lading were not inconsistent. This fact brings the complainant within the reason of the rule, and establishes its right to maintain this bill. It is of no concern to the appellant companies that the complainant has a sum of money which in equity and good conscience belongs to the consignees, if that be the case. That is an equity which concerns the consignees only; nor is there a necessary dependence between it and the legal right in controversy. Certainly the right of complainant to recover against the compress company as its bailee not for carriage, but for care, cannot be affected by equities which have arisen between complainant and the mill owners although they have arisen out of dealings in the identical cotton.

The argument that there was a variance between allegation and proof is based upon a misconception of the record. We quote the allegation of the third paragraph of the bill: "And orator avers that it had entered into a contract to sell a large number of bales of cotton to the Proximity Manufacturing Company of Greensboro, N. C., under which contract it was obligated to deliver said cotton in good condition 'landed,' which term signified, and is so understood by persons dealing in cotton, that your orator was to deliver the cotton to the said Proximity Manufacturing Company on the ground at Greensboro, N. C." The same contract is alleged in respect to the shipment to O. P. Heath & Co., of Charlotte, N. C. The testimony of the witness Wall supported the contract alleged, and that without dispute.

Complaint is further made of the decree that there was a failure of proof to establish it in part at least in this: The bill alleged, in substance, that by reason of the loss of the cotton, complainant was unable to deliver according to contract except by furnishing other cotton which could be purchased at an advanced price only. The bill seeks to make this the basis of a recovery of the difference between the contract price and the advanced price of cotton to replace that destroyed. It is said that there is no evi-

dence in the record that complainant purchased other cotton with which to replace the cotton destroyed. But it occurs to us that, whether so or not, complainant is entitled to be reimbursed for the cotton destroyed, while as to the further loss occasioned by the advance in price, no relief was decreed.

The compress company cannot complain that liability was fastened upon the railroad company by secondary evidence of the contract between complainant and the North Carolina parties, if that was the case. The compress company was charged as complainant's bailee, as we have already indicated, not for carriage, but as a warehouseman. We think there can be no sufficient reason for holding that by its contract with the railroad company for carriage, or by the assignment of that contract to the North Carolina parties, the complainant company lost the right to have the compress company deliver the cotton to the railroad company for carriage in amount and condition as when received by the compress company. Nor did a constructive delivery to the railroad company meet the ends to be served by an actual delivery. It charged the railroad company, but did not relieve the compress company. The result obtained by the decree was in accordance with the theory of the bill, the proof, and the principles of equity. The briefs disclose a recurrence to the idea, advanced when this cause was here on the former appeal, that different causes of action against different defendants are joined in the decree. But that was discussed and decided on that appeal satisfactorily to the court, and we will not again go into it. The railroad company has not complained of the character of the evidence offered. The compress company has no reason to complain.

Appellant compress company was erroneously charged with one of the two bales of cotton referred to in evidence as "M. 131" and "W. 18." We think that one of these two bales was traced into the possession of the compress company, while the other was not, but we are unable to say from the evidence in the record with reasonable satisfaction which one. In this state of the proof the least valuable bale must be charged against the compress company. Its value must, of course, be proved before the register.

The chancellor's decree of reference will be corrected so as to direct the register to charge the least valuable of the two bales marked "M. 131" and "W. 18" against the compress company, and, as corrected, will be affirmed.

The costs of this appeal will be taxed against the appellants equally. We cannot anticipate that other costs will not be properly taxed in the chancery court. As yet no decree for costs has been made there.

Affirmed.

CREEEL v. CREEEL et al.

(Supreme Court of Alabama. June 9, 1910.
Rehearing Denied June 30, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 39*)—DESCENT OF REAL PROPERTY.

Land descends to the heirs and not to the personal representative, and every step he takes, in regard to the land, is an interference with the rights of the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 285-294; Dec. Dig. § 39.*]

2. EXECUTORS AND ADMINISTRATORS (§ 129*)—POWERS AND DUTIES—CREDITORS—HEIRS.

All the powers conferred and duties imposed upon personal representatives, by statute, as to the land, are in the interest of the creditors of the estate, and are antagonistic to the rights of the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533-536; Dec. Dig. § 129.*]

3. EXECUTORS AND ADMINISTRATORS (§ 137*)—POWER TO SELL LAND.

The administrator has no duty or power to sell the lands of the estate, unless needed for some purpose of administration, such as paying debts, the personalty being insufficient, or unless it becomes necessary to sell for distribution among the heirs, and then only in the manner prescribed by statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 557-559; Dec. Dig. § 137.*]

**4. EXECUTORS AND ADMINISTRATORS (§ 148*)—SALE OF LAND—BILL TO ENJOIN—DEMUR-
REB.**

A bill to enjoin an administrator's sale of land and to remove the settlement of the estate from the probate to the chancery court set up an original contract with the administrator, without the aid of a court, for the purchase of lands of the estate, and alleged that complainant discovered that the contract was void before he had paid all the purchase money, and that he and the administrator agreed that they would have the land sold in probate court as authorized by law; that it was so sold; that complainant bid it off for the same price and declined to comply with his bid, because he and the administrator agreed that the price was too much, and that it should be sold again at a less price; that it was resold, and that he again bid it off at a less price and again declined to pay his bid because he had paid the administrator that amount on his original void contract of purchase, and sought to restrain the administrator from selling the land under an order of the court. *Held* that, as the administrator had no duty or power to do what the bill alleges he agreed to do, nor what the bill seeks to have a court of chancery compel him to do, and, even if he had, there was no consideration for his relieving complainant from the payment of the balance which the bill confessed he owed on the land, and as he did not offer to pay the balance if found to be due, it was error to overrule a demurrer to the bill, since the hands of the heirs could not be subjected to compensate for the errors or wrongs of either the complainant or the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 597, 601; Dec. Dig. § 148.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by John T. Creel and others against

George W. Creel, as administrator, etc. From a decree overruling a demurrer to the bill, defendant appeals. Reversed and rendered.

Sterling A. Wood, for appellant. Allen & Bell, for appellees.

MAYFIELD, J. The bill is filed to enjoin an administrator's sale of land, and to remove the settlement of the estate from the probate to the chancery court. The bill alleges a contract between complainant and the administrator, made out of court, whereby the former purchased the land in question, and payment by complainant of the purchase price; that on discovering that the administrator had no authority to sell, except as authorized by the statute and a court of competent jurisdiction, it was agreed between complainant and the administrator that the latter should have the land sold by proper proceedings in the probate court, and that complainant should become the bidder for said property, at such sale, at such price "as the same could be bought for at the said sale"; and that the administrator then agreed that the property was not worth \$1,000, and that it would not bring that sum at the sale; and that the administrator then advised complainant not to pay any more of the purchase price until after the sale, that the property might bring \$1,000, and that he did not desire to make complainant pay more than the property brought at the sale. The land was accordingly sold by the court, and complainant purchased at the sale, for the price of \$1,000, which was reported to the court; but it was further reported that complainant had failed to comply with his bid, and had not paid all of the purchase price. And the purchaser being in open court, and assenting to such report, and assenting to a resale of the property by the court, the said sale was set aside and a resale ordered; and on the second sale the complainant became the purchaser, at the price of \$700, which amount complainant declined to pay, on the ground that he had originally agreed to purchase the property from the administrator at private sale at \$1,000, and had paid \$700 of the purchase price, and that the administrator had this money and should accept it as the purchase price at the last sale. The auctioneer refused to accept this statement as payment, or to accept complainant as the purchaser on these conditions, and then and there offered the land for sale again; and at this sale a third party, one Wood, became the purchaser and was reported to the court as such purchaser; and the auctioneer refused to report the complainant as the purchaser for \$700, because he would not pay that amount in cash. The probate court refused to confirm this sale to Wood, and ordered a resale of the property.

Complainant further alleges that said pro-

bate court was proceeding to order another sale, and would not accept complainant's bid, and his original payment of \$700 to the administrator as the purchase price; that the administrator had agreed to accept this as payment, and had agreed that this was all the land was worth, and that he would have his attorney to make complainant a deed as cheaply as possible.

Land descends to the heirs and not to the personal representative. Every step the administrator takes, in regard to the land, is an interference with the rights of the heirs. All the powers conferred or duties imposed by the statutes, as to the land, are in the interest of the creditors of the estate, and are antagonistic to the rights of the heirs. 3 Mayfield's Dig. p. 681. The administrator, therefore, has no duty, right, or power to sell the lands of the estate, except for the purpose, and in the manner prescribed by the statute. Unless needed for some purpose of administration, such as paying debts of the estate, the personalty being insufficient for that purpose, or unless it becomes necessary to sell for distribution among the heirs, the administrator never has any right, power, or duty, as to the land. It belongs to the heirs or devisees. In no event can the administrator, without the aid of a court of competent jurisdiction, sell or even contract to sell the lands of the estate.

It may be that the complainant twice agreed to pay \$300 too much for the land—that is, more than it was worth—but as to this we do not decide. If such was the case, he has no one to blame but himself. He neither shows nor attempts to show why he should be relieved from paying the three hundred dollars, as a condition to having the land conveyed to him, except that the administrator probably agreed or promised to relieve him. The bill then prays to enjoin this last ordered sale, and to compel the administrator to make complainant a deed to the land, and that the settlement of the estate be removed from the probate court to the chancery court. The administrator demurred to the bill on a number of grounds. The chancellor overruled the demurrer, and from that decree this appeal is prosecuted.

The bill is palpably defective for the reason pointed out in the demurrer. It sets up an original contract made with the administrator, without the aid of a court, for the purchase of lands of the estate of the intestate. Such contract was of course void, and could not be enforced against either party. In fact, the bill alleges that complainant discovered this before he had paid all of the purchase price, and that he and the administrator agreed that, in order to correct this error, they would have the land sold in the probate court as authorized by law; that it was so sold; that complainant bid it off at the same price, and deliberately declined to comply with his bid, because he and the administrator concluded the price was too much,

and that it ought to be sold again at a less price; that the administrator procured or consented for it to be resold in order that he might purchase it at lower price, that it was so resold, and that he did again bid it off, at a less price, and that he again declined to pay his bid—this time on the ground that he had paid the administrator that amount on his original void contract of purchase. And complainant now asks a court of chancery to aid him, and compel the administrator to deprive the heirs or creditors of the estate of the intestate of \$300.

The bill affirmatively shows that complainant has never complied and has never offered to comply, with the terms of a single one of his numerous contracts or bids as to this land; that he deliberately and willfully refused to perform any one of his contracts. The only excuse he assigns for all his wrongs is that he twice promised to pay too much for the land, and that the administrator admitted this and promised to help him out of his mistake, by continuing to have the land resold until he could bid it off at a low price. The bill thus shows a premeditated scheme on the part of complainant and the administrator to release the former from his confessed liability of \$300 to the estate, and permit him to obtain the lands of the heirs of the estate of the intestate at a price \$300 less than that at which he had twice agreed to purchase. This, in law though not in fact, would be palpable fraud on the heirs of the estate or on its creditors, one or both. The administrator, of course, had no duty, right, or power to do what the bill alleges he agreed to do, nor what this bill seeks to have a court of chancery to compel him to do. The administrator had no right to make any such promise as to the lands of the estate; and, even if he had such right, there was shown no consideration whatever for his relieving complainant from the payment of the \$300 which the bill confesses he owes for the land. Moreover, the bill seeks to have the land conveyed to complainant, yet it does not offer to pay the \$300, if found to be due. In short, it seeks to have the court convey to complainant the land in question without his paying one cent into court in consideration therefor, the only excuse assigned for the failure being that he had paid the administrator a part of the purchase price, such part as the land was worth, and that the administrator had spent this money.

As before stated, the administrator had no right or duty to make such contract, or to so act, and the lands of the heirs cannot be subjected to compensate for the errors or wrongs of either the complainant or the administrator. The complainant shows no right or color of right, on his part, to have the administration removed from the probate into the chancery court.

It follows that the decree of the chancellor overruling the demurrer to the bill is error, for which it must be reversed; and a de-

cree will be here rendered sustaining the demurrer to the bill.

Reversed and rendered.

SIMPSON, McOLELLAN, and EVANS, JJ., concur.

ST. LOUIS HAY & GRAIN CO. v. AMERICAN CAST IRON PIPE CO.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

1. SALES (§ 340*)—BREACH—REMEDY.

Where a purchaser agreed to buy and the seller agreed to deliver f. o. b. North B., shipment to be made during the month of September, five cars of foundry hay, the contract was executory, and where the buyer committed a breach before delivery an action for the breach and not for the price was the proper remedy.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 938; Dec. Dig. § 340.*]

2. SALES (§ 340*)—RESCISSION—AFFIRMANCE OF CONTRACT—REMEDY.

A purchaser of five cars of hay, delivery to be made f. o. b. North B., after receiving and paying for three cars, rescinded the order for the remaining two before delivery. The cars were, however, delivered, and after delivery the purchaser notified the seller that he was short two cars, and asked that they be traced, etc. *Held*, that an action for the price was the proper remedy on a refusal to accept the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 939; Dec. Dig. § 340.*]

3. SALES (§ 201*)—TRANSFER OF TITLE—DELIVERY OF GOODS.

While title does not pass where the buyer rescinds before delivery, title passes where the goods are shipped f. o. b., though the cars containing the goods are lost, the buyer having recanted a seasonable rescission by requesting the seller to trace the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 540; Dec. Dig. § 201.*]

4. SALES (§ 176*)—BREACH OF CONTRACT—DELAY IN DELIVERY—ESTOPPEL OR WAIVER.

A purchaser of five car loads of hay, delivery to be made f. o. b. North B., after receiving and paying for three cars, rescinded the order for the remaining two before delivery. The seller, however, delivered the hay, and thereafter the purchaser wrote the seller that he was short the two cars and asked that they be traced. The purchaser then notified the seller that he could not accept the cars because of delay in transportation. *Held* that, since the letter asking for a tracer was an affirmation of the contract in spite of the attempted rescission, and since, at that time, the cars had really been delivered in accordance with the contract, there could be no defense of delay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

5. EVIDENCE (§ 165*)—BEST EVIDENCE—CONSIGNMENT OF GOODS.

A purchaser of car loads of hay, insisting that consignment was to be made to the seller's order "Notify J. E. C.," could not show by its general manager that the commercial agent of the carrier phoned him that such was the fact, since the written contract of shipment was the best evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 549; Dec. Dig. § 165.*]

6. EVIDENCE (§ 317*)—HEARSAY EVIDENCE—CONSIGNMENT OF GOODS.

To prove that a consignment of goods sold was to the seller's order "Notify J. E. C.," testimony of the purchaser's general manager that the commercial agent of the carrier notified him over phone that such was the fact is inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action of the St. Louis Hay & Grain Company against the American Cast Iron Pipe Company. From a judgment for defendant, plaintiff appeals. Reversed, and judgment rendered.

Tomlinson & McCullough, for appellant.
Cabaniss & Bowie, for appellee.

McOLELLAN, J. After eliminating the evidence, to be later mentioned, illegally admitted, these conclusions result from the substantially undisputed proof in the cause: That defendant agreed to buy and the plaintiff agreed to "deliver f. o. b. North Birmingham," shipments to be made during the month of September, 1907, five cars of foundry hay; that the cars were shipped either during last days of August or the first days of September; that three of them were accepted and paid for by defendant; that the shipments, as shown by bills of lading, were made direct to the sender; that on September 2d defendant informed plaintiff that the two cars in question would not be received or paid for; that plaintiff insisted upon defendant's acceptance of the cars and payment therefor; that on October 28th by letter, defendant notified plaintiff that it was "short" the two cars involved here, and requested that they be "traced" and "delivery of same" be shown; that these cars reached North Birmingham on October 7th; that on October 31st a letter was written by defendant to plaintiff, whether posted or not was not shown by any witness having knowledge of that fact, stating that these cars had been so long in reaching defendant it had become overstocked, and requesting instruction to the carrier what disposition to make of the cars; and that the sole objection to receiving these cars, as testified to by defendant's general manager, Linthicum, was their "delay * * * in arriving at North Birmingham—that is, the delay in transportation. * * *" Until the delivery of these cars f. o. b. North Birmingham, the contract was executory, and a breach by defendant of the agreement entitled the plaintiff to its action for that breach, and not for the purchase price, the title to the hay not having passed until delivery f. o. b. North Birmingham. *Capehart v. Furman Imp. Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60.

If the conduct of defendant had stopped with the breach of the agreement wrought

by the notification of September 2d, there would be no hesitancy in holding that the plaintiff's remedy was for damages for the breach and not for the agreed price. But it is evident from the letter of October 26th, quoted above, that the defendant recanted and expressly recognized the agreement as existent, and, on the other hand, in effect withdrew its communicated desire and intent to countermand the order with respect to these cars and to refuse to accept them. Whatever may have been the reasons for this clear change of purpose, as evinced by the notification of September 2d and the letter of October 26th, the effect was to remove the status created by notification of September 2d. Obviously, if the plaintiff so desired, and the record shows such to have been the case, to waive the breach and to let the agreement stand as if the notification had not been given, the defendant had not nor has any right to complain. At the time this letter of the 26th was sent these cars were at the point of delivery, and so within the terms "free on board"; and we can see no escape from the conclusion that the written recognition of the existence of the contract, whatever had theretofore transpired in the direction of a refusal by defendant to be bound by it, availed to pass the title to the hay in question as effectually as if the notification of September 2d had not been communicated, unless the "delay," asserted as indicated, was such as to avoid the liability now sought to be enforced.

Reference to the contract as herein above stated must convince that the agreement to ship "during the month of September" was complied with by plaintiff. So far, then, as "delay" was concerned, that was not and could not be ascribed to shipment, but to transportation. If it be assumed that the agreement contemplated delivery f. o. b. North Birmingham, within a reasonable time, the defendant here certainly cannot appropriate the objection of "delay" when previous to the announcement of that objection the hay had been delivered f. o. b. North Birmingham, and also previous thereto defendant had expressly recognized the continuing binding efficacy of the contract by writing the plaintiff that it was "short" the cars in question and requesting a "tracer" and a showing of "delivery" thereof. In other words, the letter of October 26th confirmed, notwithstanding the notification of September 2d, the contract, and when that was effected the agreement had been performed by plaintiff, and so 24 days previous to the writing of the letter of October 31st, wherein the objection of "delay" was first mentioned. If the defendant would have

availed of that objection to the reception of the hay, it should not have written plaintiff with a view to hastening delivery, and that at that date (October 26th) it still regarded the contract as unavoided by any act or omission of the plaintiff; the goods then having been delivered f. o. b. at North Birmingham. But the defendant insists that the cars were not consigned to defendant as they should have been, but, on the contrary, were consigned to plaintiff "Notify J. E. Carter." Of course, if such was the fact, legally shown in evidence, the contract was not complied with by plaintiff. The issue was one of fact. According to the bills of lading issued for the cars in question, they were consigned direct to defendant. Other evidence in the record supports the view that the cars were so consigned. The defendant sought to maintain its insistence by testimony of its general manager that, in the latter part of October, some one phoned him that the consignment was to plaintiff's order, "Notify J. E. Carter," and that the person phoning him was the commercial agent of the carrier. This testimony was inadmissible. It was shown by the then witness that the cars were at the place of delivery, and it had been otherwise shown without dispute that the charges had been paid. The only point of controversy, in this connection, was the terms of the consignment. This should have been shown, we think, by the records of the carrier. But, if it be allowed that the fact could be shown ore tenuis of the carrier's agent, certainly it was incumbent on the defendant to examine that witness or else account for its inability to produce him or to take his testimony. To permit the rehearsal of the carrier's agent's declaration by another and to bind the plaintiff thereby would be to avoid all effect to the rule against hearsay evidence in an instance palpably within the rule. With this proffered testimony excluded, defendant's insistence was unsupported in the proof, and the judgment, upon the record before us, cannot be sustained.

The other objection as to the drafts, drawn by plaintiff upon defendant, need not be considered, since the defendant rests its sole right to avoid the recovery of the agreed price upon "delay in transportation." By that it must stand or fall.

The judgment is reversed. Proceeding to render the judgment the trial court should have rendered, it is ordered and adjudged that the plaintiff have and recover of the defendant the sum of \$497.28, principal and interest due it to the date of this judgment.

Reversed and rendered.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

FRANCIS et al. v. JEFFERSON COUNTY SAVINGS BANK.

(Supreme Court of Alabama. June 9, 1910.)

MORTGAGES (§ 154*)—BONA FIDES—NOTICE—POSSESSION.

Complainant, a stockholder, alleged that the corporation was the vendee of certain land under a contract of purchase, and that its directors permitted the vendor to convey the property to another stockholder, who mortgaged it to defendant bank, by which the mortgage was foreclosed, and prayed that the bank account to complainant for his interest as a stockholder. The bill also charged that the bank had notice of complainant's equities at the time it took its mortgage, but the proof only went to show that at the time of the mortgage the corporation had a foundry located on the land. *Held* that, since the title was not in the corporation, and there was no proof that the bank knew that the land had been bargained to it, and not to the mortgagor, the corporation's use of the property was not notice of its rights.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 350-352; Dec. Dig. § 154.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by R. W. Francis and others against the Jefferson County Savings Bank. From a decree sustaining demurrers to the amended bill, complainants appeal. Affirmed.

The original bill and answer is set out in the former opinion in this case, which will be found reported in 115 Ala. 317, 23 South. 48, reference to which is here made. The bill was afterwards amended by striking out sections 2, 3, 4, and 5, and inserting in lieu thereof the following paragraphs, numbered 2, 3, 4, and 5, respectively:

"(2) That prior to the 15th of July, 1887, Excelsior Foundry & Machine Company was a corporation under the laws of Alabama, with a capital stock of \$10,000, 400 shares, at the par value of \$25 each, and on that day Carter owned or controlled 320 shares, and complainants owned jointly 80 shares, and that at that time the corporation had ceased to do business, or to carry on or to exercise any of its corporate functions, and was practically dead, and that its entire assets consisted of the property herein described.

"(3) That on the 28th day of May, 1886, the Excelsior Foundry & Machine Company, contracted with the Avondale Land Company for the following described land: [Here follows description]—and received a bond from said Avondale Land Company, for a conveyance of said lot, and afterwards erected valuable improvements on said lot, and placed thereon said machinery and tools for carrying on its business.

"(4) That said Excelsior Foundry & Machine Company, prior to July 15, 1887, had several stockholders, a board of directors, and a president, and carried on its business until some time prior to July 15, 1887, when it ceased to do business.

"(5) That prior to July 15, 1887, Carter

had secured control and ownership of four-fifths of the capital stock of the Excelsior Foundry & Machine Company, and there was no other stock of said company existing, except the 80 shares owned by complainant; that the board of directors had ceased to perform any of their duties or functions, and the said Carter, desiring to secure the whole of the assets and property of said company for his own use, on said date paid to the Avondale Land Company, the sum of \$350, balance due as purchase money for said lot, and procured a deed to be made to himself for the said lot, and on the same day, in order to secure advances that had been made or agreed to be made him by the Jefferson County Savings Bank to the extent of \$500, executed jointly with his wife a mortgage on said lot of land, with its improvements, to the Jefferson County Savings Bank; that complainants never consented to or in any way ratified any of the conveyances mentioned, nor did they have any notice or knowledge thereof until long after the same was made; that no meeting of the stockholders or directors was ever held to authorize or ratify any of the conveyances, and the said Jefferson County Savings Bank took said mortgage with full notice or knowledge of the manner in which said party had wrongfully acquired the title to the property, and that complainants had an equitable claim thereto as stockholders of the Excelsior Foundry & Machine Company.

"It is further alleged that the value and improvements of the property was \$10,000. The demurrers take the point that the bill is without equity; that it is not shown that the complainants were entitled to any relief against the defendants; that it appears from the bill that the complainants sue as stockholders of the Excelsior Foundry & Machine Company, a body corporate, for and on behalf of the said corporation, and yet the bill fails to show that before filing the bill complainants took any step or proceedings to have the corporation act on its own behalf, and fails to show any excuse for a failure to take such steps; for failure to make the Excelsior Foundry & Machine Company, a party; for failure to join Carter as a party; and because the bill as amended shows that complainants have no equity or interest in the lands described. Respondents also answered, and the answer incorporated certain demurrers not necessary to be here set out.

London & Fitts, for appellants. Forney Johnston, for appellee.

ANDERSON, J. This case has been here upon former appeal. 115 Ala. 317, 23 South. 48. The equity of the bill was then fully considered and discussed at length in the opinion of the court. The question now is:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Did the amended bill cure the defects heretofore pointed out, and because of which the original bill was adjudged to be wanting in equity? Upon the first consideration of the case, it was held, among other things, that the bill failed to aver that the respondent bank had notice of any equities of the complainant or the Excelsior Company at the time it took the mortgage from Carter. The bill was amended in this respect, so as to charge notice to Enslen, the president; but the proof failed to establish this important averment. It is true the mortgage recites that the Excelsior Foundry was located on the land mortgaged; but the legal title to the land was in Carter, and the evidence does not show that Enslen knew that the land had been bargained to the company, instead of Carter. On the other hand, if such had been the case, it does not appear that Enslen knew that the making of the deed to Carter was not sanctioned or authorized by the Foundry Company.

This court has also construed the agreement of December 9, 1887, and held that it did not add the complainants as to the relief sought under the present proceeding. We do not think this phase of the case was benefited by the amended bill, and which was subject to the respondent's demurrer.

The decree of the chancery court is affirmed.

Affirmed.

MAYFIELD, SAYRE, and EVANS, JJ., concur.

STEELE v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

1. CRIMINAL LAW (§ 815*) — REQUEST TO CHARGE—ARGUMENTATIVE INSTRUCTION.

A request to charge, constituting a mere argument in favor of defendant, based on part of the testimony only, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

2. CRIMINAL LAW (§ 814*) — INSTRUCTIONS — EVIDENCE.

A request to charge that there was no evidence in the case of a particular fact, intended to meet an argument probably well advanced by counsel for the state, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 179; Dec. Dig. § 814.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Roy Steele was convicted of larceny, and he appeals. Affirmed.

Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted and convicted of larceny. The indictment was in Code form, and the judgment entries as to trial, conviction, and sentence seem to be without error. The only

ruling presented for our review by the bill of exceptions is the refusal of the trial court to give written charges 1 and 2, requested by the defendant.

The court properly declined to give each of these charges. Charge 1 was argumentative. To give it would be for the court to make an argument in favor of the defendant, based upon a part only of the testimony. Charge 2 was properly refused, because it requested the court to charge the jury that there was no evidence in the case of a particular fact. The charge was evidently intended to meet an argument probably well advanced by the state's counsel. It has been frequently held by this court that charges like charge No. 2 are properly refused.

Finding no error, the judgment of the court must be affirmed.

Affirmed.

ANDERSON, SAYRE, and EVANS, JJ., concur. EVANS, J., is, however, of the opinion that charge 1 was properly refused because, in so far as it asserts a proposition of law, it is fully covered by other charges which were given at the request of the defendant.

MURPHREE v. OLISBY.

(Supreme Court of Alabama. June 1, 1910.)

1. SUBROGATION (§ 1*)—RIGHT TO SUBROGATION.

One who, to protect his own rights, satisfies a debt for which another is primarily liable, may enforce against the latter all the securities, benefits, and advantages held by the creditor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. SUBROGATION (§ 25*)—RIGHT TO SUBROGATION.

A vendor conveyed land to a purchaser, who was insane, and who borrowed money from a third person for a part of the price, and secured the same by a mortgage on the premises. The vendor received no money of the third person, except at most a manual receipt, and the consideration for the deed moved from the purchaser to the vendor. The vendor and the third person acted in entire independence of each other. Held, that the third person could not obtain from the vendor the amount of the loan to the purchaser, on the theory of subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 50; Dec. Dig. § 25.*]

3. FRAUD (§ 6*)—PARTICULAR TRANSACTIONS—CONSTRUCTIVE FRAUD.

A vendor conveyed land to a purchaser, who was insane, and who borrowed money from a third person for a part of the price secured by a mortgage on the premises. The vendor and purchaser acted in good faith and in ignorance of the purchaser's insanity. There were no relations of contract, trust, or confidence between the vendor and the third person. Held, that the third person could not maintain a suit against the vendor for the amount of the loan to the purchaser, on the ground of fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 7; Dec. Dig. § 6.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Suit by Mrs. F. W. R. Clisby against W. T. Jackson and others. From a decree overruling demurrers to the bill, defendant Alice Murphree appeals. Reversed and remanded.

The case made by the bill as originally filed was to enforce the foreclosure of a mortgage executed by W. T. and Clara Jackson to Clisby. It seems that there was decree pro confesso taken against the two Jacks- sons, which was afterwards set aside, and Clara Jackson answered the bill, setting up the insanity of W. T. Jackson at the time of the execution of the mortgage. Later the death of Jackson was suggested, with leave to revive against his heirs and representatives. The bill does not seem to have been revived against the heirs or representatives of W. T. Jackson; but after his death the bill was amended, so as to make the following facts the basis for relief. Immediately prior to the execution of said mortgage, the said Jackson had agreed to purchase from one Alice Henemuth the property described in the bill, and to pay therefor the sum of \$1,250; and Jackson had \$700, and in order to secure the additional sum of \$550 borrowed that amount from complainant. Jackson paid the said sum of \$700 to Alice Henemuth, and directed complainant to pay the said sum of \$550, which he had borrowed from her, to the said Alice Henemuth as the balance of the purchase money, which complainant did, whereupon Alice Henemuth executed and delivered to Jackson a deed to the property, and at the same time Jackson delivered to plaintiff the mortgage here sought to be foreclosed; and the said Alice Henemuth knew, at the time she received said money from complainant on account of the said Jackson, that complainant had loaned the same to Jackson, and that Jackson had borrowed the money from complainant for the purpose of paying him the balance of the purchase money; and the said Alice Henemuth knew that complainant was lending said money upon the security of the mortgage as aforesaid. It is then alleged that Alice Henemuth knew during this entire transaction that Jackson was insane, and that since the filing of the bill Jackson had died, leaving Clara Jackson, his wife, as his only heir, and that there had been no administration on his estate, and that shortly after the filing of the original bill W. T. Jackson and Clara Jackson had filed a bill in this court setting up the insanity of the said W. T. Jackson at the time of said transaction, and seeking to have the same rescinded and the money paid the said W. T. Jackson, which he had paid out to the said Alice Henemuth. It is then alleged that on account of the insanity of Jackson the entire transaction was utterly void, and that this complainant was entitled to have and receive from the said Jackson primarily, and from Alice Henemuth, the sum of \$550 paid by complainant in the manner herein set forth, and that she is entitled to a lien upon the

property set forth for the payment thereof. This is followed by an appropriate prayer for relief. The demurrers take the points discussed in the opinion.

John V. Smith, for appellant. Ball & Sanford, for appellee.

SAYRE, J. Appellee filed her bill to foreclose a mortgage, which had been made to her by W. T. and Clara Jackson, husband and wife, to secure the debt of the former; the wife joining merely to release her dower right. When answers were filed it appeared that the defendants would rely upon the fact that the husband was insane at the time of the execution of the mortgage to defeat foreclosure. Later the death of Jackson was suggested, and leave had to revive against his heirs and representatives. There was, however, no effort to revive; but an amendment was filed, which brought in appellant as a party defendant, and prayed that a decree be rendered against appellant for the mortgage debt, together with an attorney's fee as provided in the mortgage, and that a lien for the same be declared upon the property. As establishing appellee's right to this relief against the appellant, the amendment showed that prior to the execution of the mortgage Jackson had agreed to purchase the mortgaged property from appellant; that to piece out his own funds to the amount of the agreed purchase price he borrowed money of appellee and executed the mortgage in question to secure the same; that Jackson paid the money he had in hand to appellant, and directed appellee to pay to appellant the sum secured by the mortgage as the balance of the purchase money, which complainant did, whereupon appellant executed a deed to Jackson, and Jackson executed the mortgage to appellee; that appellant understood the purport of the entire transaction; and that Jackson was at the time insane. It does not appear that either appellant or appellee knew of Jackson's lunacy. Appellant demurred to the amended bill generally and specially, and, upon her demurrer being overruled, prosecuted this appeal.

There are a number of difficulties in appellee's position. Among them, her assertion of equity against the appellant is fundamentally unsound. She states her equity as one of subrogation in some sort. Assuming the nullity of deed and mortgage, that the legal title to the land is still in appellant, and that Jackson's representatives are entitled to have back the money paid by him, the contention is that since appellant, with knowledge of the circumstances—not, however, a knowledge of Jackson's insanity, if that would make any difference—received appellee's money, knowing that appellee, in paying it, relied upon the security of the mortgage, appellee ought to have a decree against appellant for her money and a lien upon the land. We need not concede that

the efficacy of an absolute deed, without conditions, depends upon the legal capacity of the grantee to transfer an estate by deed. *Concord Bank v. Bellis*, 10 Cush. (Mass.) 276. However that may be, the fact is that appellant received no money of the appellee—or at most the receipt was manual only. The consideration for the deed moved from Jackson to appellant. The consideration for the mortgage moved from appellee to Jackson. Appellant and appellee acted in entire independence of each other. The doctrine of subrogation is that where one, not voluntarily, but to protect his own rights, satisfies a debt for which another is primarily liable, he may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor. A statement of the case has shown that appellee is in no position to appeal to this doctrine. Appellee's contention seems rather to squint at fraud. But the bill is totally inadequate along that line. There were no relations of contract, trust, or confidence between appellant and appellee. Both acted in good faith and in ignorance of Jackson's lunacy. To permit appellee to maintain her bill would be to hold her as a warrantor of her grantee's sanity. It is clear that she did not assume that burden, and there is no principle of law by which it may be imposed upon her. Appellant's demurrer for want of equity should have been sustained.

Reversed and remanded.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

WHITMORE v. STATE.

(Supreme Court of Alabama. June 16, 1910.)

1. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

The court properly refused a charge that, before the jury could convict, they must be satisfied to a moral certainty, not only that the proof was consistent with defendant's guilt, but that it was wholly inconsistent with every other rational conclusion, and that, unless they were so convinced of defendant's guilt that they would each venture to act on that decision in matters of highest concern and importance to his own interest, they must acquit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1847, 1877, 1878, 1906, 1907, 1909–1911; Dec. Dig. § 782.*]

2. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS.

Defendant requested a charge that if he did not provoke or bring on the difficulty, and deceased advanced towards him with gun in hand so as to indicate to a reasonable man his intention to do great bodily harm, and there was no reasonable mode of retreat without increasing his danger, defendant was authorized to anticipate the deceased and kill him, but that, if the jury had a reasonable doubt on this proposition, they must acquit. *Held*, that there was no error in refusing the same as misleading.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

3. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

There was no error in refusing charges justifying the homicide on the ground of self-defense, where they omitted in the hypothesis defendant's bona fide belief of peril at the time he shot deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

Appeal from City Court of Gadsden; Alto V. Lee, Judge.

Jack Whitmore was convicted of manslaughter in the first degree, and he appeals. Affirmed.

In drawing the jury the court followed the usual method employed in capital cases before the adoption of what is known as the "jury law," and the orders made and the drawing was conducted accordingly. The following charges were refused to the defendant: (4) "The court charges the jury, before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof was consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of highest concern and importance to their own interest, then they must find the defendant not guilty." (5) "The court charges the jury that if the defendant did not provoke or bring on the difficulty, and the deceased advanced towards the defendant with his gun in his hand, and in such a manner as to indicate to a reasonable man that his intention was to do great bodily harm to the defendant, and that there was no reasonable mode of retreat for defendant without increasing his danger, then the defendant was authorized to anticipate the deceased and kill him; and if the jury have a reasonable doubt on this proposition they must find the defendant not guilty." (3) "The court charges the jury that if the defendant did not provoke or bring on the difficulty, and the deceased advanced towards the defendant with his gun in his hand and in such a manner as to indicate to a reasonable man that his intention was to do great bodily harm to the defendant, then the defendant was authorized to anticipate the deceased and kill him; and if the jury have a reasonable doubt on this proposition they must find the defendant not guilty."

George D. Motley and W. H. Standifur, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The complaint against the method pursued to constitute the jury to try this defendant is based, as appears from the brief of counsel, upon the misconception that the jury law, approved August

31, 1909 (Gen. Acts Sp. Sess. 1909, p. 305 et seq.), was in effect when the defendant was tried. For some purposes it was in effect; but by section 17 (page 312) it was postponed, in partial operation and effect, covering the matter the appellant questions on this appeal, until the first Monday in January, 1910.

There is no merit in the criticisms of the organization of the jury for the trial of this defendant.

The refusal, to defendant, of charge 4 accorded with the ruling here on a duplicate of that charge 7 in *Shirley v. State*, 144 Ala. 35, 42, 40 South. 269.

Charge 5, refused to defendant, is confused, not clear. To what proposition, of the several set forth therein, the concluding sentence had reference is so doubtful as to be misleading. Besides, it omitted in its hypothesis, the bona fide belief of defendant of his peril at the time he shot deceased. The charge probably has other vices.

Charge 3 was well refused. It, like refused charge 5, omitted, in hypothesis, the bona fide belief of defendant of his peril at the time he shot deceased. It may have other infirmities.

There is no error in the record.

Affirmed.

SIMPSON, MAYFIELD, and EVANS, JJ., concur.

TURNEY v. STATE.

(Supreme Court of Alabama. June 2, 1910.)

1. DISORDERLY CONDUCT (§ 11*)—INSULTING LANGUAGE.

Accused, a negro, approached prosecutrix, and, after being informed that her husband was not at home, said: "Christmas gift; give me some fresh meat for a Christmas gift." Prosecutrix replied: "I have no fresh meat." Accused said: "Give me some backbone." Prosecutrix: "I have no backbone." Accused: "Give me some spareribs." Prosecutrix: "I have none for you." Accused: "Give me some fresh meat for a Christmas gift, and I will give you something." Held, that such language was susceptible of an obscene meaning, and hence, whether, when said to a female, it was insulting, within the prohibition of Code 1907, § 6217, was for the jury.

[Ed. Note.—For other cases, see *Disorderly Conduct*, Cent. Dig. § 18; Dec. Dig. § 11.*]

2. JURY (§ 71*)—STRUCK JURY—STATUTES.

Code 1907, § 4635, providing for struck juries, applies only to civil cases.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 71.*]

3. JURY (§ 72*) — SUMMONING TALESMEN — GROUNDS.

Absence of one jury serving the court trying accused, in the performance of its duty in the trial of another case, warranted the court in directing the summoning of talesmen to complete the jury to try defendant, as provided by Code 1907, § 7272.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 333; Dec. Dig. § 72.*]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Willis Turney was convicted of using abusive, insulting, or obscene language in the presence or hearing of a female, and he appeals. Affirmed.

The evidence for the state tended to show that on Christmas morning Mrs. Sharp was in her lot, across the road from her home, and that the defendant came into the lot and asked if Mr. Sharp was at home, and was told that he was not. Another negro was with the defendant, but passed on by the lot and stopped some distance away. The defendant, after being told that Sharp was not at home, said: "Christmas gift; give me some fresh meat for a Christmas gift." Mrs. Sharp replied: "I have no fresh meat." Defendant said: "Give me some backbone." Mrs. Sharp: "I have no backbone." Defendant: "Give me some spareribs." Mrs. Sharp: "I have none for you." Defendant: "Give me some fresh meat for a Christmas gift, and I will give you something." Mrs. Sharp further testified that while talking to her defendant was in a shake all over, and she became frightened and went towards the house. Defendant followed a little way, but did not come to the house.

Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. Under the influence of *Carter v. State*, 107 Ala. 146, 18 South. 232, it must be held that the trial court properly submitted to the jury the inquiry whether the language attributed to the defendant by the state's witness, Mrs. Sharp, was, under the circumstances attending its utterance, within Code, § 6217, insulting. It cannot be ruled that, under all the circumstances, the language so attributed was not susceptible of a meaning vulgar or lewd, and hence, to a female, insulting.

This trial was had in March, 1909. The defendant demanded a "struck jury." It was refused him. Upon what authority this demand was made, or could be sustained, we are not advised, and have not been able to discern. The provision for "struck juries," made in Code, § 4635, had application to civil causes only. The absence of one jury serving the court trying this defendant, in the performance of its duty in the trial of another case, warranted the court in directing the summoning of the talesman to complete the jury to try this defendant. Code, § 7272.

After a careful review, we find no prejudicial (to defendant) error in respect of instructions, special or general, given by the court to the jury.

Affirmed.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

ALDRICH MINING CO. v. PEARCE.

(Supreme Court of Alabama, April 21, 1910.
Response to Application for Rehearing,
June 30, 1910.)

1. TROVER AND CONVERSION (§ 16*)—PROPERTY SEVERED FROM FREEHOLD—TITLE OR RIGHT TO POSSESSION OF PLAINTIFF.

The owner of the freehold cannot maintain a personal or transitory action to recover a part of the freehold, or damages for conversion thereof which has been converted into personalty by a severance from the freehold, if at the time of the severance he has not actual or constructive possession of the land, since titles to land cannot be inquired into in purely personal actions.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 128; Dec. Dig. § 16.*]

2. PROPERTY (§ 4*)—DISTINCTION BETWEEN REALTY AND PERSONALTY—ACTIONS—NATURE AND SCOPE OF REMEDY.

While, in an action for trespass and for the statutory penalty for cutting trees, ownership or title to land may be inquired into, such is not true as to purely personal actions, such as trover, detinue, assumpsit, replevin, etc.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 4.*]

3. PROPERTY (§ 5*)—CONVERSION FROM REALTY TO PERSONALTY—RECOVERY OF PROPERTY OR OF DAMAGES FOR CONVERSION—NATURE AND SCOPE OF REMEDY.

When any part of the freehold, such as coal, minerals, sand, gravel, crops, or fixtures, etc., are severed from the freehold, they become personalty, and an action of trover, detinue, or other personal action may be brought to recover the property as a chattel, or for damages for the conversion.

[Ed. Note.—For other cases, see Property, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

4. TROVER AND CONVERSION (§ 16*)—PROPERTY SEVERED FROM FREEHOLD—POSSESSION OF LAND BY PLAINTIFF.

In trover for the conversion of a chattel, rendered such by severance from the freehold, a possession which is merely transitory, for the purpose of making the trespass or severing a part of the freehold, is not sufficient to defeat a recovery by the owner of the freehold who has either actual or constructive possession of the land.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 128; Dec. Dig. § 16.*]

Appeal from Circuit Court, Marion County; A. H. Alston, Judge.

Action by James P. Pearce against the Aldrich Mining Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John C. Forney, A. T. London, and Bankhead & Bankhead, for appellant. W. C. Davis and S. D. & J. B. Weakley, for appellee.

MAYFIELD, J. This was an action of trover for the conversion of 3,000 tons of coal, mined from the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, township 12, range 12 west, in Marion county, Ala. The case was tried upon the general issue in short, by consent, with leave for defendant to give in evidence anything that would be a defense; and for the plaintiff to give in evidence anything that

would be good as a replication if specially pleaded. The trial resulted in verdict and judgment for plaintiff for \$1,023, from which judgment the defendant appeals, here assigning various errors on the part of the trial court.

The plaintiff, Pearce, claimed to be the owner of the S. E. $\frac{1}{4}$ of section 10, township 12, range 12 west, which was contiguous to, and just west of, the S. W. $\frac{1}{4}$ of section 11 of said township and range; and averred that the defendant company had mined across the section line, between sections 10 and 11, onto plaintiff's lands, thereby converting his coal.

It appears that the real controversy between the parties, and that upon which the rights of both parties depended, was the location of the true boundary line between the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, this being a part of the section line between such sections—the defendant claiming that the true line was one running north and south from a certain red oak tree, known for many years as the "Red Oak Corner"; that this tree bore the marks and hacks of surveyors, as if it were a monument or witness tree. While it had been known as such for many years, it was not conclusively shown to have been so made by the original survey of the United States.

On the other hand, plaintiff introduced several surveyors, who had made surveys of the lands in question in trying to ascertain and fix the boundary lines of these lands; and, while their surveys did not exactly coincide, they all located the boundary line between the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, at some distance east of the line run north and south from the "Red Oak Corner." The testimony of these surveyors was to the effect that they could not make the "Red Oak Corner" check up with the original field notes of the government survey. These surveys offered by plaintiff, as to the location of these boundary lines, appear to have been made after the coal was mined and preliminary to the bringing of this action.

The coal in question was taken from this strip of land lying between the two lines, which the parties respectively claimed to be the boundary line between the two 40's of land. If the "Red Oak Corner" line was the true line, then clearly defendant had not taken any of plaintiff's coal; but if, of any of the later surveyed lines, any one was the true line, then plaintiff was entitled to recover, provided he had shown title to the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10.

The plaintiff claimed to have acquired title by adverse possession, under color of title, through a deed executed to him by one Butler and wife, in 1875, but which did not pass the title thereto, because it was the homestead of

Butler at the time, and because the instrument was not properly acknowledged by Butler's wife. This color of title attempted to convey the whole of the S. E. $\frac{1}{4}$ of section 10. The plaintiff appears never to have been in the actual possession of the particular strip of land in question, but he claims that, through his tenants and others holding under him, he had been in the actual possession of a part of this quarter section conveyed for 10 years, and that this color of title extended his possession to the whole of the quarter section which included the land in question.

The defendant appears to have been in the actual possession of the strip of land in question, prior to, and, of course, at the time the coal was mined; certainly so, as for the purpose of mining the coal, claiming also to have been in possession of the surface. But as to this latter contention there is some dispute, the plaintiff claiming that the defendant's possession (whatever it was) was not adverse as to him, but was only the possession of a contiguous owner not knowing the true boundary line and only claiming to the true boundary line, wherever it might be found to be. The defendant never claimed title or right to any part of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, until it purchased and acquired deed from Butler and wife to the S. E. $\frac{1}{4}$ in June, 1908, just a short while before the bringing of this suit; but it claimed on the trial, and its proof tended to show, that it claimed the land and coal in question as being a part of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11—not by this description, but as being a part of the 40 acres just east of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10. But all the proof shows that whatever actual possession there was of the particular strip in question, as distinguished from constructive possession, was in the defendant. If the plaintiff had title to it, it was by virtue of 10 years' continuous adverse possession acquired under his color of title prior to the taking of the coal, and his possession was that acquired by his being in the actual possession of a part of the quarter section, and that possession being extended to the land in question by virtue of his color of title. If plaintiff never acquired the title to any part of the S. E. $\frac{1}{4}$ of section 10, then of course he never acquired title to the part in question. If the part in question was not a part of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, but was a part of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, then of course he had no title thereto, though he acquired title to the S. E. $\frac{1}{4}$ of said section 10. In other words, to support a judgment for plaintiff, the jury must have determined that plaintiff had title to the particular land in question. This they could only do, by determining whether or not he acquired the legal title to the S. E. $\frac{1}{4}$ of section 10 by adverse possession for 10 years; and if he did so acquire title thereto, then was the strip in question a part of that quarter section, or was it a part of the S. W. $\frac{1}{4}$

of the S. W. $\frac{1}{4}$ of section 11? In other words, they must have found the boundary line between sections 10 and 11, at least to the extent of saying whether the land in question was east or west of that line.

The serious questions necessarily involved in this case are: (1) Can the title to land be determined in an action of trover? (2) Could the plaintiff recover in this action, without a determination of the title to the land from which the coal in question was mined? The first question we think is well settled, by numerous authorities, in the negative.

The owner of the freehold cannot maintain a personal or transitory action to recover a part of the freehold, or damages for conversion thereof, which has been converted into personalty by a severance from the freehold, if at the time of the severance he has not the actual or constructive possession of the land. *Cooper v. Watson*, 73 Ala. 254; *Felder v. Childs*, 73 Ala. 567; *Beatty v. Brown*, 76 Ala. 267; *Street v. Nelson*, 80 Ala. 230; *Rogers v. Brooks*, 99 Ala. 34, 11 South. 753; *Keller v. Bullington*, 101 Ala. 270, 14 South. 466; *Stewart v. Tucker*, 106 Ala. 321, 17 South. 385.

It is true that the above authorities, and others, hold that the plaintiff cannot recover because the defendant was in the adverse possession at the time of the severance; but the true reason of the rule, as often stated in these cases, is, not that the adverse possession itself defeats the action, but that it requires or necessitates an inquiry into the legal title to the land, which all the authorities hold cannot be done in a purely personal and transitory action. If that could be done, the titles to land in one county could be tried by an action in another, or titles to land in this state could be determined by personal action in another. *Cooper v. Watson*, 73 Ala. 254, and cases there cited and quoted. The rule is general if not universal that titles to land cannot be inquired into in purely personal actions. There are appropriate remedies provided for contesting and trying titles to land, which must be resorted to. It would be attended with perplexing confusion and practical mischief if parties were not limited to these actions, to settle titles to land.

Take the case at bar: This trial did not and could not settle the titles to this strip of land, nor did or could it settle the question of the possession thereof. Suppose an action should be brought, to quiet the titles to this strip of land in question, or ejectment brought, for it, or the boundary between sections 10 and 11 established by appropriate actions, and the "Red Oak Corner" determined to be the boundary, then unquestionably the plaintiff could not recover; and if he had severed coal or timber therefrom then unquestionably this defendant could maintain trover or detinue against this plaintiff therefor. Surely each party is not entitled to recover from the other for conversion of the same property. In an action for trespass

and for statutory penalty for cutting trees, ownership or title may be inquired into, but such is not true as to purely personal actions such as trover, detinue, assumpsit, replevin, etc. *Rogers v. Brooks*, 99 Ala. 34, 11 South. 753; *White et al. v. Farris*, 124 Ala. 461, 27 South. 259. All the authorities above held that when any part of the freehold, such as coal, minerals, sand, gravel, crops, or fixtures, etc., are severed from the freehold, they then become personalty, and an action of trover, detinue, or other personal action may be brought to recover the property as a chattel, or damages for the conversion or for wrongful conversion. There are a great number of later cases, holding this same doctrine. See *Ivy Coal Co. v. Alabama Coal Co.*, 135 Ala. 579, 33 South. 547, 93 Am. St. Rep. 46; *White v. Yawkey Co.*, 108 Ala. 270, 19 South. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; *Warrier Co. v. Mabel Co.*, 112 Ala. 624, 20 South. 918; *Birmingham Co. v. T. C., I. & R. R. Co.*, 127 Ala. 137, 28 South. 879; *Karthauss v. N., C. & St. L. R. R. Co.*, 140 Ala. 438, 37 South. 268.

It is also true that, in actions like this, it is not every assertion of an adverse claim to the land, by the defendant, which will defeat the action of the plaintiff to recover in trover for the conversion of the chattel which was rendered such by being severed from the freehold. It must be an assertion in good faith. A possession which is merely transitory, for the purpose of making the trespass or severing a part of the freehold, is not sufficient to defeat a recovery by the owner of the freehold, who has either actual or constructive possession of the land. *Young v. Herdic*, 55 Pa. 172; *Yeumans v. Francisco*, 15 N. Y. Wkly. Digest, 312; *Stewart v. Tucker*, 106 Ala. 321, 17 South. 385.

In all cases the court should look into the substance of the claims and rights of the parties, and not to the mere show or claim for the mere purpose of maintaining or defeating the action; and if it appears that in truth it is a trial of title to land, then it cannot be done in a personal and transitory action, but must be tried in another form of action appropriate to the rights and relief. *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612.

The rule has also been thus stated: In personal and transitory actions, such as trover, detinue, replevin, and the like, the title to land may be examined or looked into far enough to determine whether or not there are bona fide adverse claimants. If such claims are found to exist, the validity thereof cannot be tried in such actions. Such actions are purely to try title to personalty, and not that to lands. *Cobbey on Replevin*, 353, 374, 376, 382; 24 Am. & Eng. Ency. Law, § 486.

It is true that it does not require actual possession of the land, on the part of the plaintiff, to maintain the personal action for a part of the freehold, after it is severed;

constructive possession is sufficient. But constructive possession can never be in one except the owner of those claiming through him. Constructive possession, of necessity, depends upon ownership as its basis. If this were not true, both parties in this action, under the evidence in this record, could maintain trover for the coal taken from this strip or zone of land in question; the defendant certainly, because it was in actual possession certainly, and claimed it under deed conveying the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11. The plaintiff claims to be in constructive possession, because he claims under color of title, his deed conveying the S. E. $\frac{1}{4}$ of section 10, and he claiming that this zone in question is a part of section 10. Each could maintain the same action against the other, for the same property, under the same state of facts. Hence, to determine which of the two conflicting claims is right or superior, the title to the land must of necessity be determined.

It therefore follows that the general affirmative charge should have been given for the defendant.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

Response to Application for Rehearing.

MAYFIELD, J. On a thorough examination of this application for a rehearing, and on further examination of the record, we are constrained to adhere to the original opinion, and to the conclusion and decision reached on the original hearing. In confirmation of the correctness of the conclusion that the plaintiff could not in this action establish title, we may add that the record in this case shows conclusively that the plaintiff had no possession to the zone or band of land from which the coal in question was mined by the defendant, other than the constructive possession which the legal title draws to itself. While such constructive possession is sufficient to support the action, the plaintiff did not and could not show such constructive possession in this action. He confessedly had no documentary title to this particular land or to any other lands adjoining it. The deed under which he claims title was shown to be absolutely void because it was an attempt to convey the homestead, and was not separately acknowledged by the wife as required by the statute; consequently, at best, it could answer only as color of title.

Hence, in order to establish title which would draw to it constructive possession sufficient to support the action, he must prove the open, notorious, and continuous adverse possession of the land for 10 years prior to the alleged conversion of the coal by the defendant. This transitory action of trover was not the appropriate action in

which to establish such title; and without establishing it the plaintiff showed no right to recover.

It matters not what may be the rights of the defendant—whether or not he was holding the land adversely, or where the dividing line between sections 10 and 11 may be. The plaintiff having proven no property in himself, general or special, and having shown no right to the immediate possession of the coal thus mined by the defendant, he could not recover in the action of trover.

HUGHES v. LETCHER et al.

(Supreme Court of Alabama. June 16, 1910.)

1. TRUSTS (§ 63½*)—RESULTING TRUST—VALIDITY—LOAN OF PURCHASE MONEY.

Complainant's testimony that decedent agreed to lend him the money used in paying for land and hold the legal title for complainant until payment of the loan fails to establish a resulting trust, and shows a parol trust in violation of law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. § 63½.*]

2. TRUSTS (§ 365*)—RESULTING TRUSTS—LACHES.

Suit filed in August, 1905, to enforce a resulting trust under a purchase of land by decedent in 1888, is barred by laches, where possession was given decedent in 1892, was held by him until his death in January, 1904, and by his administrator until shortly before the suit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 571, 572; Dec. Dig. § 365.*]

Appeal from Montgomery City Court; A. D. Sayre, Judge.

Bill by A. T. Hughes against the administrator of the estate of John D. Letcher, deceased, and others, to enforce a resulting trust. Judgment for respondents, and complainant appeals. Affirmed.

The bill alleges that complainant borrowed of one John D. Letcher \$200, to be used in paying the purchase money of a tax sale for certain lands therein described, with the agreement that the title to said lot should be taken in the name of Letcher to secure him in the payment of the purchase money and the interest thereon, and that the deed was accordingly so made. It is further averred that after the purchase, which was in 1888, orator spent about \$1,150 in improving the property, and occupied it as a residence from 1888 to 1892, when orator moved to Texas, agreeing at the time that the said Letcher should take possession of the said lot, and hold it until the rents and profits arising therefrom should pay the said indebtedness due to said Letcher. It is then averred that Letcher took possession and collected the rents and profits therefrom until the time of his death, which occurred in January, 1904; that his administrator then took possession of the land, and held same until June, 1906, when the lands were sold for division among

the heirs of the estate; that the sale was confirmed on the 10th of July, 1906, when your orator was present in person and objected to the confirmation on the ground as stated above. It is further alleged that Shaw was a purchaser at the time of the sale, and that, becoming dissatisfied with the purchase, J. T. Letcher and F. M. Letcher bought his purchase, and both J. T. and F. M. Letcher were present, and heard orator's objection to the confirmation of the sale before purchasing Shaw's bid. It is alleged that more than enough rents were collected to pay all orator owed decedent. It is then alleged that the Montgomery Street Railway is occupying the premises as the tenant of said Letcher. The bill was filed the 12th day of August, 1905.

John V. Smith and Phares Coleman, for appellant. Troy, Watts & Letcher, for appellees.

SIMPSON, J. The bill in this case was filed by the appellant to enforce a resulting trust in certain real estate in the city of Montgomery.

In the case of Butts v. Cooper, 152 Ala. 384, 44 South. 619, citing authorities, we defined the nature of resulting trusts and constructive trusts, to the effect that "resulting trust is a trust which arises by operation of law, where the consideration is paid by one party, and the title is conveyed to another. Says Pomeroy: 'In order that this effect may be produced, it is absolutely indispensable that the payment should be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him, as a part of the original transaction of purchase at or before the time of the conveyance.' 3 Pom. Eq. Jur. (3d Ed.) p. 1992, § 1037." "Resulting trusts arise by implication of law, and cannot grow out of a contract to hold the title for a third person who advances the purchase money. * * * Eliminate the testimony as to the verbal agreement, and it would be difficult to find anything from which to conclude that the consideration moved from Butts."

In the present case there is no evidence tending to show that the consideration for the purchase money was actually paid by the complainant. On the contrary, the evidence is without conflict that John D. Letcher, to whom the title was made, paid the purchase money. The utmost that can be made out of the testimony on the part of the complainant is that said Letcher agreed to lend to the complainant the money which he paid for the property, and hold the title for complainant, until the money was paid, and it is attempted to prove this by the testimony of the complainant himself, against the estate of said John D. Letcher. "This is a parol trust pure and simple in violation of the statute."

Moreover, even if this legal difficulty were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not in the way, the judge of the city court properly found that the evidence is not of that conclusive nature required by the law, and the complainant has slept too long on his rights, if he had any.

The decree of the city court is affirmed.
Affirmed.

MCCLELLAN, MAYFIELD, and EVANS,
JJ., concur.

BROWN v. BIRMINGHAM WATERWORKS CO.

(Supreme Court of Alabama. May 12, 1910.
Rehearing Denied June 30, 1910.)

1. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL SUPPLY—WATERWORKS COMPANY—FRANCHISE—CONTRACT TO FURNISH WATER—RATES.

Under the franchise of the Birmingham Waterworks Company, it was entitled to contract with an individual to furnish water for less than the maximum franchise rate and less than the rate charged other individuals for similar service, so long as the discrimination is enjoyed solely at the expense of the company, and does not infringe on the rights of the other consumers.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 290; Dec. Dig. § 203.*]

2. WATERS AND WATER COURSES (§ 203*)—MUNICIPAL SUPPLY—WATERWORKS COMPANY—CONTRACT FOR SERVICE.

Where a waterworks company contracted to furnish plaintiff with water at less than maximum rates, the contract was subject to the implied provision that the charge for water should in no case be greater than the maximum franchise rate nor greater than a reasonable charge.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 290; Dec. Dig. § 203.*]

3. WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—WATERWORKS COMPANY—FRANCHISE—SUPPLY TO CONSUMERS.

A flat water rate provided by a waterworks company's franchise contract would not permit a consumer to use water extravagantly, but only in reasonable quantities sufficient, without inconvenient economy, for the consumer's domestic requirements.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

4. WATERS AND WATER COURSES (§ 203*)—PUBLIC WATER SUPPLY—WATERWORKS COMPANY—CONTRACT FOR SUPPLY—RATES—CONSIDERATION.

A contract by which a waterworks company agreed to furnish a consumer water for a dwelling house, for a specified price per quarter, payable, etc., and by which the consumer agreed to pay the price at such times, was based on a sufficient consideration.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 290; Dec. Dig. § 203.*]

5. WATERS AND WATER COURSES (§ 201*)—DEFINITENESS—DURATION.

A contract by a waterworks company to furnish a consumer water, at a specified price,

as long as she used the premises as a dwelling, was not defective for indefiniteness as to the length of time it was to run.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 201.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Suit by Mary B. Brown against the Birmingham Waterworks Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A. G. & E. D. Smith, for appellant. London & Fitts, for appellee.

EVANS, J. This is a suit brought by appellant, Mary B. Brown, against appellee, Birmingham Waterworks Company, to recover damages arising from the breach of a certain contract in writing whereby appellee contracted and agreed with appellant to furnish water to appellant's dwelling house No. 1136 in the city of Birmingham, Ala., for a certain stipulated price. The contract is set out in full in the complaint. The court sustained demurrers to each count of plaintiff's complaint as last amended, and, plaintiff declining to amend further, the court gave judgment for defendant.

The appellant's counsel in their brief insist upon assignments of error 1, 2, and 8. Assignment No. 1 is that "the court erred in sustaining demurrer to first count as amended." Assignment No. 2 is that "the court erred in sustaining demurrer to second count as amended." Assignment No. 8 is that "the court erred in giving judgment for appellee."

So it would seem that assignments 1 and 2 are all that is necessary to be considered because the eighth assignment will depend upon the proper disposition of these. In other words, if the demurrers were properly sustained, and the plaintiff declined to plead further, then the court was right in rendering judgment for defendant. But, on the contrary, if it erred in sustaining the demurrers, then it erred in the final judgment rendered. Furthermore, if the demurrer is good as to the first count as amended, it is good as to the second count as amended; if bad as to one, it is bad as to the other. The first count is in case for the breach of a duty arising out of the contract. The second is for the breach of the contract. Under the Code of 1907, two such counts can be joined.

The contention of the appellee is that the contract itself is void, and therefore no duties arose from it, and there could be no damages recovered for its breach.

The propositions raised by the demurrer are as follows: (1) That section 12 of the franchise contract between the city of Birmingham and the waterworks company fixed the price to be charged for water for dwellings, water-closets, and bath tubs at a certain rate, which could not be departed from even by the making of a lower charge. (2) That

the said contract is void because that under certain conditions the rate fixed in said contract would be greater than the maximum rate fixed by the franchise contract for water furnished for the purposes mentioned. (3) That said contract is without consideration. (4) That it would work an unjust discrimination in favor of Mrs. Brown, the plaintiff, and against other citizens. (5) That it is uncertain as to duration and therefore terminable at the will of the defendant.

The first of these propositions has been decided by this court quite recently in the case of *State of Alabama ex rel. C. W. Ferguson v. Birmingham Waterworks Co.*, 51 South. 354, in construing the said contract between the city of Birmingham and the defendant in this case. There it is held, in effect, that the said Birmingham Waterworks Company had a right to contract with an individual to furnish water at a less rate than the maximum rate fixed by said franchise contract and less than that charged other individuals for similar service, so long as the "discrimination is enjoyed by those having the favored rate at the expense of the company, and does not impinge upon any rights of other consumers." There is nothing in the complaint that shows that the rights of other consumers have been impinged upon. Therefore the contention of appellee, on proposition 1, cannot be sustained.

The second proposition is that a condition could arise under the provisions of said contract where a greater charge could be made by defendant than that provided by the maximum rate; that is, that the rate provided for in the contract for water in excess of 3,333 gallons per month is such that the excess could be large enough to make the rate greater than the maximum rate fixed by the franchise contract. We think it sufficient answer to this argument to say that the parties contracted with full knowledge of what the franchise contract provided as well as the law, and what limitations the same imposed, and that a proper construction of the contract between appellant and appellee would be that there was implied the following: Provided that the charge for water shall in no case be greater than the maximum provided by said franchise contract, and provided further that it shall not be greater than what is a reasonable charge. Furthermore, the flat rate provided by the franchise contract would not permit a person contracting in accordance with it to use water extravagantly, but only in reasonable quantities, sufficient, without inconvenient economy, for the purposes of dwelling houses, water-closets, and bath tubs. If one should go beyond this, he would be liable for waste. We cannot say, therefore, that the contract of plaintiff, as to the price to be paid under it for water, would exceed the price under the flat rate, as that would depend upon matters which do not ap-

pear in the complaint. In other words, the amount of water which a person situated as plaintiff is would be entitled to under the flat rate might easily be such that the same amount of water could be gotten under the plaintiff's contract for the same or a less price. We are, therefore, of opinion that the second proposition contended for by appellee cannot be sustained.

The third proposition, "that said contract is without consideration," hardly needs to be considered, as a mere reading of the contract will show that the one party agrees to furnish the other water to her dwelling house for a certain price per quarter payable at certain times therein mentioned, and the other agrees to pay the said price at said certain times. There is clearly a consideration moving from each party to the other.

The fourth proposition, that it would work an unjust discrimination in favor of Mrs. Brown and against other citizens, has already been disposed of, against the contention of appellee, in discussing the first proposition.

The fifth proposition, "that it is uncertain as to duration, and, therefore, terminable at the will of the said waterworks company," is untenable, for the reason that it was not indefinite in a legal sense; for it expressly provides that the appellee is to furnish the water, and appellant is to pay the price named at certain stipulated times, as long as Mrs. Brown, the appellant, uses the premises as a dwelling. It cannot be said that this contract is void for uncertainty, for it is expressly terminable upon Mrs. Brown's ceasing to use the premises as a dwelling, which must necessarily be the case some time; for, if she does not move from the premises, she cannot live always. In either event she would cease to use the house as a dwelling, and the contract would terminate. *Christian & Craft Grocery Co. v. Bienville Water Company*, 106 Ala. 127, 17 South. 352.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON, and SAYRE, JJ., concur.

YARBROUGH et al. v. HARRIS.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

1. DEEDS (§ 196*)—VALIDITY—BURDEN OF PROOF.

Where, in an action to set aside a deed, it is shown that the grantee was an intelligent business man, and the grantor a negro woman, ignorant of business and the value and extent of her interests in the property conveyed, and the grantee went to her attorney so as to negotiate the sale, and the sale was for much less than the value of the property, the burden of proof is on the grantee to show that the transaction was fair.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. DEEDS (§ 70*)—VALIDITY—OVERREACHING NEGRO WOMAN.

Where an intelligent business man went to the attorney of a negro woman, and together they negotiated the sale of a piece of her property, the value or extent of interest of which she was ignorant, and secured a full warranty deed thereof for the false recited consideration of \$250, and when in fact she was paid only \$25, and the property was worth \$1,000 or \$1,200, and the attorney, though not shown to have advised her to sell, lent her the money to go with them to the place where the property was situated so as to negotiate the sale, the deed is fraudulent and will be set aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

Suit by Ann Harris against W. T. Yarbrough and others. From a decree for plaintiff, defendants appeal. Affirmed.

W. R. Walker, for appellants. Callahan & Harris and H. C. Thach, for appellee.

MAYFIELD, J. The bill in this case was filed primarily to set aside a deed of conveyance to a tract of land of 25 acres, and personal property to the amount of several hundred dollars, and incidentally to sell the lands for partition and distribution.

The property involved belonged originally to an old negro man named Temp Harris. He died January 26, 1906, leaving a widow, Ann Harris, the complainant, and two or more children, two of whom lived with him upon the land. (which was located in Limestone county, near Athens) at the time of his death. His wife had not lived with him for about 10 years prior to his death, but lived in Morgan county, at Decatur. All the property owned by Temp at the time of his death was less than that exempt, and, he dying intestate, it therefore vested in his wife alone, if all his children were of full age; but, if they were not, then in his wife and minor children jointly.

The evidence is in dispute as to whether or not two of these children were of full age.

The respondent desired to purchase the property soon after Temp's death, and inquired of one W. H. Turrentine, an attorney at law, as to the chance of purchasing it. Turrentine replied that he thought he could buy it. On the request of Yarbrough, Turrentine went with him to Decatur to purchase from the widow, and agreed with her to purchase all her interest in her husband's estate, at the price of \$25. For some cause unexplained, though it is attempted to be explained, she accompanied or came on the same train with them from Decatur to Athens, and the deed was executed within a few minutes after their arrival at Athens; Turrentine writing the deed, and Yarbrough going to get a mortgage which one Lerman held upon the property, which mortgage, on its face, was to secure \$500—as alleged, in or-

der to get the description of the property. The exact amount that was actually due on this mortgage is not shown. Probably it was about \$250, though this is not at all certain.

The deed was an absolute conveyance of the property with full warranties and covenants of seisin and good right to convey and against incumbrances; and it is shown that the widow had other property. Whether Turrentine represented the grantor, or the grantee, or both, as attorney in the matter, it does not clearly appear. In exactly what capacity he acted, or what he received, or was to receive, for his services, and to whom he looked for his compensation, is not certain.

A petition had been filed in the probate court of Limestone county to set aside this property to the widow, and it was so set aside to her. Turrentine acted as attorney in this matter, drawing all the papers, and even signing the name of the widow to the papers. The widow says she knew Mr. Turrentine was looking after it for her, but did not know what he had done. Friends, neighbors, and relatives of Yarbrough assisted Turrentine in having this property set aside to the widow. It is not certain, from all the evidence, whether Turrentine was representing Yarbrough or the widow in this matter. He claims to have represented the widow alone. The papers in these proceedings are in bad form, and the dates and other matters much confused. The petition and proceedings are so confused that it is made to appear from the face of the papers that the petition was filed in court before Temp died. The appointment of the commissioners, their report, the confirmation of the report, and all things else connected with it, are "confusion worse confounded."

The property conveyed is estimated to be worth from \$500 to \$1,900. It was probably worth about \$1,000 or \$1,200, lands and personalty.

The children of Temp had a crop growing on the land when it was sold to Yarbrough by the widow. The proceeds of this crop were applied to the payment of the mortgage debt, and Yarbrough paid the balance, if any.

The recited consideration of the deed was "\$250.00 cash in hand paid"; but the true consideration paid to Ann was \$25, and the balance of the mortgage debt, if any. Turrentine and Yarbrough both claim they did not know the exact amount due on the mortgage debt at the time of the sale, but thought it about \$200 or \$250. The widow is shown not to have known the amount or the value of the property or the extent of her interest in it.

If her attorney knew, he did not advise or instruct her in the matter; but, while professing to represent her, he allowed her to sell, and warrant the title to property worth at least \$500, and probably \$1,900, for \$25.

The chancellor, on the final hearing on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bill, answer, and proof, granted the relief prayed, decreeing that the deed was fraudulent in law, and annulling it; and decreeing that two of the children were under 21 years of age at Temp's death, and that, therefore, they and the widow each acquired a one-third undivided interest in the property; and directing that it be sold for partition and division among them, and that a reference be had, to ascertain the value of the property converted by the grantee, Yarbrough, and that he be charged with and held for the value thereof as so ascertained; and allowing an attorney's fee for services in the matter, dependent upon the amount received from the sale of the property, to ascertain the value of which the reference was ordered, and that such and other matters of reference be reported back to the next term of the court.

The respondent was an intelligent business man, of affairs. He knew the property purchased, knew its value, knew its owner, and knew she was old and ignorant—ignorant not only of the quantity, quality, value, and extent of her own interest and ownership therein, but of everything pertaining to the business. He desired to purchase the property, and for fear she would not sell to him he sought her attorney, and advised with him relative thereto; carried her own attorney to Decatur, to see her, knowing she would rely upon what her attorney advised her. True, he and her attorney say that the latter did not advise her thereto; but they admit that the attorney lent her the money wherewith to pay her expenses back to Athens, with them; and the attorney drafted the deed, which she signed before him, and which he attested, by which she conveyed \$1,000 worth of property to the respondent for \$25, and this deed recited a consideration of \$250 to her in hand paid, which recital was shown to be false.

It is inconceivable that this transaction could be fair and free from undue influence. The parties to it were not by any means dealing on equal terms; on one side were two intelligent persons, and on the other was a poor old ignorant woman. If they had told her that it was best for her to accept \$1 for the property, it conclusively appears from the evidence she would have done so.

Under the state of facts in this case, the burden of proof was upon the purchaser to show that the transaction was fair, just, and righteous. But, no matter upon whom rested the burden of proof, the transaction cannot stand. There is not a single fact to show that it was fair or just; but, to the contrary, every circumstance shows it to have been unfair and oppressive—oppressive of the ignorant, weak, and confiding, by the intelligent, strong, and dominating. *Kidd v. Williams*, 132 Ala. 140, 31 South. 458, 56 L. R. A. 879; *Kyle v. Perdue*, 95 Ala. 579, 10 South. 103;

Shipman v. Furniss, 69 Ala. 556, 44 Am. Rep. 528; *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904; *Cannon v. Gilmer*, 135 Ala. 305, 33 South. 659.

There is no doubt that the decree of the chancellor is correct and righteous, and it is by this court in all things affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

ATLANTIC COAST LINE R. CO. v. RICE. (Supreme Court of Alabama. April 21, 1910. Rehearing Denied June 30, 1910.)

1. CARRIERS (§ 107*)—CARRIAGE OF GOODS—LOSS OR INJURY—LIABILITY OF CARRIER.

The exceptions other than those legally possible of creation by special contract, to the exacting common-law liability of a common carrier of goods, are the acts of God and of the public enemy, where no negligence of omission or commission concurred therewith.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 501-507; Dec. Dig. § 107.*]

2. CARRIERS (§ 205*)—CARRIAGE OF ANIMALS—LIABILITY FOR LOSS—DAMAGE.

In the absence of contract limiting the liability, a carrier is an insurer against such loss or damage to live animals received for shipment, as do not arise from acts of God or the public enemy, nor from the nature or propensities of animals, against which due care could not provide.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 920, 923; Dec. Dig. § 205.*]

3. CARRIERS (§ 132*)—CARRIAGE OF GOODS—ACTION FOR LOSS OR DAMAGE—BURDEN OF PROOF.

The burden is on a carrier in order to escape liability for loss or damage of a consignment received by it to trace the loss or damage to negligence of the shipper, or one or more of the exceptions with which its negligence did not concur.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. § 132.*]

4. CARRIERS (§ 39*)—CARRIAGE OF GOODS—DUTY TO TRANSPORT.

A common carrier is in general bound to transport all goods that are properly offered for that purpose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98; Dec. Dig. § 39.*]

5. CARRIERS (§ 111*)—CARRIAGE OF GOODS—LIABILITY FOR LOSS—ACCEPTANCE OF SHIPMENT.

Where a carrier accepts goods improperly packed, their condition being open to ordinary observation, the duty attaches of using due care for their safe carriage, and the carrier is subject to all the liabilities ordinarily attaching to an ordinary shipment of the same character.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 507; Dec. Dig. § 111.*]

6. CARRIERS (§ 39*)—CARRIAGE OF GOODS—DUTY TO ACCEPT FOR SHIPMENT.

A carrier has the right to inspect proffered shipments and to refuse them when not in fit condition for transportation, and, where ordinary observation would discover their unfitness, it is the duty of the carrier to refuse the

shipment in order that the shipper may put it into a fit condition for transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 98; Dec. Dig. § 39.*]

7. CARRIERS (§ 217*)—CARRIAGE OF LIVE ANIMALS—LIABILITY FOR LOSS—CONTRIBUTORY NEGLIGENCE OF OWNER.

That a shipper of dogs delivered them to a carrier in a crate which was insufficient, so that a dog escaped, was not negligence exonerating the carrier; the defense of contributory negligence not being available in such case.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 981; Dec. Dig. § 217.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Action by Julian M. Rice against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint in substance alleged that the plaintiff bought a ticket at Kissimmee, Fla., to Montgomery, Ala., paying therefor \$1.75; that he presented the ticket to the agent at Kissimmee, together with the crate containing two dogs, and that the agent delivered him a check for said crate, charging him the excess therefor, from Kissimmee to Montgomery; that when he delivered the crate to defendant's agent it contained two dogs; and that when he presented his check at Montgomery, and the crate was delivered to him, one of the dogs had escaped. Plea 3 was as follows: "For further answer defendant says that the plaintiff presented for transportation two dogs in a box which was locked, and to which plaintiff had and retained the key, and that defendant accepted said box containing said dogs in the condition it was at the time of its delivery by plaintiff, to wit, for carriage, and that while the said box was in the same condition as when presented to and accepted by defendant, the dog, for a failure to deliver which this action is brought, escaped from said box and from the car of this defendant, in which it was being transported, without fault on the part of this defendant, its agents or servants. This defendant therefore pleads that the escape and loss of the dog was wholly due to the fault of the plaintiff, and not to any fault of this defendant, its agents or servants."

A. H. Arrington and John R. Tyson, for appellant. Fred S. Ball and Frank Stollenwerck, for appellee.

McCLELLAN, J. The action is for breach of a contract between appellee (plaintiff) and the appellant, a common carrier, to transport and deliver a dog from a point in the state of Florida to appellee at Montgomery, Ala.

Plea 3, which will be set out in the report of the appeal, avers, in substance, that the dog escaped, in transit, from the locked crate, appellee having the key, in which it

was when delivered to the carrier by appellee, and from the appellant's car, without fault of the carrier; and that the crate or box was delivered to appellee at Montgomery in the same condition as when received by the carrier at the initial point in Florida; and concludes that the loss of the dog was wholly due to the fault of the appellee. It is necessarily inferable from the averments of the plea that the escape of the dog from the crate or box was effected through an opening therein.

Whatever may have been, or may now be, the opinion elsewhere prevailing, it is settled with us that a carrier, undertaking to transport and deliver live animals, is subject to the same responsibilities, with respect thereto, as in ordinary cases of goods received for transportation by a common carrier, except it is not accountable for, and does not assume the risk of, loss or damage to live animals "arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." *Central Railroad v. Smith & Chastain*, 85 Ala. 47, 4 South. 708; *South & N. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 South. 649. The exceptions, aside from those legally possible of creation by special contract, to the exacting common-law liability of a common carrier in the carriage of goods, are the acts of God and of the public enemy, where no negligence, of omission or commission, concurred therewith to produce the damning result. *Authorities supra*; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *McCarthy v. L. & N. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; *Green v. L. & N. R. Co.*, 50 South. 937. In short, in the absence of contract limiting liability, the rule here is that a common carrier, in cases of loss or damage to live animals received for shipment, is an insurer against such loss or damages as do not arise from the act of God, the public enemy, and those arising from the nature and propensities of the live animals so received for transportation, and against which due care could not provide. And to avail in exoneration of legally unmodified liability of the common carrier for the loss or damage of a consignment received by it, the burden is on the carrier to trace the loss or damage to negligence of the shipper, or to one or more of the exceptions, with which its negligence did not concur. *Authorities supra*.

Counsel for both litigants construe plea 3 as asserting, when reduced to legal formula, that where the shipper of a live animal crates or boxes it, the shipper, and not the common carrier, assumes the risk of escape of the animal therefrom if such escape results from the nature and propensities of the animal. To state the matter otherwise: That where such live animal is crated or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

boxed by the shipper and escapes therefrom, after reception by the carrier, as the result of natural propensity, the shipper, and not the carrier, is negligent.

It is not contended that the carrier was ignorant of the character of the shipment. The carrier affirms, by its plea as construed by counsel, and the shipper (here) denies, by his demurrer thereto, the correctness of the proposition. The gist of the argument in negation of the soundness of the proposition is that the carrier, by receiving the animal so crated or boxed, assumes the risk of the sufficiency of the inclosure, else it should refuse to receive the subject of the shipment if ordinary observation would disclose its insufficiency. On the other hand, the gist of the argument in affirmation of the proposition is that by offering a self-contrived inclosure for the live animal the shipper relieves the carrier of any duty to overlook the inclosure with a view to restraining the natural propensity of the animal to leave confinement in the crate or box. Without considering or treating the plea as asserting, well or ill, any other matter of defense than that which counsel for both parties ascribe to it, we will decide only the question raised below and argued here.

Subject to the exception, among others not now necessary to enumerate, that it may properly refuse to accept for transportation goods "tendered in an unfit condition" therefor, a common carrier is duty bound to transport all goods that are properly offered for that purpose. 4 Elliott on R. R., § 1466; 1 Hutchinson on Carriers, §§ 143, 145. While the carrier may refuse to accept goods improperly packed, yet if it accepts them in that condition—a condition open to ordinary observation—"the duty attaches of exercising due care for its safe carriage." Union Ex. Co. v. Graham, 26 Ohio St. 595; E. J. & E. Ry. Co. v. Bates Machine Co., 93 Ill. App. 311, 315; Hannibal R. R. v. Swift, 12 Wall. 262, 272, 20 South. 423; 4 Elliott on R. R., § 1466, p. 134; Munster v. S. E. Ry. Co., 4 C. B. N. S. 676. Mr. Elliott, at the citation last made from his work, says: "If goods which may be properly rejected are actually, not merely constructively, accepted for carriage, the common carrier's liability attaches."

In the case of Hannibal Railroad v. Swift, supra, the Supreme Court dealt with this state of fact: An army surgeon was en route under orders, with a part of the command to which he was attached, from South Dakota to Cincinnati. At St. Joseph, Mo., it was necessary to use appellant's line of road across to Hannibal, in that state. Along this line of road the country was represented by appellant's servants as being in a state of insurrection dangerous to persons and property on its trains, and, on this ground, refused to engage at St. Joseph, for the transportation of the troops, their equipment and the personal effects of the appellee, Swift, to Hannibal. On demand of the com-

manding officer the appellant furnished the required transportation for troops, baggage, etc., including the chattels of the appellee, and the effects of the plaintiff were loaded in a car by the troops. The appellant's agents took charge of the car after it was loaded and locked up by the commanding officer, and placed it in the train. These agents had nothing to do with the selection, loading, or packing of the car. En route the car was burned, and with it appellee's effects. The court, through Justice Field, said: " * * * The liability of the carrier attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed. * * * If objection existed on any of these grounds, or on any other ground not concealed but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading. * * * Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier. * * * The common carrier is regarded as an insurer (subject to exceptions, we interpolate) of the property carried, and upon him the duty rests to see that the packing of the conveyance is such as to secure safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property." For the value attached to the decision as authority, see 7 Rose's Notes, pp. 542, 544.

We think it can be safely ruled, in accord with Hannibal R. R. v. Swift and the other texts and decisions cited, that, first, the carrier has the right to inspect proffered shipments and to refuse their acceptance when not in fit condition for transportation; second, that, if unfit for shipment, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may, if he can, conform the shipment to a fit condition for transportation; and, third, that the acceptance of a shipment for transportation, without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

In this instance—that shown by the complaint and by plea 3—the character of the shipment, viz., live animals in a box or crate, and their natural propensity to escape confinement, were known to appellant's servants. The tender for transportation was of

these animals, and not, primarily, of the box or crate which was but a means to conserve convenience of custody and handling and the safety of the animals within it. If the dog had been leashed with cords attached to a heavy block, there would have been, in principle, no difference. If that had been the means employed, the carrier could not, after acceptance of the shipment, have answered, when impleaded for the loss or injury of the animal, that the cord was too sleazy to serve the purpose, and hence that the shipper was negligent in that regard, with the result that he could not recover for the loss or injury. That this is true is demonstrated, we think, when the announcement of duty in *Central R. R. v. Smitha & Chastain*, by way of approving quotation from *Penn. v. B. & E. R. Co.*, 49 N. Y. 204, 10 Am. Rep. 355, is considered, viz.: " * * * They are not insurers of animals against injuries to animals arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." (Italics supplied.)

It will be observed that this court did not conclude, in the quotation, to the common carrier's exoneration solely upon the ground that the injury arose from the nature and propensity of the animal. That, alone, will not suffice to exonerate the carrier in case of loss to a live animal after acceptance for transportation. The natural propensity of the animal that may lead to injury or loss must be anticipated "by foresight, vigilance and care," if the transportation thereof is undertaken. The very statement of the rule of duty—to exonerate—precludes any right of the carrier to transfer the consequences of its neglect in this regard to the shipper. *Hannibal R. R. v. Swift*, supra. Being bound in duty, as *Central R. R. v. Smitha & Chastain* defines it, it would be obviously illogical—an immediate qualification of the duty declared—to close the responsibility of the carrier for restraint thereof against natural propensity to escape when the shipper tenders and the carrier accepts a live animal, boxed or crated, for transportation. The carrier may, in a proper case, refuse a shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment, as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation. It follows, of course, that the insufficiency of the crate or box from which the dog escaped, for the purpose here disclosed, was not negligence exonerating this carrier. There is no such thing as contributory negligence in cases of this character (*McCarthy v. L. & N. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29) for the satisfactory reason that if negligent at all in the loss of or dam-

age to goods committed to a common carrier for its service the carrier is liable, the plea of contributory negligence being one of confession and avoidance.

The demurrer to plea 3, on the theory respectively asserted and denied by counsel, was properly sustained. On like considerations to those inducing our conclusion as respects plea 3, the demurrer to replication 2 was well overruled.

A careful review of the evidence, especially with reference to the material averments of plea 2, which counsel for appellant insist were proven without dispute, does not convince this court that the court below (the trial was without jury) reached an erroneous conclusion as upon the facts and circumstances in evidence.

The allegation in the complaint of the sum paid was under *videlicet*, and hence the insistence, for appellant, of variance in respect of the sum alleged and that proven cannot prevail.

The judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

ALABAMA STEEL & WIRE CO. v. SELLS et al.

(Supreme Court of Alabama. Feb. 1, 1910.
Rehearing Denied June 30, 1910.)

1. APPEAL AND ERROR (§ 1079*)—WAIVER OF ERRORS ASSIGNED.

An assignment of error on the record, without more, does not amount to insistence in argument, and the assignment will be regarded as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262; Dec. Dig. § 1079.*]

2. APPEAL AND ERROR (§ 1079*)—ASSIGNMENTS—WAIVER OF ERRORS.

Appellants assigned errors as follows: "The questions propounded by plaintiff to the witnesses (assignments 10, 16, 23, etc.) with reference to the condition of the mines at periods remote from the time of the accident were improper." "The charges given at plaintiff's request were erroneous. Defendant's first charge should have been given. The second, fourth, eighth, ninth, tenth, eleventh, and twelfth charges refused to defendant were also clearly proper charges and should have been given." "Its rulings on demurrers to the complaint and sustaining demurrers to defendant's plea were erroneous." *Held*, that such repetition of assignments on the record could not be considered an insistence in argument, and the assignments were waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262; Dec. Dig. § 1079.*]

3. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR.

Where counts are withdrawn and evidence introduced thereon excluded, exceptions to the introduction of the evidence are rendered unavailable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1053.*]

4. NEW TRIAL (§ 156*)—PRESERVATION OF MOTION—CONTINUANCE.

Error in the overruling of a motion for new trial is not available where the motion was not kept alive, but was suffered to be discontinued by failure to have it regularly continued on the docket.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 156.*]

5. APPEAL AND ERROR (§ 230*)—OBJECTIONS—REMARKS OF COUNSEL.

Objections to the remarks of counsel must be made at the time, and cannot be made available on appeal by objection made for the first time on motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230.*]

6. EXCEPTIONS, BILL OF (§ 36*)—FILING AND SIGNING—TIME.

A bill of exceptions signed more than six months after the trial and after the commencement of a subsequent term of court, and before the adoption of the present Code, is not available under Rule 30, Circuit Court Practice, Code 1896, p. 1200.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 36.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by W. R. Sells, as administrator, and others against the Alabama Steel & Wire Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Forney Johnston and Joel F. Webb, for appellant. Stallings & Drennen, for appellees.

DOWDELL, O. J. The mere repetition, in brief of counsel for appellant, of the assignment of an error on the record, without more, has been repeatedly decided by this court not to amount to insistence in argument, and in such case the assignment will be regarded as waived. *Birmingham Railway, Light & Power Co. v. Oldham*, 141 Ala. 200, 37 South. 452; *B. R., L. & P. Co. v. Landrum*, 153 Ala. 192, 45 South. 201, 127 Am. St. Rep. 25, and other cases.

As a sample of the argument in appellant's brief, on many of the assignments of error, we quote the following: "The questions propounded by plaintiff to the witnesses (assignments 10, 16, 23, etc.), with reference to the condition of the mines at periods remote from the time of the accident, were improper." "The charges given at plaintiff's request were erroneous. Defendant's first charge should have been given. The second, fourth, eighth, ninth, tenth, eleventh, and twelfth charges refused to defendant were also clearly proper charges and should have been given." "Its rulings on demurrers to the complaint and sustaining demurrers to defendant's pleas were erroneous." This, in reality, is nothing more than a repetition of the assignment on the record, and, under the cases above cited, cannot be considered an insistence in argument.

All of the counts of the complaint counting on negligence of Anderson Donaldson, the fire boss, were withdrawn by the plaintiff,

and with plaintiff's consent the evidence introduced under these counts as to the negligence of said Donaldson was excluded by the court. Exceptions reserved on the introduction of this evidence were thereby rendered unavailable.

The overruling of the motion for a new trial is assigned as error. The appellee contends that the motion was "not kept alive as required by law" in the court below, but was suffered to be discontinued by a failure to have the motion regularly continued on the docket. Whatever of force might otherwise be found in this contention, it is overcome by the fact that after the time of the alleged discontinuance the appellee consented to an amendment of the motion, and went to trial on it without objection. In this there was a waiver of the discontinuance. *McCarver v. Herzberg*, 135 Ala. 542, 33 South. 486.

One of the grounds for the motion for a new trial, and which is here separately assigned as error, that is insisted on in argument, and the only one that is argued with a degree of seriousness, relates to the remarks of counsel for plaintiff to the jury. The bill of exceptions, however, in this connection, recites that "no motion was made by defendant's counsel to exclude from the jury the remarks of plaintiff's counsel above stated. The court made no comment at any time with reference to the same, and did not rebuke counsel for plaintiff for the use of such remarks, and defendant's counsel reserved no exceptions to the court's action in reference thereto." So it appears that neither objection nor exception was taken at the time of the remarks of counsel.

We know of no decision of ours that holds that objection can for the first time be made and availed of on a motion for a new trial. It should have been made, and exceptions duly reserved, at the time of the trial.

We find no reversible error in anything that is insisted on in argument by counsel for appellant. The judgment will be affirmed.

Since the writing of the foregoing opinion, counsel for appellant have filed what is designated as a supplemental brief. In this brief, assignments of error not insisted on in the original brief, filed at the time of the submission of the cause, are now for the first time urged in argument.

Counsel for appellee insists that what purports to be a bill of exceptions in the transcript was not signed within the time prescribed by law. An inspection of the record discloses that the bill was signed more than six months after the trial, and after the commencement of a subsequent term of the court. This all transpired before the adoption of the present Code (1907). Rule 30, Circuit Court Practice, Code of 1896, p. 1200; *Bank & Trust Co. v. Keith*, 136 Ala. 409, 34 South. 925.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We were at first of the opinion that the discontinuance of the motion for a new trial, made in the court below, had been waived by appellee's consenting to an amendment of the motion after the discontinuance arose. We find upon further investigation that we were mistaken in supposing, or rather, in concluding, that such consent had been made.

The bill of exceptions, not having been signed as required by law, cannot be considered as to the original hearing, nor as to the motion for a new trial, since any rights under that motion had failed by reason of the discontinuance.

We see no reason for changing our first conclusion of an affirmance of the judgment appealed from.

Affirmed.

ANDERSON, SAYRE, and EVANS, JJ., concur.

GRAYSON v. DU BOSE.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Suit by W. T. Du Bose against Mayme O. Grayson. From a decree for complainant, defendant appeals. Affirmed.

Lawrence Cooper, Jas. H. Ballentine, and S. S. Pleasants, for appellant. Brickell & Smith, for appellee.

MAYFIELD, J. The majority of the court, after full consideration of this case, are of the opinion, and so decide, that the decree of the chancellor or trial court is correct, and that there is no reversible error in the record.

From this conclusion, however, MAYFIELD, J., dissents, and expresses the following views, in which EVANS, J., concurs:

MAYFIELD, J. (dissenting). The appellee filed his bill against the appellant, a married woman, to foreclose a certain mortgage on a lot in Huntsville, Ala., by her and her husband executed to appellee to secure the payment of a note executed by appellant alone. The appellant answered the bill, and made her answer a cross-bill, thereby seeking to have the mortgage declared void, because it was executed on her property, not to secure her debt, but that of her husband, and was therefore void under the statute of this state (Code, § 4497), which prohibits the wife from directly or indirectly becoming surety for her husband.

There are but two questions disputed—but two necessary to be decided—and the determination of these will afford a correct decision and disposition of all questions raised on this appeal: (1) Was the debt secured by the mortgage that of the wife or of her husband (it being indisputably shown to be

that of the one or of the other, and not, of both)? (2) If the debt of the husband, was the wife estopped from showing the truth of the matter?

The record, we think, conclusively shows that in truth and in fact it was the debt of the husband, though writings speak the contrary. The writings and the parol evidence, taken together, show a clear attempt to evade or avoid the statute. It is clearly shown that the wife did not borrow the money, that she did not want it, and did not want her husband to borrow it, but that under the influence of her husband she finally consented to make the application, and to sign the note and mortgage and receipt, all at the same time; that by this means the husband, and not she, really obtained the loan, though on the face of the papers it is made to appear that she was the borrower; that in order to perfect this plan, and in order that the transaction should apparently be within the law (when as a matter of fact and truth it was clearly a violation of the law), the \$1,000 loaned and to be secured by the mortgage—every dollar in gold—was brought to her at her house, and delivered manu captu, and she was requested to count it, which she declined to do, saying that she did not want it; and according to her testimony she wept because she had thus to receive it, and to sign the papers necessary to get that which she did not want—that which, as a matter of fact, it was never intended she should enjoy, and which, in reality, she was not allowed to retain. Her obtaining this money, as is clearly shown, would have rendered the loan absolutely useless to her or to anyone else; her having or owning the money would no more have served the only purpose of the loan than if it had never been made.

The undisputed evidence shows that this formality of her signing the application, note, mortgage, and receipt, and acknowledging the same, and receiving the counted money, was no sooner consummated than the money was, without her request or consent, taken from her and delivered to the attorney who borrowed it from the mortgagee (ostensibly for her, but really for her husband), and by him paid over, together with \$1,400 or \$1,500 of the husband's money, in settlement of a debt of the husband, amounting to about \$2,500, which was necessary to be paid on that particular day or the next, in order to redeem some property of the husband which had been in litigation conducted for the husband by this same attorney, and which, by decree of the court or operation of law, would be lost unless redeemed on one or the other of said days. The evidence leaves no room to doubt that this was the purpose, and the only purpose, for which the loan was negotiated.

While the attorney who negotiated the loan says the husband told him his wife wanted it, and while this may be true, yet

it was only a part of the necessary plan to comply with the statute. He could not, under all the facts, have been unconscious of the fact that it was the husband who desired the loan, and that he had to have it by the given date. If the contrary had been true, why the haste of negotiating the loan by telephone, and of having the check cashed in gold before the closing of the bank? The wife was not shown to have needed the money, nor indeed to have wanted it, unless for the creditors of the husband; and, if for this object, the attorney was certainly chargeable with knowledge that it was in truth the husband who wanted it. She being so nigh at hand, assuredly this was enough to cause the attorney to inquire of her as to the facts before negotiating the loan in such haste.

We do not mean to charge bad faith on the part of the attorneys or on that of the husband. The husband was in dire distress; the attorneys were evidently trying as best they could to save his property, and thus, incidentally, to save the wife, but, in order to do this, it appears that it was necessary to avoid the statute, and this was clearly attempted to be done. There was nothing criminal in this, but nevertheless the act was void, because the statute makes it so.

Next, is the wife estopped, by signing the application, the note, mortgage, and receipt, from now disputing same? We think not. The parties who induced her to sign it either knew that the loan was not for her, but for her husband, or were chargeable with knowledge thereof. Certainly they had such notice of these facts as was sufficient to charge them with knowledge. The husband says it was his debt, and that the attorneys knew it, the wife says it was his debt and that the attorneys knew it; and the attorneys say they did not know it, but they do admit having had cognizance of facts such as were sufficient to charge them with knowledge. The wife made no representations whatever, directly to the mortgagee, to procure the loan; all that were made were made by the attorney. The attorney did not profess to be employed directly by her to negotiate the loan, but only indirectly by her husband, who professed to be her agent, and who now says he was not her agent. As said above, we think that all the evidence shows he was not her agent in negotiating the loan, but was acting for himself. It is unnecessary to try to reconcile the testimony of the attorney with that of the husband, or to decide which was correct; the result must be the same in any event.

The attorney who negotiated the loan evidently represented both parties to the transaction. All the evidence shows that the husband requested him to make the loan—the husband saying it was for himself; the attorney, that the husband as the agent of the wife employed him; and the mortgagee saying that, on account of the confidence he

had in the attorney, he was willing to risk the loan to him—had employed no one to represent him in the transaction, and omitted to look after it himself.

If the mortgagee was not represented by the attorney who negotiated the loan, then he was not represented at all. He of course consented to it, and sent the check; but the terms of the security, the execution of the mortgage, and the recording thereof, and the collection of the interest, at least, were matters intrusted to the same attorney who represented the mortgagor and the loanee. So whatever knowledge or notice the attorney had as to this matter, both parties were chargeable with.

It appears that the attorney had not only represented both parties on former occasions, but was exceedingly friendly and intimate with both, being, besides their attorney, the nephew of the mortgagors; that the mortgagee was an intimate friend of his, between whom and himself there subsisted an unusual degree of mutual confidence and trust; that by an agreement with this mortgagee the attorney had, on former occasions, used the name of the mortgagee in making loans in Huntsville, when the money lent was in fact that of the attorney himself. And evidently, in this transaction in hand, he represented both parties—not for any improper purpose, but because of his friendship and relations to all the parties concerned; not upon consideration of any profit to himself for such double service, for he received none, but purely to save to both parties costs and time. Both the mortgagor and her husband knew full well as to the attorney's relations in the matter; neither of them could have been deceived therein because both were cognizant of the double capacity in which his services were rendered.

The statute in question shows by its very working that the legislators expected that attempts would be made to evade it, and consequent care to prevent its successful avoidance. It (the part in question) reads thus: "But the wife shall not *directly* or *indirectly* become the surety for the husband." This is exactly what was attempted to be done in the case at bar. The money obtained was not hers at all, and was not intended for her; its temporary delivery to her was purely formal, and made under the idea that it was a compliance with the statute. That thereby it was constituted *her* loan. But the money obtained was used by the husband, on the very day it was procured, for the only purpose for which it was borrowed. He no doubt intended to pay the debt himself, and had he been able to pay it, his wife would probably never have heard of it. He did pay the interest, without her knowledge or consent, and later procured an extension of the loan; and it was only upon his failure and bankruptcy that resort was had to the surety, the wife.

It is true that the wife, under our statutes, can mortgage or sell her property, and may use the proceeds obtained thereby in payment of the husband's debts, without violating the statute. *Sample v. Guyer*, 143 Ala. 615, 42 South. 106; *Hamill's Case*, 127 Ala. 90, 28 South. 558; *Hollingsworth v. Hill*, 116 Ala. 184, 22 South. 460; *American Mortgage Co. v. King*, 105 Ala. 358, 16 South. 889; *Ginn v. N. E. Mortgage Co.*, 92 Ala. 135, 8 South. 388; *American Mortgage Co. v. Thornton*, 108 Ala. 258, 19 South. 529, 54 Am. St. Rep. 148. But the wife cannot, under the guise of doing this, mortgage her lands to secure a debt of the husband. He and she, by making the papers recite that it is her debt, cannot make it so, if in fact it is not, unless by way of estoppel. Of course they will not be allowed to perpetrate a fraud upon an innocent purchaser or mortgagee without notice of the fact that it was the husband's debt; neither will they be permitted to violate the statute by making what is in form an absolute sale and deed of her property, but which is in fact only a mortgage of her property to secure his debt, but of course if the purchaser was not a party to the transaction, and was not chargeable with notice of the real truth, he would be protected, because they would be estopped from showing the truth. *Henderson v. Brunson*, 141 Ala. 674, 37 South. 549.

The doctrine of estoppel as to married women is not very certain or well defined. The uncertainty to some degree results from the fact that the statutes in the various states, for the last 100 years, have been constantly changing her common-law rights, powers, and duties, which modifications necessarily more or less affect the rule and doctrine of estoppel as applied to her. At one time, under the common law, she could not contract at all, and for that reason could not be bound by estoppel. By statutes her disabilities have more or less been removed; and where so removed as to allow her to contract, she can be bound by estoppel as to matters embraced in her contracts. *Vincent v. Walker*, 93 Ala. 165, 9 South. 382. As a general rule, a married woman is not estopped from asserting title to her land, except by fraud. She must and can convey it only in the mode and for the purpose authorized by law. But a married woman who executes a deed or other conveyance of her land, upon a sufficient consideration and in the manner prescribed by statute, is thereby estopped to deny its validity, or to set up an after-acquired title thereto. *Harden v. Darwin*, 77 Ala. 472; *Parker v. Marks*, 82 Ala. 548, 3 South. 5; *Zimmerman v. Robinson*, 114 N. C. 39, 19 S. E. 102. But if the deed be executed not as prescribed by statute, or founded on a consideration not authorized by law, she is not estopped thereby.

Where the husband is authorized to act as the agent of the wife, and, with her con-

sent, wrongfully appropriates her property to his use, the wife is estopped from reclaiming the property, in the absence of fraud on the part of the husband and on the part of the assignee of the property wrongfully converted by the husband to his use. *Bank v. Nelson*, 106 Ala. 535, 18 South. 154.

It is said that no person can be estopped by an act that is in itself illegal and void; that conveyances cannot be affected by the doctrine of estoppel, which the law expressly prohibits, otherwise the law would provide for its own evasion; but an apparent exception to this rule is that no one will be allowed to take advantage of his own wrong—to acquire an advantage over an innocent person who relied upon and acted upon the wrong, not knowing the truth, and not being chargeable with knowledge thereof. *Vincent v. Walker*, 93 Ala. 165, 9 South. 382; *Russell v. Peavy*, 131 Ala. 567, 32 South. 492; *Shook's Case*, 140 Ala. 577, 37 South. 409.

The statute in question has been often construed by this court, and has been held to be founded upon public policy, to protect the estate of the wife against the influence of the husband or of other persons, or even against her own inclination to subject it to her husband's debts. The wife being expressly prohibited by statute from so contracting to secure her husband's debts, she is not, and ought not to be, estopped to deny her power to do what the law forbade. Equity will not, by setting up an estoppel against her, accomplish the exact thing that the statute and public policy prohibit. *Richardson v. Stephens*, 122 Ala. 301, 25 South. 39; *Elston v. Comer*, 108 Ala. 76, 19 South. 324; *Russell v. Peavy*, 131 Ala. 567, 32 South. 492. But these cases do not hold, nor recognize the law to be, that the wife may not estop herself by actual fraud, or concealment or suppression of the truth.

Was there such fraud on the part of the wife in this case as to estop her? We think not. She was guilty of no fraud, intended none, and committed none. The record shows that the mortgagee had parted with the money before she ever made any application or had any knowledge of the loan. True, she signed an application for the loan, and signed a receipt for the money, concurrently with the signing of the note and mortgage, but this was clearly done under the influence of her husband, against her wishes and protest, and to enable him to secure the loan for himself. The husband may have deceived the attorney and the mortgagee, but she did not. It is not at all certain that the mortgagee was deceived by any one. The attorneys, if they did not have actual knowledge of all the facts, were unquestionably chargeable therewith; and certainly the wife did not deceive or mislead them because she did only what her husband requested and insisted that she do, and even this over her protest. She did not profit a cent by the

transaction, and it was never contemplated that she should do so. If she had accepted and retained the money when tendered to her, it would have defeated the whole object and purpose of the loan; and it would not have been negotiated had the husband or the attorneys known that it would not be used to pay off the balance of the husband's debt, necessary to redeem his land, to which purpose it was almost simultaneously applied.

It does not seem that the mortgagee should lose his debt, but it is equally hard that the wife should lose her home and her all. Courts must construe the law as it is written, and not as it ought to be. We sit here "dicere, et non dare legem."

The statute clearly and surely expressly forbade this transaction of the wife's—the executing of this mortgage to secure the debt of the husband. As long as the statute exists it should be upheld.

In my opinion the decree of the chancellor should be reversed, and a decree here rendered, granting the relief prayed in the cross-bill.

In accordance with the conclusion of the majority of the court the decree of the chancellor is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, McCLELLAN, and SAYRE, JJ., concur. MAYFIELD and EVANS, JJ., dissent.

BRAMLETT v. KYLE et al.

(Supreme Court of Alabama. June 16, 1910.
Rehearing Denied June 30, 1910.)

1. HOMESTEAD (§ 108*)—PROPERTY OF INDIVIDUAL PARTNER—MORTGAGES—EXONERATION—PRINCIPAL AND SURETY.

Where a firm mortgaged firm property, and also the homestead of one of the individual partners, to secure a firm debt, both parties being jointly and severally liable for the debt, the partner owning the homestead as to that property did not occupy the position of a surety for the firm, and hence he could not compel the creditor to proceed against the firm property in exoneration of the homestead; he being entitled at his election to foreclose against the homestead without reference to the firm property.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

2. HOMESTEAD (§ 171*)—EXEMPTION—WAIVER.

A partner, by mortgaging his homestead to secure a firm debt, waived his homestead exemptions.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 338; Dec. Dig. § 171.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by L. W. Bramlett against T. S. Kyle and others. Judgment for defendants, and plaintiff appeals. Affirmed.

George D. Motley, for appellant. O. R. Hood and A. R. Brindley, for appellees.

McCLELLAN, J. In 1906 L. W. Bramlett (complainant) and J. M. Sullivan borrowed, on mortgage of real estate jointly owned by them, of the Merchants' & Farmers' Bank, \$7,000. In order to take up the bank mortgage and to satisfy demands against the firm of Bramlett & Sullivan, they, in 1908, borrowed of Amos E. Goodhue \$7,500. The security for the note executed by them to Goodhue was a mortgage on the jointly owned real property of Bramlett and Sullivan, and also on separate property belonging to Bramlett, alleged to be his homestead. All of the money derived from the Goodhue loan was, it is averred, applied to the joint obligations of Bramlett and Sullivan, and none of it to the individual benefit, it is alleged, of Bramlett. This latter mortgage was assigned to T. S. Kyle. He entered upon its foreclosure, under its power, by the advertisement for sale of only that part of the property, covered by the mortgage, described as being, and which was and is, the individual, separate property of Bramlett. This provision was incorporated in the mortgage: "The note herein mentioned and this mortgage are given to secure a loan of money made by the said Amos E. Goodhue to the said J. M. Sullivan and L. W. Bramlett. The livery stable lot described above is owned jointly by the said J. M. Sullivan and L. W. Bramlett and the other property is owned individually by the said L. W. Bramlett, but it is intended that all the property herein conveyed shall secure the whole indebtedness."

The indicated effort at foreclosure was restrained on the theory, to be read from the bill, that the equitable doctrine of suretyship and the rights of a surety alleged to be invested in Bramlett required the mortgagee (assignee) to first exhaust the joint property before resorting to the sale of the individual, separate property of Bramlett, described in the mortgage.

While the ruling below might be justified on other grounds, we prefer to determine the appeal upon the consideration to be stated.

The essence of the doctrine attempted to be asserted in this instance is, of course, that the relation of principal and surety, as to Bramlett's individual property described in the mortgage, prevailed in respect of the Goodhue debt and mortgage. Was Bramlett a surety? Was he or not a principal in the obligation to satisfy the Goodhue debt?

In *Mobile & Ohio Railroad Co. v. Nicholas*, 98 Ala. 92, 128, 12 South. 723, 736, it was said: "The relation of surety does not exist when the party contracting is the direct beneficiary and the contract is entered into by him for his own benefit." The doctrine of the quoted case was recognized in the case of *Wimberly v. Windham*, 104 Ala. 409, 412.

16 South. 23, 53 Am. St. Rep. 70. In this case H. T. Wimberly received from Nicholson cotton on which Scott & Co. claimed a lien, and in settlement or adjustment of that claim H. T. Wimberly and Nicholson executed to Scott & Co. a promissory note. This note was transferred by the payees to Windham. Wimberly, on the trial of the suit on the note, asserted that he was a mere surety on the note. Because he was "directly interested in and benefited by the settlement made with Scott & Co."—this being the consideration of the contract sued—Wimberly was held to be a principal, not a mere surety.

The debt to Goodhue was the joint and several obligation of Bramlett and Sullivan. Each was liable for all of it. Each derived from the loan to them a direct benefit. That the sum so received from Goodhue was used to satisfy the bank mortgage debt—a debt to pay which Bramlett and Sullivan were principal obligors—did not alter the status so far as the purpose of this bill is concerned. Bramlett, by means of the Goodhue loan, discharged an obligation, a liability, personal to him, and hence was individually benefited by the operation. To secure the loan he contributed an individual asset; but this act or service, though redounding to the benefit of Sullivan, his co-obligor, could not operate to make him a surety when he, himself, was a principal obligor to the holder of the mortgage debt. He could not, as to the mortgage creditor, be both a principal and a surety, at one time, in respect of one obligation.

Counsel for appellant cites in brief, as supporting his contention of equitable substance in the original and amended bills, the following of our decisions: *Thomas v. St. Paul Church*, 86 Ala. 138, 5 South. 508; *Clark v. Dane*, 128 Ala. 122, 28 South. 960; *Bragg v. Patterson*, 85 Ala. 233, 235, 4 South. 716; *Newbold v. Smart*, 67 Ala. 326; *Gresham v. Ware*, 79 Ala. 192; and *Pac. Guano Co. v. Anglin*, 82 Ala. 492, 1 South. 852.

The doctrines of these several decisions, in the particulars here appealed to for appellant, are sound. They cannot, because inapplicable, influence the conclusion on this appeal. *Clark v. Dane*, *Bragg v. Patterson*, and *Newbold v. Smart*, were instances where the doctrine of contribution, between persons occupying, toward each other, the relation of surety, was involved and necessarily affected the rights of the original debtor parties between themselves. That, as between the obligors, the relation of surety may prevail, notwithstanding all are principals to a common creditor, is well settled in the cited cases, among others *Thomas v. St. Paul Church* reckoned with the kindred doctrine of exoneration—exoneration of the surety's or guarantor's liability by the invocation of equity to compel the principal debtor to satisfy the demand or liability for which the surety stood responsible.

The doctrine of contribution between joint obligors rests, as of course, upon the ante-

cedent fact that the actor co-obligor has discharged all, or more than his share, of the common obligation. It is a proceeding by a co-obligor against his fellow, and is not a process directed against the common creditor. The kindred doctrine of exoneration is the weapon of the surety, whether that relation be affirmed by the contract itself, or be the product of equity's motive to attain natural justice on the theory that the real beneficiary of the obligation, assumed by the parties (obligors), should discharge the burden; and this proceeding is directed to control and compel the exonerating action of him who is the real beneficiary of the obligation assumed, with him, by him whom equity regards, as between them, as the surety. Neither of these processes for the attainment of equity intends, primarily, the control of the creditor's rights or powers. They each operate, more immediately, upon and between those who are obligated to the creditor. The cases of *Gresham v. Ware* and *Pacific Guano Co. v. Anglin* each rest in ruling and principle upon suretyship. Neither Mrs. Ware nor Mrs. Anglin, in those cases, derived a direct benefit, as did Bramlett in this instance, from the dealings described therein.

The sum of the matter is that two parties negotiated and secured a loan, on mortgage of property owned by both, jointly, and of property owned by one of them only, and the proceeds were applied to their joint debts to others, and, on default, the one contributing the individual asset to secure the loan invokes the compulsory power of equity to so control the mortgagee's exercise of the power of sale to satisfy his debt, as that the individual asset may be, at least, *pro tanto*, viz., to the extent the jointly owned property may extinguish the mortgage debt, exonerated from the charge of the mortgage debt, when it affirmatively appears that the mortgagors have become bankrupt, and that the individual assets, contributed to the security described in the mortgage, is the homestead of the complainant, and that it has been claimed, in the bankrupt court, as exempt. Bramlett not being a surety, whatever might be his equities, against Sullivan, for contribution when the mortgage debt is paid, he cannot maintain a bill under the equitable doctrine of exoneration.

The amended bill foreshadows in averment the effect of an enforced conclusion, in the premises, consistent with the contention for appellant—an effect that would be wrought with no other creditor, save the mortgagee, before the court. It is this: The individual asset, already claimed as exempt in the bankrupt court, would be relieved of the charge of the mortgage debt in a sum commensurate with the net proceeds of the sale of the jointly owned property, and the estate of the bankrupt firm, or of complainant, a member thereof, available to general creditors, would be tolled to the extent the jointly owned property should be taken to satisfy the Goodhue

mortgage, and this, in relief of property, covered by the mortgage, to which complainant has asserted his homestead exemptions. It would seem, then, that had the mortgagee been impleaded by other creditors, or by proper representatives of such creditors, consistently with the rules of equity, to compel him to exhaust the property (the homestead in this instance) unavailable to them, before resorting to that available to satisfy both the mortgagee's demand and that of the other creditors, the bill would have possessed equity. 4 Pom. Eq. § 1414; Coker v. Shropshire, 59 Ala. 542. That the mortgagee undertook to do so, voluntarily, accords with the doctrine and operates no injustice to complainant—one not a creditor and not, as we view it, a surety as to the mortgagee.

The fact that the property sought to be relieved, at least pro tanto, of subjection to the satisfaction of the mortgage debt, is, or may be, exempt property, does not create in the mortgagor an equity to control the order of sale of the mortgaged property to satisfy the mortgage debt. He waived his exemption by the inclusion of the homestead in the mortgage. 2 Jones on Mort. § 1632.

It accordingly results that no oppression or injustice has or will attend the foreclosure entered upon by the respondent Kyle. No equity appears to reside in the complainant upon which the court could or should interfere with the mortgagee's exercise, in his discretion, of the power of sale of a part of the mortgaged property to the end that his debt may be satisfied.

The bill, original and as amended, is without equity. The decree below, effecting that conclusion, must be affirmed.

Affirmed.

SIMPSON, MAYFIELD, and EVANS, JJ., concur.

ARRINGTON v. STATE.

(Supreme Court of Alabama. June 1, 1910.)

1. LANDLORD AND TENANT (§ 323*)—CONTRACT OF HIRING—CROPPING CONTRACT.

Code 1907, § 4743, declares that when one party furnishes land and team, and another furnishes the labor with stipulations to divide the crops, a contract of hire shall be held to exist, and the laborer shall have a lien on the crop for the value of the portion to which he is entitled, etc. *Held*, that such a contract created the relation of master and servant, and not of landlord and tenant or tenants in common of the crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1350-1355; Dec. Dig. § 323.*]

2. TRESPASS (§ 81*)—OFFENSES—WARNING—AUTHORITY TO GIVE.

Where an employé of a landowner was only a rider on the plantation to see that the negroes worked, and there was no proof that he was the landowner's general agent, he had no sufficient contract of management of the

land to give warning to an alleged trespasser, so as to establish the offense of trespass after warning.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 81.*]

3. TRESPASS (§ 88*)—TRESPASS AFTER WARNING—EVIDENCE.

In a prosecution for trespass after warning, evidence that defendant asserted a claim to the land in a conversation with the one in possession, and said that he was going to get the land back, was admissible.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 88.*]

4. CRIMINAL LAW (§ 696*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

A motion to strike evidence in gross, a part of which was admissible, was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1643; Dec. Dig. § 696.*]

5. TRESPASS (§ 88*)—TRESPASS AFTER WARNING—EVIDENCE.

That defendant's gear and plow were seen on the land after he had been warned to quit was admissible to show that he was on the land after warning.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 88.*]

6. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EVIDENCE—RELEVANCY.

Where, in a prosecution for trespass after warning, defendant did not attempt to justify, but denied going on the land after warning, he was not prejudiced by the exclusion of evidence as to the custom of the owner to let the tenants work their land during succeeding years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

7. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a prosecution for trespass after warning, evidence as to what the owner's overseer told witness about warning defendant was inadmissible as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

Appeal from Montgomery City Court; Armstead Brown, Judge.

Fib Arrington was convicted of trespass after warning, and he appeals. Reversed and remanded.

The evidence for the state tended to show that one C. E. Johns was a rider or overseer, whose duty it was to superintend the work of the laborers and renters on the plantation of W. B. Bell, and that he rented the premises in question from the agent of Mr. Arrington, signing the rent notes in his own name, and saying nothing about Mr. Bell at the time of the renting. Mr. Bell then rented the same premises to Sid Palmer, Sr., and put him in possession of the land under a contract whereby Bell furnished the land and the team and Palmer the labor, with an agreement to divide the crops equally. It seems that the only warning shown to have been given the defendant to stay off the land was that given by C. E. Johns. The other facts sufficiently appear in the opinion.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Arrington & Houghton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The proof shows that Bell furnished the land and team and Palmer cultivated the land on shares. This created the relation of employer and employé, not of landlord and tenant or as tenants in common. Section 4743 of the Code of 1907; *Jordan v. Lindsay*, 182 Ala. 567, 31 South. 484; *Maddox v. State*, 122 Ala. 110, 28 South. 305. The premises were properly set out in Bell.

The proof did not show that Johns was a general agent, and it was incumbent upon the state to show that he had authority to warn trespassers to keep off the land. Nor do we think that authority to do this could be inferred from the fact that Johns was "just a rider and saw that the negroes worked." There was no proof that he had the control and management of the land. The defendant was therefore entitled to the general charge upon this theory. Assuming, however, that authority can be shown, we will discuss so much of the rulings upon the evidence as may operate as a guide upon the next trial.

The fact that the defendant asserted a claim to the land in the conversation with Palmer, and said he was going to get the land back, was a circumstance for the jury to determine whether or not he went upon the land after warning. It is true, these were things said in the conversation, which were not relevant or material, and which were calculated to prejudice the defendant with the jury; but the motion to exclude went to the whole conversation and did not separate the bad from the good, and the trial court will not be put in error for refusing to sustain said motion to exclude. It is true, when a part of a conversation is proved, the party against whom it is used would be entitled to bring out the entire conversation; but, when the state proves the acts or declarations of a defendant, it should be confined to those that are relevant and material only.

The fact that defendant's gear and plow were seen on the land after the warning was a circumstance tending to show that he was on the land after warning. If they were there before the warning, this fact should have been brought out on cross-examination.

The custom of Mr. Arrington as to letting tenants work their land succeeding years, etc., could have been only material in case the defendant attempted to show a lawful excuse for going on the land after warning; but the defendant did not attempt to justify, but denied going on the land after the warning, and the exclusion of the evidence as to custom was of no detriment to him.

The trial court erred in letting the witness Palmer, Jr., testify what and when Mr. Johns

told him about warning the defendant. It was hearsay and not admissible. He could state when he saw the defendant on the land, and Johns could testify when he gave him the warning; but the witness not having heard Johns give the warning and not knowing that it was given, or when given, except from what Johns told him, it was error to let him fix the time he saw the defendant on the land as being subsequent to the time Mr. Johns told him he had warned the defendant. It is true the trial court limited this evidence; but the limitation did not eradicate the hearsay evidence. The witness could only fix the time he saw the defendant on the land as being subsequent to the warning by stating that Johns had told him he warned him. This was hearsay evidence pure and simple. 1 *Mayfield's Digest*, p. 318.

For the errors pointed out, the judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON, McCLELLAN, and SAYRE, JJ., concur.

WELLER & CO. v. CAMP.

(Supreme Court of Alabama. May 12, 1910.)

1. PLEADING (§ 18*)—"CERTAINTY."

The "certainty" required in declaration, or plea, is such a statement of the facts constituting the cause of action or ground of defense as will enable them to be understood by the party answering them, the jury, and the court, and Code 1907, § 5321, enjoining brevity consistent with perspicuity, and the presentation of facts so intelligibly that a material issue in law or fact can be taken thereon by the adverse party, does not impair the substance of this requirement.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 39; Dec. Dig. § 18.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1028.]

2. ANIMALS (§ 27*)—INJURY TO HIRED HORSE—ACTION FOR DAMAGES—COMPLAINT—SUFFICIENCY.

A complaint for injuries to horses hired to defendants held sufficient.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 76; Dec. Dig. § 27.*]

3. ANIMALS (§ 27*)—CONVERSION OF HIRED HORSE.

Where the owner of a horse lets him for a certain purpose, a material departure from the contemplated use amounts to a conversion, for which the bailee will be liable in trover if the horse is injured or destroyed while being so used.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 72-74; Dec. Dig. § 27.*]

4. ANIMALS (§ 27*)—CONTRACT OF HIRING OF HORSE—INTERPRETATION AS TO USE.

Parties to a contract of hiring of a horse must be held, as affecting liability for putting it to a use not contemplated, to have had in mind such contingencies as may and do naturally occur in the course of the use contracted for, unless specifically excluded, and the man-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ner of rightful use is to be ascertained from the agreement as rationally interpreted.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-74; Dec. Dig. § 27.*]

5. TRIAL (§ 141*)—UNDISPUTED FACTS—ISSUE AT LAW FOR COURT.

Material facts being undisputed, issue thereon becomes one of law for the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.*]

6. ANIMALS (§ 27*)—CONVERSION OF HIRED HORSE—WHAT CONSTITUTES.

Plaintiff hired to defendants two teams, furnishing drivers therefor, to haul heavy iron castings, in which business defendants also had teams of their own. One of defendants' wagons got into a hole where the street paving had been torn up, whereupon one of plaintiff's drivers who had just had a similar experience at the same place unhitched his team and took it back to help defendants' team, and, because his team would not work in the lead, hitched it to the wagon with defendants' team in the lead, and in the effort to extricate the wagon a casting fell on one of plaintiff's horses and killed it. Held not a tort or breach of the contract of hiring, so as to render defendants liable as for a conversion.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-74; Dec. Dig. § 27.*]

7. ANIMALS (§ 27*)—NEGLIGENCE IN INJURING HIRED HORSE—BURDEN OF PROOF.

Where a horse is injured while in possession of bailees, and nothing else appears, they have the burden of showing it was not injured by their negligence, and where the bailor furnishes his own driver pursuant to the contract, the presumption is that the injury was due to his negligence, if the injury indicates negligence of any one, and it is error in an action for the injury to charge that the burden rests on defendants to show that the horse was not injured by their negligence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 77; Dec. Dig. § 27.*]

8. EVIDENCE (§ 472*)—OPINION EVIDENCE—MATTERS DIRECTLY IN ISSUE.

Mere opinions of witnesses as to questions for the jury to decide on consideration of facts in detail are inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

9. EVIDENCE (§ 122*)—RES GESTÆ—REMARK BY BYSTANDER AS SHOWING KNOWLEDGE OF DANGER.

A remark made by a bystander calling attention to a fact which should have influenced a careful driver in the management of his team should have been allowed to go to the jury under a special plea as evidence of the driver's knowledge of the danger of the situation which he was in, resulting in the accidental death of one of a team of horses hired from plaintiff who sued for the loss thereof.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 339-350; Dec. Dig. § 122.*]

10. TRIAL (§ 46*)—RECEPTION OF EVIDENCE—OFFER OF PROOF.

Until a party propounding a question to a witness affording itself no intimation of the relevancy of the expected answer shows that such answer would be relevant, the court cannot be put in error for excluding it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by J. T. Camp against Weller &

Co. From a judgment for plaintiff, defendants appeal. Reversed.

The first count claims damages for that, on the 11th day of May, 1907, at Birmingham, Ala., the plaintiff, at the special instance and request of defendants, let to hire and delivered to said defendants a certain horse, the property of plaintiff, of great value, to wit, of the value of \$750, to be had and used by the said defendants for a certain time in that behalf agreed upon by and between said plaintiff and said defendants, to wit, from the 11th day of May, 1907, to the 12th day of May, 1907, and to be redelivered by the said defendants to the said plaintiff after that time, and that said defendants then and there had and received the said horse for the purpose aforesaid, yet the said defendants, not regarding their duty in that behalf afterwards, to wit, on the day and date aforesaid, by themselves, or their servants in that behalf, conducted themselves so carelessly, negligently, and improperly in and about the use of said horse that by and through the mere negligence of said defendants and their servants the said horse was then and there so injured, by the falling upon it by a piece of metal or machinery being hauled by said defendants that it shortly thereafter died and was wholly lost to the plaintiff. Amended count A is in trover. Amended count B states substantially the same facts, with the additional allegation that plaintiff hired to the defendants for an agreed consideration two teams, meaning two outfits consisting each of one driver, one wagon, and two horses, with the express agreement that the defendants should be, and by the act of hiring did become, absolutely responsible for any injuries which might be sustained by said teams while under hire to the defendants.

W. T. Hill and James A. Mitchell, for appellants. London & Fitts, for appellee.

SAYRE, J. In *Posey v. Hair*, 12 Ala. 567, it was said that the certainty required in declaration, or plea, is such a statement of the facts constituting the cause of action, or ground of defense, as will enable them to be understood by the party who is to answer them, the jury who are to ascertain their truth, and the court which is to give judgment. The later statute (Code, § 5321), which enjoins brevity as far as consistent with perspicuity, and the presentation of facts in an intelligible form so that a material issue in law or fact can be taken thereon by the adverse party, has not impaired the substance of the requirement stated in the early cases, though it may be admitted that in some late cases the limit has been reached in permitting the allegation of mere conclusions. No fault is to be found with the complaint in question. It is meritorious as a clear statement of plaintiff's case without

the incumbrance of unnecessary detail, and, as to substance, meets every requirement of early case or later statute.

There is no dispute but that the plaintiff hired to defendants two teams, each consisting of a wagon and two horses, to be used by the defendants in hauling heavy castings between the Lynn Iron Works and defendants' place of business in the city of Birmingham. Defendants were to load and unload the wagons. Plaintiff furnished drivers for his teams. Defendants were to pay for the teams by the hour. At the same time defendants had teams of their own engaged in the same business. All the teams were driven along the customary route between the points indicated. At a point where the paving had been torn up one of defendants' wagons got into a hole or ditch from which the team was unable to move it. Thereupon the driver of one of plaintiff's teams, who had just had a similar experience at the same place, unhitched his team and took it back to help defendants' team; and because his team would not work in the lead, hitched them to defendants' wagon with defendants' team in the lead. The driver did this of his own initiative, but it is clear that one of the defendants approved and acquiesced. In the effort to extricate the wagon from the hole or ditch the casting fell from the wagon upon plaintiff's horse, killing it. There was dispute as to whether the accident resulted from the negligent manner in which, according to plaintiff's contention, the casting had been placed upon the wagon, and whether negligence of the driver in the management of his team did not cause or proximately contribute to the result. These matters of dispute became thereby questions for the decision of the jury, and appellee contends that upon the facts and tendencies detailed it was a question for the jury whether there had been a conversion of plaintiff's team as alleged in count A of the complaint. And so the court below ruled. But we are of the contrary opinion. Where the owner of a horse lets him to hire for a certain purpose, any material departure from the contemplated use amounts to a conversion for which the bailee will be liable in trover if the horse is injured or destroyed while being so used. 2 Cyc. 312. But this rule proceeds upon the principle that the bailee becomes a wrongdoer by putting the horse to a use not within the contemplation of the parties when they entered into the contract of hiring. They must be held to have had in mind such contingencies as may and do naturally occur in the course of the use contracted for unless specifically excluded. The manner of rightful use to which defendants might put the horse is to be ascertained from the agreement for hire as rationally interpreted. Mr. Schouler, speaking on this subject, remarks that "the leaven of common sense, which keeps our law in constant ferment, is here at

work, recalling the injustice of visiting blame-worthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor, or he misses his way. Such instances are matters of every-day occurrence." And he suggests that a serviceable defense in such cases lies in a just and reasonable interpretation of the undertaking of bailment itself, which, "if pursued with ordinary prudence, under all the circumstances, ought not to be too literally construed against a bailee who may have found himself in some unforeseen emergency, and, while far from his bailor, obliged to act upon his own judgment. For one who hires may be presumed to have much latitude as to time and methods of enjoyment; and local usage and the good sense of the contract should interpret favorably, where restrictive use was not clearly specified. If the hiring be general, any prudent use of the thing is permissible; and even if it be particular, terms not fairly meant for exclusion need not warp the hirer's discretion." Schouler's Bailments, §§ 140, 141. See, also, Spooner v. Manchester, 133 Mass. 270, 43 Am. Rep. 514. Here the facts were shown without contradiction or contrary inference—the facts as to which there was dispute not being of consequence in this immediate connection—and the issue thereupon became one of law for the decision of the court. Assuming the defendants co-operated in the use of the animal charged as a conversion to the extent which would make that use chargeable to them, we are of opinion that their act in temporarily using the horse as one of a team of four instead of as a team of two to get their wagon over a hard place in the road, under the circumstances shown, did not amount to a tortious breach of the contract of hiring, and that the defendants were entitled to the general charge on the count for trover.

In oral and special written charges the court told the jury that if the horse was in the possession of the defendants at the time of its injury, the burden rested upon them to show that it had not been injured by their negligence. The court was authorized to assume as facts the bailment, and that the horse was injured while in the possession of the bailees, for as to that there was no dispute. And on these facts, nothing else appearing, the statement of the burden of proof would have been free of fault. Higman v. Camody, 112 Ala. 267, 20 South. 480, 57 Am. St. Rep. 33. But there was a circumstance of material qualification which the charge seems to have overlooked. In proving the bailment the plaintiff proved also as a part of the contract an agreement that he was to

furnish the driver; and it clearly appeared that he did so. In that situation the presumption must in reason rather be that any injury which came to the animal resulted from the negligence of the driver, if the character of the injury indicated negligence on the part of anyone; for, although the bailee had possession in a certain large and loose sense, that possession was not exclusive. The rule that the burden of proof rests upon a bailee is generally stated of cases in which the bailee has exclusive possession. *Collins v. Bennett*, 46 N. Y. 490. And it rests upon the consideration that in such cases the facts attending loss or injury must be peculiarly within the bailee's own knowledge. On no other principle can a departure from the rule which requires the plaintiff to make out his case be sustained, and, unless the bailor goes with his property or reserves a certain oversight, as where the owner of a horse rides with the hirer, or the guest at an inn puts his watch under his pillow, or a drover goes on the train with his cattle—instances mentioned in the books—the bailee must have peculiar knowledge. Here the bailor sent his own driver. The safety of a team depends most immediately upon the driver as we know from common experience. The case was the same as if the owner had driven his team, and in such case it seems that common sense and sound law would place the burden of proof upon the plaintiff as it is ordinarily placed where negligence is charged. *Hughes v. Boyer*, 9 Watts (Pa.) 556. There was error in the charges.

Assignments based upon rulings on the admissibility of evidence need not be treated in detail. It will suffice for a proper disposition of the case here to say that those questions which sought to have witnesses state as mere conclusions—such was the effect of a number of them—whether the casting had been so placed upon the dray as that it would probably fall under circumstances which did intervene and which ought to have been foreseen in the exercise of due care, and whether the driver, to whose negligence the jury were free to refer the accident, was acting under the control of the defendants, were of course properly disallowed. Those questions the jury were brought to decide upon consideration of the facts in detail.

One ruling may be mentioned. Appellants cite *Telephone Co. v. Cleveland*, 44 Kan. 167, 24 Pac. 49, to prove that a witness, who had been a bystander while the driver was endeavoring to get his wagon out of the dangerous place in the street, should have been allowed to testify to a remark made by him to the driver. If the witness had called attention to a fact of the situation which ought to have influenced a careful driver in the management of his team, that would have been allowed to go to the jury under the spe-

cial plea as evidence of the driver's knowledge of the danger of the situation; but it may well have been that the remark was irrelevant to any issue involved. The question itself afforded no intimation as to the relevancy of the expected answer. The trial court could not be put in error until the party showed that the expected answer would be relevant. The Kansas case contains nothing to the contrary.

For the errors indicated, we are of opinion that the judgment should be reversed and the cause remanded for another trial.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

HAMRICK v. SHIPP.

(Supreme Court of Alabama. June 9, 1910.)

1. APPEAL AND ERROR (§ 907*)—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.

Where the bill of exceptions does not set out all the testimony of a certain witness, it must be presumed on appeal that such testimony tended to support defendant's contention in some manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

2. TRIAL (§ 85*)—RECEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE GOOD IN PARTS.

Where an objection to the admission of evidence did not separate that which was admissible from that which was inadmissible, there was no error in admitting all of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

3. PHYSICIANS AND SURGEONS (§ 14*)—CARE REQUIRED—NEGLIGENCE.

A physician is not required to be infallible in diagnosing or treating diseases, so that the fact that a patient's disease was different from what it was diagnosed to be was merely evidence of negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 23; Dec. Dig. § 14.*]

4. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—ACTIONS—INSTRUCTIONS.

In an action against a physician for damages for negligently treating plaintiff's son, an instruction that the question for the jury's determination was not whether the boy had peritonitis, osteomyelitis, or rheumatism, but whether defendant had used reasonable skill, and was not negligent in diagnosing and treating the case, correctly stated the ultimate question for the jury's decision.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 45; Dec. Dig. § 18.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUEST.

If plaintiff apprehended prejudice from failure to further amplify the ground of defendant's liability, he should have requested an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. PHYSICIANS AND SURGEONS (§ 18*)—CARE REQUIRED—INSTRUCTIONS.

While due care requires skill and knowledge of diseases and their manner of treatment by a physician, it is immaterial whether an unsuccessful treatment results from lack of skill, or failure to exercise it, if due care was not exercised, so that in an action against a physician for damages for negligence in treating plaintiff's son, a charge that if the jury finds that defendant was not negligent in treating him before he was placed in an infirmary, they must find for defendant, merely stated that there could be no recovery unless the jury were reasonably satisfied that there had been a lack of skill in treatment and was proper.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 45; Dec. Dig. § 18.*]

7. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

A charge in an action against a physician for negligence in treating plaintiff's son that defendant was only required to exercise that degree of skill usually employed by physicians was not affirmative error; there being no request for amplification as to his liability.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 636, 637; Dec. Dig. § 256.*]

8. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

That medical treatment was unsuccessful would not of itself justify an inference of unskillfulness or negligence by the physician in an action against him for malpractice.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 43; Dec. Dig. § 18.*]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

Action by James T. Hamrick against M. G. Shipp. From a judgment for defendant, plaintiff appeals. Affirmed.

The facts sufficiently appear in the opinion of the court. The following charges were given at the request of the defendant: (1) "The question submitted to you for determination by you in this case is not whether the boy had perioritis, osteomyelitis, or rheumatism, but whether the defendant was possessed of reasonable skill, and was reasonably diligent, not negligent, in the efforts to diagnose and properly treat the case." (2) "The court charges the jury that if they find reasonably from the evidence that the defendant, Shipp, was not negligent in his treatment of plaintiff's son before he was placed in an infirmary in Atlanta, then you must find in favor of the defendant." (3) "The court charges the jury that the law only requires the exercise of that degree of skill which is usually employed by physicians. He does not warrant a cure." (4) "The court charges the jury that the jury cannot draw the conclusion of unskillfulness or negligence simply because the treatment was not successful."

Street & Isbell, for appellant. John A. Lusk and E. O. McCord, for appellee.

SAYRE, J. Plaintiff (appellant) sued defendant for damages alleging that defendant,

who was a physician and surgeon, conducted himself in an ignorant, unskillful, or negligent manner in the professional treatment of plaintiff's son. After the treatment had continued for some months, the patient was taken to a hospital in the city of Atlanta, Ga. The deposition of the attending physician there was taken for, and offered by, the defendant. He was allowed to repeat the history of the case as it had been stated to him on arrival at the hospital by the defendant in the presence and hearing of plaintiff and others, among them the patient's mother. The bill of exceptions recites that the history given by the defendant "was corroborated as far as they were able to do so by the father and mother of the boy." The bill does not purport to set out all the evidence in the cause, nor even all the testimony of the physician in Atlanta. One charge brought against the defendant was that he had erred in diagnosis. It must be presumed that the testimony of the Atlanta physician tended to support the defendant's contention in some way, as that he had not erred in diagnosis, or that correct diagnosis under the circumstances was so difficult that a mistake afforded little evidence of lack of skill, or that his treatment was skillful. Clearly the value of any opinion along these lines depended in large measure upon his knowledge of the history of the case. Plaintiff had carried his son there for treatment. He must be presumed to have understood the necessity of the history of the case being correctly stated, and if he stood by and heard a history given and corroborated it as far as he was able to do, the inference is natural and easy that the history was to that extent at least correct. The objection taken at the trial was that the history of the case, unless given by the plaintiff himself, was illegal, irrelevant, and immaterial. This objection carried the concession that a history of the case stated by the plaintiff would have been admissible. In part at least defendant's statement became the statement of plaintiff. The objection did not undertake to discriminate between the good and the bad, if any was bad, nor did it take the point that the witness had failed to discriminate between those parts of the history which had and those which lacked corroboration. As for any objection taken, there was no error in admitting the testimony.

Plaintiff's son had been thrown by a mule. Some days afterwards the condition developed which made it necessary to procure medical attention. Defendant treated for acute articular rheumatism. Other physicians of good reputation concurred in his diagnosis and treatment. There was testimony, however, which went to show that the boy's trouble was perioritis or osteomyelitis. The court, on defendant's request, charged the jury that the question for their

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

determination was not whether the boy had periorchitis, osteomyelitis or rheumatism, but whether the defendant was possessed of reasonable skill, and whether he had been reasonably diligent, not negligent, in diagnosing and treating the case. The question put to the jury by the pleading was whether the defendant had "conducted himself in an ignorant, unskillful or negligent manner" in and about his treatment of the plaintiff's son. This the charge seems to state with sufficient clearness. It was perhaps not so carefully limited on all sides as it might have been, for it seems capable of the interpretation that it was not for the jury to determine the nature of the boy's ailment for any purpose, whereas, if the jury could have decided that question, that decision would have been of consequence in determining the ultimate question proposed by the pleading. In *McDonald v. Harris*, 131 Ala. 359, 31 South. 548, this court quoted with approval from 14 Am. & Eng. Encyc. Law, pp. 76, 78, as follows: "Physicians, surgeons and dentists, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill and diligence, but that is the extent of their liability. * * * The reasonable and ordinary care, skill and diligence which the law requires of physicians and surgeons is such as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." There is no rule of responsibility which requires the physician to be infallible in the diagnosis or treatment of diseases. *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830, and authorities cited in elaborate note. The fact, therefore, if it was a fact, that the disease was something other than rheumatism, was evidential merely, not conclusive. The charge under consideration correctly stated the ultimate question to be submitted to the jury for decision. If the plaintiff apprehended prejudice from lack of further statement, he might have supplied that element by an explanatory charge. There was no reversible error in giving the charge as written.

It is urged that the third charge given on defendant's request should have been refused, because it did not require of the defendant that he should be skillful in his profession. Due care in the treatment of disease requires of course skill, the ability to know and to do what ought to be known and done. But if there is lack of due care in treatment, as respects consequences, it is immaterial whether it results from lack of skill or a failure to exercise it. The charge does no more than assert that there could be no recovery unless the jury were reasonably satisfied that there had been lack of skill in the

treatment of plaintiff's son. The charge was rightly given.

Charge 4 required of defendant only that he should have exercised that degree of skill usually employed by physicians. Appellant's criticism of the charge is that it falls to exact of defendant that degree of skill usually employed by physicians of reasonable care and skill under like conditions. By reference to the rule already stated it is to be seen that the charge might have been amplified substantially as suggested without error. The rule makes concession to physicians who have not the learning nor the advantages of observation and experience enjoyed by the most learned and advantageously situated of their professional brethren. The charge, however, applied the standard attained by physicians generally. The qualification contended for would have amounted to a concession to the defendant. There was, under the circumstances, no error of which the appellant can complain.

For reasons which have already appeared, there was no error in giving charge 5.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

COFER v. STATE.

(Supreme Court of Alabama. May 12, 1910.
Rehearing Denied June 30, 1910.)

1. HABEAS CORPUS (§ 30*)—MATTERS REVIEWABLE—CONVICTION OF CRIME—ERRORS AND IRREGULARITIES.

The attempt by one convicted of crime to obtain his discharge by habeas corpus was a collateral attack on the judgment, and on such attack no mere errors or irregularities affecting the trial are available, but petitioner must show that the judgment and sentence were so fatally defective as to be void.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 25; Dec. Dig. § 30.*]

2. HABEAS CORPUS (§ 85*)—JUDGMENT—CONCURRENCE.

A judgment entry in a criminal case being clothed with jurisdiction in facie, and its due authentication not being denied, it was, on the hearing of a writ of habeas corpus, to be taken as conclusively showing the true history of the proceedings in the trial court.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

3. STATUTES (§ 124*)—TITLE AND SUBJECT OF ACTS—CONSTITUTIONALITY.

Act March 1, 1901, p. 1342, entitled "an act to confer additional jurisdiction on the county court of Cullman county, Alabama, and to regulate proceedings therein," provides, in section 1, that the county court shall have jurisdiction of all misdemeanors committed in the county concurrent with the circuit court. Section 2 provides that the presiding judge of the circuit court, at each succeeding term, shall enter on the minutes on the day of adjournment an order transferring to the county court all indictments in the circuit court against persons charged with misdemeanors, and that after the making of such order exclusive jurisdiction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

shall vest in the county court. *Held*, that the act is constitutional; the provision for the removal of cases from the circuit court and for the exclusive jurisdiction of the county court thereafter being germane to the purpose announced in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 184; Dec. Dig. § 124.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Petition for habeas corpus by William T. L. Cofer. There was an order dismissing the petition, and petitioner appeals. Affirmed.

Emil Ahlrichs, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. The petitioner's effort to bring about his discharge on a writ of habeas corpus was a collateral attack upon the judgment and sentence which had been pronounced upon him by the county court of Cullman. On such attack no mere errors or irregularities affecting the trial which resulted in the judgment could avail the petitioner; he must show that the judgment and sentence was so fatally defective as to be void. That judgment had been affirmed on appeal to this court, and was beyond question in the circuit court. It was merged in the judgment of this court. In *re Newton*, 94 Ala. 431, 10 South. 549. The sentence pronounced by the county court after the affirmation in this court was a mere repetition of the sentence which had been affirmed, and was unnecessary. Furthermore, the effort to show that the record of the county court did not speak the truth, or that the entry upon the judgment roll of that court, though speaking the truth, had been made at a time when and under circumstances such that there was no authority of law for making it, was a collateral attack upon the record which the policy of the law inhibits. That fact should have been shown on a proper proceeding for that specific purpose had in the county court, subject to review in this. The judgment entry being clothed with jurisdiction in fact and its due authentication not being denied, it was on the hearing of the writ to be taken as conclusively showing the true history of the proceedings in the county court.

On March 1, 1901, an act of the Legislature was passed under this title: "To confer additional jurisdiction upon the county court of Cullman county, Alabama, and to regulate proceedings therein." Acts 1900-01, p. 1342. Section 1 of the act provides that the county court shall have jurisdiction of all misdemeanors committed in the county concurrent with the circuit court. Section 2 provides as follows: "That the presiding judge of the circuit court of said county, at each succeeding term, shall enter on the minutes of said court on the day of adjournment an order transferring to the county court of said county, all indictments pre-

sented or filed in the circuit court against persons charged with the commission of misdemeanors, and after the making of such order, the jurisdiction of the circuit court shall cease, and exclusive jurisdiction shall vest in the county court of said county." Other appropriate provisions for the trial of misdemeanors in the county court follow. Appellant was convicted of a misdemeanor in a prosecution commenced and concluded in the county court under the authority of the act. He contends that the act conferred upon the county court no jurisdiction to try charges of misdemeanor because it deprives the circuit court of that jurisdiction without intimation of that provision in the title. Appellant's contention cannot be sustained. The provision of the act for the removal of misdemeanor cases from the circuit court, and for the exclusive jurisdiction of the county court thereafter in cases so removed, is germane to the purpose announced in the title. The body of the act goes no further. The general jurisdiction of the circuit court to hear and determine misdemeanor cases remains unimpaired. But if it should be conceded that the act is constitutionally defective in the respect pointed out by appellant, that concession could not avail the appellant. In that event the obnoxious provision only would fall, leaving the rest of the act intact. That conclusion would not affect the right of the county court to try cases originating in that court, as did the case against the appellant. We are unable to sustain appellant's contention on the ground indicated, or on any other which has been brought to our attention.

The record shows nothing of the pardon mentioned in appellant's brief.

The order of the judge of the Eighth judicial circuit dismissing the petition and remanding the petitioner to the custody of the sheriff of Cullman county for the execution of the sentence pronounced by the county court must be affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and EVANS, JJ., concur.

HOWELL & HOWELL et al. v. HARRIS, CORTNER & CO.

(Supreme Court of Alabama. April 14, 1910.
Rehearing Denied June 30, 1910.)

1. RECEIVERS (§ 5*)—APPOINTMENT—TIME.
The chancellor prior to the filing of a bill in vacation has no jurisdiction to appoint a receiver.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 5.*]

2. RECEIVERS (§ 29*)—BILL FOR APPOINTMENT—FILING.

A bill for the appointment of a receiver should be filed with the register of the chancery

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

district in which the defendants or a material defendant resides, as provided by Code, § 8093.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 29.*]

3. RECEIVERS (§ 29*)—APPOINTMENT—JURISDICTION OF REGISTER.

On the filing of a bill for a receiver with the register, he may act alone in appointing a receiver.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 29.*]

4. APPEAL AND ERROR (§ 1166*)—REVIEW—APPOINTMENT OF RECEIVER BEFORE BILL.

Where a receiver is erroneously appointed on an ex parte application before bill filed, the appointment will be revoked on appeal without reference to the merits of the application.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1166.*]

Appeal from Chancery Court, Lawrence County; W. H. Simpson, Chancellor.

Action by Harris, Cortner & Co. against Howell & Howell and others. From an order appointing a receiver, defendants appeal. Reversed and remanded.

Chenault & Chenault and Kirk, Carmichael & Rather, for appellants. C. M. Sherrod and E. W. Godbey, for appellee.

SAYRE, J. Appeal from an order appointing a receiver. The order in question was made by the chancellor on December 21, 1909. The bill was filed on the next succeeding day. The point is made that the order is void because made by the chancellor in vacation and at a time when no suit was pending, and, in consequence, at a time when the chancellor was without jurisdiction. The precise point has been decided by this court in consonance with the contention of appellants on two occasions. *Harwell v. Potts*, 80 Ala. 70; *Crowder v. Moore*, 52 Ala. 220. Appellees, appreciating the difficulty presented by the cited adjudications, argue, on the authority of *Universal Savings Co. v. Stoneburner*, 113 Fed. 251, 51 C. C. A. 208, and *Horn v. Pere Marquette R. R. Co.* (C. C.) 151 Fed. 628, that the bill should be treated as having been filed when the chancellor entertained it by making a judicial order thereon, or, what would amount to the same thing, the order should be treated as having become effective only from the time when the bill was filed. They also support the argument in an historical review, much in the line followed in the last-mentioned federal case, which goes to show that the master's office and the rules and paraphernalia thereof are no more than so much machinery instituted as an aid to the chancellor in the convenient and efficient exercise of his powers. And on these considerations, and upon the assumed necessity for a rule which would permit the appointment of a receiver by the chancellor in advance of bill filed in cases of pressing emergency, it is urged that the decisions of this court are opposed to both reason and authority.

In *Universal Savings Co. v. Stoneburner*, the assimilation of the equity powers exercised by the judges of the United States to the prerogative powers exercised by the ancient chancellors will appear in the following extract: "Appellants insist that when the order of May 25, 1901, was entered, the suit in which it purported to be issued had not at that time been instituted, and that therefore said order was null and void. This claim is based upon the fact that the bill was not lodged in the clerk's office until the 27th day of May, 1901, and that the subpoena did not issue until that date. In other words, the insistence is that a suit in equity has not been commenced until the subpoena has issued. Appellants, therefore, claim that the receiver was appointed and the restraining order granted before the suit was commenced. While it is true that no process of subpoena can issue from the clerk's office in any suit in equity until the bill has been filed in such office, still it does not follow that the court, or a judge thereof in chambers, may not enter an order on consideration of the bill before it has been so lodged in said office. Under the old English practice, from which our procedure is taken, all bills in equity were first presented to the judge, who determined whether process should issue thereon; and, if he so ordered, then the bill was filed in the clerk's office. Subsequent proceedings in such suits have been controlled chiefly by rules of court, and the practice established thereunder. We are not aware of any statute or rule of practice, nor of any authoritative decision, by which the contention of the appellants in this particular instance can be sustained. In this case the bill was presented to the court on Saturday, the 25th day of May, 1901; and one of the orders now complained of was on that day, after due consideration of the bill and exhibits, directed to be entered. The bill, therefore, was in fact filed on the 25th day of May, though it seems that process thereon did not issue until Monday, the 27th—a practice not at all uncommon in the courts of the United States. If, as a matter of fact, the order of the 25th of May by which the receiver was appointed was improvidently awarded, would not the decree of the court made on the 4th of June following, after subpoena had issued, after appellants had given notice to discharge the receiver and dissolve the injunction, and after the court had heard argument thereon, amount, in substance, to the granting of an injunction and the appointing of a receiver? We think so."

In *Horn v. Pere Marquette R. R. Co.*, Judge Lurton, then on the circuit bench, said: "An order appointing a receiver made at chambers, like an order allowing an injunction or other interlocutory order, presupposes a pending case. The objection that there was no pending suit when the order in this case

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was made is a misconception. I am not at all inclined to agree that when the complainant's bill and the defendant's answer were exhibited to me at Cincinnati, and an application made by both parties for the appointment of a receiver, this lodging of the pleadings with me and this consent by the defendants was not such a commencement of the suit and filing of the bill as to make my order relate to the very time when I acted at Cincinnati. *Universal Savings & Trust Co. v. Stoneburner*, 113 Fed. 251, 51 O. C. A. 208. To save the question, I made my order to take effect when the bill should be filed at Grand Rapids, and directed the clerk to then issue the necessary process. Thus the order was signed by me on December 4th. It was provisional upon the actual filing of the bill, and became effective then only. * * * The appointment related back to the actual time of the appointment, which was the actual time when the bill was filed, because my order was framed to become effective only then, and was as if I had made it simultaneously with the filing of the bill."

It is observed that in each of the federal cases cited an argument is stated in conclusion which puts those cases much in line with the reasoning of our own decisions, though it is to be conceded that in the main they proceed upon a different theory. On the other hand, we find that Lord Chancellor Eldon said in 1808 that never in his experience had he observed an instance of the appointment of a receiver without a bill. *Ex parte Mountfort*, 15 Ves. 445. And in *Leddell's Executor v. Starr*, 19 N. J. Eq. 159, it is said that while a receiver is generally appointed on bill filed for that purpose, and rarely before answer, except under provisions by particular statutes, there are a few exceptional cases where a receiver has been appointed upon petition; but these are the cases of infants whose position as wards of the court gives them the right to apply by petition, or the cases of others similarly situated. Without conceding the intimation of the last case that infants become wards of the court of chancery, as that court exercises jurisdiction under the Constitution and laws of this state, without a bill filed in regular course, and still less that chancellors here exercise the prerogative functions of *parens patriæ* as did the chancellors in earlier times, we note that on these authorities Mr. High states the usual practice, both in England and America, to be that receivers are appointed only upon bills filed for that purpose, and that as a general rule the courts will not grant a receivership merely upon petition, when no cause is actually pending and no bill is filed to give the court jurisdiction, unless in very special cases of emergency. *High on Receivers*, § 83. The filing of the bill is the commencement of the suit under

our statute. Code, § 3092. And the filing is to be made with the register of the chancery district in which (in this case) the defendants, or a material defendant, resides. Code, § 3093. We apprehend that no urgency of special cases, still less that any supposed considerations of mere convenience in reaching at once the chancellor and the register which do not exist, because the register may act alone in appointing a receiver, can justify the assumption of jurisdiction except upon bill filed as provided by statute. In the cases heretofore decided by this court the considerations here urged were necessarily involved; but it was held that, where a receiver was appointed upon *ex parte* application before bill filed, the appointment should be revoked upon appeal without weighing the merits of the application. We perceive no overruling reason for departing from those cases, and conceive our duty to be, on consideration of all the circumstances, to follow in their wake.

A decree will be entered here revoking the appointment of the receiver, and remanding the cause for further appropriate orders.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

MAYOR, ETC., OF CITY OF BIRMINGHAM v. POOL.

(Supreme Court of Alabama. May 12, 1910.)

1. MUNICIPAL CORPORATIONS (§ 816*)—DEFECTIVE STREETS—NOTICE—COMPLAINT—SUFFICIENCY.

A complaint, in an action against a city for injuries to a traveler by a ditch in a street, which alleges that the city made the ditch and negligently permitted it to remain open, sufficiently alleges that it had notice of its existence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1714; Dec. Dig. § 816.*]

2. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a traveler on a defective street, a witness testified that he called up the street commissioner's office and requested them over the telephone to remedy the defect several days prior to the accident, and that the person answering the telephone replied that it would be attended to, and the street commissioner denied obtaining the information and making the promise, it was competent to show that a telephone was kept in the commissioner's office, that similar complaints were usually received over the telephone, and that a person in the office had authority to receive complaints during the absence of the commissioner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1729; Dec. Dig. § 818.*]

3. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREETS—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where there was evidence justifying the inference that a city knew of the existence of a ditch in a street, and negligently failed to fill

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it, or negligently permitted it to remain, a general charge in favor of the city in an action for injuries to a traveler caused by the ditch was properly refused.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

4. TRIAL (§ 145*)—INSTRUCTIONS—ISSUES.

Charges requesting a finding for defendant on the different counts of the complaint are improper, unless defendant is entitled to a verdict under the entire complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.*]

5. MUNICIPAL CORPORATIONS (§ 822*) — DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—INSTRUCTIONS.

An instruction, in an action against a city for injuries to a traveler on a defective street, that unless the defect had existed long enough, in the absence of actual notice, for the city in the reasonable exercise of its duties to have discovered and remedied the defect, there could be no recovery, was properly refused, because it premitted the city's duty to guard the defect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that there is no evidence of a fact set forth therein is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 454; Dec. Dig. § 194.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by H. C. Pool against the City of Birmingham. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count alleges that the ditch or excavation which proximately caused the damage was made in said street by and with the knowledge of the defendant, and that defendant had knowledge of the danger and defective condition of said street at the time of plaintiff's said injury, and defendant negligently failed to have said street put in reasonably safe condition. The second count alleges that the defendant had knowledge of the defective and dangerous condition of said street, or by the exercise of reasonable diligence might have had such knowledge, and negligently failed to repair the same, or place any warnings, signals, etc. The fourth count alleges that the defendant permitted the excavation to be made, and that the same had not been properly filled in and made solid, and knew of the dangerous condition, or with exercise of reasonable care could have known, and failed to place warning signals of any kind. Count 3 alleges that the defendant permitted said excavation to be made, and with notice of the same allowed the same to remain in an unsafe and dangerous condition. The demurrers raise the question of a failure to sufficiently allege notice of the defects, or of facts from which such notice would be inferred.

The charges refused are: (1) The general affirmative charge. (2) Verdict for the de-

fendant under the first count, if the jury believe the evidence. (3) Same as to the second count. (4) Same as to the third count. (5) Same as to the fourth count. (6) Same as to the fifth count. (7) Same as to the sixth count. (8) "I charge you, gentlemen of the jury, that unless you believe from the evidence in this case that the defect complained of had existed long enough, in the absence of actual notice, for the defendant in the reasonable exercise of its duties to have discovered and remedied said defects, there can be no recovery in this cause." (9) "I charge you, gentlemen of the jury, that there is no evidence in this cause showing that the defendant had actual notice of the defective condition of the street described in the complaint prior to the time of plaintiff's accident."

R. H. Thach, for appellant. L. J. Haley, Jr., for appellee.

ANDERSON, J. The counts of the complaint either aver that the defendant affirmatively caused the ditch to be made, or negligently permitted it to remain open. If it caused it to be made, then it had notice of its existence. On the other hand, whether it caused it to be made or not, but negligently permitted it to be there, the averment that it did so negligently permit it to be in the street is the equivalent of averring notice of the defect. *Lord v. City of Mobile*, 113 Ala. 360, 21 South. 366; *Ensley v. Smith*, 51 South 343; *City of Anniston v. Ivey*, 151 Ala. 392, 44 South. 48. The complaint was not subject to the grounds of demurrer insisted upon in appellant's argument.

The witness Sellers had testified that he called up the street commissioner's office and requested them over the phone to fill the ditch several days prior to the plaintiff's accident, and that whoever answered the phone said it would be attended to. The street commissioner, McCartin, denied getting the information and making the promise, and it was therefore competent to show that a telephone was kept in his office, that complaints of this character were usually received over the phone, and that a young man was left in his office with authority to receive them during his absence and report same.

Charge 1, the general charge as to the entire complaint, was properly refused, as there was evidence from which the jury could infer that the defendant knew of the ditch, and negligently failed to fill it, or negligently permitted it to be there.

Charges 2, 3, 4, 5, 6, and 7 requested a finding for the defendant upon the different counts. This form of charge has been repeatedly condemned by this court, unless the defendant was entitled to a verdict under the entire complaint. *Bessemer Co. v. Till-*

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man, 139 Ala. 464, 36 South. 40; L. & N. R. R. v. Sandlin, 125 Ala. 585, 28 South. 40. We do not mean to hold, however, that defendant was entitled to the general charge as to any of the counts, had it been properly framed.

Charge 8, requested by the defendant, was properly refused. If not otherwise bad, it pretermits the defendant's duty to have guarded or signaled the defect. It may not have had actual notice of the ditch, or may not have been negligent in failing to discover and repair same, and yet may have been negligent in failing to discover and guard or place warnings to protect the public.

Charge 9 asserts no legal proposition and has been repeatedly condemned by this court. *Montgomery R. R. v. Smith*, 146 Ala. 327, 39 South. 757; *Tutwiler v. Burns*, 49 South. 455.

The judgment of the city court is affirmed. Affirmed.

DOWDELL, C. J., and SAYRE and EVANS, JJ., concur.

DAVIS v. STATE.

(Supreme Court of Alabama. June 9, 1910.)

1. JURY (§ 70*)—SPECIAL VENIRE—QUASHING.

The court ordered fifty names to be drawn from the jury box as special jurors for the trial of a capital case against the defendant. Certain names of jurors which had been drawn in a previous case were either intentionally put back in the jury box or put in an envelope and shaken out with the other names when the box was shaken. Held that, if several names thus wrongfully and illegally in the box were drawn and made to constitute a part of said fifty names so drawn, then defendant did not have a special venire drawn from the names rightfully and legally in the jury box, and the venire should have been quashed.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 324; Dec. Dig. § 70.*]

2. JURY (§ 117*)—VENIRE—MOTION TO QUASH—TIME OF MAKING.

A motion to quash a venire made before the trial is entered on is in due time, and the fact that accused failed to object to jurors at the time they were drawn, though his attention was then called to the facts, makes no difference.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 544; Dec. Dig. § 117.*]

3. JURY (§ 116*)—QUASHING VENIRE—EXCUSE OF JURORS—POWER OF COURT.

A venire will not be quashed on the ground that two of the jurors summoned for the week of the court that a capital case was set for trial were excused by the court on the ground that to serve would work a great injustice to them by closing up their business, though accused was not in court at the time and did not consent thereto.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 543; Dec. Dig. § 116.*]

4. JURY (§ 144*)—IMPANELING—MISTAKE IN NAME OF JUROR—STATUTES.

Under Code 1907, § 7267, providing that a mistake in the name of a person summoned

as a juror for a capital case does not justify the quashing of the venire, but the court must discard the name and direct the summoning of other jurors, the court may discard a juror because of a mistake in his name as drawn.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 633; Dec. Dig. § 144.*]

5. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS.

Where the bill of exceptions does not purport to set out all that was done on the trial court discarding the name of a juror drawn from the venire on the ground of mistake in the juror's name, the court on appeal will presume that the trial court complied with Code 1907, § 7267, in supplying the juror's place.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3023; Dec. Dig. § 1144.*]

6. CRIMINAL LAW (§ 1120*)—APPEAL—EVIDENCE—REVIEW.

Where the bill of exceptions does not purport to set out all of the evidence, the court on appeal cannot say that the trial court erred in allowing a witness, against the objection of accused, to testify as to a confession of accused at the preliminary trial on the ground that it was not shown to be voluntary.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2034; Dec. Dig. § 1120.*]

7. CRIMINAL LAW (§ 400*)—EVIDENCE—SECONDARY EVIDENCE—ADMISSIBILITY.

Where a confession was made during the preliminary trial while accused was testifying for himself, it will be presumed that his testimony was reduced to writing by the trial justice as required by Code 1907, § 7600, so that parol evidence of the confession is inadmissible, in the absence of a predicate showing that the testimony was not reduced to writing or that the writing has been lost and cannot be found after due diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 879, 882; Dec. Dig. § 400.*]

8. CRIMINAL LAW (§ 517*)—CONFESSIONS—ADMISSIBILITY.

The court may permit a witness testifying to a confession of accused voluntarily made to state the entire confession forming a part of the res geste.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1150, 1151; Dec. Dig. § 517.*]

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

John Davis was convicted of murder in the first degree, and he appeals. Reversed and remanded.

It appears from the transcript that in drawing the venire for the case of *State v. Walter Harrison* the following were drawn as jurors and placed upon said venire: W. R. De Bardalaben, O. H. Williams, J. R. Roy, L. T. Norris, S. M. Peevey, J. H. Jones, and T. R. Collier. It further appears that H. P. Wideman was drawn as a grand juror for the term of the court at which this venire was drawn, and that he served upon the grand jury, and that S. P. Storrs and G. E. Enslen were drawn and served as regular jurors for the week of this trial. Either these names were replaced in the jury box by the judge, or they escaped from the envelope in which they were placed, and became mingled with the other names in the

jury box, and were drawn upon the special venire to try this defendant. The motion to quash contains these three reasons for the quashing of the venire served upon the defendant in this case.

J. A. Holmes and B. K. McMorris, for appellant. Alexander M. Garber, Atty. Gen., for the State.

EVANS, J. The motion by defendant to quash the venire should have been sustained. When the names had been drawn out of the jury box for the trial of another capital case, they could not be restored to the jury box by the presiding judge, or any one else, and then drawn for the trial of defendant without thereby making an illegal venire. It is the purpose of the law that the jury box shall be filled only by the jury commissioners at the time and in the manner prescribed by law, and whenever a name is drawn therefrom for forming any jury, regular or special, that name can never be restored to the box except by the jury commissioners when they refill the box. No one else has authority to do so. "It is from the names, properly, rightfully, legally in the jury box, the statute contemplates, so long as the box is not exhausted, the jurors forming the special venire shall be drawn." It is immaterial whether the names were intentionally put back in the jury box and mingled with those already in there, or whether, as the admitted facts show, they were put in an envelope and were shaken out with the other names, when the box was shaken. In either case they were improperly in the box and formed no part of the names therein from which a legal jury could be drawn. The court made an order for 50 names to be drawn from said jury box as special jurors for the trial of the case against the defendant, and, if several of the names thus wrongfully and illegally in the box were drawn and made to constitute a part of said 50 names so drawn, then defendant did not have a special venire drawn "from the names properly, rightfully, and legally in the jury box, and the venire was not such as the law provided he should have." *Wilkins v. State*, 112 Ala. 55, 21 South. 56; *Cawley v. State*, 133 Ala. 128, 32 South. 227; *Jimmerson v. State*, 133 Ala. 18, 32 South. 141. The motion, having been made before the trial was entered upon, was in due time, and the fact that defendant failed to object to said jurors at the time they were drawn, and his attention was called to the fact, can make no difference. He could make the motion at any time before the trial was entered upon. *Mayfield's Dig.* vol. 1, p. 533, §§ 317, 318, and cases there cited.

The court excused two of the jurors who were summoned for the week of the court that this case was set for trial, upon the ground that to serve would work a great injustice to them by closing up their business.

The defendant was not present in court when this was done, nor did he consent thereto. This was made one of the grounds for motion to quash the venire. Chief Justice Stone, in the case of *Fariss v. State*, 85 Ala. 4, 4 South. 680, says, in speaking of the rule laid down in *Parsons v. State*, 22 Ala. 50, and of the criticisms of such a practice by the court as the matter now being discussed in the cases of *Phillips v. State*, 68 Ala. 469, and *Shelton v. State*, 73 Ala. 5: "This question, however, has been twice decided the other way, and we will treat it as settled. *Floyd v. State*, 55 Ala. 61; *Jackson v. State*, 77 Ala. 18. We do this not reluctantly, because the rule asserted in *Parson's Case* is exceedingly inconvenient in practice, and it is believed that it accomplishes no good result. It must be presumed that judges, in excusing jurors, act on correct principles, and discharge them only for good and sufficient reasons." Upon this authority we hold that this ground of the motion to quash was not well taken.

The bill of exceptions states that when the jury was being drawn or selected from the venire for this trial, the name of one "Bowling" was drawn and called, and in answer to said name one "Bowen" appeared as the man who had been summoned under that name; that the court discarded the name against objection and exception of defendant. The court in doing this acted within and according to the plain mandate of the law. Code 1907, § 7267. The bill of exceptions does not purport to set out all that was done, and this court will presume that the court complied with said section of the Code in supplying his place.

The bill of exceptions does not purport to set out all of the evidence. We cannot therefore say that the court erred in allowing the witness Monroe Jowers, against the objection of defendant, to testify as to the confession of defendant at the preliminary trial before the justice of the peace, on the ground that it was not shown to be voluntary. The said confession having been made during the preliminary trial, while defendant was testifying for himself, it will be presumed that his testimony was taken down in writing by the trial justice as the law directs, and the objection to the parol evidence of his confession should have been sustained, unless a proper predicate for the admission of secondary evidence was first laid, by showing that in fact it was not taken down, or that it had been lost and could not be found after diligent search, as the law directs. *Davis v. State*, 17 Ala. 417; Code 1907, § 7600; *Mathews v. State*, 96 Ala. 62, 11 South. 203; *Sanford v. State*, 143 Ala. 78, 39 South. 370.

If the confession was voluntary, it was competent for the court to allow the witness Lucius Body to tell the entire confession, as it was all a part of the res gestæ, and the objection to that part wherein he told

of striking the little boy with the gun was properly allowed over the objection of defendant. *Smith v. State*, 88 Ala. 73, 7 South. 52.

For the errors pointed out, this case is reversed and remanded.

Reversed and remanded.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

WHALEY v. STATE.

(Supreme Court of Alabama. Dec. 16, 1909.
Rehearing Denied June 30, 1910.)

1. CONSTITUTIONAL LAW (§ 48*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—CONSTRUCTION IN FAVOR OF STATUTE.

All doubts should be resolved in favor of the constitutionality of a law, and it should be upheld when it is capable of being construed so as to harmonize with the Constitution without doing violence to the legislative intent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. CONSTITUTIONAL LAW (§ 64*)—LEGISLATIVE POWERS—DELEGATION.

Sp. Sess. Laws 1907, p. 89, authorizing street railroad companies to make reasonable rules regarding transfers, and making it unlawful to fraudulently or willfully violate such rules, is not unconstitutional as delegating to street railroad officials not only the right to legislate, but to, in effect, suspend the law by a suspension or abolition of the rules; the right to make reasonable rules existing independently of the act, and the authority thereby given not being the delegation of authority to legislate, but merely reiterating the right to make such rules.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 64.*]

Mayfield, Sayre, and Evans, JJ., dissenting.

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

R. E. Whaley was convicted of an offense, and he appeals. Affirmed.

Gaston & Pettus, for appellant. Alexander M. Garber, Atty. Gen., and Tillman, Bradley & Morrow, for the State.

ANDERSON, J. It first appeared to this court, that the act in question (Sp. Sess. Laws 1907, p. 89) was violative of the Constitution because it delegated to officials of street railroad companies, not only the right to legislate, but to, in effect, suspend the law by a suspension or abolition of the rules. The question is still a close one, but all doubts should be resolved in favor of the constitutionality of a law, and it should be upheld when it is capable of being construed so as to harmonize with the Constitution without doing violence to the legislative intent. The right to make reasonable rules by street car companies, through its officers and servants, exists independent of the act, and the authority thereby given is not the delegation of authority to legislate, but mere-

ly reiterates the right of the officers to make reasonable rules in and about the conducting of the business of the public service utility, and, in addition thereto, prohibits under penalty, a violation of said rules. This statute makes it unlawful to fraudulently or willfully violate said rules. A party cannot be guilty of violating this law unless he violates the rules fraudulently or willfully and knowingly. The rules must be reasonable, and must be known to him at the time of the violation of same. The fact that the rules may be changed or suspended is no delegation of authority to make, change, or suspend the law, but merely relates to the subject upon which the law operates. The law is made by the Legislature, and cannot be repealed or suspended except by said body, and the fact that the rules may be changed or suspended in no wise changes or suspends the law. It is on the statute books, and there it remains until repealed or amended by the Legislature, and the abolition or suspension of the rules only removes the subject for the time being, upon which the law operates. Whether the rules are made or not, or are repealed or suspended after being made, we still have the law remaining in force, and ready to apply to the subject whenever it comes into existence. There might be but one street car company in the state, and it might suspend operation, and there would therefore be no subject upon which the law would presently operate, but this fact would not repeal or suspend the law itself, for later we might have many street car companies, or the existing one might resume operation, and as soon as any of them formulated reasonable rules there would be a subject upon which this existing law can operate, notwithstanding it was not in being when the law was enacted or may have not existed at all times after the passage of same.

The act in question being valid, and there being no reversible error disclosed by the record, the judgment of the criminal court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

SAYRE, J. (dissenting). I do not doubt that the Legislature may in the proper exercise of the police power regulate every business in the state. Nor do I doubt that the Legislature may confer upon railroad companies, or individuals operating railroads, the power to provide proper regulations for the protection of their property, the property of those with whom they deal, and for the enforcement of their mutual rights. Indeed, they have that right without express legislative grant, and there are circumstances in which a failure to adopt a proper system of rules and regulations would amount to a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dereliction of duty. But it has never been supposed, so far as I am informed, that rules adopted in pursuance of this general power amounted to more than rules of prudence binding only upon those who have notice of them. Here, the proposition is to punish criminally persons who may violate the rules a certain class of private business corporations may see fit to adopt from time to time, and commits the power also to their managing agents. It seems obvious to me that no peculiar merit to save the statute is to be found in the fact that the enterprises concerned are railways, or that the agents upon whom the power is conferred are managing agents. If the act is to be sustained as a valid exercise of legislative power, a similar power may be conferred on any corporation or person doing business in this state, and may as well have been conferred upon a motorman or conductor. But I do not agree that any private corporation or person can have the power to define the elements of a criminal act. The citizen can be required to look only to the common law, to legislative enactments, or to the ordinances and rules of a certain class of public corporations, and perhaps to some public officers acting under responsibility as the representatives of the people, to which quasi legislative powers are delegated for limited and most generally local purposes, to know what acts of his may be punished under the criminal laws of the state. Mr. Cooley thus speaks of the doctrine: "It has already been seen that the Legislature cannot delegate its power to make laws; but, fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the Legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and public regulations usual with such corporations, would always pass unchallenged." Cons. Lim. 264. In *Dunn v. Court of County Revenues*, 85 Ala. 144, 4 South. 661, speaking of a stock law, it was said: "These laws are complete within themselves, providing, as they do, in detail, for regulating the running of stock at large, and the enforcement of the rights of all parties to be affected by them in the particular locality to which they are made applicable. None of their terms or provisions are made to rest in the legislative discretion of the county authorities. As to this feature, the General Assembly had not abdicated any of that constitutional and prerogative power, which is peculiarly its own. The only power conferred or delegated is to determine the contingency on which the laws, or certain designated portions of them, may go into effect. It is no objection to a statute that it is conditional, or that its taking effect is to depend upon some specified subsequent event. Amma-

tive legislation, in some cases, may be adopted of which the parties interested are at liberty to avail themselves or not at their option"—citing *Cooley Cons. Lim.* 117. In *Brodhine v. Inhabitants of Revere*, 182 Mass. 598, 66 N. E. 607, it was held that a statute giving the board of metropolitan park commissioners authority to "make rules and regulations for the government and use of the roadways or boulevards under its care, breaches whereof shall be breaches of the peace, punishable as such in any court having jurisdiction of the same" was constitutional. But observe the reasoning upon which that decision was placed. After noting that there is a well-known exception to the rule which forbids the delegation of the power to make laws, resting upon conditions which existed from ancient times in most of the older states of the Union, which the Constitutions of those states generally recognize, namely, the existence of towns or other local governmental organizations which had always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interest of their own inhabitants, and that on this account the determination of matters of this character had been held to be a proper exercise of local self-government which the Legislature might commit to a city or town, the court expressed itself as follows: "How far this principle may be extended in the proper application of it is a subject on which there is much difference of opinion among judges. Whether it will justify the creation of a tribunal other than the voters or their usual representatives, where they have a representative government for the management of municipal affairs, seems not to have been much considered by the courts. It is very clear, where the people of a city or town have become so numerous that the management of their municipal affairs can be conducted conveniently only by a representative body like a city council, that municipal legislation, such as making ordinances and regulations as to local matters affecting the health, safety, and convenience of the people, may be intrusted to the people's chosen representatives in a city government. * * * In this commonwealth legislation has gone further than this. Apparently on grounds of expediency amounting almost to necessity, the making of rules and regulations for the preservation of the public health has been intrusted to boards of health * * * and a violation of the rules established by city or town boards has long been and is now punishable in the courts." And it was said that those statutes were to be justified upon one or both of two grounds: The board of health was treated as properly representing the people in making regulations; the work of the board of health was treated as only a determination of details in the nature of administration. In my judgment the concurrence of both grounds is necessary to support leg-

islation of that character. And penal rules made by boards of harbor and land commissioners were said to be sustained upon these grounds. On these principles, also, was based the decision in *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782.

The Massachusetts case from which I have just quoted states, as well as it can be stated, the theory of penal rules and the justification for them. Chief Justice Marshall had before that used this language, which, in my judgment points out, by inference at least, an exceedingly important limitation upon the delegated power of establishing such rules: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself. * * * The difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes, the law. But the making of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which the courts will not enter unnecessarily." *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253. And he instances the power conferred upon courts to make rules which was the subject of inquiry in that case. I am not disposed to aid in the extension of this doctrine of delegated powers to private corporations and persons which are not any part of the scheme of government and which are without responsibility for the manner in which the power may be exercised. Certainly this court has never gone to any such extent. Certain, also, it is that in each of the cases cited to support this statute the Legislature had conferred power to make necessary rules upon co-ordinate branches of the government, and not upon private persons. In the case at hand we are requested to put the citizen who may desire to conduct himself in conformity to all the laws of his country in a situation where he cannot go to the Legislature, nor to his local government, nor even to any official bureau or public officer, but must have recourse to such information as may be vouchsafed by a private business corporation or a private person, to know what he may, and what he may not, lawfully do. The private files of a business concern are to be the sole memorials of penal rules under which every citizen of the state may suffer. Without such rules enacted by street railway companies or their agents the statute means absolutely nothing. A more complete surrender of the legislative power, a more decided step towards a bureaucratic scheme of government, cannot be imagined. Such rules, in my judgment, are not called for by any necessity of government, lack legislative authority, lack that promulgation which is an essential of con-

stitutional legislation, and are absolutely void. For these reasons, I dissent.

MAYFIELD and EVANS, JJ., concur in these views.

MAYFIELD, J. (dissenting). I concur in all that is said by Justice SAYRE in his dissenting opinion, and in addition thereto I feel constrained to add the following, as expressive of my views of the unconstitutionality and invalidity of the statute in question, and which is upheld by the court in the majority opinion:

If the statute in question only declared that any person who, with intent to defraud or injure another, issues transfers or otherwise disposes thereof, in willful violation of any reasonable rules of any common carrier, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine of \$100, and may also be sentenced to imprisonment in the county jail, etc., I concede that it would be within the power of the Legislature, and might be valid if constitutionally enacted. The statute in question, however, does not do this, but in my opinion it has attempted to authorize any person or corporation operating a street railroad within this state, acting through a president or other authorized managing officer, to make any and all rules and regulations for the issue and use of transfer tickets, commonly called "transfers," which may be necessary for the protection of the person or corporation making the rules. The statute does not at all limit it to rules which are reasonable, but permits it to make any rules for the issue or use of transfers which the carrier deems necessary for its protection. If it does not mean this, what is the use or sense of the first section of the statute? The power and right to make all such reasonable rules as to transfers, already existed. The act is certainly not merely declaratory of the common law; it was clearly not so intended.

The second section of the act makes it unlawful for any person not authorized by the rules (not the statute) to issue or dispose of such transfers.

The third section makes it unlawful for any person to use a transfer not issued in accordance with such rules, or to use one properly issued for any other purpose than that for which the rule authorizes it to be used.

Section five attempts to make it a crime for any conductor or other agent of the corporation to issue or dispose of such transfers in violation of any existing rules, or of any that might thereafter be adopted by the common carrier, and to fix a penalty for the violation.

Section five makes it a crime for any person, other than the conductor or agent of the common carrier, to issue or dispose of

any transfer in violation of any rule or regulation that might be adopted by the person or corporation operating a street railroad; and also makes it a crime for any person to buy or receive, for the purpose of using, or to use or attempt to use, any such transfer, as fare, on any car operated upon such street railroad, willfully in violation of such rules, and prescribes a penalty by fine and imprisonment or hard labor.

The act, in addition to the foregoing, does make it a crime to issue, dispose of, or use, such transfers in violation of the rules and with the intent to defraud. This provision I think is proper, if the act was otherwise valid. In short, the act is in my opinion nothing more nor less than an attempt, on the part of the Legislature, to authorize any and all persons in this state who operate a street railroad, or the president or managing officer of a corporation which operates such a street railroad, to make and unmake the criminal laws of the state pertaining to the issue, use, or disposition of transfers used in connection with street railroads.

The act does not attempt to authorize, regulate, or prohibit, anything except the issuance, use, or disposition of these transfers. It neither makes nor attempts to make any law relating to the subject-matter. It merely attempts to authorize certain private individuals to make or unmake any law they may desire, relative to the matter, without let or hindrance, and attempts to make all persons guilty of a crime who violate such individual-made laws, and prescribes a rather severe punishment of fine, imprisonment, or hard labor. If these favored persons authorized to make the laws on this subject make no rules or regulations thereon, then there can be no crime under this act. If they make rules on this subject there will be just that many laws, and no more, under this act; if they make rules on the subject to-day, there are that many laws on the subject to-day; if they repeal or abolish all these rules to-morrow there will be no laws on the subject, until they make some more rules and regulations. If two or more of these persons make different and inconsistent rules, no matter how inconsistent, they are all law. The criminal law on the subject of transfers may and will be one thing to-day and another to-morrow; one thing in one town or city, and another in other towns or cities. A given act will be a crime in Montgomery, and not in Birmingham; it will be a crime on one street car in Montgomery, and not on another; it will be a crime on one car, and not on another of the same train.

The act does not attempt to provide that all street car companies shall make the same rules, but authorizes entirely different ones, and makes all the criminal law on the subject—whether they be reasonable or unreasonable, consistent or inconsistent. That is, if this statute is valid, the criminal law on

the subject of transfers for street railroads depends solely upon the ipse dixit of those individuals authorized to make the rules and regulations. In my judgment there is no escape from this conclusion. If I am right in my construction of the statute it cannot be a valid or constitutional enactment. Such acts are clearly not within legislative competency, because attempting an unwarranted delegation of the law-making power, because authorizing private individuals to make and suspend the laws, in violation of section 21 of our Bill of Rights.

Mr. Cooley, in his work on Constitutional Limitations (page 163), says: "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust;" and he there, as well as in other places in his book, cites approvingly what Mr. Locke, in his work on Civil Government, says as follows: "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government: First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. Secondly. These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly. They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves. Fourthly. The Legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." Locke on Civil Government, § 142.

While there are certain delegations of the law-making power which have been upheld, such as are pointed out and referred to by Justice SAYRE in his dissenting opinion, and there may be others, which are exceptions to or qualifications of the general rule denying the delegability of the law-making power, I do not believe that any like the one in

question has ever before been upheld. The Massachusetts Court held, in the recent case of *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160, that matters of local self-government might always be intrusted to the inhabitants of the town, and that the Legislature might delegate to a commission the power to fix the heights to which buildings might be erected; but that court has never held that the Legislature could delegate to private individuals the power to make criminal laws, though the laws did pertain to public service corporations.

It is likewise true that the Legislature, in the exercise of the police power, may regulate the issuance and transfer of railroad or street car tickets or prevent the transfer thereof, or provide that no one but the carrier or his agent shall sell or deal in such tickets; and may make it a crime for any other person to sell such tickets. But a statute which made it a crime for any person other than the agent of a common carrier, to sell tickets which contained on their face a statement that such sale is penal, but left it optional with the carrier whether or not the ticket should contain such statement, was held void, as an unwarranted delegation of the legislative authority to make or suspend a law; and also because it failed to define with certainty an offense, and not of itself creating an offense, and as giving to the carrier the option to create an offense. See *Jannin v. State*, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821.

A statute which authorized an insurance commissioner to prepare a standard policy of insurance, and prohibited the use of any other form, was held void as an unauthorized delegation of legislative power, and because the law was not complete in all its terms when it left that branch of the law-making power of the government. *O'Neill v. Ins. Co.*, 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650. In speaking of the power thus delegated to the insurance commissioner, the court said: "Take out the form prepared by the insurance commissioner and to be found in some pigeonhole in his office, and the act is without meaning or effect. It is completely eviscerated. * * * By its provisions the Legislature says in effect to its appointee: 'Prepare just such policy or contract as you please; we do not care to know what it is. The Governor shall have no opportunity to veto it. File it in your own office, and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' * * * We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee."

Is not the case at bar a more radical, if not a more complete, surrender of the legislative function? In this case the Legislature

does not even select or appoint the law-maker, but authorizes any and all who operate a street railroad to become such. It does not even require that the law be in writing, and allows as many laws as there may be persons operating street railroads; it does not limit each to one law—each such person may make and unmake as many as he desires.

If this law is valid, how can this court, or any citizen desiring to observe or enforce the criminal law relating to these transfers, know or find it? Only by interrogating every person who by this act is authorized to make the law. And, if you could reach all, while you were interrogating one, the others might be making other laws or repealing those then existing. It is true that under our system of government a state Legislature, as a law-making power, is well nigh omnipotent. There are no limits to its power for this purpose, except those written in or implied from the state and federal Constitutions. The entire law-making function of the state sovereign is vested in the Legislature, subject only to the above exceptions or restrictions. Without these, the power would be as that of the whole people from whom it is derived. But this power, almost unlimited, as it is, must be exercised in the manner and mode pointed out by the Constitution. This much is necessary to the preservation of the Constitution, or of the government itself; for the Constitution is the sole instrument by which this law-making power is created, and it defines and limits the power of the Legislature, and prescribes the principles by which, alone, the affairs of the government are to be administered.

Justice Patterson, speaking of the important and almost sacred character of the Constitution, in the case of *Vanhorne's Lessee v. Dorrance*, 2 Dall. (Pa.) 308, Fed. Cas. No. 16,857, 1 L. Ed. 391, says: "It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hands."

Justice Bell in the case of *Parker v. Commonwealth*, 6 Pa. 507, 47 Am. Dec. 480, after quoting the above from Justice Patterson, adds: "Until altered or destroyed by this authority, it is obligatory upon the people themselves; and Legislatures, which are merely its creatures, must conform to it, or their acts will be void. Everything done in contravention of its principles is an act of usurpation, which, uncorrected, tends directly to overthrow it." And in the same opinion the learned justice adds: "As has been well remarked, the constituent is entitled not

only to the industry and fidelity of his representative, but to his judgment, also, in all that relates to the business of public legislation. Among the principal axioms of jurisprudence, political and municipal, is to be found the principle that an agent unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge understanding, knowledge, and rectitude. The maxim is *delegata potestas non potest delegari*. And what shall be said to be a higher trust, based upon a broader confidence, than the possession of the legislative function? What task can be imposed on a man, as a member of society, requiring a deeper knowledge and a purer honesty? It is a duty which cannot, therefore, be transferred by the representative; no, not even to the people themselves; for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the General Assembly; much less can it be relinquished to a portion of the people, who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community. An attempt to do so would be not only to disregard the constitutional inhibition, but tend directly to impress upon the body of the state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered."

Mr. Justice Chase, in the case of *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, says: "I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state."

Chief Justice Marshall said, in the famous case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, that: "Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, they are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or public safety has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudicate and thereby give effect to the Constitution."

The act in question is no doubt attempted to be adjudicated on the ground that it protects and promotes the public safety; but in effect it attempts to make it a public crime to violate any rule or regulation of a street car company, as to transfers, whether the

rule is reasonable or unreasonable, whether it would tend to promote or to destroy the public safety. It merely invokes the criminal machinery of the state to enforce the rules and regulations of street railroads.

I know that the majority of this court do not think the law means what I construe it to mean, if they did they would strike it down. They of course believe and hold that it is a proper police regulation of the issue, use, and disposition of street railroad transfers, and, if they are correct, of course the enactment would be valid. But in my opinion the act is, in effect, an attempt to authorize those who operate street cars to make criminal laws as regards street railroad transfers, and to make it a crime to violate the laws thus made by such street car operators. This the Legislature has no power to do.

My conclusion is that the act is in violation of the Constitution (1) because it is an unwarranted delegation of legislative power to individuals; (2) because it is an attempt to authorize individuals to suspend the laws at pleasure.

HAWKINS v. STATE.

(Supreme Court of Alabama. Dec. 6, 1909.
Rehearing Denied June 30, 1910.)

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

G. W. Hawkins was convicted of an offense, and he appeals. Affirmed.

John F. Knight and Gaston & Pettus, for appellant. Alexander M. Garber, Atty. Gen., and Tillman, Bradley & Morrow, for the State.

ANDERSON, J. Affirmed on the authority of *Whaley v. State*, 52 South. 941.

MAYFIELD, SAYRE, and EVANS, JJ., dissenting.

ROY et al. v. O'NEILL.

(Supreme Court of Alabama. June 2, 1910.)

1. REFERENCE (§ 101*)—RE-REFERENCE—JUDICIAL DISCRETION.

Where the question whether land sold for distribution brought less than its fair value was referred, and the referee reported that, being informed that one of the bids had been withdrawn, he recommended that the sale of the land covered by that bid be not confirmed, it was discretionary with the chancellor to re-refer the matter on the referee's request, based on the bidder's evidence that he had not withdrawn the bid.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 175, 177; Dec. Dig. § 101.*]

2. JUDICIAL SALES (§ 39*)—VALIDITY—ADEQUACY OF PRICE.

A properly advertised and fair sale, in proceedings by a creditor to collect his debt, will not be vacated for mere inadequacy of price.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 77; Dec. Dig. § 39.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. EXECUTORS AND ADMINISTRATORS (§ 375*)
—SALES FOR DISTRIBUTION—CONFIRMATION—
JUDICIAL DISCRETION.

Confirmation of sale of lands of an estate for distribution is largely discretionary with the chancellor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1529; Dec. Dig. § 375.*]

4. APPEAL AND ERROR (§ 1017*) — REVIEW —
REFEREE'S FINDINGS—CONCLUSIVENESS.

A referee's findings, based on his examination of witnesses orally, with opportunity to observe their manner, are presumed on appeal to be correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3996, 4001; Dec. Dig. § 1017.*]

5. EXECUTORS AND ADMINISTRATORS (§ 379*)—
SALES FOR DISTRIBUTION—OFFERS.

A sale of lands for distribution is unaffected by offer of a larger price by the heirs, made after confirmation of the sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1549; Dec. Dig. § 379.*]

6. EXECUTORS AND ADMINISTRATORS (§ 382*)—
SALES FOR DISTRIBUTION—VACATION—RE-
SALE.

On vacating a sale of lands for distribution, a chancellor could not direct a conveyance to heirs making a better offer; he being only empowered to order another sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1566; Dec. Dig. § 382.*]

7. APPEAL AND ERROR (§ 304*) — REVIEW —
MOTION FOR NEW TRIAL—NECESSITY FOR
RULING.

Motion for new trial presents nothing for review on appeal, in the absence of a ruling thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1757; Dec. Dig. § 304.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

In the matter of the estate of James A. Roy, deceased. From a decree of the chancery court on removal of the matter from the probate court, Louis A. Roy and others appeal adversely to John W. O'Neill. Affirmed.

Sterling A. Wood, for appellants. Tomlinson & McCullough, for appellee.

SLMPSON, J. The administration of the estate of James A. Roy was removed from the probate into the chancery court; and, under a decree of said court, the lands of said estate were ordered to be sold for distribution. Said sale was made, and report of the same made to the court by the administrator; but, before confirmation of the sale, exceptions were filed by the heirs, claiming that the sales of various named parcels were made for amounts greatly disproportionate to their values. Thereupon the court ordered a reference by the register, to have ascertained and reported whether any of said properties "sold for less than their full and fair value." The register made his report (September 13, 1909), stating that certain witnesses had testified before him; that he had reduced their testi-

mony to writing and attached the same to his report; that no testimony was offered as to east half of lot 7, block 5, Birmingham, purchased by John W. O'Neill for \$8,500; that he had been informed that O'Neill's bid had been withdrawn, and he therefore recommended that the sale of said property be not confirmed; but that the other property brought a fair price. (There is evidently a mistake in the description, leaving out lot 8, as shown by other parts of the record.) On September 23, 1909, the register filed a paper stating that John W. O'Neill had informed him (and had made an affidavit to that effect) that he (the register) had been misinformed as to the withdrawal of his bid for lot 8 and east half of lot 7, block 5, Birmingham. The register, accordingly, requests that the matter be again referred to him. A motion was made to strike from the files said supplemental report of the register, on the ground that the five days for exceptions having expired, the original report stood for confirmation; said O'Neill having, by laches, lost any right to except to the same. This motion was overruled, and a decree was rendered on October 30, 1909, referring the matter back to the register, in accordance with his request, and authorizing him to consider the testimony on file in the previous report; and on November 17, 1909, the register made another report, recommending the confirmation of all of the sales, and attaching additional testimony taken. Exceptions to said report were overruled, and the report was confirmed December 9, 1909. On December 15, 1909, the adult heirs appeared in court and offered \$12,500 for said property which had been bid in by O'Neill for \$8,500, and prayed that the same be conveyed to them; and said petition was denied January 17, 1910. A petition was filed by O'Neill praying that the property be delivered to him, which was demurred to and answered, and this appeal is from the final decree, overruling demurrers, fixing the amount of the supersedeas bond for appeal, etc.

It is insisted, first, that the chancellor erred in making the order of re-reference to the register.

This is a matter which rested in the discretion of the chancellor, and will not be revised on this appeal. *Nunn v. Nunn*, 86 Ala. 36, 38; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 233, 236, 49 Am. Rep. 813.

At first sight there seems to be some confusion in the cases as to the principles which should control, in a court of equity, in regard to affirming, or refusing to affirm, sales made under its orders; but the seeming conflict may be to a great extent explained by the fact that some of the cases relate to sales under mortgages, or creditors' bills, or other proceedings to enforce the collection of a debt.

It is evident that, when a creditor is proceeding to collect his debt, he is not under

any obligation to see that the property of his debtor brings a reasonable price, but is entitled to enforce it whether the property brings its value or not; the owner being protected by the redemption statutes. It therefore follows that, in such proceedings, if the sale is properly advertised, and fairly sold, according to law, the sale will not be set aside merely for inadequacy of price. *Littell v. Zuntz*, 2 Ala. 256, 260, et seq., 36 Am. Dec. 415; *Helena Coal Co. v. Sibley*, 132 Ala. 651, 654, 32 South. 718; *Mahone v. Williams*, 39 Ala. 202, 220.

The case of *Bethea v. Bethea*, 136 Ala. 584, 34 South. 28, was a bill for sale for partition among joint owners, and the court does not state distinctly whether the above principle governs, but states the facts that the sale was made after unusual advertisement, in the presence of a large crowd; that men of large means were among the bidders; that, "in the face of such a showing, the opinion of real estate dealers cannot be taken for much"; that the advance offer was only \$500 on a purchase of \$9,500; that the parties complaining were *sui juris* who stood by and made no suggestion of the mistake in the description (which was one of the reasons set up for a refusal to confirm); also that the statement was made by the parties complaining, or others, at the sale, that the part not covered by the description would pass by the sale, no objection being made to the statement; and that "this leaves the complaining parties in the attitude of speculating on the possible results of a mistake which was known to them. This cannot be allowed." The court, accordingly, affirmed the decree confirming the sale.

On the other hand, this court refused to declare the chancellor in error for refusing to confirm a sale, in a case seeking to foreclose a deed of trust, wherein the evidence was in conflict with regard to the value of the property, with the weight probably in favor of confirming the sale; but the fact established that a much larger price will be paid for the property on resale. *Montague et al. v. International Trust Co.*, 142 Ala. 544, 38 South. 1025.

Also, on a bill by one tenant in common for a sale for partition, this court refused to disturb the decree of the chancellor overruling objections to the confirmation of a sale, though there were affidavits to the effect that the land was worth twice as much as sold for, because there was "no guaranty that, upon a resale, it should fetch a higher price than was obtained." *Cockrell v. Coleman's Adm'r*, 55 Ala. 583, 589.

It is not necessary, in this case, to determine just what theory will govern in partition sales.

When the court, in the progress of administration, grants an order for the sale of the lands of the estate, it seems that a different principle applies. The rights of no creditor to the enforcement of his claim is involved,

and it seems proper and equitable that the court should see that a reasonably fair price is obtained, before confirming the sale. Accordingly, section 2642 of the Code of 1907 provides that the court must be satisfied not only "that the sale was fairly conducted," but also that "the land sold for an amount not greatly less than its real value," before confirming the sale.

It is true that said section relates to proceedings in the probate court; but this court has held in this case, when before this court, at a previous term, that the requirements of the Code in ordering sales of land in the probate court must be complied with, in the chancery court (*Roy v. Roy*, 159 Ala. 555, 48 South. 793), and, aside from that decision, as the chancery court is making the sale for the same purpose, and the same reasons apply, it would at least furnish a rule to guide the discretion of the chancellor. Accordingly, in sales made by order of the probate court, it has been held that the sale is incomplete and rests in negotiation, until confirmed, and that the court is the vendor, and it may reject the offer "if the sale has not been fairly conducted, * * * or if the price is disproportionate to the value of the lands," etc. *Cruikshank v. Luttrell*, 67 Ala. 318, 321, 322; *Howison v. Oakley et al.*, 118 Ala. 215, 237, 23 South. 810.

Although this is the rule with regard to the confirmation of sales of the lands of an estate for distribution, yet the very nature of the case is such that much must be left to the discretion of the chancellor, though it is a judicial discretion, to be used in accordance with the rules established by statutes and decisions.

A difference between the amount bid (\$305), and the value of the land (\$328.17), was, of course, held to be not such a disproportion as to authorize a refusal to confirm. *Glenon v. Mittenlight*, 86 Ala. 455, 5 South. 772.

Also, in a case where there was a conflict in the proof as to value, this court said: "In this state of the evidence, and considering the opportunities of the witnesses to form a correct judgment, we cannot say that the court erred in refusing to confirm." *Eatman v. Eatman*, 83 Ala. 478, 3 South. 850.

Next, as to the presumption in favor of the report of the register, the writer confesses that it does seem something of an anomaly in our law that the conclusion of one man (or woman), and that, too, only the clerk of the court, should carry with it the same force and effect as the verdict of a jury, and have greater weight than the decision of the chancellor himself, for the statute provides that there shall be no presumption in favor of the correctness of the chancellor's decree. Yet doubtless this rule was originally adopted, and still rests on the idea that the register had the witnesses before him, and the full force of their manner and testimony cannot be photographed in the written statement of their testimony. *Mahone v. Williams*, 39

Ala. 202, 221; Anniston Loan & Tr. Co. v. Ward & Co. et al., 108 Ala. 85, 88, 18 South. 937; Jones v. White, 112 Ala. 449, 451, 20 South. 527; McQueen v. Whetstone, Adm'r, 127 Ala. 418, 431, 432, 30 South. 548; Pollard v. Am. F. L. M. Co., 139 Ala. 183, 200, 201, 35 South. 767; Williams v. Norton, 139 Ala. 402, 404, 36 South. 11.

Doubtless it is true, as suggested by counsel, that if the register's report is based entirely on written testimony by deposition, which comes up before this court in the same shape as he had it, the reason of the rule would fail, and there should be no presumption in favor of his report; but that is not the case here. The witnesses were examined by him orally, and he reduced their testimony to writing, so that he had the benefit of observing their manner, etc., and therefore, under our decisions, the rule of the presumption in favor of the correctness of his findings must be followed.

In the case of Jones v. White, supra, this court said: "The evidence before the register, consisting for the most part of the oral testimony of witnesses, and being presented to the chancellor and here in written form, the rule laid down in Woodrow v. Hawing, 105 Ala. 240 [16 South. 720], and also the general rule to be observed in reviewing findings of fact by the register on reference (Malhorne v. Williams, supra [39 Ala. 221]), required the chancellor and require us to indulge all reasonable presumptions in favor of the register's decision upon questions of fact, and not to reverse it unless clearly satisfied that it is wrong."

While several witnesses place the value of the property at from \$12,500 to \$20,000, yet they do not testify specifically as to the condition of the improvements; some saying that they had not seen the property for two years.

On the other hand, several witnesses testify that the buildings are in bad repair, the plumbing all out of repair, that it will take from \$3,000 to \$3,500 to put it in repair, and that \$8,500 is a fair price for it.

So the evidence is in conflict on the value, and also in conflict on the question as to whether O'Neill agreed to give up his bid, and his money is still in the hands of the administrator.

We cannot attach much, if any, weight to the offer, by the heirs, of \$12,500, as that was not made until after sale had been confirmed. It was then too late to make the offer. Field et al. v. Gamble, Adm'r, 47 Ala. 443; Lowe v. Guice, 69 Ala. 80, 83.

This court said, in another case: "The order or decree of confirmation is essentially a judgment; it fixes the rights and liabilities of the purchaser, and operates a divestiture of title." Sayre v. Elyton Land Co., 73 Ala. 96.

It may be noted also that the offer of the

adult heirs did not guarantee that the sum of \$12,500 would be bid at another sale, but that they simply offered that amount and requested that the property be conveyed to them, which the chancellor could not do.

If, for any cause, the first sale was vacated, the court could only order another sale. Howison v. Oakley et al., 118 Ala. 215, 237, 23 South. 810; Cruikshank v. Luttrell, 67 Ala. 318, 322, 323.

There being no ruling on the motion for a new trial, no question is presented to this court on that subject. Ala. Nat. Bank v. Hunt et al., 125 Ala. 512, 518, 28 South. 488, and cases cited.

Finding no error in the record, the decree of the court is affirmed.

Affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

SMITH et al. v. HILL.

(Supreme Court of Alabama. June 7, 1910.)

1. PARTITION (§ 77*)—SALE FOR PARTITION—IMPOSSIBILITY OF EQUITABLE DIVISION.

While partition in kind is matter of right, mere difficulty or resulting injury being no defense to an action therefor, one to have a sale of land for division among its joint owners must aver and prove that it cannot be equitably divided.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

2. PARTITION (§ 77*)—ACTUAL PARTITION OR SALE—OWELTY.

While it is the intent of the law that a partition shall be final and among the individual owners, and not partial, and among classes of individuals, and while in view of the area of the land and its character and the fact that though complainant owns a seven-twelfths interest therein, and each of the nine respondents owns a one-ninth interest in the remaining five-twelfths, subject to the life of their father therein, a prima facie showing for sale for division may be made, yet where such respondents by cross-bill seek to have their joint five-twelfths interest set apart to them jointly, subject to the life estate, and invoke the rule of owelty, the right to which, if not previously existing, is given by Code 1907, § 5233, thus making an equitable division of the land possible, partition, and not sale for division, should be granted.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

3. APPEAL AND ERROR (§ 935*)—PRESUMPTION.

The setting aside of a decree pro confesso, on the filing of an answer before publication of the testimony, being authorized by Code 1907, § 3167, though the mere filing of the answer does not per se set aside the decree, but it must be set aside on leave, and an answer filed before the decree is set aside will be stricken on motion, it will be presumed, where decree pro confesso had been entered against three of the respondents when they filed an answer and adopted the cross-bill of the other respondents, that leave to file the answer was given and the default was set aside, or that the default was waived by complainant; no objection to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

answer and cross-bill because of such default having been made, complainant having answered the cross-bill, and the cause having been submitted in part without objection, on such answer and cross-bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783-3787; Dec. Dig. § 935.*]

Appeal from Talladega City Court; G. K. Miller, Judge.

Bill by George A. Hill against Marcus L. Smith and others. From a decree granting the relief prayed, and denying relief on cross-bill, respondents appeal. Reversed, rendered, and remanded.

The original bill was filed by George A. Hill against M. L. Smith and others, seeking partition of 598 acres of land by sale, alleging that he owned seven-twelfths, that Marcus L. Smith owned a life estate in the remainder, and that, subject to such life estate, the other nine respondents each owned an undivided one-ninth interest in the remainder, subject to being diminished by any other children born to Marcus L. Smith. The respondents M. L. Smith and Lottie Smith demurred to the bill on various grounds. W. M. Lackey was appointed guardian ad litem for the minors, but failed to file any answer. M. L. Smith, Lottie Smith, and Kate McDonald having failed to file an answer, a decree pro confesso was entered as against them. On the 14th of September, 1909, the guardian ad litem filed an answer and cross-bill for all of the minor respondents, denying that the property could not be equitably partitioned, and asking that it be partitioned in kind, and that he, as guardian, had the right to pay in behalf of the minor any sum necessary to make the parts equal. Afterwards the respondents M. L. and Lottie Smith and Kate McDonald adopted the answer and cross-bill of the minor respondent, and filed same as their answer and cross-bill, but without having the decree pro confesso set aside. The bill also prayed for a construction of a deed, and that the court ascertain the interest of the respondents therein. By his decree the chancellor ordered the land sold as prayed, and denied the prayer of the cross-bill that the lands be divided by metes and bounds.

Whitson & Harrison, for appellants. Knox, Acker, Dixon & Blackmon, for appellee.

ANDERSON, J. Partition in kind is matter of right; that it will be difficult, or that injury may result, is no defense to an act of partition. *Gore v. Dickinson*, 98 Ala. 363, 11 South. 743, 39 Am. St. Rep. 67; *Cates v. Johnson*, 109 Ala. 126, 19 South. 416. In order, however, for the chancery court to sell land for division among joint owners, it must be averred and proven that it cannot be equitably divided. *Berry v. Tenn. Co.*, 134 Ala. 618, 33 South. 8; *McMath v. De Bartdelaben*,

75 Ala. 68. It is also the purpose and intent of the law that a partition should be final and not partial, and the land should be divided among all of the owners, and not by grouping the interests and making a partial division between a certain class.

We may concede that the bill sufficiently avers that the land in question cannot be equitably divided between all of the owners, and that the proof shows that it cannot be done in view of the fact that the land would have to be divided so as to give the complainant seven-twelfths and each of the respondent children, and the wife, one-ninth of the five-twelfths, each, subject to the life estate of their father, taking also into consideration the area of the land and its character as disclosed by the evidence, we think the complainant made out a prima facie case entitling him to a sale for distribution but for the cross-bill of the respondents. The respondents by their cross-bill seek to have their joint five-twelfths interest set apart to them jointly and which will give the complainant his seven-twelfths interest, which he can get and with which he must be satisfied, as he has no concern in the other five-twelfths, if the land can be equitably divided at the ratio of seven-twelfths and five-twelfths.

Two or more tenants in common may unite in a bill against another co-tenant, and may jointly elect to consider their several moieties as one moiety, and to have it set apart to them as one undivided fractional share of the whole. *Donner v. Quartermas*, 90 Ala. 164, 8 South. 715, 24 Am. St. Rep. 778; *Freeman on Co-Tenancy*, § 459; 30 Cyc. 240-261. The respondents, by their cross-bill, sought to have their respective moieties treated as one moiety, and to have the same set apart to them as an undivided fractional share of the whole. We can conceive of but little difficulty that the chancery court would experience in having the lands in question equitably divided into two parts, seven-twelfths to the complainant and five-twelfths to the respondents, the wife and children jointly, subject to the life estate of their father to the whole of their said part. Especially can there be an equitable division of this land, in view of the fact, that the respondents invoke the rule of owelty, which the chancery court has the power to award independent of the statute. 30 Cyc. 238. Section 5233 of the Code of 1907, however, gives the right whether it previously existed in the chancery court or not.

It seems that a decree pro confesso was entered against three of the respondents; that shortly thereafter, and before the publication of the testimony, they filed an answer and adopted the cross-bill of the other respondents, who were not in default. Section 3167 of the Code of 1907 authorizes the setting aside of a decree pro confesso upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the filing of an answer before the publication of the testimony. It seems, however, that the mere filing of the answer does not per se set aside the decree, but it must be set aside upon leave of the chancellor or register, and an answer filed before the decree is set aside will be stricken upon the motion of an adversary party. *Pickering v. Townsend*, 118 Ala. 351, 28 South. 703. In the case cited, a motion was made to strike the answer, and it was granted, and this court held there was no error in striking the answer; but in the case at bar there was no objection to the answer and cross-bill because three of the respondents were in default, the cross-bill was answered by the complainant, and the cause was submitted in part without objection on said answer and cross-bill. We will therefore presume that leave was given to file the answer and the default was set aside, or that the default was waived by the complainant upon answering the cross-bill, and who did not see fit to avail himself of the decree pro confesso.

The chancery court erred in granting the complainant relief upon the original bill, and in not granting the respondents the relief sought by their cross-bill, and the decree is reversed, and one is here rendered denying relief under the original bill, and the cause is remanded for further proceedings.

Reversed, rendered, and remanded.

SIMPSON, MAYFIELD, and SAYRE, JJ., concur.

VARY v. THOMPSON.

(Supreme Court of Alabama. Feb. 10, 1910.
Rehearing Denied June 30, 1910.)

1. EQUITY (§ 442*) — BILL OF REVIEW — GROUNDS.

A bill of review is not available in lieu of appeal or writ of error; but it must be apparent from the record that an erroneous conclusion of law, of substance and not mere form, has been reached and effected by the court as affecting the rights of the parties; and errors otherwise, in the regularity of the proceedings, and erroneous deductions from the evidence, must be corrected by appeal or other action in that nature.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065-1070; Dec. Dig. § 442.*]

2. EQUITY (§ 442*) — BILL OF REVIEW — GROUNDS.

Errors subject to revision on appeal or on other like procedure may be the basis of a bill of review, but not every irregularity available to reverse on appeal will support a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065-1070; Dec. Dig. § 442.*]

3. EQUITY (§ 418*)—DECREE PRO CONFESSO.

Code 1907, § 3183, provides that where parties are in default for want of an answer or other cause, notices may be entered on the order book of the register, and such entries for such times as fixed by the register, are sufficient in case of amendments and other orders

in the cause. Chancery Practice, rule 48, provides for the expiration of a 30-day period after notice of amendment. *Held*, that such section does not modify the rule, but deals alone with notices where the party to whom directed is in default, and not to the period after the elapsing of which from perfected notice a decree pro confesso may be taken.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 418.*]

4. EQUITY (§ 446*) — BILL OF REVIEW — GROUNDS.

That a decree pro confesso was entered prematurely was not ground for a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1079-1090; Dec. Dig. § 446.*]

5. EQUITY (§ 446*) — BILL OF REVIEW — GROUNDS.

If a notice entered in the order book of the register for the amendment of a bill should designate a day when the amendment should be considered, and contain a literal copy of the amendment, and that it did not, was not ground for a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1079-1090; Dec. Dig. § 446.*]

6. APPEAL AND ERROR (§ 909*) — PRESUMPTIONS.

In a suit in which the parties were decreed to be the joint owners of real estate and the land was ordered sold for a division of proceeds, an amendment to the bill gave the source of complainant's title as the children of a certain woman who acquired title by the will of their mother, and it was also alleged that they inherited the lands from their mother who left a husband surviving. The cause was submitted on pleadings and proofs. *Held*, that a decree in favor of complainant would be sustained on appeal from the decree on a bill of review, under the presumption that the woman did not die intestate, though the surviving husband was not made a party.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 909.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Bill of review by W. A. Thompson against John Vary. From a decree in favor of complainant, defendant appeals. Reversed and rendered.

Charles E. Elder, for appellant. Frank S. White & Sons and Carmichael & Wynn, for appellee.

MCCLELLAN, J. In consequence of a bill originally filed by Vary against Thompson and others certain real estate in Jefferson county was decreed to be sold for division of the proceeds between Vary and Thompson, the then adjudged joint owners thereof. Thompson, complainant in the present bill of review assailing the mentioned decree, appeared in the original cause, and filed his demurrer to that bill, which demurrer was overruled. The decree overruling his demurrer granted Thompson 30 days in which to answer the bill. After the expiration of that period, as appears from the order of the court of date June 12, 1908, decree pro confesso was taken against Thompson. Subsequent to the entrance of that decree pro confesso, the complainant, Vary, sought to amend

his bill. Notice of the application and purpose to amend as stated was undertaken to be given by an entry on the order book of and by the register of the court. The register fixed 5 days as the period after the expiration of which the amendment would be allowed. More than 60 days after the expiration of the stipulated period, the register entered in such order book an order reciting the allowance of the prayed amendment, and that after the expiration of the 5-day notice before mentioned. Six days after the order allowing the amendment was entered, upon motion of the complainant, Vary, the court entered a decree pro confesso against Thompson to the bill as amended. Thompson remained entirely inactive in the cause otherwise than by his presentation of his demurrer to the original bill.

Bill of review, its office, scope, and effect, has been frequently considered by this court; and it was long since announced as settled that such a bill was not available in lieu of appeal or writ of error; but that to be available it must be apparent from the record that an erroneous conclusion of law, of substance and not mere form, has been reached and effected by the court as affecting the rights of the parties; that errors otherwise, in the regularity of the proceedings, erroneous deductions from the evidence, must be corrected by appeal or other action in that nature. *McCall v. McCurdy*, 69 Ala. 65; *Tankersley v. Pettis*, 61 Ala. 354; *McDougald's Adm'r v. Dougherty*, 39 Ala. 409; *Jordan v. Hardie*, 131 Ala. 72, 31 South. 504. And it may be added, in limitation of the foregoing statement of the sum of the holdings on this subject by this court, that errors subject to revision on appeal or on other like procedure may be the basis of a bill of review, but that not every irregularity available to reverse on appeal will support a bill of review. Authorities, *supra*.

The court below entertained the opinion that the bill of review was well filed, and hence overruled the numerously grounded demurrer of the appellant. Appellant, touching our first statement of ground for the bill of review, would answer and deny its efficacy by an appeal to Code 1907, § 3133. It is obvious that that section deals alone with *notices* where the party to whom directed is in default, and not to the *period* after the elapsing of which from perfected notice decree pro confesso may be taken. We do not understand that rule 48 of Chancery Practice is at all modified by the statute above cited. That rule provides, expressly, for the expiration of a 30-day period after notice of amendment, and we take *notice* to imply perfected notice. It appears, then, that the cause, after amendment of the bill, was put at issue by a decree pro confesso prematurely taken against a defendant who was already in default, and against whom a like decree had been taken as upon the original bill. On the third day after the entrance of the lat-

ter decree pro confesso the cause was submitted for final decree, upon the original bill as amended, both decrees pro confesso and depositions of witnesses named, and on that day final decree was rendered, and filed in the cause, granting the prayer of the amended bill.

We do not think there can be any serious doubt that the premature entry of the latter decree pro confesso, and such was the case in this instance, was a mere irregularity in procedure that, while available on appeal to reverse, is not serviceable to support a bill of review. It is conceded in brief of solicitors for appellee that error in respect of such a decree would not, because interlocutory, support an appeal; and, this being true, we are unable to attach to it a graver importance when to maintain a bill of review apparent errors in conclusions of law, of substance, and of prejudice to the party complaining must infect the final decree sought to be reversed. The case cannot be distinguished in principle from that dealt with in *Jordan v. Hardie*, 131 Ala. 72, 80, 31 South. 504, where requisite notice and lapse of time were not had in ordering and holding a reference, making up of a report thereon, and the confirmation thereof was effected. It was therein ruled that the error was not of the character necessary to support a bill of review. Such is our view in respect of the premature allowance of the latter decree pro confesso in this instance. The notices sought to be effected by the two entries on the order book were sufficient, under Code 1907, § 3133. If this character of notice should properly designate a day when the amendment will be considered and contain a literal copy of the proposed amendment, it is obvious that omissions in those respects would be irregularities not of the kind necessary to afford bases for a bill of review, namely, errors in conclusions of law, of substance, and of prejudice to the complaining party.

Another ground set forth for reversal of the original decree in the bill of review is the absence of a footnote to the amendment made to the original bill. The amendments made to the original bill, becoming a part of it, were not of such a character as to require a footnote additional to that appearing on the original bill. *Enslin v. Allen*, 160 Ala. 529, 537, 49 South. 430.

It is also objected in the bill of review that C. L. McMillon was a necessary party to the original cause, after the bill was amended. This depends upon the construction of the bill as amended, even if we assume that Thompson could, by bill of review, complain of the nonjoinder of necessary parties. After amendment the bill contained averments attributing the source of Vary's title to one of the two children of Virginia McMillon who, it was alleged, became so possessed by virtue of the last will and testament of Virginia McMillon, and a copy of

that will, duly probated, appears as an exhibit to the bill; and, on the other hand, an averment by addition, that these two children *inherited* the lands from their mother who, dying, left a husband, C. L. McMillion, surviving. If Virginia McMillion died intestate, as may be implied by the latter allegation, the husband took a life estate in the lands described in the bill.

The cause was submitted not only on the pleadings, but also on proof, and, under the rule of favor extended here to decrees and judgments below, we must presume that the proof supported the former averment, viz., that Virginia McMillion did not die intestate as to these lands; and thereby avoiding the error in decree if a sale for division was directed upon a bill by a remainderman or reversioner only, and a life tenancy, without other interest, in the realty was existent. So treating the case made by the bill, C. L. McMillion was not a necessary party, nor, in consequence, could the sale be held erroneously ordered in violation of the rule just stated.

It may be, as is urged for appellant, that this appeal could be disposed of upon the ground that the bill of review presents a case of extreme neglect on the part of the appellee, defendant in the original cause; and also, upon the ground that the bill is silent in averment tending to show any prejudice resulting to him from the final decree assailed. That decree awards him half of the proceeds of the sale of the land, a proportion equal to his adjudged interest in the land. His bill asserts no greater interest, nor does it appear therefrom that the court, on another trial, would or could reach any other conclusion than that a sale of division was necessary. However, we will not ground our conclusion upon the latter considerations, sound as they may be.

The bill of review is without equity. The grounds therein asserted against the decree assailed token errors not availing to support a bill of review.

The decree appealed from is, hence, reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

SLOSS-SHEFFIELD STEEL & IRON CO. v. O'NEAL.

(Supreme Court of Alabama. April 14, 1910.
Rehearing Denied June 30, 1910.)

1. TRIAL (§ 76*)—OBJECTIONS TO EVIDENCE.

In an action for malicious prosecution, it appeared that plaintiff was taken on a train by the officer having him in custody, and he testified that every one on the train knew he was under arrest because the officer told them; such testi-

mony being in answer to a question, "The deputy told them?" *Held*, that the question forecast the relevancy of the answer, and defendant's objection after answer was too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 185; Dec. Dig. § 76.*]

2. APPEAL AND ERROR (§ 242*)—REVIEW.

An objection to testimony is not subject to review where the record shows no ruling by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

3. MALICIOUS PROSECUTION (§ 72*)—INSTRUCTIONS.

In an action against a corporation for malicious prosecution, it appeared that plaintiff was prosecuted for an assault on an employé of defendant, and that in the prosecution an attorney prepared the affidavit for a warrant in consultation with the assaulted person, and an officer of defendant, and the court instructed that, while it was a defense that prosecutor secured advice from an attorney in order for it to be a complete defense, prosecutor must have made a full and fair statement of the facts. *Held*, that the instruction was proper.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 72.*]

4. MALICIOUS PROSECUTION (§ 71*)—QUESTION FOR THE JURY.

In an action for malicious prosecution, the question whether defendant had made a full and fair statement of the facts to counsel was one for the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.*]

5. MALICIOUS PROSECUTION (§ 68*)—DAMAGES.

In an action for malicious prosecution, the malice required for the recovery of punitive damages need not amount to ill will or hatred, but it is sufficient if defendant is guilty of a wanton disregard of the rights of plaintiff.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. § 68.*]

6. MALICIOUS PROSECUTION (§ 72*)—INSTRUCTION.

In an action for malicious prosecution, a requested instruction that, though plaintiff was innocent, he was not entitled to a verdict if prosecutor honestly "thought" that plaintiff was guilty, was properly refused.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.*]

7. MALICIOUS PROSECUTION (§ 71*)—INSTRUCTION.

Issues as to good faith in consulting counsel, and probable cause generally, are for the determination of the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.*]

8. WORDS AND PHRASES — "BELIEF" — "THOUGHT."

"Belief" is that conviction which follows from the consideration of facts or evidence, while a "thought" may be no more than a mere conceit or fancy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 739-741.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Charles A. O'Neal against the Sloss-Sheffield Steel & Iron Company. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff was prosecuted for an assault with intent to murder upon one Stith, who appears to have been in the employment of the defendant company. The facts leading up to the prosecution and the question of the participation of the company therein through its agents are sufficiently intimated in the opinion of the court.

The following charges were given at the instance of the plaintiff: "(1) The court charges the jury that, while it is a defense to a suit in malicious prosecution that the prosecutor had secured advice from a practicing attorney learned in the law, yet the court charges the jury that, in order for such advice to be a complete defense, the law requires that the prosecutor shall have made a full and fair statement of the facts, and unless such full and fair statement was made it is no protection to him in a suit for malicious prosecution. (2) The court charges the jury that the malice required for the recovery of punitive damages in this case need not amount to ill will, hatred, or vindictiveness of purpose. It is sufficient if the defendant is guilty of a wanton disregard of the rights of the plaintiff."

The following charges were refused to the defendant: "(1) If you believe that Aldridge went to the place where Stith was being assaulted for the lawful purpose of separating the combatants, and if you believe, further, that O'Neal interfered with or retarded Aldridge in the execution of his purpose, intending thereby to prevent the separation of the combatants, then in that event O'Neal was guilty of an assault on Stewart; and if you believe that Stith honestly thought that O'Neal had been guilty of the conduct aforesaid, then in that event you cannot find a verdict for the plaintiff, although you may believe that O'Neal was in fact innocent, on the first count of the complaint. (2) Plaintiff is not entitled to recover as against the defendant's orders under the third count of the complaint." (3 and 4) Affirmative charge as to the appealing defendant under the first and third counts of the complaint.

Tillman, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

SAYRE, J. This was an action of malicious prosecution, and grew out of an assault made upon one Stith, in 1904, who was at the time superintendent of the defendant company's mine at Brookside. It appeared without any sort of contradiction that in the prosecution which followed, and of which the plaintiff complained, Mr. Bradley, an attorney at law, had prepared the affidavits for warrants—there were two—in consultation with Stith and J. W. McQueen, secretary, treasurer, and vice president of the defendant company, and had appeared in court advising about the prosecution of the

cases so made. Question seems to have been made in the case on trial whether in so doing Bradley was acting as an attorney for the defendant company or for his personal friend Stith. At the time he had a general retainer with the company, and had attended to such legal affairs as Stith had from time to time. It was objected to the testimony of the witness by whom plaintiff endeavored to prove Bradley's attorneyship for defendant company that they were stating conclusions merely and had no knowledge of the fact. It is hardly necessary for the disposition of the several exceptions reserved in this connection to discuss the grounds of objection interposed, for at a later stage of the case it was admitted in open court that Bradley had received from the company a fee as attorney for prosecuting the cases against plaintiff and others, and Bradley, who was called as a witness by defendant, testified that McQueen had authority to speak to attorneys about such matters and was present at the consultation. If, on consideration of the whole case, there appeared any conflict as to Bradley's agency, or any reason for doubting the sufficiency of the evidence to establish the fact, a different question would be presented. As it was, we consider it sufficient to say that, if there was error in the rulings complained of, we are satisfied that it was without prejudice to the appellant's case.

After his arrest the plaintiff had been taken by the deputy sheriff having him in charge from Brookside to Birmingham on a train. Plaintiff testified that most every one on the train knew he was under arrest, assigning as a basis of the statement that the deputy had told them. This was in response, as the bill of exceptions states, to the question: "The deputy told them?" The uncertain indication of the bill is that this question was asked by the defendant. But if the contrary be assumed, the question clearly forecast the relevancy of the answer, and defendant should have interposed objection before answer. It may also be deemed a proper disposition of this exception to say that the record fails to show any ruling by the court below.

The first charge, given on the request of the plaintiff, was a statement of the law serviceable to the jury and accurate in its application to the tendencies of the evidence in this case. Stith, in making his statement to the attorney and in speaking for McQueen, who, the jury might have inferred, was acting for the defendant on that occasion, had narrated an assault upon himself, and its attendant circumstances—an affair quorum magna pars. There was nothing in the case so stated, nor in the character of the man making the statement, to indicate any reasonable occasion for further inquiry. Defendant was not required to indulge suspicion of the statement. The only question of practical application in the immediate

connection was whether he had made a full and fair statement of the facts known to him. That was a question for the jury, and was submitted to the decision of the jury by the charge. *Jordan v. A. G. S. R. R. Co.*, 81 Ala. 220, 8 South. 191, relied on by appellant, holds with the appellee on this point. There the information connecting plaintiff with the commission of the crime charged against him was inherently weak and unsatisfactory, and one would suppose that prudence would have stimulated further inquiry. *Stone, C. J.*, laid down the general proposition that where a prosecutor fully and fairly submits to learned counsel all the facts which he knows, or by proper diligence could know, to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and acts upon such opinion in good faith, he is not liable. Nevertheless, he sustained a charge predicated nonliability upon a full and fair statement of all the facts, but omitting all reference to facts which could be known by proper diligence. There was a like ruling in *McLeod v. McLeod*, 73 Ala. 42.

The second charge given to plaintiff is not argued. It states a proposition which seems sufficiently clear.

In *Chandler v. McPherson*, 11 Ala. 919, it was said that if the defendant in an action for malicious prosecution, when putting the prosecution on foot, acted under an honest belief that the plaintiff was guilty of the offense charged against him, no recovery can be had. And that case is cited as authority for the proposition that the court erred in refusing to give charge 1 requested by appellant. The assertion of the charge in respect to the guilt of plaintiff on the facts hypothesized may be conceded. But the charge goes further and asserts that, although plaintiff was innocent, no verdict could be found for plaintiff, if Stith honestly thought he was guilty. In *Long v. Rodgers*, 19 Ala. 321, this court qualified *Chandler v. McPherson*, saying: "It will never do, as we have above intimated, to hold that a belief of the plaintiff's guilt, founded upon the caprice, prejudice, or idle dreams of the prosecutor, in the absence of all facts and circumstances which would generate such suspicion of a reasonably prudent man, will exonerate the party from liability. The books abound with cases to the contrary"—citing a number of cases. This case has since been followed on a number of occasions. In *Steed v. Knowles*, 79 Ala. 446, the court expressed itself in this language: "There can be no justification without honest belief coupled with, and supported by, reasonable grounds." *Lunsford v. Dietrich*, 86 Ala. 250, 5 South. 461, 11 Am. St. Rep. 37; *McLeod v. McLeod*, supra; *Jordan v. A. G. S. R. R. Co.*, supra; *Ewing v. Sanford*, 21 Ala. 157. In *Long v. Rodgers*, however, it seems to

have been held that an honest belief implied a belief founded upon sufficient evidence. We do not intend to become mere critics of language; but we think it ought to be noticed that the charge in question used the word "thought" instead of "belief." "Belief" is that conviction which follows from the consideration of evidence or of facts, while a "thought" may be no more than a mere conceit or fancy. In this case the plaintiff contended that he interfered in the difficulty between Stith and Burrell as a peacemaker only, and that there was no reason for attributing to him a different purpose. There was evidence to support his contention. So, then, without deciding that the court would have been in error if it had given the charge, we hold that the court is to be sustained in its refusal to give it.

We do not know why we should be asked to consider charge 2 refused to defendant. The charge permitted a recovery against the defendant Aldridge. But there is no judgment against him.

Other assignments of error relate to the refusal of the general charge to defendant and the overruling of the motion for a new trial. There can be scarcely any doubt that the defendant participated in the prosecution of plaintiff. We need to add only that issues as to good faith in consulting counsel, and probable cause generally, are for the determination of the jury. *Brown v. Master*, 111 Ala. 897, 20 South. 344.

We think the judgment should be affirmed. Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

GILCHRIST v. ATCHISON.

(Supreme Court of Alabama. June 9, 1910.
Rehearing Denied June 30, 1910.)

1. TRIAL (§ 143*)—TAKING CASE FROM JURY—GENERAL CHARGE.

In unlawful detainer, where there is a conflict in the evidence as to whether plaintiff had ever been in possession of the land prior to the time defendant went into possession, it was error to give the general charge for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. EJECTMENT (§ 16*)—RIGHT OF ACTION—POSSESSION.

In trial of title as in ejectment on transfer of unlawful detainer case, the older possession gives the better right, which is not defeated by a subsequent entry and occupation by the opposing claimant until it has ripened into title by adverse possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*]

3. EJECTMENT (§ 90*)—EVIDENCE—ADMISSIBILITY.

In trial of title as in ejectment on transfer of unlawful detainer case, evidence of the pos-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

session of defendant's grantor prior to plaintiff's possession was admissible.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

4. CHAMPERTY AND MAINTENANCE (§ 7*)—EVIDENCE—ADMISSIBILITY.

A deed from defendant's grantor, whom defendant claimed had been in possession before plaintiff, to defendant, was admissible in evidence; it being a question for the jury whether plaintiff was in adverse possession of the land when the deed was made.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 58; Dec. Dig. § 7.*]

5. CHAMPERTY AND MAINTENANCE (§ 7*)—CONVEYANCE OF LAND HELD ADVERSELY—VALIDITY.

Prior to Code 1907, § 3839, a deed of land was void as to a third person in adverse possession when the deed was made, but was binding between the parties and all others, except the adverse possessor and his privies, and void as to them only as a conveyance; being sufficient to authorize the grantee to use the grantor's name in a suit for the recovery of the land.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 58; Dec. Dig. § 7.*]

Appeal from Circuit Court, Washington County; Samuel B. Browne, Judge.

Unlawful detainer by Henry Clay Atchison against Thomas Gilchrist. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The cause was commenced in the justice court, and upon proper application and affidavit was removed to the circuit court, where trial of title was had under the statute.

Granade & Granade, for appellant. Turner, Wilson & Tucker, for appellee.

ANDERSON, J. The plaintiff showed no title to the land, but proved a possession in the early part of 1907, under color of title, of about the same date. The possession of the plaintiff, however, was disputed by the defendant, who testified that no one was in possession of it when he took charge of it under his deed, made in the fall of 1907. There being a conflict in the evidence as to whether or not the plaintiff had ever been in possession of the land prior to the time the defendant went into possession, the court erred in giving the general charge for the plaintiff. On the other hand, the defendant showed a prior possession in Knapp & Atchison and attempted to connect himself with them. The rule is that, where neither party has the true title, the older possession gives the better right, and such right is not defeated by a subsequent entry and occupation by the opposing claimant until it has ripened into title by adverse possession. *Reddick v. Long*, 124 Ala. 267, 27 South. 402, and cases cited. If, therefore, the defendant showed a possession in another with whom he connected himself, prior to the plaintiff's possession, if any he had, and which was a question for the jury, the plaintiff would not be entitled

to recover. The defendant attempted to connect himself by a mortgage from Knapp & Atchison to Vizard, a foreclosure of the mortgage, and a deed to himself. The description in the mortgage was capable of being made definite by parol evidence. *Cottingham v. Hill*, 119 Ala. 354, 24 South. 552, 72 Am. St. Rep. 923. Whether the defendant's offered proof in connection therewith was sufficient to put the trial court in error, we need not decide, as it can be made more specific on another trial, and this cause must be reversed on other grounds.

With the mortgage omitted, however, the defendant attempted to show possession in his grantor, Vizard, by the witness Robertson, prior to the plaintiff's claimed possession, and, if he did so and connected himself with Vizard, this would be a good defense to the action, and the trial court erred in not letting him do so. The court also erred in not letting the defendant introduce the deed from Vizard to himself. In the first place, it was a question for the jury as to whether or not the plaintiff was in the adverse possession of the land when the same was made. Moreover, the adverse possession of the plaintiff when the deed was made would only render it void as a conveyance and not as color of title or destroy its use to the grantee for the purpose of connecting himself with the grantor. While this ancient rule against champerty is obsolete in many states, it remains in Alabama, and all deeds made by one out of possession are void as to any one in the adverse possession of the land when the deed is made. They are binding, however, between the parties and all others except the adverse possessor and his privies, and are void as to them only as a conveyance, as they authorize the grantee to use the grantor's name in a suit for the recovery of the land. *Pearson v. King*, 99 Ala. 125, 10 South. 919; *Warvelle on Ejectment*, 300. If such a conveyance would authorize the grantee to sue in the name of the grantor, by analogy, it should operate to enable the grantee to defend in the name of the grantor, and, whether valid as a conveyance or not, would enable the defendant to connect himself with the previous possession of his grantor, Vizard. As this Vizard deed was made and this suit was brought prior to the adoption of the Code of 1907, we have discussed the rule of champerty as it then existed, but which is now abolished by section 3839 of the Code of 1907. Whether the said section would or would not apply to the present case we need not determine, as the result would be the same, and the deed was improperly excluded.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, SAYRE, and EVANS, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CROOM, Comptroller, et al. v. PENNINGTON & EVANS.

(Supreme Court of Florida. June 11, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 689*)—SALE—VALIDITY.

Where a tax collector issued to the state a certificate of the sale of land for the nonpayment of the taxes thereon, when the taxes had been paid, such certificate as an evidence of the sale of the land is illegal; and when it is shown to be void, upon proof or admission of the payment of the taxes, the custodian of the certificate and of the record of the sale may be required to make proper entries, showing the illegality of the certificate as a sale of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1380-1386; Dec. Dig. § 689.*]

2. STATES (§ 191*)—ACTIONS AGAINST.

A suit to obviate the effect of an illegal act of an officer as such is not a suit against the state, for the state authorizes only legal acts by its officers.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

3. TAXATION (§ 679*)—VOID TAX CERTIFICATE—RIGHTS OF STATE.

The state acquires no right under an illegal and void tax certificate issued to it by its officers, and the illegal act of the officer may be reached by the courts in proper proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

In Banc. Appeal from Circuit Court, Calhoun County; J. W. Malone, Judge.

Bill by Pennington & Evans against A. C. Croom, as Comptroller, and others. A demurrer to the bill was overruled, and defendants appeal. Affirmed.

Park Trammell and Calhoun & Campbell, for appellants. Paul Carter, for appellees.

WHITFIELD, C. J. The appellees filed a bill in equity for the cancellation of certain tax certificates as a cloud upon the title to lands. It is in substance alleged that the land was assessed, and that the turpentine rights thereon were separately assessed; that the taxes upon the lands were paid, but, as the taxes assessed against the turpentine lease privileges upon the lands were not paid, the said turpentine lease privileges upon the lands were sold to the state; that the papers or tax certificates issued for such sales "recite that the taxes due upon the lands therein mentioned have not been paid; that there is nothing on the face of said papers, purporting to be tax certificates, to show that they relate to taxes upon turpentine lease privileges, except the words "Tur. Lease" at the top of said papers"; that said papers are the regular forms used when lands are sold for nonpayment of the taxes due thereon; that under the law deeds may issue on the certificates and be a cloud on the title to the lands; that on application the Comptroller refused to cancel said certificates.

A demurrer to the bill of complaint was overruled, and the defendants appealed.

The certificate of sale made a part of the bill of complaint states that the land was sold to the state for a stated sum, being "the amount due and unpaid for taxes, costs, and charges on the described lands," and that the holder "or his assignees will therefore be entitled to a deed of conveyance of such lands in accordance with law, unless the same shall be redeemed." At the top of the certificate are the words "Tur. Lease"; but there is nothing in the certificate to indicate that only the turpentine lease privileges on the lands were sold. It is plain that the certificate covers the lands for unpaid taxes on the lands, and not the lease interests in the lands. The demurrer admits the payment of the taxes assessed on the lands, and was properly overruled.

Where a tax collector issued to the state a certificate of the sale of land for the nonpayment of the taxes thereon when the taxes had been paid, such certificate as an evidence of the sale of the land is illegal, and when it is shown to be void, upon proof or admission of the payment of the taxes, the custodian of the certificate and of the record of the sale may be required to make proper entries, showing the illegality of the certificate as a sale of the land.

Such a proceeding is not a suit against the state, but is to correct an illegal act of an officer. A suit to obviate the effect of an illegal act of an officer as such is not a suit against the state, for the state authorizes only legal acts by its officers. The state acquires no right under an illegal and void tax certificate issued to it by its officers, and the illegal act of the officer may be reached by the courts in proper proceedings.

The tax certificate may not be void on its face, but its invalidity as a sale of the lands may appear upon proof or admission that the taxes on the lands had been paid.

The validity of the certificates as a sale of the leasehold interest separately assessed is not involved here.

The order appealed from is affirmed.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

COCKRELL, J., absent.

BLUDWORTH v. BRAY.

(Supreme Court of Florida. June 13, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUED EXISTENCE.

As a general rule, when a state or condition is proven to have once existed, there is a presumption of its continued existence. But this rule is dependent upon the degree of permanency

of the subject-matter under consideration, and there is no legal presumption of the existence in January, 1909, of field crops raised in 1907.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 67.*]

2. APPEAL AND ERROR (§ 1009*)—EVIDENCE.

When it is stated that the consideration for the execution of a mortgage was solely to secure the payment of a note for \$102.80, and the defeasance clause undertakes to require the payment of advances in addition to the said consideration, and when the answer to the bill of foreclosure sets up various facts tending to show that the mortgagor did not intend that the mortgage should be a security for any other debt than the note, and that the note has been paid, and there is no exception to the answer, and the facts proven tend to support the answer, a decree finding the equities to be with the defendant in the court below will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

In Banc. Appeal from Circuit Court, Walton County, J. E. Wolfe, Judge.

Bill by R. P. Bludworth against John N. Bray. Decree for defendant, and complainant appeals. Affirmed.

W. T. Bludworth, for appellant. Daniel Campbell & Son, for appellee.

HOCKER, J. The appellant, R. P. Bludworth, filed a bill in the circuit court of Walton county to foreclose two mortgages executed to him by John N. Bray appellee.

The bill alleges: That appellant has been a merchant at Eucheanna, Walton county, for several years last past, and that on the 16th of March, 1908, appellee was indebted to him for supplies already furnished, and on that day executed to him a note for \$102.80, and to secure the payment of said note, and the payment of the balance due him, next prior to and the time of executing said note, for supplies already furnished, and other supplies and advances that might be made to appellee during the life thereof, executed on that day a mortgage on certain farm crops that may be grown on appellee's farm in Walton county, a description of which is given.

That on the 1st of January, 1909, appellee was indebted to appellant in the sum of \$248.02. The note and mortgage are attached to the bill as "Exhibit A" and "Exhibit B" and made a part thereof.

Exhibit A.

"\$102.80. Eucheanna, Fla. 3/16/1908.

"On October 1, 1908, after date for value received, I promise to pay to R. P. Bludworth, or order, the sum of one hundred two and $\frac{80}{100}$ dollars (\$102.80), with interest thereon from date until paid at the rate of ten per centum per annum. I further promise and agree that if this note is not paid at maturity and is placed in the hands

of an attorney for collection, I will pay all costs of collection including attorney's fee.

"J. N. Bray. [Seal.]"

Exhibit B.

"State of Florida, County of Walton.

"Know all men by these presents that I, J. N. Bray, for and in consideration of the sum of one hundred two and $\frac{80}{100}$ dollars (\$102.80) to me in hand paid by R. P. Bludworth, the receipt whereof is hereby acknowledged, have granted, bargained and sold and by these presents do grant, bargain, sell and convey unto the said R. P. Bludworth, the following described property, to wit: * * * And also all the crop or crops of corn, fodder, hay, peas, potatoes, syrup, cotton, and other produce of whatsoever kind or nature, that may be grown or raised by or for me on my farm in Walton county, Fla., during the life of this instrument, the lands used as said farm being more particularly described as follows, to wit: Place where I now live also the land tended on the Caswell place bought by me, and by or for me on any and all other lands in said county and state during the life hereof.

"To have and to hold all and singular the same property unto the said R. P. Bludworth, his heirs, executors, administrators and assigns forever, free from all exemption and homestead right or claim of I the said mortgagor, and I do hereby covenant that I am the lawful owner of the said mortgaged property, that is free of incumbrance.

"The condition of the above and foregoing obligation is such that if I the said mortgagor shall well and truly pay or cause to be paid unto the said R. P. Bludworth, or order, the sum of 102.80 dollars, according to the tenor and effect of one certain promissory note, of even date herewith with interest and all costs of collection as therein provided, and shall well and truly pay or cause to be paid to the said R. P. Bludworth, or order, any indebtedness for any advances of money, goods, wares or merchandise that the said R. P. Bludworth may make or cause to be made to said mortgagor during the life hereof, and the recording fees of this mortgage, then and in that event this instrument to be null and void, otherwise to be and remain of full force and effect.

"It is distinctly agreed and understood by and between the parties hereto that this instrument is intended to be a mortgage to secure not only the note above mentioned, but also all and every indebtedness of whatsoever character that may be due and owing from the said mortgagor to the said R. P. Bludworth at any time during the life of this mortgage.

"It is further stipulated, agreed and covenanted that I, the said mortgagor, will at my own proper costs and charges do all things necessary to keep perfect and unim-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paired the security hereby intended and will pay or cause to be paid all taxes, assessments and penalties against the said property or any part thereof.

"It is further agreed and understood and covenanted that upon the failure of the said mortgagor to pay the principal of the said note at maturity, together with the interest thereon, or if, at any time during the life hereof the said mortgagor shall consume, sell, convey, incumber, destroy or otherwise dispose of any of the said mortgaged property before the full and complete satisfaction of this mortgage, without notice to the said mortgagee and his consent thereto in writing first had and obtained, or shall in any particular violate any of the stipulations or covenants herein contained, then and in either of those events this mortgage debt is to be immediately due and payable and this mortgage foreclosable, at the option of the said mortgagee, and all costs of collection or suit in foreclosure including a reasonable attorney's fee shall be a part of the mortgage debt and a lien upon said mortgaged property.

"In testimony whereof, the said party has hereunto set his hand and seal on this the 16 day of March, A. D. 1908.

"J. N. Bray. [Seal.]

"Signed, sealed and delivered in the presence of: Herman Bludworth.

"State of Florida, County of Walton.

"Before the subscriber personally came J. N. Bray to me well known to be the individual described in, and who executed, the foregoing mortgage and acknowledged to me that he executed the same for the uses and purposes therein set forth.

"Witness my hand and seal official this 16 day of March, A. D. 1908.

"[Seal.] Herman. Bludworth,

"Notary Public.

"My commission expires March 8, 1910."

"Exhibit C.

"\$82.30. No. _____,

"State of Florida, Walton County, Euchanna P. O.

"April 9, 1907.

"On or before October 1, 1907, I promise to pay the Virginia-Carolina Chemical Company, or order, eighty-two and $\frac{30}{100}$ dollars, for 17 sacks of sea gull guano Sacks
for 18 sacks cotton belt guano Sacks
" sacks Sacks
" sacks Sacks
sold to me by the said Virginia-Carolina Chemical Company. Should this note be unpaid at maturity and be placed in the hands of an attorney for collection or adjustment then there shall also become due and payable on this note an attorney's fee of 10 per cent. on the amount of said principal and on interest due and to become due thereon. This note bears interest from its maturity at the rate of 8 per cent. per annum until paid.

"The consideration of this note is the commercial fertilizer mentioned above and which has been sold to me by the said Virginia-Carolina Chemical Company, and it is expressly understood that such company has refused to make and does not make any warranty of the quality or value of such fertilizer, or any representations as to its quality or value; and that I am to rely as to such quality and value, solely upon the fact that the laws of said state as to the analysis of such fertilizers have been complied with in so far as is necessary to offering the same for sale in this state. The said fertilizers for which this note is given have been advanced to me for the express purpose of aiding me in carrying on my farming operations during the present year on my farm containing 50 acres more or less in section 32, township 2, range 18 and in said state and county, and I hereby sell and convey and pledge unto the said Virginia-Carolina Chemical Company or its assigns to be paid for at the market quotations at the time of the delivery the proceeds of such sale to be retained by the Virginia-Carolina Chemical Company, or its assigns and applied to the satisfaction of this indebtedness; and also upon all indebtedness of any kind that I am due or may become to R. P. Bludworth during the life of this note.

"Witness my hand and seal this the 9th day of April, A. D. 1907.

"J. N. Bray. [Seal.]

"Signed, sealed and delivered in our presence: Herman Bludworth.

"State of Florida, Walton County:

"Before me, a notary public in and for Florida, personally appeared J. N. Bray known to me to be the same individual who executed the above-written instrument, and acknowledged that he signed, sealed and delivered the same freely and voluntarily, and for the purposes therein stated.

"In testimony whereof, witness my hand and official seal this the 9th day of April, A. D. 1907.

"[Seal.] Herman Bludworth.

"Commission expires 3/8/10.

"For a valuable consideration the Virginia-Carolina Chemical Company hereby assigns, transfers and sets over to R. P. Bludworth or order all of its right, title and interest in and to the within note.

"C. J. Beane, Manager. [Seal.]

"State of Alabama, county of _____."

To this bill an answer was filed by J. N. Bray, the appellee, admitting the execution of the mortgage on the 16th of March, 1908, but denies that he executed it to secure the note of \$102.80, and also to secure the balance due complainant by respondent next prior to and at the time of executing the note and for supplies already furnished by complainant to respondent, but alleges that on the 16th of March, 1908, Herman Bludworth,

son of complainant, came to respondent's house to secure what he called a "guano note" for \$102.80, the price of guano that had been then purchased by respondent for the year 1908, the respondent then being sick, and that said note was a lien on his crop for guano, and that nothing whatever was said about any prior or future accounts, and that respondent, believing the representations of Herman Blutworth that he was merely giving a lien on his crop for the guano note, executed the instrument without reading it, or having it read to him, and that it was not the intention of respondent, and was no part of the agreement, to secure anything else than the guano note. The answer furthermore alleges that respondent was not indebted to complainant as alleged in the bill. The answer also alleges: That the instrument called a mortgage to the Virginia-Carolina Chemical Company for \$82.30 was made solely to secure the payment for guano used by respondent in the year 1907, and was not given to secure any accounts or advances made by the complainant, and that nothing whatever was said about including such a clause in the instrument; that respondent, relying upon the assertion of complainant that said instrument was only to secure payment for the guano, executed said instrument without reading it. The answer further alleges that the respondent has paid all amounts covered by the mortgage and has demanded it of the complainant, but complainant has failed to deliver it.

A replication was filed to this answer and a considerable amount of testimony taken. On final hearing a decree was made finding the equities in favor of the defendant, the appellee here, and the bill was dismissed. A few days subsequent to the making of this decree, on the application of the solicitor for the complainant, an order was made modifying the former one, dismissing the bill without prejudice to complainant's right to sue at common law on the note or mortgage executed by J. N. Bray to the Virginia-Carolina Chemical Company on the 9th of April, 1907, which mortgage was not considered by the court in making its final order of dismissal, "as it appeared to the court that the property mentioned in said note or mortgage as security was not in existence at the time of filing the bill." An appeal was taken to this court by the complainant from the final decree.

The assignments of error question the decree of dismissal as contrary to law, and contrary to and not supported by the evidence.

We do not think the court erred in its action relating to the mortgage note of J. N. Bray given to the Virginia-Carolina Chemical Company. It is true that as a general rule, when a state or condition is proven to have once existed, there is a presumption of its continued existence. But this rule is dependent upon the degree of permanency of the subject-matter under consideration. The

presumption does not arise unless the condition or state of facts is such as to be continuous in its nature; in other words, so long as is usual with conditions or things of the particular nature under consideration. 22 Am. & Eng. Ency. Law (2d. Ed.) pp. 1238, 1239. We do not think there is any legal presumption of the existence of field crops in January, 1909, raised in 1907. Ordinarily such crops would be entirely used up or disposed of within the intervening period, and, as there was no proof to the contrary, we cannot discover that the circuit judge erred in disposing of the mortgage note given to the Virginia-Carolina Chemical Company as he did.

As to the other mortgage dated March 16, 1908, executed by appellee, Bray, to appellant, Blutworth, it appears from the mortgage itself that the consideration recited therein for its execution was the sum of \$102.80, which was the amount of the guano note. It is true that the defeasance clause recited that it was to be void on the payment of the \$102.80, and also any indebtedness for advances, etc., that Blutworth may make to the mortgagor during the life of the mortgage, and that, immediately after this defeasance clause, it is stated that the mortgage was to secure all and every indebtedness of Bray to Blutworth. But it appears clearly from the testimony of Herman Blutworth that when Bray executed the mortgage nothing was said to him about securing anything except the note. He admits that Bray, who was an old man 76 years old, was sick when he executed the mortgage, did not read it, and it was not read to him. He admits also that he told Bray the mortgage was executed to secure the guano note of \$102.80. This substantiates Bray's testimony on this point. It is also stated by Blutworth that the form of this mortgage was one which he was in the habit of using.

In view of the fact that the consideration expressed for the execution of this mortgage is solely the note of \$102.80, and the defeasance clause undertakes to require the payment of advances, in addition to the consideration, we are disposed to look to the facts and circumstances attending the execution of the mortgage to ascertain what was really intended by Bray when it was executed. 20 Am. & Eng. Ency. Law (2d Ed.) 957; 27 Cyc. 1058; Albion State Bank v. Knickerbocker, 125 Mich. 311, 84 N. W. 311. And we take this course especially as those matters were set up in the answer, and no exception was taken to it. We are therefore of the opinion that this mortgage was not intended by Bray when he executed it to secure any other debt than the note for \$102.80. We think the other matter contained in the mortgage must have gotten into it from the use of a regular form of mortgage used by Blutworth.

Upon the question whether this note for \$102.80 was paid there was a conflict of the

evidence, and such a conflict as we think would not warrant us in holding the circuit judge in error in dismissing the complainant's bill.

The decree appealed from is affirmed, at the cost of the appellant.

WHITFIELD, C. J., and SHACKLEFORD, TAYLOR, and PARKHILL, JJ., concur. COCKRELL, J., absent.

McCASKILL v. UNION NAVAL STORES CO.

(Supreme Court of Florida, Division B. June 9, 1910.)

(Syllabus by the Court.)

1. EQUITY (§ 24*)—JURISDICTION—FORFEITURES.

Courts of equity always mitigate forfeitures or relieve against them, when this can be done without doing violence to the contracts of the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 69; Dec. Dig. § 24.*]

2. EQUITY (§ 24*)—FORFEITURE—AMBIGUOUS LANGUAGE.

Forfeitures, not being favored in equity, will not be enforced if couched in ambiguous language.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

3. CONTRACTS (§ 321*)—BREACH OF COVENANT TO PAY TAXES—FORFEITURE.

The covenant to pay taxes is in the nature of a covenant to pay money, and a forfeiture incurred by a breach thereof may be relieved against on the same principle.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. § 321.*]

4. CONTRACTS (§ 167*)—CONSTRUCTION—PROVISIONS OF LAW.

All provisions of a contract should be considered and construed with reference to controlling provisions and principles of law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 750; Dec. Dig. § 167.*]

5. CONTRACTS (§ 167*)—PROVISIONS OF LAW APPLICABLE TO SUBJECT-MATTER.

Provisions of law applicable to the subject-matter of contracts are parts of the contracts, whether so expressed or referred to in the contract or not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 750; Dec. Dig. § 167.*]

6. CONTRACTS (§ 226*)—CONSTRUCTION—CONDITIONS SUBSEQUENT—FORFEITURE.

Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1036; Dec. Dig. § 226.*]

7. STATUTES (§ 241*)—CONSTRUCTION—FORFEITURES.

Statutes are construed strictly against a forfeiture.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 822, 823; Dec. Dig. § 241.*]

8. CONTRACTS (§ 213*)—CONSTRUCTION—TIME—FORFEITURES—"BECOME DUE AND PAYABLE."

Where the statute provides, "all taxes shall be due and payable on or after the first

Monday of November of each and every year," and unpaid taxes are not collectible by levy and sale until after the first Monday in April thereafter, and a contract obligating the U. N. S. Co. to pay all taxes on land for certain years contains the provisions that if the U. N. S. Co. shall, for three months after taxes "become due and payable" on the land, fail to pay such taxes, all rights shall immediately cease forever as to all tracts of land on which the U. N. S. Co. has failed to pay said taxes, a forfeiture will not be incurred by a delay to pay the taxes until the month of March succeeding the first Monday of November.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 957; Dec. Dig. § 213.*]

For other definitions, see Words and Phrases, vol. 1, p. 730.]

Appeal from Circuit Court, Walton County; J. E. Wolfe, Judge.

Bill by the Union Naval Stores Company against J. J. McCaskill. Decree for complainant, and defendant appeals. Affirmed.

Wm. W. Flournoy, for appellant. Blount & Blount & Carter, for appellee.

PARKHILL, J. The bill of complaint filed by appellee against appellant in the circuit court for Walton county alleges: That the Union Naval Stores Company is the owner, by deeds duly executed under seal by the Louisville & Nashville Railroad Company, R. G. Peters, and A. L. Langellier, of all the timber situated upon some twenty odd thousand of acres of land fully described; the consideration therefor being \$21,653.02. By said deeds of conveyance the Union Naval Stores Company and its assigns were granted not only the timber but the right to cut and remove same and to box, chip, and work same for turpentine purposes for 15 years, of which period less than seven years expired prior to the filing of this bill. That at the time of the execution of said conveyances the said railroad company and Peters and Langellier were the owners of the land and the timber thereon in fee simple and in possession thereof. That immediately subsequent to the making payment of the moneys mentioned in such conveyances, the Union Naval Stores Company, through its agents and lessees, entered into possession of the lands and timber described and boxed large quantities of the timber, and is still in possession of the said lands and using the timber thereon for turpentine and other purposes. That the defendant, J. J. McCaskill, claims to have purchased all the lands hereinbefore described; the lands being the same upon which grew the timber theretofore sold to the Union Naval Stores Company, and the said McCaskill having purchased the said lands, not only with constructive notice by reason of the record of the conveyances, but with actual notice of each of the said conveyances to the complainant and of the rights of the Union Naval Stores Company to the lands and timber hereinbefore men-

tioned, and the said McCaskill claims that he is now and was during the year 1907 the owner of the said lands by virtue of said purchase. That under the terms of the provisions in the deed from the said railroad company and Peters and Langellier to the Union Naval Stores Company, the said Naval Stores Company was under obligation to pay all taxes commencing with those levied for the year 1902, upon the said land, and the deed contained the provision: "And if it (the Union Naval Stores Company) shall for three months after taxes become due and payable on the land, fail to pay such taxes on any of the tracts of land herein described, such failure shall be taken as a declaration that the grantee abandons all rights thereby conferred upon the said lands on which taxes have not been paid, and all rights conferred by this instrument shall immediately cease forever as to all tracts of land on which grantee has failed to pay said taxes." That in the month of March, 1908, the Union Naval Stores Company applied to the tax collectors for receipts for the state and county taxes upon said land assessed for the year 1907 and offered and tendered the full amount of taxes due thereon; but the tax collectors refused to accept payment of such taxes for said company because the defendant, McCaskill, had, a short while before, paid said taxes. That the said McCaskill now claims that the Union Naval Stores Company has failed to pay the taxes on the said lands in accordance with the terms of the conveyance, and thereby forfeited all rights in and to said land and the timber thereon.

The chancellor issued a temporary injunction which was afterwards made perpetual, restraining the said McCaskill from entering upon said lands and from interfering with the complaining company in the use of said timber for turpentine purposes; the complainant being ordered to pay into the registry of the court for the defendant the sum of \$651.73, upon such payment being made the complainant being relieved from the forfeiture claimed by defendant as against the rights of complainant in the lands and timber upon the lands described.

Passing by the question whether appellant, who was the defendant in the court below, is in a position to take advantage of the alleged forfeiture—the forfeiture clause not having been made by him and not embracing the grantees of the grantor, who was the beneficiary of the forfeiture, and the appellant having purchased the land, not the timber, before the alleged forfeiture—it seems clear to us that the Union Naval Stores Company was within its rights when it attempted in the month of March, 1908, to pay the taxes assessed against the land involved here for the year 1907.

Courts of equity always mitigate forfeitures, or relieve against them, when this

can be done without doing violence to the contracts of the parties. *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57, and note 85; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322. Forfeitures, not being favored in equity, will not be enforced if couched in ambiguous language. *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187.

The covenant to pay taxes is in the nature of a covenant to pay money, and a forfeiture incurred by a breach thereof may be relieved against on the same principle. *Giles v. Austin*, 62 N. Y. 486.

All provisions of a contract should be considered and construed with reference to controlling provisions and principles of law. *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 South. 19. And provisions of law applicable to the subject-matter of contracts are parts of the contracts, whether so expressed or referred to in the contracts or not. *State ex rel. Ellis v. Tampa Waterworks Co.*, 56 Fla. 858, 47 South. 358, 19 L. R. A. (N. S.) 183.

Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed. *Town of Mt. Morris v. King*, 77 Hun, 18, 28 N. Y. Supp. 281, text 284; 3 Words and Phrases, p. 2894. Statutes are construed strictly against a forfeiture. 2 *Lewis' Sutherland Statutory Construction*, par. 547; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Manhattan Trust Co. v. Davis*, 23 Mont. 273, 58 Pac. 718.

The provisions of section 541 of the General Statutes of 1906 are applicable to the subject-matter of the contract before us and become part of the contract. That section of the statute provides in part as follows: "All taxes shall be due and payable on or after the first Monday of November of each and every year." And, according to the provisions of this section, unpaid taxes are not collectible by levy and sale until after the first Monday in April.

The complainant was bound to pay the taxes within three months after such taxes shall become due and payable. We think, according to a fair construction of the language of this contract, the word "become" means "be"; that is, the time when the taxes "become due and payable" is the time when the taxes "shall be due and payable." And, according to the statute, taxes do not become due and payable "on" the first of November, but "on or after" the first Monday of November. Of course, if taxes became due and payable only on the first Monday of November, then, according to the contention of appellant, three months thereafter, when the Union Naval Stores Company was required to pay the taxes, would expire on the first Monday of February following, and the Naval Stores Company was too late when it attempted to pay the taxes in March. This contention, however, loses sight of the provision that taxes shall be due and payable

after the first Monday of November, as well as on that day. "All taxes shall be due and payable on or after the first Monday of November of each and every year." Then, the taxes were due and payable on the first Monday of November and the next day, Tuesday, and Wednesday, and the last Monday of November and the first Monday of December, January, February, and March, and during all the month of March, and the Union Naval Stores Company was in ample time in its proffer to pay the taxes during the month of March.

In *Acosta v. Anderson*, 56 Fla. 749, 48 South. 260, we took this view of a contract requiring the purchaser "to pay all taxes that may be legally levied or imposed" upon the land, saying of the contract: "It simply binds the complainant to pay the taxes that may become due each year"—thereby holding that the word "become" was the equivalent of the word "be."

In the *Acosta-Anderson Case*, considering the contention that the taxes were due and payable in November, 1905, and should have been paid before the advertisement of the land for nonpayment of the taxes in April, 1906, this court said: "We think the complainant could comply with the contract by paying the taxes on or before the time fixed by the tax collector in his notice of sale of the property for nonpayment of the taxes." It is true that in that case the contract did not fix a time for the payment of the taxes; but that fact makes no difference in the applicability of the doctrine of that case here, because the contract in the instant case fixes a time for the payment of the taxes at three months after the time when the complainant could have paid them under the law without the benefit of the three months allowed by the contract for the payment of the taxes.

The decree is affirmed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD and COCKRELL, JJ., concur in the conclusion.

WHITFIELD, C. J. (concurring). This sale of growing timber on land, with the right of possession to remove the timber extending over a period of years, upon condition that if the taxes on the land are not paid by the grantee within three months after the taxes shall become due and payable the interest conveyed shall revert to the grantor, is a conveyance of an interest in the land, and creates an estate upon condition subsequent. The mere failure to perform the condition does not in equity at least ipso facto terminate the estate, but only entitles the grantor to re-enter; and, if he does not re-enter, the breach of the condition may be regarded as waived. The condition was imposed to insure the payment of the taxes on

the land as required by law, so as to avoid a burden to the grantor. The time of payment of the taxes is not made an essential element of the condition if the requirements of the law are satisfied, and no burden is imposed upon the grantor. The mere voluntary payment of the taxes by a vendee of the land does not of itself accomplish a forfeiture of the rights acquired by the conveyance of the timber, particularly when the grantee of the timber rights offers to pay the taxes before the expiration of the time allowed by law for their voluntary payment.

COCKRELL, J. While I might agree to an affirmance of the decree, I cannot concur with the construction placed upon the contract by Judge PARKHILL.

Taxes "become" due and payable in this state on the 1st of November, but "continue" due and payable for several months thereafter. The word "become" connotes an entering into a new condition as opposed to a continuance in an existing condition. See the various dictionaries, "sub verbo." The condition subsequent is not a requirement for the payment of taxes within three months after they are or may be due and payable, but after they "become" due and payable, and to my mind that means by the 1st of February, even under the peculiar verbiage of our statute.

SHACKLEFORD, J., concurs in the above.

FLORIDA RY. CO. v. DORSEY.

(Supreme Court of Florida. June 11, 1910.)

(Syllabus by the Court.)

1. ACTION (§ 38*)—JOINDER—SINGLE CAUSE OF ACTION.

In an action by a passenger against a railroad company, allegations that the defendant in operating and running its trains did not stop long enough to allow the plaintiff a reasonable time to alight from the car, but carelessly and negligently started said train, and carelessly put said train in violent quick motion, which said careless and negligent act threw the plaintiff violently to the ground by means of which she was injured in a specified way, states a single cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.]

2. APPEAL AND ERROR (§ 1042*)—REVIEW—HARMLESS ERROR—STRIKING OUT PLEAS.

Where testimony covered by special pleas is admitted under a plea of general issue, the action of the court in striking the special pleas need not be reviewed, since no harm could have resulted from striking the special pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

3. NEGLIGENCE (§ 97*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

In an action to recover damages for a mere negligent injury, not charged to have been willfully, wantonly, or maliciously done, where the injury would not have occurred but for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

negligence of the plaintiff, even though the defendant was negligent as alleged, the plaintiff, having proximately contributed to the efficient cause of his own injury, cannot in general recover damages under the common-law rule that where both parties are at fault the law will leave them to the consequences of their own wrong.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.*]

4. NEGLIGENCE (§ 100*) — "CONTRIBUTORY NEGLIGENCE"—PROXIMATE CAUSE—WILLFUL OR WANTON NEGLIGENCE.

To constitute such "contributory negligence" as bars recovery, the plaintiff's negligence must have been a portion of the efficient proximate cause of the injury, and the defendant's negligence must not have been willful, wanton, or malicious. If the injury was caused solely by the plaintiff's negligence, of course the defendant is not liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

5. NEGLIGENCE (§ 97*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

Public policy requires that every one shall exercise reasonable care and diligence for the protection of his own person and property, and, when his failure to do this concurs with the mere negligence of another and proximately causes the injury, there can be no recovery under the common-law rule.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.*]

6. NEGLIGENCE (§ 97*)—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT OF DAMAGES.

The common-law rule of nonliability of a merely negligent defendant, when the plaintiff is guilty of contributory negligence, has been modified by the statute allowing a recovery, but requiring the damages to be apportioned, where the plaintiff and the defendant are both negligent, and the injury to one not an employé is caused by the running of railroad trains or machinery, or by any person in the employment and service of a railroad company. Such enactments are within the legislative power where the limitations imposed by the Constitution are observed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.*]

7. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED OF CARRIER.

The common-law rule of duty and liability sustained by public policy does not make a common carrier an absolute insurer of the safety of its passengers; but, for the purpose of stimulating efficiency in the carrier and of securing the safety and comfort of passengers in the interest of humanity and the general welfare, a common carrier is required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier. This rule is not abrogated by the statute regulating the liability of railroad companies in certain cases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1117; Dec. Dig. § 280.*]

8. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED OF CARRIER.

In an action for negligence, the question whether the railroad company has exercised all ordinary and reasonable care and diligence is to be determined by a consideration of the duty imposed by law upon the company under the

facts and circumstances of each case that arises.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1117; Dec. Dig. § 280.*]

9. NEGLIGENCE (§ 4*)—ELEMENTS—DEGREE OF CARE REQUIRED—CIRCUMSTANCES OF PARTIES.

The care and diligence that are exercised in a given case might be all that is ordinary and reasonable with reference to one duty imposed by law because of the relation and circumstances of the parties towards each other; but it may be regarded as not being ordinary or reasonable care and diligence or as being negligence with reference to another duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*]

10. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—CARE REQUIRED OF CARRIER.

Where a person is entitled to passage on a train, he has a right to the protection due a passenger until he has safely alighted by the proper egress.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216-1243; Dec. Dig. § 303.*]

11. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—SUDDEN JERKS.

The unnecessary sudden jerking of a train while a passenger is rightfully alighting is negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216-1243; Dec. Dig. § 303.*]

12. NEGLIGENCE (§ 101*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT OF DAMAGES.

If a passenger improperly attempts to alight from a car that is in motion and is injured in doing so, such attempt may be the sole cause of the injury and may bar a recovery; but where a passenger is properly leaving a car at her destination, and as she is about to step to the ground from the usual egress the car is suddenly and violently jerked or moved, when the agents of the carrier should have known she was alighting, it is negligence, and, if injury to her results proximately therefrom, the plaintiff has a right of action under the statute, even though she is also negligent, the recovery being apportioned according to the relative negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163-167; Dec. Dig. § 101.*]

13. CARRIERS (§ 333*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—LEAVING CONVEYANCE.

Ordinary prudence requires that a passenger shall not alight from a moving car; but if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.*]

14. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

A charge that the plaintiff sues the defendant "in an action on the case and claims * * * damages for the negligence of the defendant in the operation of its train, whereby the plaintiff was thrown from the steps of its passenger coach and injured, as set out in her declaration, which has been read in your hearing," is merely a statement of the complaint as made, and does not assume the negligence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendant and is not a charge upon the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.*]

15. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTION—INSTRUCTIONS.

In an action by a passenger against a railroad company for negligently starting the train before the passenger could alight, a charge that if the jury find from the evidence that when the train stopped at her destination "the plaintiff in reasonable haste commensurate with her age and innumbrance of baggage directly proceeded to alight, * * * and that before she could clear herself from the steps of the train the train was started with such violent motion as to throw the plaintiff to the ground and injure her, then you should find for the plaintiff," is within the issues and is not erroneous because of the reference to the plaintiff's baggage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326-1343; Dec. Dig. § 321.*]

16. CARRIERS (§ 303*)—INJURIES TO PASSENGERS—SETTING DOWN PASSENGERS.

A charge that it is the duty of a railroad company "to give a reasonably sufficient time at its stopping places for its passengers to safely alight from their trains" is not error. It is not a too high degree of duty and is within the issues.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216-1243; Dec. Dig. § 303.*]

17. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTION—INSTRUCTIONS.

To charge the jury "that a railroad company cannot promulgate an arbitrary rule for the conduct of their passengers as will exempt them from liability inflicted by their sole negligence" is not error, particularly when the remainder of the charge makes the whole more clear and entirely fair to the carrier; the promulgation of a rule being testified to.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

18. TRIAL (§ 241*)—INSTRUCTIONS—FORM—LANGUAGE OF STATUTE.

It is not error for the court to charge the language of a statute applicable to the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 563; Dec. Dig. § 241.*]

19. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTION—INSTRUCTIONS.

There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor of a train should then avoid all injury to a passenger that he "possibly can when he knows or sees that she is about to suffer some damage."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326-1343; Dec. Dig. § 321.*]

20. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTION—INSTRUCTIONS.

The evidence as to the length of time the train remains stationary being without conflict, a charge "that the time required for a passenger to leave a train depends upon the circumstances of each particular case; whether the stop on the day of this accident was reasonably sufficient under the circumstances in evidence is a question for you to determine"—is not erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326-1343; Dec. Dig. § 321.*]

21. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—ACTION—QUESTION FOR JURY.

Where the facts are not conceded, and the testimony as to them is conflicting, the reasonableness of the time allowed for passengers to

alight from a railroad train is not a question of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1244, 1322; Dec. Dig. § 320.*]

22. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS PARTLY ERRONEOUS.

It is not error to refuse to give a charge that is not entirely correct, particularly when the substance of the requested charge is given in another instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671; Dec. Dig. § 261.*]

23. JUDGMENT (§ 272*)—ENTRY—TIME FOR ENTRY.

The circuit court has authority to have a judgment entered in vacation after the disposition of a motion for a new trial properly made in the case and continued in term time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 522; Dec. Dig. § 272.*]

24. APPEAL AND ERROR (§ 1135*)—REVIEW—ERROR NOT SHOWN.

Where no errors of law appear, and there is testimony to support the verdict, and it does not appear that the jury were not governed by the evidence in their finding, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.*]

In Banc. Error to Circuit Court, Taylor County; B. H. Palmer, Judge.

Action by M. S. Dorsey against the Florida Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

W. B. Davis and Carter & McCollum, for plaintiff in error. Gornto & Battle, for defendant in error.

WHITFIELD, O. J. Mrs. M. S. Dorsey, a widow, brought an action to recover damages for personal injuries while a passenger of the railway company. The negligence alleged is that the defendant in operating and running its train did not stop it long enough to allow the plaintiff a reasonable time to alight from the car, but "carelessly and negligently started said train, * * * and carelessly and negligently put said train in violent quick motion, which said careless and negligent act * * * threw the said plaintiff violently to the ground, by means of which" she was injured. The declaration was demurred to on the grounds that it is not the carrier's legal duty to see that a particular passenger safely leaves the train; that the carrier's only duty is to allow the passengers in general a reasonable time to alight unless the passenger is decrepit and the carrier knows of it; that it is not shown that passengers did not have a reasonable time to alight at the time of the injury, or that plaintiff was decrepit and defendant knew of it; that the allegations are indefinite as to whether the alleged injury was caused by the failure to give time for alighting or by the sudden and violent moving of the train. This demurrer was overruled. Judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment was recovered by the plaintiff, and the railroad company took writ of error.

Overruling the demurrer was not error. Whatever may be the exact legal duty of the carrier to its passengers while alighting from a car, the allegations of the declaration above quoted show actionable negligence, and the allegations are not double or indefinite. They state a particular single right of action.

The court struck several special pleas, but as the defendant was allowed to introduce evidence under the general issue matters contemplated by the special pleas, and as the court charged fully upon the subjects, it is not necessary to consider in detail the assignments of error predicated on the striking of the special pleas.

In an action to recover damages for a mere negligent injury, not charged to have been willfully, wantonly, or maliciously done, where the injury would not have occurred but for the negligence of the plaintiff, even though the defendant was negligent as alleged, the plaintiff, having proximately contributed to the efficient cause of his own injury, cannot in general recover damages under the common-law rule that where both parties are at fault the law will leave them to the consequences of their own wrong.

To constitute such contributory negligence as bars recovery, the plaintiff's negligence must have been a portion of the efficient proximate cause of the injury, and the defendant's negligence must not have been willful, wanton, or malicious. If the injury was caused solely by the plaintiff's negligence, of course the defendant is not liable. Public policy requires that every one shall exercise reasonable care and diligence for the protection of his own person and property; and, when his failure to do this concurs with the mere negligence of another and proximately causes injury, there can be no recovery under the common-law rule. This rule operates harshly in cases where persons have to deal with dangerous agencies which they are generally not familiar with or accustomed to, and statutes have been enacted to modify the strict common-law rule in certain classes of cases where the parties are not on equal footing.

The common-law rule of nonliability of a merely negligent defendant, when the plaintiff is guilty of contributory negligence, has been modified by the statute allowing a recovery, but requiring the damages to be apportioned, where the plaintiff and the defendant are both negligent, and the injury to one not an employé is caused by the running of railroad trains or machinery, or by any person in the employment and service of a railroad company. Such enactments are within the legislative power where the limitations imposed by the Constitution are observed. *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428; *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South.

680; *Atlantic Coast Line Ry. v. McCormick* (decided at this term) 52 South. 712.

The common-law rule of duty and liability sustained by public policy does not make a common carrier an absolute insurer of the safety of its passengers; but, for the purpose of stimulating efficiency in the carrier and of securing the safety and comfort of passengers in the interest of humanity and the general welfare, a common carrier is required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier. This rule is not abrogated by the statute referred to above. See *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, 29 South. 541.

Whether the railroad company has exercised all ordinary and reasonable care and diligence is to be determined by a consideration of the duty imposed by law upon the company under the facts and circumstances of each case that arises. *Seaboard Air Line R. Co. v. Scarbrough*, 52 Fla. 425, 42 South. 706.

The care and diligence that are exercised in a given case might be all that is ordinary and reasonable with reference to one duty imposed by law because of the relation and circumstances of the parties towards each other; but it may be regarded as not being ordinary or reasonable care and diligence, or as being negligence, with reference to another duty.

Where a person is entitled to passage on a train, he has a right to the protection due a passenger until he has safely alighted by the proper egress. *Moore on Carriers*, 554, and authorities cited.

The duty of the carrier to safely deliver a passenger at his desired destination involves the duty of observing whether he has actually alighted before the car is again started. If the agent of the carrier fails in this duty and does not give the passenger a reasonably sufficient time to get off before the car is started again, it is negligence; and, if injury proximately results therefrom, the carrier is liable in damages. The duty is due the passenger not only because of danger of injury, but also because the carrier has engaged to carry to destination and to safely deliver the passenger. The carrier, having received the fares, knows what passengers intend to leave the cars at any station, and before starting the cars again the agents of the carrier should see that all who are leaving the cars have safely alighted. The unnecessary sudden jerking of a train while a passenger is rightfully alighting is negligence.

If a passenger improperly attempts to alight from a car that is in motion and is injured in doing so, such attempt may be the sole cause of the injury and may bar a recovery; but where a passenger is properly leaving a car at her destination,

and as she is about to step to the ground from the usual egress the car is suddenly and violently jerked or moved, when the agents of the carrier should have known she was alighting, it is negligence; and, if injury to her results proximately therefrom, the plaintiff has a right of action under the statute, even though she is also negligent, the recovery being apportioned according to the relative negligence.

Ordinary prudence requires that a passenger shall not alight from a moving car; but, if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.

These observations will render unnecessary a detailed discussion of many assignments of error predicated upon charges given and refused.

A charge that the plaintiff sues the defendant "in an action on the case and claims * * * damages for the negligence of the defendant in the operation of its train, whereby the plaintiff was thrown from the steps of its passenger coach and injured as set out in her declaration, which has been read in your hearing," is merely a statement of the complaint as made, and does not assume the negligence of the defendant, and is not a charge upon the facts.

A charge that if the jury find from the evidence that, when the train stopped at her destination, "the plaintiff in reasonable haste commensurate with her age and incumbrance of baggage directly proceeded to alight, * * * and that, before she could clear herself from the steps of the train, the train was started with such violent motion as to throw the plaintiff to the ground and injure her, then you should find for the plaintiff," is within the issues and is not erroneous because of the reference to the plaintiff's baggage. By custom and usage passengers are allowed to have baggage with them when others are not inconvenienced thereby. The plaintiff testified that she had "some parcels and a grip" in her hands as she was leaving the car. Defendant's agents should have known of the baggage the passenger had with her, and her effort to leave the car with her baggage is one of the circumstances to be considered in determining the question of negligence. The negligence alleged is the sudden and violent movement of the car before the plaintiff had time to reach the ground from the steps of the cars, and the charge was within the issue made by the plea of not guilty.

A charge that it is the duty of a railroad company "to give a reasonably sufficient time at its stopping places for its passengers to safely alight from their trains" is not error. It is not a too high degree of duty and is within the issues.

To charge the jury "that a railroad com-

pany cannot promulgate an arbitrary rule for the conduct of their passengers as will exempt them from liability inflicted by their sole negligence" is not error, particularly when the remainder of the charge makes the whole more clear and entirely fair to the carrier; the promulgation of a rule being testified to. *Louisville & Nashville R. Co. v. Berry*, 58 Fla. 300, 50 South. 579. It is not error for the court to charge the language of a statute applicable to the case. Section 3148 of the General Statutes of 1906 is applicable to this case and may be given in full in a charge to the jury; the last provision in it, that "the presumption in all cases being against the company," having reference only to the burden of proof cast by the statute in the particular case. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318.

There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor of a train should then avoid all injury to a passenger that he "possibly can when he knows or sees that she is about to suffer some damage." The conductor testified that, when he thought all passengers were out, he signaled the train to start. It started off slowly, and he then saw the lady coming down the steps and called to her to "wait a minute and I will stop the train for you." It was for the jury to determine whether the carrier had discharged its duty under the circumstances. A very high degree of care was required of the carrier under the circumstances stated in the evidence.

The evidence as to the length of time the train remained stationary is not without conflict, and a charge: "That the time required for a passenger to leave a train depends upon the circumstances of each particular case. Whether the stop on the day of this accident was reasonably sufficient under the circumstances in evidence is a question for you to determine"—is not erroneous.

As the facts were not conceded, and the testimony as to them was conflicting, the reasonableness of the time allowed for passengers to alight was not a question of law in this case.

A charge requested by the defendant as to the duty of the conductor to assist passengers to alight was incorrect, as it referred to the courtesy shown "female passengers in some instances," and the substance of the charge was properly given by the court in its general charge.

Further discussion of the charges seems to be unnecessary. No fatal error appears in the action of the court thereon. The verdict has testimony to support it, and it does not appear that the jury were not governed by the evidence in their finding.

The court had authority to have the judgment entered in vacation after the disposition of the motion for new trial properly

made and continued during a term. See *McGee v. Ancrum*, 33 Fla. 499, 15 South. 231. The judgment is affirmed.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

COCKRELL, J., absent, concurred in the opinion as prepared.

TYLEE v. HYDE et al.
(Supreme Court of Florida. June 16, 1910.)

(Syllabus by the Court.)

1. STATUTES (§ 181*)—CONSTRUCTION—GENERAL RULES.

In construing and applying a statute, the language used, the subject regulated, the purpose designed to be accomplished, and the means adopted for accomplishing the purpose should be considered, to ascertain the true and lawful legislative intent, which alone has the force of law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. COUNTIES (§ 178*)—BONDS—CONDITIONS PRECEDENT TO ISSUE—SUBMISSION TO POPULAR VOTE—NOTICE OF ELECTION—SUFFICIENCY OF PUBLICATION.

The object of the statutory requirement that publication be made of notices of the election called to authorize the issue of county bonds is to apprise the general public of the county of the matter to be determined by the election. This may be accomplished with reasonable certainty and completeness by publication in newspapers devoted to the publication of current news in general that are circulated among all classes of the people, without the aid of publications devoted chiefly or wholly to the purposes of those persons who belong to some organization, society, race, nationality, or other class constituting only a portion of the entire general public.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 178.*]

3. COUNTIES (§ 178*)—BONDS—CONDITIONS PRECEDENT TO ISSUE—SUBMISSION TO POPULAR VOTE—NOTICE OF ELECTION—STATUTORY PROVISIONS—"NEWSPAPERS."

Considering the object designed and the practical means of accomplishing the object, the manifest legislative intent in the requirement of section 788 of the General Statutes of 1906 that the notice "shall be published in the several newspapers printed in the county" was to include only such "newspapers" as are devoted to the publication of current news in general and are circulated among all classes of the people, and not to include publications designed chiefly or wholly for the purposes of only a portion of the entire public.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 178.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4791-4794; vol. 8, pp. 7731, 7732.]

4. NEWSPAPERS (§ 3*)—PUBLICATION OF LEGAL NOTICES—STATUTORY PROVISIONS—PAPER PRINTED IN FOREIGN LANGUAGE.

The English language is the means recognized by our law for communication and information; and, while a paper printed in a foreign language may be a newspaper, it may not be within the purview of a statute requiring the publication of legal notices designed for the in-

formation of all the people, where the statute contains nothing to indicate an intention to include such a publication.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. § 19; Dec. Dig. § 3.*]

5. COUNTIES (§ 178*)—BONDS—CONDITIONS PRECEDENT TO ISSUE—SUBMISSION TO POPULAR VOTE—NOTICE OF ELECTION—STATUTORY PROVISIONS.

Section 788 of the General Statutes of 1906 requires publication only in "newspapers printed in the county."

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 178.*]

In Ranc. Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Action by William C. Tylee against F. J. Hyde and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

H. H. Buckman, for appellant. Kay & Doggett and R. Ragland, for appellees.

WHITFIELD, C. J. This appeal is from a decree of the circuit court for Duval county, Fla., denying an injunction against the issue of bonds by the county.

The bill of complaint alleges in substance that William C. Tylee is a resident, citizen, and owner of taxable real estate in Duval county, Fla.; that the defendant county commissioners of Duval county have determined to issue \$1,000,000 of interest-bearing bonds of the county, the proceeds thereof to be used in the construction of paved, macadamized, or hard-surface roads or highways in said county, and "did in meeting duly assembled, by resolutions duly and lawfully passed and voted to that end, duly and in accordance with the statutes in such cases made and provided, resolve the issuance of said bonds for the purposes aforesaid, and ordered an election * * * as required by law"; that pursuant to said resolution two notices of the calling of the election required by law were duly published in four named newspapers printed and published in the county, and in one named newspaper "containing general news" printed in Atlanta, Ga., and distributed and published weekly in the city of Jacksonville "and of general circulation in said county of Duval"; that said notices were also published, but not for the full period required by the statute, in three named publications that are "actually printed" in Atlanta, Ga., under the date line of Jacksonville, Fla., and distributed in Jacksonville, Fla.; that pursuant to said notices an election was held October 26, 1909, and 1,123 votes were cast "for bonds" and 366 "against bonds"; that notices for bids were duly published, and a bid for the bonds was accepted; that the notices for said election were not inserted in a named German "journal printed and published in Jacksonville, Fla., all portions of the reading matter of which is in the German language, and which has a small circulation among the German

element residing in Duval county, Fla., and that the only matter in English is the advertising matter, no part of which is legal advertisement"; that the notices of said election were not inserted in three named publications "actually printed in Atlanta, Ga., and copies sent in full to Jacksonville, Fla., for distribution among the subscribers"; that said bonds have not yet been delivered; that the bonds are illegal because the notices of the election thereon "were not published in each and every newspaper printed in said county at the time of the publication," and because the notices were not published in stated newspapers as required by law. An injunction against the issue of the bonds was prayed.

The court sustained a demurrer to the bill of complaint and denied the injunction, and the complainant on appeal makes the sole contention that the failure to publish the election notices in all the papers above mentioned for the required period of time renders the bonds illegal.

The General Statutes of 1906 provide as follows:

"786. Purposes for Which County Bonds may Issue.—Whenever the board of county commissioners of any county shall deem it expedient, or to the best interests of such county, to issue the county bonds of their county, for the purpose of constructing paved, macadamized, or other hard-surfaced highways, or erecting a courthouse or jail or other public buildings, and funding the outstanding indebtedness of the county, or for any of such purposes, they shall determine by resolution to be entered in their records, what amount of bonds is required for such purpose, the rate of interest to be paid thereon, and the time when the principal and interest of such bonds shall be due and when payable."

"788. (592.) Publication of Resolution.—Before any such bond shall be issued, the resolution mentioned in the previous section shall be published in the several newspapers printed in the county at least once in each week for four weeks before the election mentioned in the next section, but if no newspaper be published in the county, publication shall be made in some paper published in the judicial circuit which includes such county."

The question to be determined is what are "newspapers printed in the county" within the meaning of the statute. In construing and applying a statute, the language used, the subject regulated, the purpose designed to be accomplished, and the means adopted for accomplishing the purpose should be considered, to ascertain the true and lawful legislative intent, which alone has the force of law.

The object of the statutory requirement that publication be made of notices of the election called to authorize the issue of county bonds is to apprise the general public of

the county of the matter to be determined by the election. This may be accomplished with reasonable certainty and completeness by publication in newspapers devoted to the publication of current news in general that are circulated among all classes of the people, without the aid of publications devoted chiefly or wholly to the purposes of those persons who belong to some organization, society, race, nationality, or other class constituting only a portion of the entire general public. Considering the object designed and the practical means of accomplishing the object, the manifest legislative intent in requiring that the notice "shall be published in the several newspapers printed in the county" was to include only such newspapers as are devoted to the publication of current news in general and are circulated among all classes of the people, and not to include publications designed chiefly or wholly for the purposes of only a portion of the entire public. If it may be assumed from the allegations of the bill of complaint that the five newspapers devoted to current news in general and of general circulation mentioned therein are the only newspapers in the county of that character, the publication in them of proper notices for the requisite period of time satisfies the statute. It was not necessary to publish the notice in papers "actually printed" in Atlanta, Ga., under a Jacksonville, Fla., date line, and circulated in Jacksonville, for the statute includes only "newspapers printed in the county." It was not necessary to publish the election notices in a paper, even though printed and circulated in Jacksonville, if it does not publish current news in general for circulation among all classes of the people, and is chiefly or wholly devoted to the purposes of, and peculiar to, those who constitute a particular society, class, race, or nationality composing only a portion of the entire general public of the county. See *Beecher v. Stephens*, 25 Minn. 146; *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507; *Crowell v. Parker*, 22 R. I. 51, 46 Atl. 35, 84 Am. St. Rep. 815.

The English language is the means recognized by our law for communication and information; and, while a paper printed in a foreign language may be a newspaper, it may not be within the purview of a statute requiring the publication of legal notices designed for the information of all the people, where the statute contains nothing to indicate an intention to include such a publication. See *In re Road*, 44 Pa. 277; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *City v. Bickett*, 26 Ohio St. 49; *Turner v. Hutchinson*, 113 Mich. 245, 71 N. W. 514; *State v. City of Jersey City*, 54 N. J. Law, 437, 24 Atl. 571.

The decree appealed from is affirmed.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

WALLER, Marshal, v. OSBAN.
(Supreme Court of Florida. June 16, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§§ 1, 57*)—NATURE AND STATUS—GOVERNMENTAL POWERS—"MUNICIPALITIES."

Municipalities are legal entities established for local governmental purposes, and they can exercise only such authority as is conferred by express or implied provisions of law. The existence of authority to act cannot be assumed, but it should be made to appear. When the authority to act appears, the correctness of the action taken thereunder may be presumed until the contrary is shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1, 1½, 144; Dec. Dig. §§ 1, 57.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4630-4631.]

2. MUNICIPAL CORPORATIONS (§ 589*)—ORDINANCES—VALIDITY.

Every act of a municipality through its ordinances should be within the powers expressly or impliedly conferred, should be based upon a proper classification of subjects, should be reasonable and applicable alike to all under practically similar conditions and circumstances, and should not violate any provision or principle of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1308, 1316; Dec. Dig. § 589.*]

3. MUNICIPAL CORPORATIONS (§ 594*)—POLICE POWER—EXERCISE.

Where cattle running at large in a city are taken up and impounded under ordinances authorized by the Legislature, the regulation operates upon the cattle, and not upon the owner thereof, except as the owner is affected by the disposition made of the cattle. The residence of the owner of the cattle is not material, where the regulation operates on the cattle, and does not undertake to impose a fine or liability upon persons not within the jurisdiction of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1319; Dec. Dig. § 594.*]

4. MUNICIPAL CORPORATIONS (§ 105*)—ORDINANCES—VALIDITY.

An ordinance must be duly passed, and must be reasonable, and not in conflict with any controlling provision or principle of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 223, 224; Dec. Dig. § 105.*]

5. MUNICIPAL CORPORATIONS (§ 63*)—JUDICIAL SUPERVISION—ORDINANCES—ENFORCEMENT—REASONABLENESS.

If in its enforcement a city ordinance is shown to be unreasonable, the law affords a remedy.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 63.*]

6. MUNICIPAL CORPORATIONS (§ 629*)—POLICE REGULATIONS—IMPOUNDING CATTLE.

Under the statutory authority given the city of Titusville "to regulate, license, tax or suppress by fine or imprisonment the keeping and allowing to go at large of all animals * * * within the city, to impound the same and in default of redemption in pursuance of ordinance, to sell, kill or otherwise dispose of the same," and "to pass all ordinances necessary to the health, peace, convenience, good or-

der and protection of the citizens," the municipality may by ordinance provide for impounding cattle found at large in the city, even though their owners do not reside in the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 629.*]

7. MUNICIPAL CORPORATIONS (§ 625*)—POLICE REGULATIONS—REASONABLENESS.

The ordinance passed does not appear to be so unreasonable as to be void on its face.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1378; Dec. Dig. § 625.*]

In Banc. Error to Circuit Court, Brevard County; M. S. Jones, Judge.

Action by John C. Osban against John Waller, Marshal of the City of Titusville. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Geo. M. Robbins, for plaintiff in error.
Hudson & Boggs, for defendant in error.

WHITFIELD, C. J. The municipal authorities of the city of Titusville, Fla., impounded cattle found running at large within the city, and the owner of the cattle recovered them in an action of replevin, and the city authorities took writ of error. The question to be determined is the power of the city to impound cattle found at large within its limits, whose owners do not reside in the city.

Section 24 of article 3 of the Constitution provides that "the Legislature shall establish a uniform system of county and municipal government, which shall be applicable, except in cases where local or special laws are provided by the Legislature that may be inconsistent therewith." Section 8 of article 8 provides that "the Legislature shall have the power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Section 1046, Gen. St., authorizes the city to regulate the running at large of cattle within the city limits and to impound cattle so running at large. Section 1105 provides that "no city or town in this state with less than twelve hundred bona fide inhabitants shall have authority or right to impound any cattle of residents who live without the limits of its corporation."

Chapter 6108, Acts of 1909, entitled "An act to abolish the present municipal government of the town of Titusville, in the county of Brevard, and state of Florida, and to establish, organize and constitute a municipality to be known and designated as the city of Titusville, and to define its territorial boundaries, and to provide for its jurisdiction, powers and privileges," contains a provision "that the city council shall have power * * * to regulate, license, tax or suppress by fine or imprisonment the keeping and allowing to go at large of all animals, fowls, and domestic birds within the city, to

impound the same and in default of redemption in pursuance of ordinance, to sell, kill or otherwise dispose of the same," and "to pass all ordinances necessary to the health, peace, convenience, good order and protection of the citizens, and to carry out the full extent and meaning of this act." The municipality adopted an ordinance that "no * * * steer, cow or other cattle * * * shall be allowed to run at large at any time within the corporate limits of the city, whether the owner thereof lives within or without the same," and provided for impounding the animals found at large in the city.

Municipalities are legal entities, established for local governmental purposes, and they can exercise only such authority as is conferred by express or implied provisions of law. The existence of authority to act cannot be assumed, but it should be made to appear. When the authority to act appears, the correctness of the action taken thereunder may be presumed until the contrary is shown. *State ex rel. v. Lewis*, 55 Fla. 570, 46 South. 630.

Every act of a municipality through its ordinances should be within the powers expressly or impliedly conferred, should be based upon a proper classification of subjects, should be reasonable and applicable alike to all under practically similar conditions and circumstances, and should not violate any provision or principle of law. *Hardee v. Brown*, 56 Fla. 377, 47 South. 834.

Under the above constitutional provisions the Legislature had power to authorize any municipality in this state to regulate the running at large of animals within the corporate limits, whether the owners live in the city or not, and as an incident thereto to impound those found at large in the city, notwithstanding the terms of section 1105 of the General Statutes of 1906, above quoted. See *Hardee v. Brown*, supra; *Porter v. Vinzant*, 49 Fla. 213, 38 South. 607, 111 Am. St. Rep. 93; 2 Cyc. 452. The general law is superseded by the applicable special charter provision.

The title of the act set out above is sufficient to cover the provision "to regulate * * * the keeping and allowing to go at large of all animals * * * within the city, to impound the same," etc., and such provision gives the city power to pass the ordinance above referred to.

Where cattle running at large in a city are taken up and impounded under ordinances authorized by the Legislature, the regulation operates upon the cattle, and not upon the owner thereof, except as the owner is affected by the disposition made of the cattle. The residence of the owner of the cattle is not material, where the regulation operates on the cattle, and does not undertake to impose a fine or liability upon persons

not within the jurisdiction of the municipality. See *Jones v. Hines*, 157 Ala. 624, 47 South. 739.

The ordinance must be duly passed, and must be reasonable, and not in conflict with any controlling provision or principle of law. While some of the provisions of the ordinance appear to be harsh, and perhaps excessive, in the charges authorized, yet it cannot be said, on the showing here made, that the ordinance on its face is so unreasonable as to be void. If its enforcement is shown to be unreasonable, the law affords a remedy.

The judgment is reversed.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

MOORE v. STATE.

(Supreme Court of Florida, Division A. June 9, 1910.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1134*)—SCOPE OF REVIEW BY WRIT OF ERROR AND BILL OF EXCEPTIONS.

The statute authorizes the appellate court to review by writ of error and bill of exceptions a refusal of the trial court to grant a motion for the continuance of a cause and other matters in pais, but in reviewing such motions the appellate court is governed by established principles of judicial procedure, designed to effectuate the provision of the Constitution that "right and justice shall be administered without * * * delay."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134*.]

2. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENT WITNESS—ESSENTIALS OF APPLICATION.

An application for a continuance on the ground of an absent witness should state under oath the facts expected to be proven by the witness, where and how the information was obtained, and that the desired witness would testify as stated, and the application should also state facts showing that all reasonable effort has been made to secure the attendance of the witness at the time of the application for continuance is made; that he is absent without the consent of the party, directly or indirectly given; that he resides within the jurisdiction of the court; that the testimony is material, and not merely cumulative; that the testimony desired cannot be given by any available witness; that the applicant reasonably expects to procure the presence of the witness at the future day; that he cannot safely go to trial without the testimony of the witness; that the application is made in good faith and not for delay only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603*.]

3. CRIMINAL LAW (§§ 586, 1151*)—CONTINUANCE—DISCRETION OF COURT.

Motions for a continuance are in the discretion of the trial court, and the action of that court on them will not be reversed unless there has been a palpable abuse of that dis-

cretion to the disadvantage of the accused, or whereby his rights may have been jeopardized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. §§ 586, 1151.*]

4. CRIMINAL LAW (§ 603*)—CONTINUANCE.

The rules as to granting continuances are substantially the same in civil and criminal causes, except as modified by the differences in procedure in the two classes of causes; yet affidavits for continuances should be scanned more closely in criminal than in civil cases, because of the superior temptation to delay presented by the former class.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

5. CRIMINAL LAW (§ 1144*)—WRIT OF ERROR—REVIEW—DENIAL OF CONTINUANCE—DISCRETION OF COURT—PRESUMPTION.

To justify an appellate court in holding the trial court in error in its ruling denying an application for a continuance in a criminal case, all facts necessary to show a clear abuse of discretion to the injury of the accused must be presented, and whenever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3022; Dec. Dig. § 1144.*]

6. WITNESSES (§ 2*)—RIGHT OF ACCUSED TO COMPULSORY PROCESS.

The exercise of the right to have compulsory process for the attendance of witnesses is subject to legislative regulation that does not impair the right or deny its reasonable exercise for the benefit of the accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 2-4; Dec. Dig. § 2; Criminal Law, Cent. Dig. § 1343.]

7. CRIMINAL LAW (§ 577*)—TIME TO PREPARE DEFENSE.

An accused and his counsel are entitled to a reasonable time in which to prepare for a trial after an accusation of crime is made. What is a reasonable time is to be determined from all the facts and circumstances of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1306-1506; Dec. Dig. § 577.*]

8. CRIMINAL LAW (§ 599*)—CONTINUANCE—SURPRISE—GROUNDS.

Where testimony should reasonably have been anticipated, it will not warrant a continuance on the ground of surprise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1333, 1334; Dec. Dig. § 599.*]

9. CRIMINAL LAW (§ 597*)—CONTINUANCE—ABSENT WITNESS—PROBABLE EFFECT OF EXPECTED TESTIMONY.

Where it clearly appears that the supposed testimony of an alleged absent witness could not reasonably affect the result of the trial, the appellate court will not disturb an order denying a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1331; Dec. Dig. § 597.*]

10. CRIMINAL LAW (§ 575*)—TIME OF TRIAL.

There is no rule of law or procedure that where an indictment is found at one term the trial cannot properly be had at that term. Whether a continuance should be had to another term depends upon the facts and circumstances of the case. The granting of a continuance is in the discretion of the trial judge,

and his ruling will not be disturbed unless abuse of discretion affirmatively appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1294-1296; Dec. Dig. § 575.*]

11. JURY (§ 72*)—RIGHT TO JURY TRIAL—SELECTION OF JURY—JURY FROM COUNTY AT LARGE.

An accused is not entitled as a matter of right to have a jury drawn from the jury box, but the court may order a jury from the county at large when the names in the jury box are exhausted.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 333-347; Dec. Dig. § 72.*]

12. CRIMINAL LAW (§ 1151*)—CONTINUANCE—PUBLIC SENTIMENT AGAINST ACCUSED—SUFFICIENCY OF AFFIDAVITS.

A denial of a motion for a continuance on the ground that public sentiment against the accused is such that he cannot obtain a fair trial in the county will not be disturbed when the affidavit of the defendant is not supported by other affidavits or evidence, and there is no showing that the accused was prevented from getting corroborative evidence, and no abuse of discretion is shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

13. HOMICIDE (§ 308*)—INSTRUCTIONS.

It is not error to fail to charge on murder in the third degree when the facts do not call for such a charge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 648; Dec. Dig. § 308.*]

14. CRIMINAL LAW (§ 415*)—EVIDENCE—HEARSAY.

Statements, not dying declarations, made by the deceased the next day after the fatal cutting, are hearsay and inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

15. CRIMINAL LAW (§ 1182*)—WRIT OF ERROR—REVIEW—VERDICT.

Where the evidence sustains the verdict, and no errors of procedure appear, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1182.*]

Error to Circuit Court, Dade County; *M. S. Jones*, Judge.

William Moore was convicted of murder, and he brings error. Affirmed.

G. A. Worley, for plaintiff in error. Park Trammell, for the State.

WHITFIELD, C. J. The plaintiff in error was indicted July 12, 1909, at a special term of the circuit court in Dade county for the murder by cutting of David Scott on April 12, 1909. This writ of error was taken to a conviction of murder in the first degree and a life sentence. The bill of exceptions shows that on July 14th the defendant was arraigned on the indictment, pleaded not guilty, and announced that he was ready for trial; that a trial was had, and the jury failing to agree a mistrial was ordered, and the case set for another trial July 22, 1909. On the latter day the defendant applied for a continuance of the case upon the grounds (1) that the indictment has

just been found, and defendant had not had ample time or opportunity to prepare his defense, and makes this application in good faith for the purpose of having time and opportunity to investigate the charges against him and prepare his defense; (2) that there are complications and developments in the case which neither the defendant nor his counsel has had time or opportunity to investigate; that the defendant has just at the special term been able to procure counsel, and relying upon statements made by witnesses for the state the defendant did not know until the witnesses had testified that there would be evidence against him tending to show that he had committed murder as charged; that the defendant and his counsel were greatly surprised at the testimony of the state witnesses C. Cone and Steve Bravo at the first trial; that there are witnesses who can and will testify that the deceased assaulted the defendant in the vicinity of the corner of Seventh street and Avenue D, "and that the deceased walked about 150 feet after he was cut before he stopped or lay down on the sidewalk, and then stated to witnesses that he had been cut by a 'cracker' in his shirt sleeves, with his sleeves rolled up above his elbows, and this defendant will be able to show that at the time he was not in his shirt sleeves, and did not have his sleeves rolled up, and if time be given defendant and his counsel to investigate said cause and procure attendance of witnesses to testify in said cause, defendant will be able to establish the fact of his innocence, but if forced to trial at the present time, he will be obliged to go into the trial without witnesses whom he is informed and believes will testify facts sufficient to establish his innocence, and great injustice will be done him in the premises; (3) that defendant has only one counsel, G. A. Worley, who because of recent sickness is physically unable to undertake the defense (this fact is sworn to by Mr. Worley); (4) because of the absence of certain witnesses, to wit, Joseph Jeffries, for whom subpoenas have been issued, and whom the court has ordered subpoenaed to testify in this cause, who, if present, would testify in behalf of defendant in substance as follows: That this defendant was on the night of the homicide assaulted on the outside of the Ninth street saloon by the deceased and beaten in an unmerciful manner at a time when this defendant was in almost a hopeless state of intoxication, having been for several days on a continuous drunk, and at the time far advanced in the state of intoxication; that the defendant, after being beaten and assaulted by the deceased started on his way home, and at or near the corner of Seventh street and Avenue D the deceased assaulted the defendant and a fierce scuffle ensued, in which the deceased was cut, and the deceased, after being cut, walked nearly 300 feet in an easterly direction, down in front of the Nelson Building, where he was found lying

on the sidewalk and there stated that he was cut by a 'cracker' with his sleeves rolled up above his elbows and in his shirt sleeves, and that this defendant did not go down near the Nelson Building, but as soon as he was released by the deceased, near the corner of Avenue D and Seventh street he proceeded on his way homeward; that these witnesses reside in the state of Florida and have their permanent abode and headquarters in Miami, Dade county, Fla., and that their presence can be procured at the next regular term of this court, and that they are not absent with the consent or through the connivance of this defendant, and that this defendant has used all diligence and means at his command to have said witnesses present and testify in his behalf at this, the special term, and that he makes this motion in good faith for the purpose of procuring the attendance of said witnesses at the next term of this court; (5) because the names of the jurors whose names have been placed in the jury box in and for this county have been all withdrawn from the box, and the jury list, as drawn from the box, exhausted, and this defendant is advised and believes he cannot obtain a fair and impartial trial unless the jury should be drawn from the box to try him in said cause; that in this trial, the jurors, as drawn, are drawn from certain localities of the county wherein bitter and deep prejudice for some unknown cause to the defendant runs rife, and this defendant cannot secure a fair and impartial trial before the jury as summoned to try him in said cause, and this motion is further made in good faith, and for the further purpose of having the jury drawn from the box to try him in said cause; (6) because defendant has recently been tried on said indictment which trial resulted in a mistrial on the 16th day of July, 1909, and that said cause has been so publicly discussed on the streets and given such prominent places in the papers until this affiant will be unable to secure a fair and impartial trial at the present time before a jury in Dade county on account of the unprecedented publicity given to the evidence introduced in the previous trial in the papers published in Miami, Fla., and also by the common rumors and discussions by the citizens throughout the county; that the Miami Metropolis, in particular, under heavy headlines during the progress of said cause published glaring reports of the testimony in said cause, declaring upon what had been said and done in speaking of the blood-stained knife and the assault, etc., until the minds of the people have become inflamed without cause against this defendant, and this defendant fears and has reason to believe that he cannot and will not secure a fair and impartial trial at this, the special term of said court on account of the undue publicity and unfair comments in the papers of certain facts and circumstances attending

the homicide; and this affiant further says that he is unable to procure the attendance of witnesses at this term of court who will testify to the facts herein set out, and cannot procure the attendance of said witnesses." The defendant alone swore to this application except that his counsel, Mr. Worley, made affidavit as to his own physical condition at the time. The only matters argued here are the motion for continuance, the charges given and refused, and the exclusion of hearsay testimony.

The statute authorizes the appellate court to review by writ of error and bill of exceptions a refusal of the trial court to grant a motion for the continuance of a cause and other matters in pais. Sections 1693, 1694, and 4044, Gen. St. 1906. But in reviewing such motions the appellate court is governed by established principles of judicial procedure designed to effectuate the provision of the Constitution that "right and justice shall be administered without * * * delay." Section 4 of Bill of Rights; *Owen v. State*, 58 Fla. 84, 50 South. 639.

An application for a continuance on the ground of an absent witness should state under oath the facts expected to be proven by the witnesses, where and how the information was obtained; and that the desired witness would testify as stated, and the application should also state facts showing that all reasonable effort has been made to secure the attendance of the witness at the time the application for continuance is made; that he is absent without the consent of the party, directly or indirectly given; that he resides within the jurisdiction of the court; that the testimony is material and not merely cumulative; that the testimony desired cannot be given by any available witness; that the applicant reasonably expects to procure the presence of the witness at the future day; that he cannot safely go to trial without the testimony of the witness; that the application is made in good faith and not for delay only. *Harrell v. Durrance*, 9 Fla. 490; *Hicks v. State*, 25 Fla. 535, 6 South. 441; *Ballard v. State*, 31 Fla. 266, 12 South. 865; *Reynolds v. Smith*, 49 Fla. 217, 38 South. 903; *Adams v. State*, 56 Fla. 1, 48 South. 219; *Clements v. State*, 51 Fla. 6, 40 South. 432.

Motions for a continuance are in the discretion of the trial court, and the action of that court on them will not be reversed unless there has been a palpable abuse of that discretion to the disadvantage of the accused, or whereby his rights may have been jeopardized. The rules as to granting continuances are substantially the same in civil and criminal causes, except as modified by the differences in procedure in the two classes of causes; yet affidavits for continuances should be scanned more closely in criminal than in civil cases, because of the superior temptation to delay presented by the former class. All facts necessary to show a clear abuse of discretion to the injury of the accused must

be presented, and wherever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling denying the motion. *Ballard v. State*, 31 Fla. 266, 12 South. 865; *Adams v. State*, 56 Fla. 1, 48 South. 219; *Webster v. State*, 47 Fla. 108, 36 South. 584.

To justify an appellate court in holding the trial court in error in its ruling denying an application for a continuance in a criminal case, all facts necessary to show a clear abuse of discretion to the injury of the accused must be presented, and whenever the record is either silent or uncertain on any point material to establish such an abuse, the presumptions are all in favor of the correctness of the ruling. *Gass v. State*, 44 Fla. 70, 32 South. 109.

In section 11 of the Bill of Rights it is provided that "In all criminal prosecutions the accused shall have the right to * * * have compulsory process for the attendance of witnesses in his favor," but this right should be reasonably exercised so as not to cause a violation of the provision that "right and justice shall be administered without * * * delay." The exercise of the right to have compulsory process for the attendance of witnesses is subject to legislative regulation that does not impair the right or deny its reasonable exercise for the benefit of the accused. In this case the motion for continuance states that a subpoena was issued for a witness, and it does not affirmatively appear that due diligence was not used by the officers to find the witness after the process was applied for and issued. An accused and his counsel are entitled to a reasonable time in which to prepare for a trial after an accusation of crime is made. What is a reasonable time is to be determined from all the facts and circumstances of the case. The homicide is alleged to have been committed April 12, 1909, and the record shows that the defendant was arrested for it that night. He was indicted July 12th, announced ready for trial when arraigned July 14th, a mistrial was had July 16th, and the case set again for July 22d. This does not appear to be unreasonable, and the surprises the defendant alleges that he experienced at the first trial cannot be relieved by the desired testimony of the alleged absent witness when the defendant states in his testimony that he cut the deceased near the corner of Seventh street and Avenue D, and there is positive testimony by a person who was with the deceased that when the defendant cut the deceased he instantly fell.

Where testimony should reasonably have been anticipated, it will not warrant a continuance on the ground of surprise. See *Merrill v. O'Bryan*, 48 Wash. 415, 93 Pac. 917. The defendant should reasonably have anticipated the testimony of Cone and Bravo who were eyewitnesses to the fatal cutting.

The desired testimony that the accused "aft-

er being cut, walked nearly 300 feet * * * where he was found lying on the sidewalk, and there stated that he was cut by a 'cracker,' is not admissible as to its hearsay feature. The application for continuance does not state how or when information was obtained as to what testimony the absent witness would give or that the testimony cannot be obtained from others, or that the continuance is not asked merely for delay. The trial judge was familiar with the facts and circumstances disclosed at the first trial, and his denial of the application for continuance was justified as appears by the whole record here. Where it clearly appears that the supposed testimony of an alleged absent witness could not reasonably affect the result of the trial, the appellate court will not disturb an order denying a continuance. See *Hicks v. State*, 25 Fla. 335, 6 South. 441; *State v. Worrell*, 25 Mo. 205, text 256; *State v. Temple*, 194 Mo. 237, 92 S. W. 869, 5 Am. & Eng. Ann. Cas. 954.

There is no rule of law or procedure that where an indictment is found at one term the trial cannot properly be had at that term. Whether a continuance should be had to another term depends upon the facts and circumstances of the case. The granting of a continuance is in the discretion of the trial judge, and his ruling will not be disturbed unless abuse of discretion affirmatively appears. *State v. Sultan*, 142 N. C. 569, 54 S. E. 841, 9 Am. & Eng. Ann. Cas. 310.

The trial court was in a position to judge of the physical condition of the defendant's counsel, and his refusal of a continuance on this ground is justified by the record showing the alert and discriminating course of counsel in conducting the defense.

An accused is not entitled as a matter of right to have a jury drawn from the jury box, but the court may order a jury from the county at large when the names in the jury box are exhausted. *Colson v. State*, 51 Fla. 19, 40 South. 183.

A denial of a motion for continuance on the ground that public sentiment against the accused is such that he cannot obtain a fair trial in the county will not be disturbed when the affidavit of the defendant is not supported by other affidavits or evidence, and there is no showing that the accused was prevented from getting corroborative evidence, and no abuse of discretion is shown. This is the rule in applications for change of venue, and is as proper in motions for continuance. *Shiver v. State*, 41 Fla. 630, 27 South. 36; *Roberson v. State*, 42 Fla. 223, 28 South. 424. No error appears in refusing to grant the continuance asked.

The testimony of Charles Cone and Stephen Bravo is that the defendant and the deceased had a personal difficulty, in which the deceased appeared to be the more aggres-

sive. This difficulty being terminated without serious injury to either party, the deceased left the scene of conflict. After a brief delay the defendant recovered his knife dropped in the conflict and went "in the same direction Scott had gone." The defendant proceeded down the street and later "commenced to run," and "did not make any noise with his feet." He overtook Scott and cut him. Scott fell and died the next day. The defendant admits the cutting, but states it was done in self-defense, and at a point more than 100 feet from the point where the deceased fell.

Error is assigned on the refusal of nine separate charges requested by the defendant. It is unnecessary to copy these charges covering several pages. In so far as they stated correct propositions of law applicable to the facts of this case they were sufficiently covered by the charges given.

The court did not charge on murder in the third degree as defined by the statute, but the facts of this case do not call for such a charge. *Cook v. State*, 46 Fla. 20, 35 South. 665.

Statements, not denying declarations, made by the deceased the next day after the fatal cutting are hearsay and inadmissible. *Lambright v. State*, 34 Fla. 564, 16 South. 582; *Smith v. State*, 48 Fla. 307, 37 South. 573; *Vickery v. State*, 50 Fla. 144, 38 South. 907.

The charge given by the court is quite lengthy, being full, explicit, and fair. It is not subject to the criticisms made of it. No useful purpose will be subserved by reproducing it here. There is evidence to support the verdict.

There is nothing in the record to indicate that the defendant did not have a fair and impartial trial, and the judgment is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

FLORIDA EAST COAST RY. CO. v. LASSITER.

(Supreme Court of Florida. June 11, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 689½*)—OPINION EVIDENCE—QUALIFICATION OF EXPERT.

Where a witness is called to testify as an expert or skilled witness upon a question pertaining to railroading, his qualifications are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill, and experience, and the relationship between the branch of the service in which he has been engaged and the

question upon which he is called to give testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.*]

2. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

A motion to strike testimony is available only when the testimony admitted is inadmissible, irrelevant, or immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228, 233; Dec. Dig. § 89.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE—CUSTOMARY CONDUCT—OPERATION OF RAILROAD.

The usual conduct of employes required or permitted by railroad companies in the ordinary operation of trains is not wholly inadmissible or irrelevant upon a question of the care and diligence required in the proper conduct of the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 925; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF RAILROAD.

Evidence that as a general custom it is usual for a switchman to ride on a car being switched when a duty is to be performed at the point of destination, and the car is going faster than a man usually walks, is not contrary to, but comports, with common knowledge, and the act is not so obviously dangerous as to be manifestly inconsistent with safe railroad operation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 754; Dec. Dig. § 240.*]

5. MASTER AND SERVANT (§ 270*)—SAFE APPLIANCES—DUE CARE IN PROVIDING—EVIDENCE.

A mere showing that boys had access to the yard, and that mischievous persons have meddled with cars, is not relevant to an issue of due care in providing safe machinery and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 920; Dec. Dig. § 270.*]

6. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

There was no reversible error in permitting a witness on cross-examination to state that the doctor who attended the plaintiff when he was injured was the defendant's local surgeon, as such testimony did not go to the question of the liability of the defendant, and the effect of the court's charge was to exclude injury to the defendant in increased damages on account of such testimony, even if the previous mention of the doctor and his attentions to the plaintiff did not justify the question on cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180, 4182; Dec. Dig. § 1053.*]

7. TRIAL (§ 143*)—DIRECTION OF VERDICT.

Where the evidence is conflicting, it is not error to refuse an affirmative charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

8. MASTER AND SERVANT (§§ 101, 150*)—DUTY TO FURNISH SUITABLE APPLIANCES—DUTY TO WARN OF DEFECTS.

It is the duty of the master to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities for his work, and in notifying the servant of any defects or risks of which the servant does not know. If the duty

is not performed the master is liable for injuries resulting proximately from such failure of duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 178, 203, 297; Dec. Dig. §§ 101, 150.*]

9. NEGLIGENCE (§ 136*)—QUESTION FOR JURY.

Where it cannot be said as matter of law that the plaintiff's negligence in part caused his own injury, the question of contributory negligence should be submitted to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 333; Dec. Dig. § 136.*]

10. MASTER AND SERVANT (§§ 229, 238*)—CHOOSING MORE HAZARDOUS METHOD—DUTY OF SERVANT TO EXERCISE CARE.

If two or more ways or methods were open to the plaintiff in the performance of his duties as switchman, and he had no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be held to have been negligent if he in good faith adopted that way or method which is more hazardous than another, provided the one pursued be one that reasonable and prudent persons would adopt under like circumstances, or provided the plaintiff was reasonably prudent in adopting the way or method used. In all cases the employe is bound to use ordinary care for his own protection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 745; Dec. Dig. §§ 229, 238.*]

11. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

Charges that are not technically accurate will not cause a reversal where correct charges are given on the point and it appears that no injury could reasonably have resulted from the technical inaccuracy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 705; Dec. Dig. § 296.*]

12. APPEAL AND ERROR (§ 1004*)—REVIEW—FINDINGS.

Where damages allowed are not clearly excessive, an appellate court will not disturb a finding sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.*]

Taylor, J., dissenting.

In Banc. Error to Circuit Court, St. Lucie County; M. S. Jones, Judge.

Action by Charles O. Lassiter against the Florida East Coast Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George M. Robbins, for plaintiff in error. Beggs & Palmer, for defendant in error.

WHITFIELD, C. J. The defendant in error recovered judgment for damages against the railroad company for personal injuries received by the running of a train while acting as yard switchman. A former judgment was reversed. Florida East Coast Ry. v. Lassiter, 58 Fla. 234, 30 South. 428. A grab iron on a freight car broke while the plaintiff was holding on by it, and he fell under the car, which passed over his left foot, crushing it.

The negligence alleged to have proximately caused the injury is that the railroad company "carelessly and negligently permitted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one of the grab irons and its fastenings and appliances on said car to become defective and out of repairs." Pleas of not guilty, and that the alleged injury was caused by the negligence and improper conduct of the plaintiff, and not otherwise, were filed.

In view of the former decision in this cause and the finding of two juries the liability of the defendant railroad company should be regarded as established unless material errors of law were committed in submitting the issue of liability to the jury in the last trial.

The plaintiff produced a witness who testified as to whether in his opinion it was necessary for the plaintiff in the proper discharge of his duty to ride on the side of the car being switched by putting his foot in the stirrup and holding on, attached to the car for that purpose, instead of walking, when he was injured.

In order to qualify himself this witness testified that he had lived in Ft. Pierce, where the injury occurred, for 14 years, and was familiar with the switchyards of the defendant company at that point; that he had had 10 years' experience as a car inspector at Jacksonville, Palm Beach, and Ft. Pierce for the defendant; that he was familiar with the requirements of switchmen in the discharge of their duties, and was acquainted with the tracks and distances in the Ft. Pierce yard, including those where the injury occurred, and had known the yard for eight years; that he had done switching, but never under regular employment. The defendant objected to the witness on the ground that he had not qualified as an expert. Exception was taken to the overruling of the objection. In admitting the witness, the court did not err and did not violate the rule contended for by the railroad company, that "where a witness is called to testify as an expert upon a question pertaining to railroading, his qualifications are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill and experience, and the relationship between the branch of the service in which he has been engaged, and the question upon which he is called to give testimony." 5 Ency. of Ev. 543. The witness here was a skilled witness and was qualified as such. See *Atlantic Coast Line Ry. Co. v. Crosby*, 53 Fla. 400, text 439, 43 South. 318, and citations therein.

The branch of railroad business in which the witness was engaged and the capacities in which he acted at different times and his opportunities and experience sufficiently qualify him as an expert or a skilled witness as to the necessity for a yard switchman to ride on the car being switched in the proper discharge of his duties as switchman under given circumstances.

This expert or skilled witness testified that

the plaintiff by walking instead of riding on the car as he did could not have gotten to the desired point in switching the car on which he rode in time to properly discharge his duty, and in answer to a question said to ride "would have been the usual way." The defendant moved to strike the last answer, but the court denied the motion and an exception was noted. A motion to strike testimony is available only when the testimony admitted is inadmissible, irrelevant or immaterial.

The usual conduct of employees required or permitted by railroad companies in the ordinary operation of trains is not wholly inadmissible or irrelevant upon a question of the care and diligence required in the proper conduct of the business. Evidence that as a general custom it is usual for a switchman to ride on a car being switched when a duty is to be performed at the point of destination and the car is going faster than a man usually walks, is not contrary to but comports with common knowledge, and the act is not so obviously dangerous as to be manifestly inconsistent with safe railroad operation. The evidence was admissible under the circumstances here. See 29 Cyc. 609; *Atlantic Coast Line Ry. v. Beazley*, 54 Fla. 311, 45 South. 761.

The inquiry being made was not how the accident occurred, for there were eyewitnesses to that; but whether the plaintiff was negligent in riding on the car that he was engaged in switching, instead of walking in the discharge of his duties.

A witness for the defendant testified that he and others had inspected the car a few hours before the injury, and the hand grab was in perfect condition; that, if the nut had been off the top bolt to the hand grab or grab iron, he would have observed it. It was then offered to prove by the witness that boys had access to the yard and "to show particular instances where they did such things," as to meddle with the cars. The proffered testimony was rejected unless it was confined to the particular car. A mere showing that boys had access to the yard and that mischievous persons had meddled with cars is not relevant to an issue of due care in providing safe machinery and appliances.

There was no reversible error in permitting a witness on cross-examination to state that the doctor who attended the plaintiff when he was injured was the defendant's local surgeon, as such testimony did not go to the question of the liability of the defendant, and the effect of the court's charge was to exclude injury to the defendant in increased damages on account of such testimony, even if the previous mention of the doctor and his attentions to the plaintiff did not justify the question on cross-examination.

As the facts in evidence did not conclusively show that negligence of the plaintiff was a proximate cause of the injury, the refusal to direct a verdict for the defendant was proper.

It is the duty of the master to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities for his work and in notifying the servant of any defects or risks of which the servant does not know. If this duty is not performed, the master is liable for injuries resulting proximately from such failure of duty. *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740.

It does not appear that Lassiter violated any law or any rule of his employer, or that he was actually negligent in riding on the side of the car by having a foot in the stirrup and holding on to the grab iron placed upon the car for the use of the switchmen and other such employes in mounting the car in the discharge of their duties; nor does it appear that such an act is apparently or specially hazardous or unusual or that the plaintiff knew of any defect in the car equipment or of any special hazard involved in his act. The law required of the plaintiff only the prudence of a prudent man, or ordinary prudence. It cannot be said as a matter of law that the act of riding on the side of the car as indicated was not the prudent act of an ordinarily prudent man, and that it was negligence under the circumstances of this case; therefore the question of contributory negligence was properly submitted to the jury. See *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *Missouri, K. & T. Ry. Co. v. Hoskins*, 34 Tex. Civ. App. 627, 79 S. W. 369; *El Paso & S. W. Ry. Co. v. Vizard*, 39 Tex. Civ. App. 534, 88 S. W. 457.

It may not have been necessary for the plaintiff in the discharge of his duty to ride as he did, and it may be that he could have as conveniently or effectively discharged his duty by walking; yet he was not a trespasser, he was not forbidden to ride, and it seems that he at least had the privilege of so riding by using the means provided by the defendant and usual in such cases, and the plaintiff had the right to rely on the reasonable safety of the grab irons provided for use at any time convenient or proper, and not obviously dangerous in the employment engaged in. It does not clearly appear that the plaintiff did not exercise ordinary care in riding as he did, and there was evidence from which the jury could find that the defendant did not furnish reasonably safe means for use in rendering the service and that the defective grab iron was the proximate cause of the injury to the plaintiff. See *El Paso & S. W. Ry. Co. v. Vizard*, 211 U. S. 608, 29 Sup. Ct. 210, 53 L. Ed. 348, and authorities cited; 3 *Elliott on Railroads*, par. 1315d.

The refusal of the court to give the following instruction requested by the defendant was excepted to and is assigned as error: "The boarding of a train in motion is necessarily attended with more or less dan-

ger under any circumstances, and employes of railroads owe it to their own safety to abstain from attempting it unless the demands of duty make it necessary." The amended declaration alleges that "while the plaintiff as switchman of defendant as aforesaid was engaged in shifting and placing the car aforesaid, he necessarily attempted to get upon said car by means of and by taking hold of the said defective grab iron." This is not clearly an allegation that in the proper discharge of his duty the plaintiff "necessarily attempted to get upon the said car," but it is an allegation that "he necessarily attempted to get upon said car by means of and by taking hold of the said defective iron." This being so, the necessity of riding was not expressly made an issue by the declaration.

The necessity of using the grab iron in riding is not controverted. No issue involved in the pleadings made the refusal to give the requested charge error, especially as it is merely abstract, and its substance was given in another charge in its proper application to the evidence.

If two or more ways or methods were open to the plaintiff in the performance of his duties as switchman, and he had no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be held to have been negligent if he in good faith adopted that way or method which is more hazardous than another, provided the one pursued be one that reasonable and prudent persons would adopt under like circumstances, or provided the plaintiff was reasonably prudent in adopting the way or method used. In all cases the employe is bound to use ordinary care for his own protection. See *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148. This rule is not in conflict with the one approved and cited by the defendant, viz.: "If there are two ways of discharging the service apparent to the employe, one dangerous and the other less safe or dangerous, he must select the safe or less dangerous way; and cannot recover for an injury sustained when the danger is imminent, and so obvious that a careful and prudent man would not incur the risk under the same circumstances." *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 South. 145. It does not appear that there was obvious danger in riding, but from the evidence it may be inferred that the method pursued by the plaintiff was ordinarily and reasonably safe and proper to be used, and that the plaintiff was not at fault. See *Kiley v. Rutland R. Co.*, 80 Vt. 536, 68 Atl. 713, 13 Am. & Eng. Ann. Cas. 269. There is nothing in the testimony to indicate that the plaintiff in riding in the discharge of his duty as switchman selected an imprudent method of action, and it was not error to refuse a charge on this point.

The plaintiff was not injured in getting on the car, but fell when the grab iron gave way, after he had ridden a short distance.

The defect in the appliance is not shown to have been so obvious as to charge the plaintiff with notice of it, and charges that a previous inspection of the car with reasonable care would relieve the defendant of liability were properly refused as that does not properly state the measure of defendant's duty. Abstract charges as to the duty of jurors were not erroneously refused in view of the very full charges given.

The giving of each of the following charges was excepted to and assigned and urged as error: (1) "If you believe from the evidence that the plaintiff properly and necessarily mounted the car, either to get to its destination in time to make signals for stopping it at the coal pit, or to husband his strength by riding, for the full performance of his day's work, and that he was injured as already charged, by the negligence of his fellow servants, then you will find for the plaintiff, and award his damages according to the manner I have already specially charged you. (2) On the other hand, if you believe that the plaintiff wantonly and unnecessarily mounted when he might just as well have walked beyond the coal pit to make signals, or that he could by reasonable vigilance have seen that the nut was off the grab-iron bolt, and have avoided the danger of mounting by the help of it, then you will find for the defendant." The first of these two charges was objected to because of the use of the phrase "or to husband his strength by riding for the full performance of his day's work." This language may be objectionable because argumentative, and there may be no particular evidence as a basis for it, but, taken in connection with other portions of the charges given, it does not appear that it could reasonably have injured the defendant. The use of the word "wantonly" in the above charge is urged to be error because it "was equivalent to saying that unless the plaintiff was guilty of gross negligence in mounting the car he could recover," and was calculated to mislead the jury. While the word is not technically a correct one to use in expressing the law on the subject, yet the plaintiff could not recover under the circumstances as stated in the charge where the word appears, and the defendant was not injured.

The charge, in effect, is that if the plaintiff wantonly rode on the car he cannot recover, not that unless he wantonly rode on the car he may recover.

A technically inaccurate charge will not cause a reversal of a judgment where correct charges are given on the point and it appears that no injury could reasonably have resulted from the technical inaccuracy. See *Mitchell v. State*, 43 Fla. 584, 31 South. 242; *Louisville & N. R. Co. v. Willis*, 58 Fla. 307, 51 South. 134.

The use of the word "wantonly" in the quoted charge was technically incorrect, but several proper charges on the same point were given by the court, and the entire rec-

ord clearly indicates that no injury could reasonably have resulted to the plaintiff in error from the giving of the technically inaccurate charge. The charge therefore is harmless in this case. *Johnston v. State*, 29 Fla. 558, 10 South. 686; *Keech v. Enriquez*, 28 Fla. 597, 10 South. 91.

The court several times instructed the jury that if they found the plaintiff was negligent or in any appreciable degree contributed to the injury he could not recover, and specifically that:

"(6) You are called upon to decide from the evidence, whether it was necessary for the plaintiff, under all the circumstances, to board the car from which he fell in order to discharge his duty properly; or whether he could have performed his duty as well by remaining on the ground. If you decide that there was no occasion for him to mount the moving car, but that he did so for his own convenience, then he assumed the risk himself, and he cannot recover in this suit, even though the injury he suffered was due to the negligence of a fellow servant of the company."

"(8) Where recovery is sought against a railroad company for injuries received as a consequence of the negligence of another employe of the company, the one injured must have done nothing negligently to contribute to his injury, and must have neglected to do nothing to prevent the consequences of the negligence of the other employe."

"(10) It is for you to determine whether, under the circumstances of this case, the plaintiff, by his conduct, contributed in an appreciable degree to the cause of the injury he suffered, and if you find from the evidence that there was negligence on his part that contributed to his injury, your verdict should be for the defendant."

These instructions with others given rendered the requested charges unnecessary for a full and fair consideration of the case. The question of the liability of the defendant appears to have been fairly presented to the jury, and there is ample evidence to justify the finding of liability. The court refused to give the following charge: "If you believe from the evidence that the operation performed on the plaintiff's foot by Dr. Worley on May 13, 1906—the one, I mean, where the plaintiff says the cushion was cut off—if you should believe that this operation was not the best that could have been done, or that it was made necessary by Dr. Lloyd's previous treatment, and that any disability has resulted therefrom that could have been avoided if the wound had had proper treatment in the first instance, you cannot hold the defendant railroad company responsible therefor, or award any damages against it on that account."

This refusal was not reversible error since the court at the defendant's request charged as follows:

"(1) The plaintiff has failed to produce to

your evidence upon which a recovery might be had upon the second count in his declaration. This count was for damages said to have resulted from the improper treatment of plaintiff's foot by Dr. Lloyd. Whatever may have been Dr. Lloyd's treatment and the injuries resulting from it, as shown by the evidence, Dr. Lloyd alone is answerable for. You cannot give damages against the defendant railroad company on that account.

"(2) If you find from the evidence that there was improper treatment of plaintiff's foot by Dr. Lloyd, and that this enhanced his injury, and has increased his disability, you cannot award damages against the defendant railroad company for the entire injury and disability, but must make a proper allowance for that part of the damage which you attribute, under the evidence, to the treatment of the wound by Dr. Lloyd. And the same is true as to pain and suffering; a proper deduction should be made for that part of it, if any, that you find from the evidence was due to Dr. Lloyd's treatment of the wound.

"(3) If you should find from the evidence that the plaintiff is entitled to recover and that his earning capacity for the rest of his expectancy of life has been lessened, you should also determine to what extent the evidence shows that this is due to the injury received by the crushing of the foot by the car wheel and how much, if any, is due to the manner in which the foot was treated by the physician Dr. Lloyd; and having ascertained the injury due to such diminished earning capacity, and made proper allowances for that attributable to the treatment of the injury by Dr. Lloyd, you should reduce the residue to its present value, and such present value thereof only should be included in your verdict."

It is urged that the rules for the admeasurement of compensatory damages in a case like this were not correctly applied by the jury, and that the verdict for \$7,458 damages is excessive.

It was for the jury to determine from the evidence whether the plaintiff was at fault or negligent in the manner in which he rode on the side of the car, and this consideration goes to the question of liability and not to the amount of recovery, since the statutory rule of comparative negligence does not apply to employees. Even if the unskillful treatment of the wound by one or more of the physicians caused successive operations and a part of the permanent injury, the accident itself caused the loss of the front part of the foot and attendant suffering, loss of time, diminished earning capacity, etc., as shown by the testimony, and it cannot be held on this record that the jury were not governed by the evidence in fixing the damages or that

the amount is so unreasonable and unjust as to warrant a reversal here.

The judgment is affirmed.

SHACKLEFORD, HOCKER, and PARK-HILL, JJ., concur.

TAYLOR, J., dissents.

COCKRELL, J., absent, concurred in the opinion as prepared.

TAYLOR et al. v. EVERETT et al.

(Supreme Court of Florida, Division A. June 21, 1910.)

(Syllabus by the Court.)

DESCENT AND DISTRIBUTION (§ 109*)—ADVANCEMENTS — BRINGING PROPERTY INTO HOTCHPOT FOR DISTRIBUTION.

Where an advancement has been made by a parent to his child, the value of the advancement at the time it was made should be brought into hotchpot, and no interest should be charged on the advancement before it is called into hotchpot.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 109.*]

Appeal from Circuit Court, Jackson County; J. E. Wolfe, Judge.

Action between W. H. Taylor and others and W. H. Everett and others. From the decree, W. H. Taylor and others appeal. Affirmed.

Paul Carter, for appellants. Calhoun & Campbell, for appellees.

WHITEFIELD, C. J. On a former appeal in this cause it was ordered that certain property given by the intestate during his life to a daughter be brought into hotchpot. *Sewell v. Everett*, 57 Fla. 529, 49 South. 187. In the subsequent proceedings the trial court decreed that upon bringing \$120 into hotchpot, as the value of the advancement when made, the heirs of the daughter to whom the advancement was made be allowed to participate in the estate. On appeal from this decree it is contended that interest from the death of the intestate should have been added to the \$120 brought into hotchpot.

Section 2302 of the General Statutes of 1906 provides that: "When any of the children of the person dying intestate shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition of the estate with the other partners, such advancement, both of real and personal estate, shall be brought into hotchpot with the whole estate, real and personal, descended; and such party bringing into hotchpot such advancement as aforesaid, shall thereon be entitled to his or their proper portion of the whole estate so descended, both real and personal; and the value of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

estate so advanced as aforesaid shall be estimated at the time of advancement and not at the death of the testator."

This statute expressly provides that "the value of the estate so advanced * * * shall be estimated at the time of advancement," and the statute does not contemplate the payment of interest on advancements made and brought into hotchpot.

The court in its decree found all the land of the intestate "acre for acre to be the same on an average, and that the value of all of said lands at the date of the" advancement "was the same, and that all of said lands * * * was worth the sum of \$1.50 per acre." The advancement here involved was 80 acres of the land. In decreeing that \$120, the value of the advancement when made, be brought into hotchpot, the statute was observed.

An advancement being a gift, and not a debt, interest is not charged on the value of the advancement, at least until after the advancement is required to be brought into hotchpot, unless a contrary intent of the intestate appears, since the intestate and the law intend the benefits to accrue from the advancement, and the person receiving the advancement may elect to keep the advancement, and thereby relinquish a right to participate in the distribution of the intestate's estate. See *Towles v. Roundtree*, 10 Fla. 299; *Davis v. Hughes*, 86 Va. 909, 11 S. E. 488; *Harris v. Allen*, 18 Ga. 177; *Hanner v. Winburn*, 42 N. C. 142.

Any advantage that may accrue to a child from an advancement may be regarded as intended by the parent, and the statute requires an accounting for only the value of the advancement at the time it was made.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(126 La.)

No. 18,310.

STATE v. WILSON.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 34*)—VALIDITY.

State v. Logan, 104 La. 254, 28 South. 912, affirming *State v. Morrison*, 30 La. Ann. 817, is itself affirmed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. § 34.*]

2. CRIMINAL LAW (§ 1121*)—APPEAL—QUESTIONS OF FACT—REVIEW.

The defendant excepted to the jurisdiction of the district court on the ground that he was

under the age of 17 years. The trial court overruled the exception. The evidence on that subject is not all before the court, and it does not feel warranted on the record in setting aside the ruling of the district judge on the question of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2933, 2939; Dec. Dig. § 1121.*]

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Ras Wilson was indicted for manslaughter, and, on motion to quash being overruled, he appeals. Affirmed.

Hugh C. Fisher, for appellant. Walter Gulon, Atty. Gen., and J. M. Foster, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

Statement of the Case.

NICHOLLS, J. On the 22d of April, 1910, the appellant, Ras Wilson, was charged with manslaughter, under an indictment found against him by the grand jury for the parish of Caddo, for having killed and slain one Jackson.

The minutes of the 22d of April show that on that day:

"The grand jury came into court to make its final report, and with leave of the court presented to the court the following bills of indictment, which the court ordered filed and made of record, and that process issue immediately, and the sheriff was authorized to take the bond as fixed by the court: * * *

"11,399. State of Louisiana v Ras Wilson," manslaughter.

The minutes of April 23, 1910, show under the proper number and title that, the defendant being present at the bar in open court, he was duly arraigned and pleaded "not guilty."

On May 9, 1910, with leave of the court, defendant withdrew his plea of not guilty, and filed a motion to quash and a plea to the jurisdiction of the court, which were overruled.

The motion to quash the indictment was prayed for on the following assigned reasons:

"That there had been no legal indictment found against him by the grand jury, as said indictment when presented in open court by the grand jury was not read in said open court in the presence of the grand jury, in order to permit said grand jury to make substantial amendments to said bill, if desired according to law as per copy of minutes of this honorable court of April 22, 1910, attached hereto and made part hereof. That said indictment is illegal, null, and void, and of no effect, as the defendant or person charged is a minor below 17 years of age and the grand jury has no power to indict a minor. All proceedings against minors must be by affidavit.

"In view of the premises, defendant and mover prays that this motion be sustained, and that, accordingly, said indictment be quashed, annulled, and set aside, and that defendant and mover be discharged from custody. Further prays for costs and for all general and equitable relief."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The exception to the jurisdiction was based upon the following allegations:

"That defendant is a minor under the age of 17 years, and that, therefore, this honorable court, sitting as a court for the trial of ordinary criminal cases, has no jurisdiction over the person of the defendant, or over the offense or crime charged.

"In view of the premises, defendant prays that this exception and plea to the jurisdiction, after due hearing had, be sustained, and that, accordingly, said case be dismissed, and the defendant discharged from custody. Further, for costs and general and equitable relief."

The motion to quash and the exception to the jurisdiction were tried together and overruled, and bills of exceptions were reserved.

The bills of exceptions declared that the trial judge stated:

"There being no law requiring the bill of indictment to be read in open court when returned, the motion to quash on that ground was overruled. That although there was some evidence that defendant was under 17 years of age, his appearance struck the court as being older; and, his intelligence being sufficient to justify the court in holding him responsible as an adult, it overruled the plea to the jurisdiction."

The issues were tried before a jury of 12, which returned a verdict of "guilty as charged." Defendant moved for a new trial on the ground that the verdict rendered was contrary to the law and the evidence. The motion was overruled, but no bill of exceptions was reserved.

The defendant was sentenced to be imprisoned in the state penitentiary at Baton Rouge for a term of five years from the date of his incarceration therein, subject to commutation as provided in Act 112 of 1890. Defendant has appealed.

Appellant cites in support of his defense: *State v. Logan*, 104 La. 254, 28 South. 912; Acts 1908, No. 83; *State v. Ragan*, 125 La. 121, 51 South. 89; *State v. Prater*, 125 La. 573, 51 South. 647; *State v. Lanassa*, 125 La. 687, 51 South. 688; *State v. Baroni*, 125 La. 687, 51 South. 688.

Counsel for the state refer the court to Act No. 82 of 1906; 22 Cyc. p. 626.

The indictment which is sought to be quashed, with its indorsements thereon, is copied in the record. It is indorsed by the clerk:

"No. 11,399. *State of Louisiana v. Ras Wilson. Manslaughter.*"

Below this indorsement are the words:

"A true bill.

"W. N. Glassel, Foreman Grand Jury."

And below this are the words:

"Filed April 22, 1910.

"A. S. Hardin, Dy. Clerk."

Opinion.

State v. Logan expressly affirmed *State v. Morrison*, 30 La. Ann. 817, and declared that that decision was still in force; that the facts in *State v. Mason*, 32 La. Ann. 1018,

were entirely different from those in the former case. The indorsement upon the indictment: "A true bill. W. N. Glassel, Foreman Grand Jury"—in the present case (as in *State v. Mason*), was written and signed by the foreman himself. There is no dispute as to that fact.

On behalf of the prosecution it is maintained that Act 82 of 1906, creating a juvenile court, excepted from the provisions of the act those persons charged with murder, rape, and manslaughter; that that portion of the act is not inconsistent with the provisions of Act No. 83 of 1908, and is therefore not repealed; that the law does not favor repeal by implication; that when defendant appeared to the trial judge over 17 years of age, and the evidence did not satisfy him to the contrary, there was nothing for him to do but to order the case to be tried by a jury; that if the defendant was not satisfied with the ruling of the trial judge on the questions of age, he should have then asked the judge to charge the jury that if they found him to be under 17 years of age they had no jurisdiction to try the case; that a defendant, seeking to shield himself from responsibility for crime on the ground of infancy, must show that he is within the age under which the law either conclusively or prima facie presumed him to be incapable of committing a crime. 22 Cyc. p. 626.

Counsel urge that in section 17 of the act of 1908 it is provided that the court may commit the child to the State Reformatory "when the delinquency charge would in an adult amount to a crime punishable at hard labor"; that the proviso in that section said "that said commitment may be for an indefinite period, but in no case beyond the minority of the child," means where the judge in his discretion has tried the offender "as a juvenile"; that sections 9 and 17 of the act, read together, mean that it is discretionary with the judge, in capital and hard labor cases, to try the offenders either by the criminal or the juvenile court; that the provisions of the act of 1908 still remain in force so far as they are not inconsistent with the act of 1908; and that the exception to the rule of trial of persons under section 17 exists in the crimes of murder, rape, and manslaughter.

The ninth section referred to declares that the juvenile court and the district courts outside of said parish sitting as juvenile courts shall have jurisdiction of the trial of all neglected and delinquent children and of all prisoners charged with contributing to the neglect or delinquencies of such children, or with the violation of any law now in existence or hereafter enacted for the protection of the physical, moral, and mental well-being of such children, not punishable by death and hard labor, and of all cases of desertion or nonsupport of children by either parent. The tenth section declares

that when a child is charged under this act, or any person is charged under this act with an offense of any child, and said child is alleged to be under any given age and shall appear to the court to be under that age, such child for the purpose of this act shall be presumed under that age unless the contrary shall be proved. There is no reference in the indictment to the age of the party accused therein. Whether or not the defendant was in fact under 17 years of age was a matter to be shown by evidence. The court has no knowledge of what evidence was taken on trial of the motion and exception. The trial judge was evidently of opinion that the accused was over 17 years of age. The court does not feel warranted (under the situation as disclosed by the record as to that question of fact) in setting aside the verdict and reversing the judgment of appeal.

The judgment appealed from is affirmed.

(126 La.)

No. 18,077.

MARKS et al. v. AMERICAN BREWING CO.
(Supreme Court of Louisiana. June 6, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 151*)—INTERFERENCE BY COURTS—GROUNDS.

This court will not interfere at the instance of a stockholder in the affairs of a corporation and cause a distribution of its surplus, unless it is manifestly evident that interference is necessary in the interest of the corporation and its stockholders. It must be shown, in order to justify interference, that there is capricious, arbitrary, or discriminating management.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 555-559; Dec. Dig. § 151.*]

2. CORPORATIONS (§ 155*)—INTERFERENCE BY COURTS—GROUNDS.

The mere fact that a corporation has a large surplus will not justify an interference by the courts. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-603; Dec. Dig. § 155.*]

3. CORPORATIONS (§ 155*)—SURPLUS—RIGHT OF STOCKHOLDER TO DISTRIBUTION.

The evidence shows that the large dividends received by plaintiff on her stock were due to the large surplus kept by the defendant, and, as she has participated in the dividends made possible by this surplus without complaining, she cannot now be heard.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-603; Dec. Dig. § 155.*]

4. CORPORATIONS (§ 387*)—VIOLATION OF POLICE REGULATION—RIGHT OF STOCKHOLDER TO INVOKE LAW.

If the defendant has violated the provisions of a police regulation, it is not for plaintiff to invoke this law, as the state has her remedy, either civilly or criminally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548-1553; Dec. Dig. § 387.*]

5. CORPORATIONS (§ 155*) — STOCKHOLDERS' ACTION FOR DIVIDENDS—NECESSARY PARTIES DEFENDANT.

This action was brought against this defendant alone, and contracts made by it with third persons cannot be affected, as sought by plaintiff, without giving these third persons a hearing.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 155.*]

(Additional Syllabus by Editorial Staff.)

6. WORDS AND PHRASES—"SURPLUS."

The "surplus" is that which remains after expenses and dividends.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6816, 6817, 7811.]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. A. F. Marks and others against the American Brewing Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Cage, Baldwin & Crabites, for appellants. Gustave Lemle, for appellee. Walter Guion, Atty. Gen., amicus curiæ.

BREAUX, C. J. This suit was instituted to force the defendant to sell real estate referred to in the petition and to compel it to call in its loans and distribute a large amount of the surplus to its stockholders.

The plaintiff does not complain of the management of the corporation. She does not charge the board of directors with neglect of the business or with bad management of its affairs.

Substantially the only complaint is that the surplus should be reduced to a comparatively small amount.

She seeks to avail herself of the provision of the Gay-Shattuck bill (Act No. 176 of 1908), which prohibits corporations engaged in brewing and in distilling intoxicating liquors from obtaining a license for conducting a beer saloon or garden, or from being interested financially in any concern so engaged, or to be the owner or lessee or interested in any lease of premises used for such business.

As relates to the undivided surplus, her contention is that it is contrary to sound business principles to have so large a surplus; that it should be reduced by dividing it among the stockholders.

The capital stock of the corporation was \$200,000, divided into 2,000 shares of \$100 each.

Plaintiff owns 95 of these shares, and her husband 5 shares.

Defendant filed in evidence a full statement of its business, which makes a favorable showing of its condition.

The statement of defendant, sustained by the testimony, substantially is that large annual dividends have been declared since its organization in 1894.

That the plaintiff has received on her in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vestment of \$10,000 the sum of \$54,500—of this amount, \$24,500 in dividends, and \$30,000 collected on bonds she received as a shareholder.

That her stock is worth \$400 per share.

Plaintiff has not sought to deny the success of the business.

She only wishes the board of directors to add to the amount paid to her by dividing the surplus, and she also is concerned about the enforcement of the statute cited supra.

All the shareholders except the plaintiff and her husband intervened and joined the defendant in its defense.

Two distinct and separate questions present themselves, viz.: First, whether a stockholder can compel the board of directors to divide the surplus and declare another and second dividend of such amount as will, taken from the assets, leave in the corporation a considerably reduced surplus; and, in the second place, whether in this case and under the pleadings the plaintiff can force the board of directors to call in all of its outstanding loans and sell all the real estate not actually used in the manufacture of beer.

As relates to the company's business: The uncontradicted evidence is that the policy adopted by the board of directors was necessary to the success it has met.

The evidence further is:

That large dividends were declared because the amount retained for the business enabled the company to so operate on a scale as enabled it to realize large profits for which it has always accounted.

The contention of defendant further is that it would be hampered, if not ruined, in its business, were any other policy adopted than that which it follows.

This is not denied by plaintiff; the suit is directed to reducing and dividing the surplus, and incidentally the contention of plaintiff is that the statute before cited should be obeyed.

As to this statute, defendant's contention is that all the contracts in which it entered with its customers antedate the date of the statute, and furthermore that it does not violate it.

At this point it is of some moment in the decision to state how the business is conducted and investments are made to which plaintiff objects and which she says is in violation of the cited statute supra.

The company bought real estate (corner lots, it is stated) for its customers before the date the Gay-Shattuck statute was adopted. The title was taken in its name. Much of the property defendant immediately after sold to its customers. A counter letter was given by the buyers who are customers of the company. The customer, vendee, pays daily, weekly, or monthly, and after he has paid the whole price with interest and taxes the property is the customer's.

The testimony shows that \$150,345.34 of

the company's assets were invested in real estate and were sold to customers as just mentioned.

Another method of business adopted by the company is the loan, particularly at that period of the year when customers are called upon to pay licenses to the tax collecting department.

These loans are secured by mortgage. They afford security for the sums advanced to customers, including the sums advanced to them to pay their licenses.

These methods of advancing money create a business tie between the brewery and its customers, the saloon keepers, and in that way the brewery controls a volume of business that it would not otherwise control.

If these methods be enjoined and prohibited, as prayed for by plaintiff, the allegation of defendant is that liquidation will be necessary.

We take up the question whether the court should interfere and compel the defendant to part with its surplus at the instance of one of the stockholders and vary in the policy which has heretofore resulted in its exceptionally favorable success.

We are not of opinion, as relates to the distribution of dividends, that there should be any interference by the court unless it is manifestly evident that interference is necessary in the interest of the corporation and its shareholders.

This court has always expressed unwillingness to interfere except where there was necessity as made evident by the testimony.

Even honest error will not be rectified if the probabilities are that the board will be equal to correcting its mistakes. *State v. Bank of Louisiana*, 6 La. 745.

In *Marcuse v. Gin Co.*, 52 La. Ann. 1383, 27 South. 846, the court said:

"And the plaintiff has failed to consider to what extent the policy of extension and improvement, which he now condemns, has contributed to the making of the very earnings and profits which he now says should have been divided."

The writers on the subject are equally as clear against the advisability of interference. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

A large surplus does not justify interference. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17.

It must be shown, in order to justify interference, that there is capricious, arbitrary, or discriminating management.

Only in proper case the court will interfere.

In the face of the good showing made of business management, there is no authority anywhere that would justify the court in ordering that the management be taken from the board of directors to the extent sufficient to take from them—in opposition to their wishes—the surplus found and distribute it among the stockholders.

The surplus is that which remains after expenses and dividends. It adds to the stability and value of a business. The surplus, although it serves a useful purpose, would amount to little if it were within the reach of the whim and caprice of every stockholder.

The amount of surplus is due to the judicious management of the directors.

We have read a number of decisions upon the subject, in our and other jurisdictions. They invariably hold that only in case of evident necessity ought the courts substitute their judgment to that of the directors.

The complainant has failed to cite an act of the board of directors unfavorable to her interest.

Evidently the tempting surplus is the lure.

In considering the issues, the conclusion is: Were it not for the surplus, there would be no complaint.

Without it, plaintiff would not have received the handsome return she has, and the shares she owns would not be of the value three or four times the amount of the investment.

In the second place we are of opinion that plaintiff is concluded by her own act; in order to succeed in a court of justice, one must be ordinarily consistent.

Plaintiff received amounts on her shares without a murmur. She shared in the profits. If there was error committed, she participated in the error and concluded herself.

If there is violation of police regulations, the state has her remedy, either civilly or criminally.

There is another consideration: This suit was brought against the corporation alone.

Its customers before mentioned have acquired rights under the plan before referred to. They have a right of property. They cannot be interfered with without making them parties. Their interest ought not to be taken from them without a hearing. They form part of the plan of the business.

There are other grounds urged in the pleadings of plaintiff and in argument.

We pass them without comment. We restrict our decision to those specifically discussed.

For reasons assigned, the judgment is affirmed.

MONROE, J., concurs in the decree.

(126 La.)

No. 18,314.

STATE v. RICHART.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1019*)—APPEAL—JURISDICTION OF SUPREME COURT.

The Supreme Court has no appellate jurisdiction in a misdemeanor case, where no sen-

tence has been imposed and where no law or ordinance has been declared unconstitutional. Const. 1898, art. 85.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 2578-2580; Dec.Dig. § 1019.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; W. P. Campbell, Judge.

B. A. Richart was indicted for misdemeanor, and the indictment was quashed. The State appeals. Dismissed.

Walter Guion, Atty. Gen., and John J. Robira, Dist. Atty. (R. G. Pleasant, of counsel), for the State. Taylor & Gremillion, for appellee.

LAND, J. Defendant was indicted for selling property at public auction, without being a regularly licensed auctioneer, and without authority of law, in contravention of section 144 of the Revised Statutes of 1870.

The defendant moved to quash the indictment, on the ground that the facts alleged therein do not constitute a criminal offense under the laws of Louisiana, or, in other words, that the liability of defendant under said section is to be enforced by suit, and not by criminal prosecution. The motion to quash was sustained, and the state has appealed.

The section in question reads as follows, to wit:

"Sec. 144. No other person than an auctioneer or a civil officer acting under the authority of some court of the United States or of this state, or the legal representative of a succession of [or?] minors, curators of interdicted persons, syndics of insolvents, or the sheriff, when there is no auctioneer in the parish, shall exercise the trade or business of an auctioneer, by selling or offering for sale at auction, any property, real or personal, within this state, under penalty of five hundred dollars for each offense, one half of the penalty for the informer when recovered."

The appellate jurisdiction of the Supreme Court extends to criminal cases—

"whenever the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars, or imprisonment exceeding six months is actually imposed." Const. art. 85.

In civil matters the appellate jurisdiction of the Supreme Court extends to cases where the matter in dispute or fund to be distributed exceeds \$2,000. Hence, whether we consider the penalty in question as a fine, or a sum of money to be recovered by civil process, the result is the same so far as the jurisdiction of this court is concerned. The appeal herein, therefore, must be dismissed on our own motion. We note that the constitutionality of no law or ordinance is involved.

Appeal dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(126 La.)

No. 18,088.

HARZ v. GOWLAND et al.

(Supreme Court of Louisiana. June 6, 1910.

Rehearing Denied June 28, 1910.)

*(Syllabus by the Court.)***1. NOTARIES (§ 11*)—"PARAPH"—PARAPH OF FORGED NOTE.**

The "paraph" of a notary is his official signature, and where he paraphs a forged note he acts as a notary, and not as an individual, and one deceived by this paraph has a cause of action against the surety on his bond. *Rochereau v. Jones*, 29 La. Ann. 82; *Nolan v. Labatut*, 117 La. 431, 41 South. 713.

[Ed. Note.—For other cases, see *Notaries*, Cent. Dig. §§ 28, 31; Dec. Dig. § 11.*]

2. NOTARIES (§ 11*)—EFFECT OF PARAPH.

While the paraph of a notary does not guarantee either the value of the property or the rank of the mortgage, it does guarantee the genuineness of the note, and of the mortgage with which it is identified, and where a notary fraudulently issues a note, the fraud gives rise to an action against him and his surety regardless of an absence of value, or of an act of mortgage.

[Ed. Note.—For other cases, see *Notaries*, Cent. Dig. §§ 20, 31; Dec. Dig. § 11.*]

3. NOTARIES (§ 11*)—RIGHT OF ACTION ON BOND—FORGERY OF NOTE.

Where a notary issues a mortgage note duly paraphed the fact that the purchaser had confidence in him personally does not have the effect of defeating the purchaser's right to recover on the notary's bond for wrongs and losses caused by the acts of the notary.

[Ed. Note.—For other cases, see *Notaries*, Cent. Dig. §§ 31, 33; Dec. Dig. § 11.*]

4. NOTARIES (§ 11*)—FORGERY OF NOTE—ACTIONS—INTEREST.

The rate of interest allowed on the money lost by the plaintiff will be 5 per cent., as there is no written evidence to show that the defendants are bound for more, and this interest will run from the day on which the notary committed the act by which plaintiff suffered loss.

[Ed. Note.—For other cases, see *Notaries*, Dec. Dig. § 11.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Joseph Harz against Joseph Q. Gowland and another, in which the United States Safety Deposit & Savings Bank intervened. Judgment for plaintiff and intervenor, and defendants appeal. Affirmed.

See, also, 52 South. 988.

P. M. Milner, for appellants. Denegre & Blair and Henry H. Chaffe, for appellee United States Safety Deposit & Savings Bank. Edgar M. Cahn and E. M. Robbert, for appellee Harz.

BREAUX, C. J. Alleging that J. Q. Gowland, notary public, forged 10 notes of which plaintiff is the holder, plaintiff brought this suit thereon against Gowland and his surety, the Fidelity & Deposit Company of Maryland, in solido, to recover the sum of \$14,400, with 8 per cent. interest.

He paid full value for the notes to Gowland.

He alleged that he accepted them, paid for them, on the faith of the paraph of the notary; that he believed they were secured by mortgage and vendor's privilege.

That there was no mortgage or vendor's privilege, although the notary said to plaintiff that they were secured by mortgage and privilege.

That the mortgage notes which are described in the petition were not of record in the recorder's office, nor was there anything of record showing their verity.

For a number of years plaintiff had been dealing with the notary. From time to time the notary would call upon him with a note of \$1,000 and ask him if he desired to invest.

The plaintiff took up different notes at different times, until they aggregated in his hands the sum claimed by him as due by the notary and the surety on his bond.

The complaint is that the notary was unfaithful to his trust, and thereby broke the condition of his bond, and rendered his surety liable.

The United States Safety Deposit & Savings Bank intervened in the suit, alleging that on January 12, 1909, through its cashier, it loaned to the Columbia Realty Company the sum of \$2,500 on the latter's promissory note, drawn to the maker's own order, and by him indorsed in blank, bearing 7 per cent. interest from date, secured by mortgage granted by the Columbia Realty Company in favor of Miltenberger, cashier, by act before the same notary, on property described in its petition of intervention.

This note of \$500 was covered by subsequent note and mortgage, and was in consequence returned to Gowland, notary, as satisfied.

The mortgage for \$500 was not recorded at all by the notary, and as to the second mortgage although it contains the declaration as follows:

"By reference to the mortgage certificate hereto annexed it will be seen that said property is free from all incumbrances, except the assumption by the mortgagor herein of a mortgage granted by William Gowland to Wm. L. Miltenberger, as per act before the undersigned notary," January 21, 1909.

This mortgage was not the first in rank; it was only the third in rank. No certificate of mortgage was ever produced by the notary and attached to the act.

We are informed that the officer of the bank before named read the act, and then it was read by the notary, in which it was stated that the mortgage was first in rank.

That it was signed by the mortgagor and mortgagee.

That some time thereafter it became known that instead of a first mortgage it was a third mortgage.

The property was of less value than the first two mortgages.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Intervener at this point invokes article 3304 of the Civil Code, which provides:

"Every notary who shall pass an act of sale, mortgage, or donation of an immovable, shall be bound to obtain from the office of mortgages of the place where the immovable is situated, a certificate declaring the privileges or mortgages which may be inscribed on the object of the contract, and to mention them in his act, under penalty of damages toward the party who may suffer by his neglect in this respect."

And the notary must see that "taxes for three years past have been paid."

The defendant joined issue with plaintiff, admitted that it was surety on the bond, but denied that plaintiff employed the notary to make the investment (that the employment was per parol); averred that he trusted the notary personally, and not as an officer; that plaintiff was influenced by consideration of friendship for and confidence in Gowland, and not by the fact that he was a notary; that plaintiff was negligent; that he should have examined the record, which would have disclosed to him the forgery charged; that the note was not such a deception and snare as plaintiff charges.

It avers that there are other claims upon the bond largely in excess of the amount claimed by plaintiff, and that if judgment is rendered for plaintiff the amount collected should be restricted to his pro rata, and respondent's right to force a concurso reserved.

Returning to plaintiff, Harz, he (made defendant in intervention) filed an exception to the petition of intervention because of want of jurisdiction, want of interest, and no cause of action.

Taking up defendant's plea to the intervention, it denied all of intervener's allegations, and reiterated that the claim of Harz exceeds the sum of \$10,000; that the maximum liability on the bond is that sum; and that, if any judgment is rendered, the judgment should be decreed payable pro rata out of the amount just stated.

The notary sued made no answer. There was as to him confirmation of the judgment by default.

On the merits there was judgment in favor of plaintiff against defendant, also in favor of intervener "amount of the bond due, to be prorated between plaintiff and intervener."

The notes, beyond question, including the paraph, were forged. They had no other effect save that which the notary sought to give to it by his forgery.

The question arises whether his surety is liable on its bond.

We are of opinion that it is. He, the notary, was acting in his official capacity, and in that capacity called upon the plaintiff and informed him, substantially, of the notes, and of their validity, stated where the property mortgaged was situated.

As relates to the paraph *ne varietur*, there was nothing done or said to place the investor upon inquiry.

The paraph is the official signature, and evidence of the reality and genuineness of the note on which it is written.

The officer is commissioned as a notary to pass acts of mortgage and of sale. Part of the duty consists in adding the words required in paraphing a note and his signature. He answers for its genuineness. His paraph is generally received in evidence in courts of justice. It is taken as true. The notary who offers this signature to an investor violates the duties devolving upon a notary if he thus forges the note and affixes his paraph in order to better enable him to deceive and induce the one to whom he proposes to take it up.

These notes were made payable to bearer.

The act of paraphing the forged note was an offense committed as notary.

The paraph is an act, one which he is authorized to perform as notary, and not personally.

In the Rochereau Case, 29 La. Ann. 82, the syllabus clearly announces the principle of the decision.

"The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged."

In the body of the decision the court says:

"The forgery is not that of the individual, but of the notary."

It must be borne in mind that in this decision the question rested on the fact that the paraph was a deception and a fraud, because the notary knew that the purported identification was no identification because of the fraud.

The same in substance is the case before us for decision.

The paraph is official. It identifies the note. Succession of Johnson, 3 Rob. 218.

The legal paraph is evidence of identity with a genuine act.

Every notary shall "attest each of the notes" by putting his name on them and date of the act. Article 3384.

Each of the notes in question is paraphed *ne varietur* for identification, the usual paraph in such cases.

In another decision the court emphasized the rule laid down substantially in preceding cases:

"The surety's liability will arise if he does not perform and discharge the duties imposed upon him by law." Schmidt v. Drouet, 42 La. Ann. 1068, 8 South. 396, 21 Am. St. Rep. 406.

In a recent case the court was still more emphatic and direct upon the subject.

Paraphing the note is a notarial function, for the nondischarge or improper discharge of which the notary and his surety may be held liable to any one who may be thereby injured. Nolan v. Labatut, 117 La. 431, 41 South. 713.

The next proposition of the defendant is that, even if the notes had been genuine,

plaintiff ought not to recover because there was no property in existence and the notary was insolvent.

True, the paraph of the notary does not guarantee either the value of the property nor the rank of the mortgage.

It, beyond question, ought to guarantee the genuineness of the note and of the mortgage with which it is identified.

While it guarantees neither of these important considerations—i. e., value of the property or rank of the mortgage—if a forgery is resorted to in order to transfer the note, the notary and his surety are liable.

There is a personal liability on the note, and a guaranty that the notary will not resort to dishonest methods in discharging the duties of his office.

The fraud committed gives rise to liability, and not the partial or entire want of value, or the absence of all act of mortgage.

The plaintiff attached a responsibility to the office of notary which it does not have. That after years of confidence he had become overconfident in the integrity of the notary, and trusted him personally, and not as notary, to assist him in making his investment, is the next ground, in substance, urged by learned counsel.

Under the laws he was warranted in giving weight to the acts of the notary, and the fact that he had confidence in him personally does not have the effect of defeating the right to recover on the bond.

There is no complete similarity between the case of one of the forged notes and the other nine, also forged. The facts and circumstances are not the same, for at the time that the last-mentioned notes were handed to him he immediately handed his check for each as they were received from the notary.

As to the other, the one note, he trusted the officer to an extent that gives it the appearance of a personal transaction between man and man.

Plaintiff left the \$1,000 negotiable check for this note with the officer; the latter assuring him that he ought to be trusted, as he is liable on his bond for any failure to account for the amount.

For these reasons, the judgment will remain unchanged in this respect.

Now as to the amount of interest, the next question at issue.

Plaintiff asked for interest at the rate of 8 per cent. from the date of failure of payment.

Defendant's contention is that, if any amount at all be due, it bears interest at the rate of 5 per cent. from judicial demand.

The interest at 8 per cent. is due only when the promise to pay is evidenced by writing.

Plaintiff has no written evidence.

It follows that the amount due is 5 per cent.

As to date, it should be from the time that defendant committed the act charged. From that date he became actively indebted for amount and interest.

We will not dwell upon the intervener's cause.

The notary became indebted for the amount as made evident by the statement of facts, and by our view, and by our opinion above.

Here, again, he failed to perform the duty incumbent upon him as notary. He must suffer the consequences. The demand of intervener as heretofore granted is sustained, and the judgment as to it is maintained.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(126 La.)

No. 18,163.

HARZ v. GOWLAND et al.

(Supreme Court of Louisiana. June 6, 1910.)

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Joseph Harz against J. Q. Gowland and another. Judgment for defendants, and plaintiff appeals. On motion to dismiss. Motion denied.

See, also, 52 South. 986.

Edgar M. Cahn and E. M. Robbert, for appellant. F. M. Milner, for appellee Fidelity & Deposit Co. of Maryland.

BREAUX, C. J. Appeal of Joseph Harz, plaintiff, from judgment rendered on the 13th day of December, 1909, and signed on the 17th day of that month.

Suggesting to the court that the surety who signed the appeal bond furnished by defendant and appellant, the Fidelity & Deposit Company of Maryland, is insolvent, insufficient, and disqualified, plaintiff moved for a dismissal of the appeal.

This motion has no foundation in fact or law. It is therefore overruled, and the demand on the motion denied, at costs of plaintiff.

(126 La.)

No. 18,269.

STATE v. TOMSA.

(Supreme Court of Louisiana. June 6, 1910. Rehearing Denied June 28, 1910.)

(Syllabus by the Court.)

1. **JURY (§ 47*)—DISQUALIFICATION—ABSENCE FROM STATE.**

Absence during the year preceding the service of a juror, without an intention of changing his citizenship or of establishing a new domicile, is not necessarily a ground for disqualifying a juror, if it be evident that he did not intend to abandon his home where he supports his wife and children. *State v. Alexander*, 35 La. Ann. 1100; *State v. Wimby*, 119 La. 139, 43 South. 984, 12 L. R. A. (N. S.) 98, 121 Am. St. Rep. 507.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 254; Dec. Dig. § 47.*]

2. CRIMINAL LAW (§ 396*)—EVIDENCE—BEST AND SECONDARY.

The testimony of a witness regarding bullet holes in the hat of the deceased is admissible, in spite of the fact that another witness testifies that the hat is within the town where the trial is held, for the state is not obliged to stop the trial in order to go in search of the hat.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 879; Dec. Dig. § 398.*]

3. HOMICIDE (§ 325*)—EVIDENCE—THREATS—REVIEW OF RULING—PROCEDURE.

While this court will review the ruling of the trial court in a homicide case on the question of whether a sufficient foundation has been laid to introduce evidence of a quarrel, of threats, and of the dangerous character of the deceased, it will not do so on testimony selected by the accused, but only where counsel for the accused, at the beginning of the trial, has notified the court of his intention to introduce this evidence and has requested the clerk to take down the testimony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 693; Dec. Dig. § 325.*]

4. CRIMINAL LAW (§ 655*)—APPEAL—HARMLESS ERROR.

The casual remark of the trial judge not calculated to influence the jury is not a good ground for setting aside a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1520; Dec. Dig. § 655.*]

(Additional Syllabus by Editorial Staff.)

5. DOMICILE (§ 4*)—CHANGE—"ABANDONMENT OF RESIDENCE."

In order to constitute an "abandonment of residence" where one leaves his home, considerable time must elapse after leaving, together with some evidence of intention to abandon the residence.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 9, 13; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, p. 8.]

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin K. Schwing, Judge.

George Tomsa was convicted of manslaughter, and appeals. Affirmed.

J. H. Pugh, for appellant. Walter Guion, Atty. Gen., and J. H. Morrison, Dist. Atty. (R. G. Pleasant, of counsel), for the State.

BREAUX, C. J. The defendant, George Tomsa, charged with murder, found guilty of manslaughter, sentenced to the penitentiary for 21 years and to pay a fine of \$1,000, appeals to this court.

Eleven bills of exceptions were taken by defendant's attorneys. Several based on the same ground will be considered together as one.

Motion to quash:

On defendant's motion to quash, on the ground that a grand juror was not a bona fide resident of the parish for one year next preceding his service on the grand jury, it appears that this grand juror left the state for Texas, where he was employed for one year, from December 16, 1908, to the same date of the following December.

He testified: That he never had the in-

tention of permanently residing in Texas. He was employed for the year. He left his family in this state at the place he considered his home in the parish of Iberville. His intention was to return after his term of employment.

We hold: Absence during the year preceding the service of a juror, without any intention of changing citizenship or of establishing a new residence, is not necessarily a ground to disqualify a juror, if it be evident that he did not intend to abandon his home where he supports wife and children.

The point was decided in *State v. Alexander*, 35 La. Ann. 1100. It was affirmed in *State v. Wimby*, 119 La. 139, 43 South. 984, 12 L. R. A. (N. S.) 98, 121 Am. St. Rep. 507.

We will not discuss the facts of the decision cited by the defense. It is sufficient to state that the decision holds, "We see no objection to this doctrine," referring to the case of *Tullos v. Lane*, 45 La. Ann. 333, 12 South. 508, in which this court held that the merely temporary absence of the citizen will not be considered an abandonment of the residence.

In every way it is evident that he left for the purpose of working elsewhere in order to provide for himself and his family, to whom he expected to return.

It was in order to better maintain his home, to provide for those dependent upon him.

In order for it to be an abandonment there must considerable time elapse after leaving, together with some evidence of intention to abandon the residence.

There was neither in this instance.

The decision in *State v. Alexander*, 35 La. Ann. 1100, is not in point.

"Mere temporary absence from the state, during the year prior to the service of a juror, if without the intention of changing citizenship or abandoning residence, will not destroy the qualification of a juror."

From the foregoing, it is evident that there was no good ground to quash the indictment.

Not the best evidence:

The next point urged by the defense is that the hat of the deceased was not offered in evidence. The witness had been permitted to testify where the buckshot from defendant's gun pierced the hat. The hat was not produced in court, though it was at a ferry landing somewhere within the limits of the town in which the case was tried.

The witness was properly heard to testify about the shots that pierced the hat without introducing the hat in evidence.

It does not appear that the prosecuting officer knew anything about the hat, or that he had it in his power to produce it in court.

It is stated that the witness swore that it was at a landing at some distance from the courthouse.

The state could not be required to stop the proceedings to enable the prosecuting attorney to go out in search of the hat, return after the search, and offer it in evidence, if found. It does not appear that the hat was within the reach of the prosecuting officer.

Overt act and evidence of prior threats and of character of the deceased:

The defense offered to introduce evidence of a quarrel, of threats, and of the dangerous character of the deceased.

The district attorney objected to the evidence on the ground that the foundation had not been laid.

The court did not permit the evidence of threats and quarrel to go to the jury and maintained the objection of the district attorney.

The point is stated in five different bills of exceptions. They will be considered as if presented in one bill of exceptions.

First as to the overt act: The first witness relied upon by the defense to prove an overt act, whose name was Collins, a brother-in-law of the defendant, whose testimony forms part of the bill of exceptions, testified that just previous to the homicide defendant asked deceased if he was carrying that gun for him; that the deceased made a motion to raise his gun a moment before defendant shot.

The other witness, McDonald, was not related to any of the parties. He also testified as to the hostile attitude of the deceased; that he was in the act of raising his gun.

This is the testimony upon which defendant relies as the foundation for admitting evidence of threat, or previous quarrel, and the dangerous character of the deceased.

We infer that the testimony of these two witnesses was heard by the jury.

After it had been heard, a copy of the testimony of each was offered as sufficient foundation.

The witness McDonald said:

"When the deceased made the motion to level his gun, the accused, getting his gun to his shoulder, fired and killed the deceased."

The statement of the trial court is to the contrary. He observed these witnesses, heard them testify, and was not impressed by their testimony; in other words, he did not believe them.

The statement of the judge, made part of the bill of exceptions, is:

"That the evidence of Collins was not sufficient to overcome proof that had been presented that there was no overt act on the part of the deceased."

In another *per curiam*, made part of another bill of exceptions, he states: That the fact "was clearly established during the trial that the deceased made no overt act or hostile demonstration, as stated by Collins. That the evidence showed that the gun carried by the deceased was found immediately after the

shooting under the body of the deceased in such a position as to make it impossible for the deceased to have had it in his hands at the time of the shooting, as stated by Collins. That it was further clearly established that at the time of the shooting the deceased was not facing the accused, and that it was impossible for the deceased to have seen the accused when the shot was fired. That the location of the wound, back of the ear, showed that it was impossible for the deceased to have been facing the accused at the time of the shooting." That the testimony of Collins was not considered true, and that of McDonald was not corroborated but contradicted.

In the motion for a new trial, which was overruled and is now before us by a bill of exceptions, the defense complained of the court's ruling in holding that no overt act had been proven and of the refusal of the court to permit witnesses to testify as to the prior difficulty, or as to threats.

As relates to the asserted overt act of the deceased and the offer to prove a quarrel and threats and the character of the deceased: The evidence as related to the particular point should be as complete as possible. It was not complete.

The defense cannot be heard to prove threats if he selects his evidence.

Our ruling is, in order to avoid, as far as possible, a prolific source of disputes, that whenever the defendant's counsel intends to offer evidence of threats, of character, or any other similar evidence, he shall notify the judge at the beginning of the trial of his intention, and shall then direct the clerk to write the testimony and annex it to a bill of exceptions.

If there be refusal, and a proper bill of exceptions taken, the verdict will be annulled and the case remanded.

When the foregoing will have been complied with, the court will be in a position to see to the taking of all the testimony, and the defendant to have the ruling reviewed.

This affords equal rights to all parties.

In both the Golden Case, 113 La. 791, 37 South. 757, and Feazell Case, 116 La. 264, 40 South. 698, the court held that it would review the decision of the district court upon this point, but the evidence must be clear and convincing to authorize interference.

The other ground is without merit.

It is that, when, during the trial, the district attorney asked the judge to make a ruling and request counsel for the accused not to propound questions trenching on prior rulings of the court, the judge, to the request of the district attorney, replied that the question did not strengthen his case.

A bill of exceptions was reserved to the judge's refusal to allow the clerk to take down the remark as he had heard it.

Going back to the words complained of:

They were not prejudicial to the accused, even conceding that they were those stated. The judge denies that he uttered them. But,

even if they were as alleged, they had no tendency to prejudice the cause. It was a casual remark, we take it, in answer to the request of the prosecuting officer, not calculated to influence the jury. Besides, the bill does not state that it was heard by the jury. If the jury heard it, there was nothing said to which to attach any importance.

For reasons stated, and the law and the evidence being in favor of the state, the verdict and judgment be, and the same are, hereby affirmed.

(126 La.)

No. 17,920.

INTERSTATE LAND CO., Limited, v.
DOYLE et al.

(Supreme Court of Louisiana. June 6, 1910.
On Application for Rehearing,
June 25, 1910.)

(Syllabus by Editorial Staff.)

1. TENANCY IN COMMON (§ 32*)—RIGHTS AND LIABILITIES OF CO-TENANTS—EXPENSES—INSURANCE.

An owner of an undivided interest in real estate, who insures the property in his own name and for his own account, and not on behalf of the infant co-owner, is not entitled to the sum paid for the insurance on the distribution of the proceeds of the property on a sale for partition.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 97, 98; Dec. Dig. § 32.*]

2. TENANCY IN COMMON (§ 30*)—RIGHTS AND LIABILITIES OF CO-TENANTS—TAXES.

One having an undivided interest in real estate who buys the entire property at a tax sale for state taxes is entitled to 10 per cent. interest on the price bid by him on the property, and an infant co-owner is properly charged with that amount in the distribution of the proceeds in partition proceedings.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 96; Dec. Dig. § 30.*]

3. TENANCY IN COMMON (§ 37*)—RIGHTS AND LIABILITIES OF CO-TENANTS—TAXES.

Where one having an undivided interest in real estate had in his hands funds belonging to the co-owners, he must, when paying taxes on the property apply the funds pro tanto to the payment of the co-owners' taxes, and he could not hold claims against the co-owners as interest-bearing claims, based on his payment of taxes, while he had funds of the co-owners which it could impute to their payment.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 106; Dec. Dig. § 37.*]

4. TENANCY IN COMMON (§ 32*)—RIGHTS AND LIABILITIES OF CO-TENANTS—EXPENSES—COLLECTION OF RENTS.

Where one having an undivided interest in real estate employed a third person to collect the rents, the co-owners claiming the moneys collected by the third person should pay a reasonable amount due for collection.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 97; Dec. Dig. § 32.*]

Breaux, C. J., and Nicholls and Provosty, JJ., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Action by the Interstate Land Company, Limited, against Willie Doyle and another, minors. From a judgment granting insufficient relief, plaintiff appeals. Modified and affirmed.

Richardson & Soule, for appellant. Benjamin Ory, for appellees.

NICHOLLS, J. The judgment rendered herein was preceded by the following opinion of the trial judge, assigning his reasons for the same. The statement of the facts of the case are, we understand, accepted as correct as far as it goes:

The project of partition prepared by the notary public appointed by the court herein is opposed both by the plaintiff and defendants on various grounds to be hereinafter stated. In order to properly determine the issue involved, the following facts must be borne in mind: The property in suit was owned by James J. Sylvester and the defendants, in the proportions of one undivided half for the former, and one undivided fourth for each of the latter.

In July, 1900, plaintiff acquired $\frac{1}{100}$ of said property at a tax sale for the state tax of 1899, paying therefor the sum of \$41.25. In June, 1901, plaintiff bought the whole of said property at a tax sale for the state taxes of 1900, paying therefor \$76.71. In November, 1902, plaintiff brought suit to be recognized as owner of the said property under the aforesaid tax title, and prayed for a writ of possession which was issued, but was not sought to be executed until November 25, 1904, when it was enjoined on the petition of Thomas J. Sylvester, acting for himself and the minors Doyle.

On the same day, plaintiff obtained, with the consent of defendants, a judicial sequestration of the property, and afterwards, from December 22, 1904, to July 2, 1905, the sheriff, under a written agreement of the parties, collected the rents through Mr. F. Rivers Richardson, who was to account to him monthly. The compensation of Richardson was fixed at 20 per cent. of the collection. On June 16, 1905, judgment was rendered in favor of the plaintiff, recognizing it as the owner of the whole property. There was no suspensive appeal from this judgment, and on July 2, 1906, plaintiff entered into full possession of the property.

The rents collected by F. Rivers Richardson from December 22, 1904, to May 31, 1905, inclusive, amounted to \$471.40. From this he deducted his commission and sundry disbursements totaling \$151.75, and turned over to the sheriff \$319.65. Out of this, the sheriff retained for costs, etc., the sum of \$40.55, leaving \$279.30, as the net amount of rents for the time stated. For the month of June, 1905, Richardson collected \$81.25, which he did not pay over to the sheriff, but out of which he was entitled to retain for his commission, etc., the sum of \$43.85, making the net amount of rent for June, 1905, \$37.40. From July 1, 1905, to May 31, 1907, inclusive, plaintiff, the Interstate Land Company, Limited, collected through its agent, F. Rivers Richardson, the rents of the property to the amount of \$2,243. Richardson charged and received commission of 20 per cent. thereon, or \$448.60.

On May 30, 1906, the minors Doyle appealed devotively from the judgment of June 16, 1905, and the Supreme Court, on March 4, 1907, finally reversed the said judgment as to them, and recognized them as owners of an undivided half of the property in question. 118 La. 587 [43 South. 173].

On April 12, 1907, the present partition suit was begun, the property was again judicially

sequestered, and whilst so sequestered from June to October, 1907, yielded revenues collected by the sheriff to the net amount of \$114.72. Judgment of partition was rendered on August 19, 1907, and the property was sold under it in due course on October 3, 1907, to plaintiff for the price of \$10,800. In the judgment of partition it was ordered that defendants' reconventional demand for an accounting of rents and revenues and plaintiff's demand for reimbursement of taxes etc., be referred to the partition before the notary named by the court for determination and adjustment.

In defendants' reconventional demand, plaintiff was called upon for an accounting from July 2, 1905. The price of the property (\$10,800) less the costs of sale, and the \$114 of the net revenues collected by the sheriff from June to October, 1907 have been partitioned by consent. The

Active Mass

For partition herein, therefore, consists of the revenues of the property from July 2, 1905, the date fixed in the pleadings, to the date of the issuance of the second judicial sequestration. They are the rents collected by plaintiff through Richardson, agent, as above stated, amounting to.... \$2,243 00
To this must be added the amount received by plaintiff from the sheriff as representing the net revenues of the property when it was first sequestered... 279 30
And the net amount collected for June, 1905, by Richardson for account of the sheriff and not accounted for to him but to plaintiff..... 37 40

Thus making an active mass of..... \$2,559 70

From this must be deducted the following

Debts and Liabilities:

- | | |
|---|-----------------|
| (1) The costs paid by plaintiff in the present action | \$ 39 95 |
| (2) The fees of the notary for the inventory herein | 20 00 |
| (The property consisted of three portions of ground and an inventory was necessary.) | |
| (3) The fees of the appraisers and experts | 20 00 |
| (4) The cost of the act of partition..... | 20 00 |
| (Objections to these two last items have been withdrawn.) | |
| (5) The costs paid by Benjamin Ory, as itemized under the numbers 3, 4, 5, 6, 8, 9, and 10, of law charges in the project of partition, aggregating | 85 15 |
| | <hr/> \$ 185 10 |
| | \$2,374 40 |
| (6) All further costs incurred or to be incurred, by either plaintiff or defendants in these proceedings. | |

The balance remaining after said deductions is to go one-half to plaintiff and one-fourth to each of the defendants, subject to the herein-after stated deductions from the share of the latter.

From the 2d day of July, 1905, when it went into possession of the property until the day when the judicial sequestration in this case was issued, plaintiff expended on the property the sum of \$387.52, as shown by Exhibit B, annexed to the supplemental answer to the rule herein. Those expenditures include \$30 for three years' premiums of insurance. As the policy was taken in the name of plaintiff, and it alone could have recovered any loss thereunder, defendant cannot be made to reimburse the premiums as having been benefited thereby. *Conrad v. Burbank*, 25 La. Ann. 112. The other expenditures (\$357.52) were necessary to preserve the property and keep it in a tenantable condition. Defendant cannot claim the benefit of the rent, and at the same time refuse to be bound for the expenditures without which the property would have remained tenantless (*Sharp v. Zeller*, 114 La. Ann. 549-

555 [38 South. 449]; *Conrad v. Burbank*, ubi supra).

Defendants are chargeable with their half thereof, say \$178.76.

Plaintiff also claims the reimbursement of \$449.70 (should be \$448.60) paid by it as commissions to Richardson for collecting the rents and attending to the property from July 2, 1905, until the second judicial sequestration. It points to the agreement during the first judicial sequestration as showing the necessity for the employment of an agent for the collection of the rents and as justifying the unusual commission of 20 per cent. It also shows that under the agreement referred to the property produced greater monthly revenues, pending the first judicial sequestration, than pending the second judicial sequestration with the sheriff as collector.

To defeat this claim, defendants rely upon the cases of *Sharp v. Zeller* and *Conrad v. Burbank*, above cited, which announce the doctrine that a co-owner who collects the rents of the common property cannot charge a commission, in the absence of an express agreement on the subject. It is contended that the agreement between the parties ended with the taking of possession by plaintiff under the judgment of June 16, 1905, and was never renewed. Strictly, that might be true, but it seems to me that the agreement was meant to endure until the question of ownership was finally settled. Had the judgment of June 16th been suspensively appealed from, the agreement would have continued in force pending the appeal. Because defendants appealed only devolutively is no reason to place plaintiff in *duriori casu*. Its situation should be the same as if the judicial sequestration and the agreement had been maintained during the appeal. It paid the commission in good faith relying upon said agreement as admitting the necessity for the employment of some one to collect the revenue. The tenants were unreliable negroes to the number of 25 or 30, and the rents had to be collected weekly in sums at times as small as 25 cents. Neither plaintiff nor the legal representatives of the defendants (had he had the opportunity) could reasonably be expected to assume such a task gratuitously. Defendants must therefore bear their half of the commission paid to Richardson, or \$224.30.

Plaintiff next claims for reimbursement of one-half of the price of the property involved, and of sundry state and city taxes paid by it prior to the judgment of the Supreme Court of March, 1907, which it contends annulled as to defendants' half interest the interest at the rate of 10 per cent. per annum from the date of each disbursement. It relied on provision of article 233 of the Constitution of 1898 to the effect that "No judgment annulling a tax sale shall have effect until the price and all taxes and costs paid, with ten per cent. per annum interest on the amount of the price and taxes paid from date of respective payments be previously paid to purchaser."

Defendants deny that the tax sales referred to were annulled by the Supreme Court, and assert that plaintiff's right of ownership rests exclusively upon the first sale of July, 1900; that the second sale of June, 1901, added nothing to plaintiff's ownership; and that the price then paid and all subsequent payments of taxes must be considered as payments for the joint benefit of the co-owners, entitling plaintiff to reimbursement as negotiorum gestor, and nothing more. The issue is not difficult of solution.

The judgment of the Supreme Court does not in terms annul either of the sales in question. It simply rejects the demand of plaintiff "in so far as the interest of the minors, Joseph and Willie Doyle in the real estate here in dispute is concerned," which means that as to the said interest or one undivided half of the property, plaintiff has taken nothing by the tax sales.

In its opinion (at page 593 [118 La., at page 173, 43 South.], the court declines to discuss whether the validity of the second sale of June, 1901, was affected by the fact that plaintiff was at that time a co-owner with defendants under the first sale of July, 1900, and leaves the question open. The decision is made to rest entirely upon the want of proper notice to the defendants and the consequent failure to reach their interest in the property.

How it can be claimed that the first adjudication was annulled to any extent, I fail to perceive. By it plaintiff acquired only $\frac{20}{100}$ of the property. Now, as the share of T. J. Sylvester, one of the co-owners, was $\frac{50}{100}$, or one-half, and as the adjudication in so far as his said share was concerned was valid there is no reason to decree its nullity in any respect. All that the Supreme Court decided was that defendants' one-half share was not affected by it. The adjudication of July, 1900, therefore stands as plaintiff's title to $\frac{20}{100}$ of the property, and plaintiff cannot pretend to be reimbursed by defendants for any part of the price.

It follows that being a joint owner with defendants, and as such interested in the payment of the taxes, plaintiff could not allow the common property to go to sale for the nonpayment of subsequent taxes, and bid it in with a view to acquiring its co-owners' share therein. The second adjudication of June 24, 1901, added nothing to plaintiff's ownership (quoad defendants at least), and the price thereof was nothing more than an advance made by it to them for the extinguishment of a common debt. The same is true of all disbursements for taxes shown to have been made by plaintiff. On said disbursements no more than legal interest can be allowed.

Defendants are therefore liable for one-half of the following amounts with 5 per cent. per annum interest from the respective dates of payment until October 3, 1907, the day of the sale of the property under the judgment of partition herein:

Amount paid under adjudication of June 24, 1901, for	
State taxes of 1900	\$ 46 71
City taxes of 1905, paid August 18, 1905.....	83 60
State taxes of 1905, paid December 29, 1905.....	25 80
City taxes of 1906, paid August 21, 1906.....	88 00
State taxes of 1906, paid December 29, 1906.....	24 00
State taxes of 1901, paid June 13, 1902.....	88 40
City taxes of 1899, paid July 31, 1902.....	113 35
City taxes of 1900, paid May 14, 1903.....	107 06
City taxes of 1901, 1902, 1903, paid April 28, 1904	299 20
City taxes of 1904, paid November 15, 1904.....	85 50
State taxes of 1904, paid November 15, 1904.....	26 60
State taxes of 1897, paid November 15, 1904.....	22 80

\$941 02

Plaintiff also claims that defendants should be charged with \$200 rent for the occupancy of the property. That claim is unfounded. The property was occupied by T. J. Sylvester, and not by defendant, who merely resided with him. It was Sylvester whom plaintiff ruled into court to deliver possession after it acquired the property at the partition sale, and it was from Sylvester that it accepted delivery. It is bound by its judicial declarations on the subject.

The claim of Ben Ory, attorney, against defendant for attorney's fees and costs, being Nos. 1, 2, 7, and 11 of the law charges and fees in the projet of partition, as well as his further claim urged by way of opposition for attorney's fees in the sum of \$2,608.20, are properly matters for settlement between him and the legal representatives of defendants upon accounting before the court having jurisdiction of the latter's estate. Due reservation to that effect will be made.

It is therefore ordered, adjudged, and decreed that the projet of partition herein prepared by Gus. Rouen, notary public, and filed on February 5, 1909, be amended—

First. By limiting the active mass to the rents and revenues collected by plaintiff from July 2, 1905, to May 31, 1907, and amounting to \$2,559.70.

Second. By charging said mass the following debts and liabilities:

(a) Costs paid by plaintiff in the present action	\$ 29 95
(b) Fee of notary for the inventory herein	20 00
(c) Fees of the appraisers and experts.....	20 00
(d) Costs of the act of partition.....	20 00
(e) Costs paid by Benjamin Ory as itemized under Nos. 3, 4, 5, 6, 8, 9, and 10 of law charges and fees projet of partition.....	82 15
(f) All further costs incurred or to be incurred by either plaintiff or defendants in these proceedings.	

Third. By charging to defendants:

(g) As their half of the necessary expenditures made by plaintiff on the property...	178 76
(h) As their half of the commission paid by plaintiff to F. Rivers Richardson.....	224 30
(i) One-half of the following disbursements for state and city taxes with 5 per cent. per annum interest from the date of each disbursement until October 3, 1907:	
Amount paid under adjudication of June 24, 1901, for	
State taxes of 1900.....	46 71
City taxes of 1905, paid August 18, 1905.....	83 60
State taxes of 1905, paid December 29, 1905.....	25 80
City taxes of 1906, paid August 21, 1906.....	88 00
State taxes of 1906, paid December 29, 1906.....	24 00
State taxes of 1901, paid June 13, 1902.....	88 40
City taxes of 1899, paid July 31, 1902.....	113 35
City taxes of 1900, paid May 14, 1903.....	107 06
City taxes of 1901, 1902, 1903, paid April 28, 1904	299 20
City taxes of 1904, paid November 15, 1904.....	85 50
State taxes of 1904, paid November 15, 1904.....	26 60
State taxes of 1897, paid November 15, 1904.....	22 80

Fourth. By striking out items Nos. 1, 2, 7, and 11 of the law charges and fees and by reserving said items and the further claim of Benjamin Ory for \$2,608.20 for attorney's fees for adjudication by the court having jurisdiction of defendant's estate.

It is finally ordered, adjudged and decreed that the parties herein be referred to Bussiere Rouen, notary public, to complete the partition in accordance with this judgment.

The plaintiff moved for a new trial urging that the judgment was contrary to the law and the evidence in the following particulars:

(1) The item of \$30 fire insurance charge paid should have been allowed as a proper charge against the mass. The insurance was effected November 25, 1905. At that time the court had decreed the entire property to belong to the plaintiff, and it of course insured it in its name alone. It was not until nearly a year afterwards that a devolutive appeal was taken from the judgment which was reversed only (final decree entered) on March 4, 1907, and this decree made executory in the district court some time after that. During all this period the mass had a full protection by such insurance, and the debt having been created in good faith, and in the name that it should have been insured in at the time, it is but just that they should contribute one-half to the expenditures made. Had they taken a suspensive appeal the insurance would have been written for the joint account of the owners, but having taken a devolutive appeal the insurance was written in the name of the decreed owners.

(2) The court having failed to allow as a charge against the defendants the costs of the first adjudication made at tax sale of

\$41.25 (being the sale made for the state taxes of 1899), the tax on the property owned by the minors was discharged by this sale. Had no sale been made, and the tax had been paid, the court would have allowed it under its decision, as it did allow the other taxes paid.

The property having been relieved of an incumbrance against it, by the payment made and for which the defendants were jointly liable, they are clearly called upon to refund one-half of the costs paid.

The court allowed the plaintiff for the tax payment made, and the tax sales annulled pro tanto or held ineffective only legal interest instead of 10 per cent. per annum. It cannot be disputed that a tax sale of the property was made or that such tax sale has been annulled, or held ineffective (which is the same thing), by the final judgment of the Supreme Court. Article 233 of the Constitution of 1898 provides:

"No judgment annulling a tax sale shall have effect until the price and all taxes and costs paid, with ten per cent. per annum interest on the amount of the price and taxes paid from date of respective payments be previously paid by the purchaser."

The amounts claimed and allowed by the court are certainly "the price and taxes paid," at the tax sale annulled by the Supreme Court. If part of the claim be recognized, then why not all? The court recognizes the claim, but refuses to enforce the express provisions of the Constitution as to the interest. The Constitution does not say interest, as the court allows but "ten per cent. per annum interest on the amount of the price and taxes paid from date of respective payments."

The court, we understand, bases this conclusion on the theory that the payment of these taxes was made by one who was a negotiorum gestor, as far as the defendants were concerned. The payments were made by one who was a co-owner, and who at the time was discharging its own debt, although at that time it thought it owned the entire debt and not the half only, and the court had so decreed. Had such co-owner desired only to pay its half of the taxes, undoubtedly it could not have done so, for the property was assessed as a whole, and the taxes had to be paid as a whole.

The theory is that when the plaintiff purchased $\frac{29}{100}$ interest in the property at the first tax sale it became the co-owner thereof and as such co-owner bound to pay the taxes on the property, and hence that it can have no benefit of the 10 per cent. clause in article 233 of the Constitution of 1898. Conceding the correctness of the position, for the sake of argument only, can such a doctrine apply to this case? The first tax sale was made August 20, 1900, and under the law could be redeemed until August 20, 1901; hence the purchase of the $\frac{29}{100}$ interest in the property was a defeasible purchase, one

that could be defeated by redemption from the tax sale. The second sale of the whole property took place on June 24, 1901, before the redemption under the first tax sale had expired. The first sale was hence not an absolute purchase but an inchoate purchase (Moore v. Boagni, 111 La. 490, 35 South 716, and State v. Register of Conveyances, 113 La. 93, 36 South. 900) and not being an absolute purchase the theory of joint tenancy has no application.

For these reasons, mover prays that a new trial be granted in the above-recited particulars only, and for general relief, and this application is submitted under the rules on the face of the papers.

The court overruled this application.

The plaintiff company has appealed.

Appellees have answered the appeal. Suggesting that the judgment appealed from is erroneous in the following respects:

(1) In allowing to plaintiffs and appellants commissions at the rate of 20 per cent. on the amount of rents collected by them from the property held in common after the judgment had become final and executory.

(2) In allowing interest to plaintiffs on the amount of taxes paid by them on the common property, and not allowing interest to defendants and appellees on the amount of rents due to them in accordance with article 3015 of the Civil Code.

They pray that said judgment of the district court be reversed or amended in that respect, but affirmed in every other particular; and that appellants be condemned to pay the costs incurred in both courts, and they pray for all general and equitable relief.

In the brief filed on behalf of appellees counsel say that in the reasons for judgment the recital of facts of the case are substantially correct, but some of the facts important to their side have not been explicitly brought out or sufficiently related to call the court's attention to them. That the omitted facts are:

First. That appellees have called upon the plaintiffs at three different times for an accounting of the rents withheld by them (the plaintiffs), and each time the accounting was evaded by technical legal objections which have succeeded in causing the funds of the minors to remain in the hands of the plaintiffs, the Interstate Land Company, represented by Mr. F. Rivers Richardson as their attorney up to the present time. The first demand for an accounting was made on the 10th day of April, 1907, by rule filed in the civil district court in the suit entitled "Interstate Land Co., Ltd., Praying for Possession," after the decision of the Supreme Court reversing the judgment of the lower court now reported in 118 La. 587, 43 South. 173. The second demand for an accounting was filed in the lower court in the present suit in the reconventional demand of de-

defendants on the 3d day of May, 1907, and finally it was urged by appellees in their opposition to the procees verbal of partition filed in the present suit in the lower court on the 13th day of April, 1909.

Second. That the wording of the stipulation made by counsel for plaintiff and defendants dated the 22d day of December, 1904, relative to the rents is not given by the court. This stipulation was as follows:

"December 22nd, 1904.

"In re Interstate Land Co., Praying for Possession. No. 69,062, Civil District Court, Division C.

"On Injunction of Thomas J. Sylvester et al.

"In this matter it is agreed that the sheriff shall collect the revenues of the property judicially sequestered through F. Rivers Richardson, Esq., who shall turn over monthly to the sheriff the amount collected by him from said property less 20% thereof which shall be retained by the said Richardson in full compensation for his services in making said collections. [Signed] W. S. Hero,

"Attorney for Plaintiffs in Injunction.

"F. Rivers Richardson,

"Atty. for Dft. in Injunction."

Third. The fact that at all times the defendants and appellees had a large credit in the hands of the plaintiffs resulting from rent collections, and no interest was allowed to the minors therefor by the lower court.

All the other important facts have been stated in the reasons for judgment, and we believe that the court will be able to understand thoroughly from the record the whole case as now presented before it and apply the law thereto.

The complaint made by appellant of the refusal of the trial court to permit the sum of \$30 paid by it for insurance on the building is not well grounded. Plaintiff did not insure the property on behalf of the minors as negotiorum gestor, but in its own name for its own account. No legal duty was imposed on it to take out insurance for the benefit of the minors nor are we prepared to say that had the property so insured burned when insured under a policy so taken out by plaintiff, and the amount thereof been paid to it by the insurance company, that the minors could have recovered from it one-half of the insurance money so paid.

A majority of the court is of opinion that the trial court erred in refusing to allow appellant 10 per cent. interest on the price bid by it on the property, and in holding the minors liable only for interest at 5 per cent. and that the judgment appealed from should in that respect be amended. The CHIEF JUSTICE and the writer are of a different opinion, and think that the judgment on that subject is correct, and should remain undisturbed.

Appellees complain that the court erred in allowing the plaintiff interest on account of taxes paid by it on the common property, and not allowing them interest on the amount

of rents due to them. Plaintiff having in his hands funds belonging to the defendants should, when it paid the taxes, have applied those funds pro tanto to the payment of the defendant's taxes as they became demandable. It could not hold the claims it had against defendants as interest-bearing claims while it had funds of the defendants which it could impute to their payment.

The parties having mutual claim against each other, the settlement of the same was postponed to the final liquidation of the rights of the parties in partition.

We think appellees were properly charged with the amounts paid Mr. F. Rivers Richardson. The plaintiff does not charge commissions for collections and disbursements made by itself, but by a third person. The amounts charged were high, but the labors imposed upon Mr. Richardson were unusually burdensome. The plaintiff found it to its own interest to pay those amounts, and we think Mr. Richardson's services fully worth the amount claimed. Defendants are claiming the moneys collected by him, and they should pay what is shown to be the reasonable amount due for that collection.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, amended by charging the appellees in favor of the appellant with interest at 10 per cent. instead of 5 per cent. on the price bid by it on the property at the second tax sale. Subject to this change and amendment, the judgment appealed from is affirmed.

PROVOSTY, J., dissents in so far as the defendants are relieved from contribution towards the expense of keeping the property insured.

NICHOLLS, J. (dissenting on one point), is of opinion that plaintiff is not entitled to charge defendants with 10 per cent. interest on the price of the property bid in by it at the second tax sale. It was its duty to have paid the taxes as they became due. It should not have permitted the taxes to become due for the purpose of bringing about a tax sale and at said sale purchasing the property for its own account and benefit. Had it before the second sale paid the taxes, it would have held a claim against the minors for the amount paid with legal interest only. It could not, by postponing the payment of the taxes until after the tax adjudication, acquire by a payment made under such circumstances a claim for reimbursement for the amount of the payment with ten per cent. interest.

The court holds the adjudication made to the plaintiff at the second tax sale to have had the effect as between the plaintiff and the minors not as a tax sale, but as a payment made by one joint owner for the joint benefit of itself and its co-owners. It could

no more speculate on the minors as to interest than it could as to property rights.

His Honor, the CHIEF JUSTICE, concurs with Justice NICHOLLS in his dissent on this point.

On Application for Rehearing.

LAND, J. It is ordered that our decree herein be amended and recast so as to read as follows, to wit:

For the reasons herein assigned it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, amended by charging the appellees in favor of the appellant with interest at 10 per cent. instead of 5 per cent. on the price of the adjudication at the tax sale of June 24, 1901, and on all taxes paid on the property between said date and October 3, 1907; and that as thus amended the judgment appealed from is affirmed.

And it is further ordered that the defendant and appellee pay the cost of this appeal, and that with these amendments the application for a rehearing be refused.

(126 La.)

No. 17,869.

FRIEDRICHs et al. v. FRIEDRICHs,
YOUNG & TANEY, Limited.

(Supreme Court of Louisiana. May 6, 1910.
On Application for Rehearing,
June 23, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 560*)—RECEIVERS—SALE—OFFICER OR STOCKHOLDER AS AUCTIONEER.

An officer or stockholder of a corporation which has been placed in the hands of a receiver can be named by the court as auctioneer to make a sale of the property, and if so appointed, and he makes a sale, he is entitled to his commissions as any other person who would have rendered that service.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.*]

2. RECEIVERS (§ 134*) — ADVERTISEMENT OF SALE—DISCRETION OF AUCTIONEER.

An auctioneer, who under an order of court is directed to make a sale of the property of a corporation which has been placed in the hands of a receiver, is not authorized to advertise the sale in more than two newspapers. The number of papers in which he shall advertise the sale and for what length of time is not left to his judgment and discretion.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 134.*]

3. RECEIVERS (§ 96*)—EXPENSES OF RECEIVERSHIP — ADVERTISING SALE — REBATE TO AUCTIONEER.

The amount charged by the auctioneer for making advertisements cannot exceed the amount actually paid by him. If the papers have given a rebate on account of their bills for advertising, the benefit of the same should be given to the receivership.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 96.*]

4. CORPORATIONS (§ 308*)—OFFICERS—SALARY AS SALESMAN—RECEIVERSHIP.

A stockholder of a corporation, who is likewise vice president without salary, is not precluded by the fact of being stockholder and officer from being employed as a salesman for the corporation at a reasonable salary, and if he performs his duties as such he is entitled to his salary as such with privilege securing the same like any third person would do who would perform such service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1336; Dec. Dig. § 308.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

In the matter of the receivership of Friedrichs, Young & Taney, Limited. From a judgment on opposition to the provisional account of the receiver, George G. Friedrichs and others appeal. Modified and affirmed.

Carl C. Friedrichs and Frank McGloin, for appellant Friedrichs. L. L. Labatt, for appellant Barangue. J. R. Le Gallez, for appellant Taney. J. Zach. Spearing, for appellees Thompson & Hallowell and others.

Statement of the Case.

NICHOLLS, J. This is a suit on appeal from a judgment on oppositions to the provisional account of the receiver of Friedrichs, Young & Taney, Limited, defendants in the above-entitled matter. The receiver was appointed on May 18, 1908, on the petition of George G. Friedrichs, alleging himself to be a stockholder of the defendant corporation as well as a creditor, and also alleging that at a meeting of the board of directors held a few days prior to the filing of the petition a resolution was passed consenting to the appointment of a receiver. A copy of the resolution was annexed to the petition. Letters of receivership issued in due time to the German-American Bank & Trust Company, and thereafter an inventory of the property of the corporation was taken, from which it appears that the property consisted of office furniture appraised at \$42.75; open accounts, appraised at about \$1,600; stock in trade, consisting of matings, rugs, carpets, shades, and general household furniture, appraised at about \$10,000. Subsequently the receiver obtained permission to continue the business as a going concern for a period of 30 days, or until the further orders of the court. In August, 1908, the receiver asked for and obtained an order to sell the property at public auction by George G. Friedrichs, auctioneer. Before the sale took place, one of the creditors obtained a rule on the receiver to show cause why the order of sale and the advertisements should not be set aside for reasons stated in the rule. The rule was made absolute to the extent of ordering a new advertisement to be made according to law and the previous order of court, but the rule was dismissed so far as it related to the changing of the auctioneer.

In due time the receiver filed a provisional account. Several creditors filed general oppositions thereto. Numerous creditors filed a general opposition to the account and particularly opposed the whole account on the ground that it was too vague, general, and indefinite to give proper information to creditors, and particularly opposed the following mentioned items on the grounds of vagueness and indefiniteness, to wit:

(1) The charge for or in favor of the auctioneer for advertising held and other expenses, etc., \$1,443.75.

(2) The credit of collections by receiver, \$501.77.

(3) The German-American Bank & Trust Company for keeper, 132 Chartres street, taxes and storage, \$812.69.

(4) German-American Bank & Trust Company, demand note secured by pledge of merchandise in warehouses, \$1,513.36.

(5) Reserved for future costs, \$100.

As a further opposition it was alleged that in proceedings entitled "Thompson & Hallowell v. Friedrichs, Young & Taney, Limited, in the United States District Court in bankruptcy, the plaintiffs therein had expended certain costs in those proceedings to have the defendant corporation declared a bankrupt and were entitled to be refunded the same.

The opponents also opposed each and every item on the account as not being due in the manner and form as stated on the account, and specially denied that any of the persons stated on the account were entitled to the privileges therein recognized. On March 2, 1909, the provisional account was homologated so far as not opposed.

After trial the trial judge rendered judgment ordering the receiver to file another and final account, as follows:

"It is therefore ordered, adjudged, and decreed that the oppositions of Edward Young, James A. Taney, and Jos. Barangue be dismissed at their costs. It is further ordered, etc., that the opposition of H. B. Claffin & Co., Margee Carpet Company, Thompson & Hallowell, and Penn Art Square Mills be maintained to the extent of ordering and directing the receiver to amend his account by filing a new one in accordance with the views hereinbefore expressed, and by adding thereto Friedrichs, Palfrey & Redersheimer for insurance \$57.64 as a privilege claim, and the following ordinary claims: H. G. Fetteroff, \$409.29, with interest and costs of court; C. P. Cochrane, \$865.98, with interest and costs of court; T. I. Birkin & Co., \$123.05, with interest and costs of court; Thompson & Hallowell, \$673.66, with interest and costs of court; Morris & Co., \$256.10; Muller MacLean & Co., \$98.16; Scharf Tag, Label & Box Company, \$4.85; Penn Rubber Company, \$205.58; Wm. Shoes & Co., \$308.76; American Ottoman & Hassock Company, \$503.50; Fries, Harley & Co., \$324.59; Whitcomb McGinchin Company, \$585; Shiffare & Lanton, \$25; J. H. Thorp & Co., \$264.41; H. L. Judd Company, \$187.28; C. P. Cochrane, \$251.64; Loscing & Co., \$726.25; Ker Saylor & Co., \$10.64."

The following reasons were assigned for the judgment:

On first account of receiver, February 12, 1909:

This account has been opposed in every particular, and because of its vagueness:

The oppositions will be maintained and the receiver ordered to file another and final account. The first item of amounts paid by auctioneer, \$1,443.76, must be materially reduced. In appointing Geo. C. Friedrichs the secretary of the defendant corporation and at the same time a stockholder and member of the board of directors to serve as the auctioneer, it will be presumed that he was acting solely and entirely in the interest of the creditors of the corporation, as he was in duty bound to do, and not for his own gain. Under the circumstances, he is not entitled to any commissions. The officers of the corporation may not enrich themselves at the further expense of unfortunate creditors of the concern.

In this particular case every stockholder is a claimant for large amounts for services alleged to have been rendered the receiver. The spectacle is a disgraceful one and will not be tolerated. If officers of an insolvent corporation are unwilling to serve the receiver without compensation, they should not be employed.

The "auctioneer's account" embraces many charges which are not authorized. The order of the court is:

"Let the property and assets of the Friedrichs, Young & Taney, Limited, be sold at public auction by George J. Friedrichs, auctioneer, after all legal delays and advertisement according to law."

Mr. F. was not authorized to incur any expenses beyond advertising in the way and to the extent authorized by law—that is, in one English and one French paper—and the claims for these two publications must be reduced by 33⅓ per cent., as Friedrichs testifies the newspapers have not collected this portion of their bills from him. The charges for labor pay roll, electrical work, catalogues, drayage, appraising, painting, and other services by Taney, Barangue, and others will not be allowed, as they were not authorized.

The only charges on the auctioneer's account to be allowed are for storage charges, duties, advertising, hospital tax, and reimbursements for goods not delivered to purchasers, all of which must be approved. The next item is "collections made by receiver, \$501.77." It seems that this amount might be largely increased by the receiver by a proper effort. The testimony on this point is not satisfactory. The clerk's costs, \$24.70, and sheriff's costs, \$5. They were admitted to be correct. They are approved. The keepers and storage charges and taxes, \$812.69, should be itemized. They have not been proved. The rent, \$855, attorney's fees, \$57, inventory, \$150, appraisers, \$50, were admitted to be correct, and they are approved. The receiver's fee of \$325 has not yet been earned. It must show that it has discharged

its full duty by making all collections possible and condensing the assets of the corporation for the benefit of the creditors before a fee can be claimed. The attorney's fee of \$300 is in the same condition. The claims of Edward Young, stockholder, \$320, Jas. Taney, stockholder, \$1,161.69, and Joseph Barangue, bookkeeper, \$963.50, for services rendered the corporation prior to the time that it went into the hands of a receiver, will not be allowed. All of these parties testify that they were employed by the corporation and offer the minute entry of the board to be produced to prove the employment. The only copy of minutes in the record is of date September 12, 1905, and it proves nothing; it is (not) valuable. It purports to be a copy of something done by the corporation September 12th, a month and a day before defendant corporation was organized on October 13, 1905. There appears to have been no action of the board after October 13, 1905, when it came into existence, with reference to the employment of these officers. They all testify that the books were regularly kept, will show regular credits to them for salary and debts for various amounts received. The books contradict every one of these statements.

The only journal entries were made May 16, 1908, the same day that the board met and asked for the appointment of a receiver "to protect the interests of all concerned," and just two days before application was filed in court for such appointment, May 18, 1908. These entries are self-serving, suspicious, and are of no probative force. And the entries in the ledger are like unto the others. They are rejected.

Edward Young, the president, testified very positively as to what the books contained, and he is contradicted by the books. He had no idea what amounts he received, or what Taney received, or what Barangue received. He explains it all by saying:

"Well, you see, the whole thing was practically a family affair. If we made money we made it, and if we lost it, then we lost it."

And they are still trying to keep the whole thing in the family. They appear to be the "all concerned" referred to in their resolution asking for a receiver. Mr. Young also contradicts Mr. Barangue on the points of amounts received. The former says that the latter received \$10 and \$15 per week at times; while the latter says he only received about \$3 on account. Where there is so much uncertainty, contradiction, doubt, and suspicion, nothing will be allowed. Some of the accounts of ordinary creditors were admitted to be due.

On July 20, 1909, Joseph Barangue, declaring himself aggrieved by the judgment of the trial court, filed a motion for a devolutive and suspensive appeal to the Supreme Court, which was granted upon mover furnishing bond with good and solvent security.

On July 21, 1909, George J. Friedrichs moved for a devolutive and suspensive appeal from the judgment of the trial court, which was granted upon his furnishing bond with security.

On July 23, 1909, Jas. A. Taney moved for an appeal suspensive and devolutive to the Supreme Court from the judgment rendered by the trial court, which was granted him on his furnishing bond with good and solvent security.

On the provisional account the receiver charged himself with the proceeds of sales made by George G. Friedrichs, auctioneer, \$6,396.19, less \$1,443.76 as due to the auctioneer. The amount as being due to the auctioneer was contested and disallowed by judgment of the court to the extent shown by the judgment. The auctioneer, Friedrichs, appealed.

Friedrichs was placed on the provisional account as an ordinary creditor for \$6,618.65.

Joseph Barangue opposed the provisional account filed by the receiver, the German-American Savings Bank & Trust Company, on the ground that he was an employé of the firm of Friedrichs, Young & Taney as a bookkeeper and correspondent, and as such entitled to a privilege and priority for the full sum of \$963.50, with 5 per cent. interest from the day of February, 1909, until paid, for this, to wit: That on or about September, 1905, opponent was employed by the said firm of Friedrichs, Young & Taney as bookkeeper and to attend to the correspondence at a weekly salary of \$10 payable weekly. That he was so employed for a period of 141 weeks from September 1, 1905, to May 16, 1908—making a total of \$1,410, which amount is subject to a credit on account of cash received of \$446.50, leaving the aforesaid amount of \$963.50 still due, owing, and unpaid. That said opponent has not been placed on said account as a privileged creditor entitled to priority the amount of his aforesaid claim, which the law gives him. That the claims appearing on said account are not due and should be stricken therefrom; or, if due, that they are excessive and should be reduced, and opponent calls for strict proof of the validity of said items.

That opponent specially opposes the claim of the German-American Savings Bank & Trust Company which is placed on the account as entitled to the sum of \$1,515 as a privilege under a certain pledge of merchandise which was contained in the Delta and United Warehouses. Opponent alleges that the property so pledged, when sold separately and apart from the rest of the stock, only produced the sum of \$920.79, after deducting the duties due to the United States government and storage and auctioneer's fees, etc., and that the privilege of the said German-American Savings Bank & Trust Company is limited to the amount realized from the sale of the said goods pledged, less duties and expenses of the sale, say \$920.79, and that

the amount for which the German-American Savings Bank & Trust Company is entitled to receive under its pledge should be reduced to the aforesaid amount.

In view of the premises, opponent prayed that this opposition be filed, that the said account be amended by placing thereon the said opponent, Joseph Barangue, as a privileged creditor to be paid by priority in the full sum of \$963.50 with 5 per cent. interest from the ——— day of February, 1909, until paid, and costs of this opposition; that the said account be further amended by striking therefrom all the items, which are not fully proved to be due; and that all other items be reduced to proper and reasonable amounts; and for general relief, etc.

This opposition was by judgment of court dismissed. Opponent moved for a new trial on the ground that the judgment rendered was contrary to the law and the evidence; that said judgment should be set aside and annulled; and that a new trial should be granted in this matter for the following reasons, to wit:

That the court erred in disallowing the claim of Joseph Barangue for the sum of \$963.50, being the amount due for salary and unpaid for services rendered within the year immediately preceding the date of the receivership; that evidence clearly shows, and it is nowhere contradictory, that the services were those of bookkeeper, and therefore entitled to a privilege under the provisions of article 3214, Civ. Code. The court erred in denying this privilege on the ground: That the claimant, being a clerk within the meaning of said article 3214, was never at any time a member of said firm or an officer in said corporation.

That the books of the corporation corroborates the testimony of the president of said corporation duly authorized by a resolution of the board of directors to employ him, and that the evidence adduced upon the trial of this opposition is the accumulated testimony of three witnesses, nowhere contradicted, all of whom corroborate each other, the whole substantiated by the books of the corporation, and all the facts and circumstances point to the truth and correctness of the evidence.

That the court erred in not maintaining the opposition to the claim of the German-American Savings Bank & Trust Company to be paid the full amount of its claim of \$1,515, when the goods and merchandise upon which they had a pledge only produced some \$900. Your opponent maintaining that the duties and charges should have been deducted and their claim reduced accordingly.

This motion was overruled, and opponent has appealed. James A. Taney opposed the provisional account of the receiver. In his petition of opposition he averred that he is a privileged creditor of the corporation in the full sum of \$1,161.69, with 5 per cent. inter-

est thereon from May 19, 1908, until paid, for this, to wit:

Opponent was engaged by said corporation as a salesman at a salary of \$125 per month; that opponent at once entered into the duties imposed upon him and rendered the services required; that he continued in said employment up to the time said corporation was placed in the hand of a receiver; and that at the time, May 19, 1908, said corporation was indebted unto opponent in the sum of \$1,161.69 as salary, which said amount is still due and unpaid; that he is entitled to a privilege with preference and priority over all other persons, in and to the assets of the defendant corporation; that he has not been placed on said account filed herein as a privileged creditor. Opponent calls for strict proofs of all items of said account.

In view of the premises, opponent prayed that this opposition be filed; that said account be amended by placing thereon opponent James A. Taney as a privileged creditor of the defendant corporation, Friedrichs, Young & Taney, Limited, in the full sum of \$1,161.69 with 5 per cent. interest thereon from May 19, 1908, until paid, and that opponent be paid said sum with preference and priority over all other persons out of the assets of said corporation, and for all costs of this opposition; that the said account be further amended by striking therefrom all items not fully proven to be due, and that all other items be reduced or increased to their proper amounts as the case may be.

This opposition was by judgment of court dismissed. Opponent moved for a new trial on the ground that the judgment was contrary to the law and the evidence; that the said judgment should be set aside and annulled; and that a new trial should be granted for the following reasons, to wit:

That the court erred in disallowing the claim of James A. Taney for \$1,161.69 as being for salary past due and unpaid for services rendered within the year immediately preceding the date of the receivership; that the evidence clearly shows that it is nowhere contradicted the services were those of a salesman, and therefore entitled to a privilege under the provisions of articles 3214 of our Civil Code.

The court erred in denying this privilege on the ground that the claimant, being a clerk, within the meaning of said article 3214, was at the time an officer and stockholder of the corporation. The privilege granted a clerk cannot be denied the clerk merely because he may have been employed by the corporation in another capacity which carries with it no privileges, and the fact of his being a stockholder would not forfeit or nullify his privileges, are strictly juris and are sacredly guarded by law.

That the books of the defunct corporation do not contradict the testimony of the witnesses as to the validity and correctness of this claim, if said books were kept in any

but the usual manner, it was merely a difference in method or system, and does not alter the figures nor the correctness thereof. That the evidence brought out in the trial of this opposition is the accumulated testimony of three witnesses nowhere contradicted, all of whom corroborate each other, the whole substantiated by the books of the corporation, and all the facts and circumstances point to the truth and accuracy of the evidence.

Opinion.

The account which gave rise to this litigation was merely a provisional account. The judgment rendered by the district court with reference to the disallowance of claims appearing on the account, with the exception of the action taken on the claims of Young, Taney, and Barangue, seems to be one of non-suit, requiring the necessity of filing a new account with more definite description of the claims appearing thereon supported by additional evidence, rather than one rejecting the items thereon. The language of the court in its opinion transcribed in the transcript is broader than the decree which follows it. We so interpret that judgment. We think the court erred in disallowing the claim of Barangue for services as bookkeeper for the corporation up to the time of its being placed in the hands of a receiver. We think his employment by Young, the president of the corporation, and the salary at which he was employed to be sufficiently shown, as is also the fact that he performed the services for which he was employed during the period claimed.

Payment or partial payment had to be established by those who would set up such defense. If he received more than he admits to have done, that fact was to be shown by those interested in showing it. Barangue's rights are not dependent upon any resolution of a board of directors. The president had the right to have employed him (and he did so) independently of any resolution of the board. The action taken by Young, Taney & Friedrichs just before organizing themselves into a corporation with reference to the after employment of Barangue and the amount he would be paid is corroborative of the fact of employment at the salary claimed. All of the parties saw him at work in their service and know necessarily that he was not giving his services gratuitously. *Crusel v. Housliere Latrelle Oil Co.*, 122 La. 913, 48 South. 322. They had no claim that he should do so. Young testified that he had employed him, and under the circumstances disclosed that fact cannot reasonably be disputed.

The amount due to Barangue is secured by privilege under articles 3214 and 3252 of the Civil Code. The judgment of the district court disallowing the claim of Joseph Barangue, bookkeeper, of \$963.50, for services rendered the corporation prior to the time that it went into the hands of a receiver, is hereby annulled, avoided, and reversed, and

said claim is ordered to be reinstated on the receiver's account as a privileged claim for that amount.

We next direct our attention to the judgment of the district court disallowing the claim of James Taney placed on the receiver's account as a privileged creditor for \$1,161.89 for services rendered as a salesman for the corporation prior to the time that it went into the hands of a receiver. Taney was a stockholder in the corporation holding \$3,000 of paid-up stock. At the organization of the corporation he was selected as its vice president, but without any salary as such. It was contemplated before the corporation was organized that when it should be organized he should act as a salesman at \$1,150 a year, and this he did, and in point of fact rendered those services up to the placing of the corporation in the hands of a receiver. Testimony in the transcript sufficiently establishes in our opinion the fact of his performance of those duties during that time claimed; also, the fact of his employment as salesman at the salary stated, and the reasonableness of the same.

It is not disputed that the services of a salesman were necessary for the purposes of the corporation, nor that some person had to be employed for that duty; if not Taney, then some one else. Neither the corporation nor those who might deal with it had the right to insist that he by virtue of holding stock gives his services gratuitously. Parties dealing with the corporation were bound to know that the corporation had to have in its employ a reasonable number of employees at reasonable rates.

It really worked no difference in their situation whether the particular person who should be employed and who was to be paid was a stockholder or an outsider. *Villere v. N. O. Milk Co.*, 122 La. 750, 751, 48 South. 162. We do not find in this case that, by a sudden move made at the moment of financial difficulties, it was sought by any member of the corporation, through some proceeding then resorted to, to make use of their position to better their position to the prejudice and injury of its creditors. The trial judge seems to have looked upon the fact that the rights of Taney and Barangue were formally recognized not a very long time before the placing of the corporation in the hands of a receiver as suspicious, self-serving, and possibly fraudulent; but the rights of those parties were not dependent upon such recognition at that time, but upon the actual facts and the establishment of the same by sufficient and proper testimony. That was at hand and adduced on the trial independently of the particular recognition which the district judge viewed with distrust. We do not find that the books of the corporation were offered in evidence.

If, as a matter of law, Taney by being a stockholder could not or should not have been employed as a salesman, or if a stockholder

who is likewise an employé of the corporation, and to whom money is due by the corporation for services as such, is bound as a matter of law to stand in the background until all the creditors of the corporation have been paid, as seems to have been decided in some cases in reference to the salary due to the officers of a corporation, then a different question is presented and has to be decided by the court.

Is the legal position taken on that subject by the opposing creditors of this corporation and sustained by the district court correct? Counsel urges that it is not, and cites *Villere v. N. O. Pure Milk Co.*, 122 La. 750, 751, 48 South. 162. *Cotton Seed Oil Co. v. Refining Co.*, 108 La. 74, 32 South. 221; *Jones v. Home Oil & Development Co.*, 124 La. 148, 49 South. 1009; *Clark & Marshall, Private Corporations*, vol. 2, p. 534; *Thompson's Commentaries on the Law of Corporations*, vol. 3, pp. 2968-4068.

He claims that a corporation is distinct from the persons who compose them, and that it can legally contract with its stockholders. Civ. Code, art. 435. He claims that a stockholder in a corporation occupies towards its creditors a very different position from that which a partner occupies towards those of the partnership; that there is no direct and immediate relation between a stockholder of a corporation and its creditors which entitles the latter to demand or to expect to receive from the former the giving to them of his time and his services without giving consideration for the same.

We are of the opinion that the district court erred in its judgment in disallowing and dismissing the claim of Taney for services as a salesman. That portion of the judgment is annulled, avoided, and reversed, and it is ordered and decreed that the said claim of Taney is ordered to be reinstated as a privileged claim for the amount thereof.

Friedrichs, one of the incorporators of the corporation, was appointed by the court as auctioneer to sell its property. The first item on the account of the receiver is the proceeds of the sales made by him, less the sum of \$1,443 which he retained for his commissions and the alleged incidental expenses for making the sales. This sum, though recognized by the receiver as correct, was contested by the creditors of the corporation.

In the opinion of the trial judge, the fact of Friedrichs being a stockholder precluded him from claiming commissions, and in his opinion a considerable number of the amounts included under the heading of incidental expenses were held by him as not properly constituting auctioneer's charges.

There is nothing going to show that Friedrichs solicited the appointment of auctioneer. He was a regular auctioneer, and his knowledge of the stock of the company was doubtless the cause of his selection. It has been held that a stockholder or officer of a corporation may be legally appointed auctioneer

to make a sale of its property. *Dupuy v. Delaware Ins. Co. (C. C.)* 63 Fed. 680.

If so, there is no good reason why he should not be as much entitled to commissions as any person would be who might perform that duty, or why the amount due him for such services should not stand on the same footing as that held by such third persons. *Villere v. New Orleans Pure Milk Co.*, 122 La. 750, 751, 48 South. 162. The district court erred in holding that Friedrichs was not entitled to commissions as auctioneer. The judgment appealed from, in so far as it disallows the right of Friedrichs to commissions as auctioneer, is annulled, avoided, and reversed.

The creditors of a corporation have, as we have said, no legal claim to the gratuitous services of stockholders. The trial judge was correct in the conclusion which he reached that the auctioneer was not authorized as such to advertise the sale ordered by the court in more than two papers. The number of newspapers in which advertisements should be inserted, and for how long a time, was not left to be determined by the auctioneer through his discretion and judgment. If additional advertisements had been needed, the matter should at least have been drawn to the attention of the court, and its sanction obtained. *Succession of Trouilly*, 32 La. Ann. 276, 26 South. 851. The auctioneer could claim payment for no amount greater than that which he himself actually paid for advertising. If the advertisements were obtained for less than the usual rates, the receiver was entitled to the benefit of any rebate or discount given. *Succession of Cordeviole*, 24 La. Ann. 322; *Union Refining Co. v. Pente-cost*, 79 Pa. 491.

We judge from the brief filed on behalf of Friedrichs that his counsel is under the impression that the effect of the judgment appealed from is to disallow his right to be placed on the account of the receiver as an ordinary creditor for any amount which he may have advanced to assist the corporation. We do not think that such was the intention of the trial judge. If, however, the legal conclusion reached by the district judge was that which counsel apprehends it was, and the judgment appealed from was intended to have the effect of disallowing Friedrichs' right to be placed on the receiver's account as an ordinary creditor for the amounts advanced by him to the corporation, the district court erred, and its judgment in that respect is set aside. The amount which may be due by the corporation to Friedrichs for moneys advanced by him to it is directed to be placed again on the account which the receiver has been ordered to file.

We are of the opinion that the rights of the German-American National Bank to preference of payment by reason of its holding a pledge upon the merchandise in the United Warehouse and the Delta Warehouse, which

goods were separately sold, is limited to the proceeds of such sales so made, less their proportional share of the charges for making the sale thereof, and less the amounts which were necessary to be paid in order to free the merchandise and goods from the pledge and place them in the possession of the auctioneer for the purposes of sale and delivery to the purchasers. As above altered and modified, the judgment appealed from, subject to our construction thereof, as announced herein, is affirmed, and the receiver directed to file a new account as ordered by the district judge in accordance with the views herein expressed.

On Application for Rehearing.

BREAUX, C. J. Plaintiff, George G. Friedrichs, who is also one of the appellants on the alleged ground that this court, in deciding this cause, omitted to pass upon the question whether or not George G. Friedrichs "is entitled to reimbursement for disbursements legitimately made in handling and disposing of the stock and property which was sold by him as 'auctioneer,'" applies for a rehearing, and he prays that this court amend the judgment and decree by providing that he be placed upon the second account to be filed in the cause.

This court declines to pass upon the question at this time.

If this plaintiff and appellant is entitled to anything in the way of reimbursement for alleged disbursements, in handling property as before stated, that issue will have to be tried in the second or other account to be filed to which he refers in his application for a rehearing. It will not be decided on this application for a rehearing. It will have to go over to a second account without prejudice to any person to claim that it should be carried on the account and paid, or to any person to urge in opposition any defense.

The application for a rehearing is refused.

(126 La.)

No. 18,273.

STATE v. STRINGFELLOW.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 25, 1910.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 202*)—DEFECTS CURED BY VERDICT.

The indictment sets forth the tenor of the petition on which service had been forged, but by a clerical oversight its caption had not been copied in the indictment; but as the petition was introduced in evidence without objection, and created no surprise, and as the defect was merely formal, it was cured by the verdict. *State v. Hauser*, 112 La. 338, 36 South. 396.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. § 202.*]

2. FORGERY (§ 31*)—SUFFICIENCY OF INDICTMENT.

The objection that the indictment did not set forth that the accused was an attorney at law is without merit, as the statute denounces the act of any one forging a petition, while the objection that the petition was not so named in the indictment is equally without merit, as the accused had named it a petition. And its tenor set forth in the indictment shows that it is a petition. *State v. Crawford*, 13 La. Ann. 300.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 31.*]

3. FORGERY (§ 31*)—FORGERY OF PUBLIC RECORD—SUFFICIENCY OF INDICTMENT.

The forging of a name on a document subsequently filed as a public record constitutes forgery of a public record, and, when the indictment clearly describes the instrument without calling it a public record, the omission is not fatal.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 31.*]

4. INDICTMENT AND INFORMATION (§ 202*)—DEFECTS—CURE BY VERDICT—SETTING OUT INSTRUMENT BY TENOR.

The objection that the indictment sets out the instrument by its tenor would have been good before verdict, but not after verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. § 202.*]

5. INDICTMENT AND INFORMATION (§ 73*)—REPUGNANCY.

The word "[signed]" before the name "Ethel Weiss" does not strike the indictment with the defect of repugnancy, because the word "signed" does not bear witness to the verity of the signature, and is not fatally defective after verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 200, 201; Dec. Dig. § 73.*]

6. FORGERY (§ 16*)—PUBLIC DOCUMENT—UTTERANCE.

The forgery was fraudulently uttered when it was filed as a public record and use made of it in obtaining a divorce.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 16.*]

Provosty and Monroe, JJ., dissenting.

Appeal from Criminal District Court, Parish of Orleans; Joshua G. Baker, Judge.

William R. Stringfellow was convicted of conspiring to accomplish a forgery, and uttering as true a forged instrument, and he appeals. Affirmed.

Chandler C. Luzenberg and J. H. Ferguson, for appellant. Walter Gulon, Atty. Gen., St. Clair Adams, Dist. Atty., and A. D. Henriques, Jr., and Warren Doyle, Asst. Dist. Attys., for the State.

BREAUX, C. J. The defendant, a practicing attorney, appeals from a verdict and judgment found and rendered against him.

He was indicted on the 11th day of February, 1910, for conspiring to accomplish the forgery and uttering as true an instrument which had been forged, for conspiring with one Diamond, and feloniously and falsely forging an acceptance of service and waiver of citation of one Ethel Weiss.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

The petition for a divorce was in about the usual form of such petitions. By oversight the pleader did not copy its caption in the indictment.

The acceptance of service of the petition reads as follows:

"Service accepted and citation waived.
 "[Signed] Ethel Weiss."

Diamond was the husband of Ethel Weiss. He employed Stringfellow to bring a suit for divorce.

The charge was, substantially, that Diamond's wife did not accept service of the petition; that it was forged by the attorney.

The attorney took a default. A confirmation of the default followed in due time.

In the case before us for decision, the defendant was found guilty as charged on the second and third counts and condemned to serve three years at hard labor in the penitentiary.

The state abandoned the case against Diamond.

The defendant filed a demurrer, in which he averred that there is no such crime as to "conspire," "combine," "agree and confederate together to forge."

The prosecuting officers for the state aver that this demurrer was withdrawn by the defendant.

The trial judge states—his statement was made part of a bill of exceptions—that he was requested by counsel in the district court to overrule the demurrer. He abandoned it, for, said counsel for defendant in the district court, it had been based on the assumption that there was no statute denouncing as a crime a conspiracy to forge; that, upon further search of the subject, he found a statute denouncing such crime.

See Rev. St. pp. 369, 370.

Counsel who argued the case before this court stated that he did not think that he ought to argue the plea that is the demurrer in question.

The district court having overruled this demurrer, no bill of exceptions was taken to the court's order overruling the plea; the court leaves it where it is, with the remark that this demurrer was only directed against the first count and not at all to the count charging forgery.

Motion for a new trial was filed and overruled.

The motion for new trial was taken to the admissibility of evidence and presents questions which relate to the guilt or innocence of the defendant, which we do not consider before us for decision.

This brings us to the motion in arrest of judgment, which presents the important and thoroughly argued points of the defense.

The error charged is that the indictment fails to set forth that the petition, the acceptance of service, and waiver of citation formed part of the public record and were filed.

The motion in arrest of judgment was overruled on the ground that the objection of the defense came too late; it having been filed after motion for new trial.

Before taking up this motion in arrest of judgment for decision, we note that, due to clerical error, the indictment shows that the petition in the suit for a divorce, on which was written the alleged forged acceptance, was copied in full in the indictment, except that the caption and title of the suit was omitted in the indictment.

The judgment of divorce had been placed over the caption; in copying, it, the caption, was unintentionally omitted.

With that exception, the petition and the acceptance of service are copied in full in the indictment.

The missing caption from the petition is made one of the grounds upon which the defense relies.

The plaintiff avers that, while there was no specific averment that the instrument alleged was a public record, that the petition having been copied in full, except the caption, as before mentioned, it shows it is a public record; that it was a petition for a divorce; that the original petition, bearing title of the cause and indorsed "Filed," was offered in evidence without objection on the part of the defendant; that the doctrine of "aider by verdict" applies; that no demurrer was filed, and no bill of particulars asked for; that it is too late after verdict to raise the question of the insufficiency of the indictment; that it was a typographical error, made evident by the original petition, produced in court during argument.

The defense insists that the omission was an error of substance not cured by the verdict.

Another point argued by the defense is:

That the indictment contains the averment that the petition was copied "according to its tenor."

That the word "tenor" used in the indictment is fatal to the validity of the indictment.

That the indictment does set forth all of the petition except the caption.

We will here state that the caption adds nothing substantial to the petition.

We take up the question whether the doctrine of "aider by verdict" cures the clerical error.

We are of opinion that it does. The decision to which we will refer later sustains that view.

There was no surprise or advantage taken in the trial of the defendant. Nothing of the kind appears of record. Whatever defect there was was apparent enough; the objection ought to have been urged before verdict. State v. Clement, 42 La. Ann. 583, 7 South. 685.

The defendant pleaded a demurrer and limited his defense to the demurrer without at the time urging any other objection. No de-

fense was presented at this time to any mere matter of form. There is something here in the nature of failure to object.

There is a crime denounced despite the omission before mentioned.

It was an amendable defect. A defect in an instrument that may be amended is a formal defect.

Evidence was admissible and was admitted.

The decision in *State v. Hauser*, 112 La. 337, 36 South. 830, is pertinent. Evidence of the charge not averred had been given, as in the case here. The court gave effect to "waiver by verdict," and approvingly quoted from *Stevens on Law of Criminal Procedure*, p. 171:

"When an averment is imperfect, but is of such a nature that the verdict could not have been returned unless evidence of the matter not averred had been given, the defect in the indictment is said to be cured by the verdict, and cannot be taken advantage of in arrest of judgment."

The instrument presented by defendant to the court, for a divorce, if defectively alleged, must be held covered under that view.

From Dr. Wharton:

There is a general rule as to pleading at common law, and in civil and criminal proceedings there is no distinction between pleadings.

If the rule is the same, the verdict rendered without the least objection on the ground urged cannot be annulled.

In another decision, the court is equally as clear and direct. If there was indefiniteness or want of technicality in the name given, it was cured by setting forth the instrument in full in the bill. *State v. Crawford*, 13 La. Ann. 350.

These decisions overlap this point and have application to the other objections of defendant.

We propose to consider them at this time.

First. That the indictment does not allege that W. R. Stringfellow was an officer of the court, or was authorized to file, or to sign, a petition.

Without reference to decision cited supra, it is evident under that statute that a crime is denounced in the indictment, for if the words "attorney at law" had been inserted they would add nothing to the offense charged. The statute denounces the act of any person who makes any public document the subject of forgery. Section 833, Rev. St.

In the second place, the defendant urges that the indictment does not show that the writing set out was a petition; that a petition must mention the name or title of the court to which it is addressed.

The petition gave to defendant full notice of the crime charged, and must have been considered in the trial of defendant. The tenor of the indictment showed that it was a petition. It was his petition, which he never disavowed.

We quote from the *Snow Case*, 30 La. Ann. 402:

"Where, however, the instrument or writing is set forth in full in the bill of information, in totidem verbis, any lack of definiteness in its designation or description, otherwise, was cured even at common law, and an incorrect designation might be rejected as surplusage"—citing *Wharton's American Criminal Law* (7th Ed.) § 1467, and note "w," and authorities cited.

See, also, *State v. Crawford*, 13 La. 300; *Regina v. Williams*, 2 Eng. Law & Equity Reports, 533.

Third. That the acceptance of service was not a public record.

This contention consists in a denial. It is a public record, it was filed and is now kept as a public record. A document, though not strictly in form, which serves the purpose intended, which is filed and kept with the record, is a public document.

In this instance the acceptance was really not informal. It serves the purpose, although it was not written with the technical precision required by the Code of Practice. The acceptance is copied literally in our decision.

It and the petition are a part of the public records. It was sufficiently described in the indictment to have it considered a public record, although the word "public" was not used as qualifying "record." The court determines whether a certain instrument is or is not a public record as a question of law. *State v. Anderson*, 30 La. Ann. 537.

Fourth. That it is not alleged in the indictment that it is a public record. This ground is in substance a reiteration of grounds above numbered 3, to which we have just referred. We none the less add:

The description set out in full the offense charged.

It is very evident that it is a petition for a divorce, addressed to a court of justice. It could be addressed only to a court. It is suggestive of nothing else. It is a record, although the word "record" is not used eo nomine; the instrument averred in the indictment is a public record.

Fifth. That the indictment sets out the instrument by its tenor, although the pleader did not copy the caption of the petition in which suit for a divorce was rendered, is another ground.

The objection before verdict would have been good; not after verdict, under repeated decisions.

The word "tenor" is not as far reaching as defendant contends. It may be cured by the verdict.

Sixth. Repugnancy by the use of the word "[Signed]" before the name of the one whose name it was alleged was made the subject of forgery.

The word "[Signed]" before "Ethel Weiss" (the wife against whom the divorce was obtained on the petition and acceptance of service before mentioned) does not bear witness to the verity of the signature.

It is not fatally defective after verdict.

The next ground of defense: That in the divorce proceedings it does not appear that the petition was filed in court.

The legal presumption is that the petition was filed in court.

The acceptance of the service was a matter of record.

At common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record. Russell on Crimes (7th Ed.) p. 1683.

The acceptance of service is a record in itself. Service was accepted, it must be inferred, after the petition had been filed. That is the requirement of article 177 of the Code of Practice—that it shall be first filed. The petition had been filed as made certain by testimony admitted without objection.

The Code of Practice provides that the defendant, or his attorney, may certify in writing and under his signature, on the back of the original, delivered to the clerk, the waiver of service.

The following decision holds that no judgment should be reversed for any imperfection in the indictment if the offense is set forth with sufficient certainty to enable the court to give proper judgment: Commonwealth v. Ervin, 2 Va. Cas. 337.

The controlling reason is that no objection was timely urged.

"Under the Revised Code 1819, p. 611, providing that after verdict no judgment, on an indictment, should be reversed for any imperfection in the indictment if the offense charged therein be plainly and in substance set forth with sufficient certainty to enable the court to give judgment thereon, according to the right of the cause, a judgment should not be set aside when the indictment charged that the person willfully assisted in a forgery without setting out the person who was assisted." Century, vol. 23, c. 1566.

The law of the state of Virginia cited in the excerpt above cannot be broader than the article of our Revised Statutes authorizing amendments in criminal proceedings.

Each authorizes amendment in matter of form, and under each, when questions of form are not raised, they may be considered cured by the effect of silence.

The defect in the averment was amendable. It follows that it is cured by failure to plead.

If the defendant had pleaded guilty to the indictment, he would have been bound by his plea. He would have had after this plea scant ground for contending that sentence could not be legal because he had not been charged with a crime.

There would have been no ground for such a contention because the averment in the indictment substantially alleged a crime.

Had it not alleged a crime, even the plea of guilty would not have been sufficient to enable the court to impose a legal sentence.

He did not plead guilty, but allowed the

case to go on, and the trial was had, and verdict returned without objection except by demurrer, which had been properly overruled.

He took the chances of an acquittal on the merits. The technical points are cured.

A forged instrument can constitute a crime, if it be made to appear that, if genuine, it would be evidence of the fact it recites and that it would prejudice the right of another. State v. Anderson, 30 La. Ann. 557.

The acceptance and waiver of service would be evidence (it is sufficiently complete to all intent and purpose), if true, of the fact it recites, and, as a forgery, it was prejudicial to the rights of another.

While it is true that the acceptance of service, or its waiver, was not precisely in the form of such acceptance, or waiver, required by Code Prac. art. 177, it was all that is necessary for a complete acceptance, or waiver. It served the active purpose of such an acceptance.

The result—the divorce obtained by defendant, as attorney—shows that it was taken as evidence of the fact it recites, and that it prejudiced the right of another.

The defendant had an opportunity to object at the time that he filed his demurrer.

Again, he had opportunity to object when evidence was offered, and when the judge delivered his charge to the jury, or in his motion for a new trial (rather late as to the latter, still it would have been more timely urged than in the motion in arrest of judgment).

It must be borne in mind that the indictment substantially sets forth the offense charged.

The forgery of any "document, public or private, if prejudicial," is an offense. Roscoe, Criminal Evidence, p. 467.

It was not necessary to copy the instrument forged in full. State v. Sherwood, 41 La. Ann. 316, 6 South. 529.

The use of the word "tenor" is not forever fatal. If the indictment does not severally set forth every part of the instrument, it may be cured by amendment, or, as in this case, by silence before verdict.

Since the case was argued at bar and submitted, a supplemental brief has been filed by defendant.

The proposition argued in this supplemental brief is: That the jury's verdict is uncertain.

That the second count is a count negating prescription.

That the third count in the indictment is the forgery count.

That the fourth count is a publishing count.

That the jury nowhere said guilty of the fourth count or guilty of publishing as charged in the indictment.

That while the publishing count sets forth no offense, the jury failed to return a verdict

on this count, as it is the fourth count in the indictment. There is an error of fact in the position of defendant as made evident by the following:

"Diamond not guilty." W. R. Stringfellow "guilty as charged in the second and third counts."

The verdict as relates to the third count is responsive to the offense as charged in the third count.

The court sentenced the defendant to suffer imprisonment in the state penitentiary at hard labor for three years on the count on which he was found guilty of forgery, and on the other count sentenced the defendant to suffer imprisonment in the state penitentiary at hard labor for two years.

The court further ordered that the sentence of two years run concurrent with the sentence of three years; so that, if the sentence for two years is null, there still remains the sentence for three years.

We have, while considering the supplemental brief, gone back to the motion in arrest of judgment and reconsidered the main issues. We add the following:

The purpose of the rules of practice in criminal cases is to enable a defendant to avail himself of them for his protection. At every step he may invoke them. If the right is denied, he has the right to have the ruling reviewed. But if he chooses not to invoke these rules, he is bound by the result. The motion in arrest of judgment is mainly directed to the alleged want of due process of law, and to averred illegalities.

Now, as to due process of law the court had jurisdiction.

All notices required were given; the issues presented were decided contradictorily with the accused. He had his day in court.

Now, as to the illegalities charged:

They were cured by the defense. The indictment did set out at least in general terms all the elements of the offense.

True, there can be no waiver, "if the declaration in a civil suit embodies no cause of action, or the indictment in a criminal one charges no offense."

We are of the opinion, as before expressed, that the indictment charges an offense, "cured at common law by verdict." At common law the verdict cures some things—as to which the rule is the same in criminal causes as in civil. It is that though a matter, either of form or of substance, is omitted from the allegation or alleged imperfectly, yet if under the pleadings the proof of it was essential to the finding, it must be presumed, after verdict, to have been proved, and the party cannot now for the first time object to what has wrought him no harm.

Sec. 707 of Bishop's New Crim. Pro. c. 58, §§ 705-707, pp. 420-423; Marr's Criminal Jurisprudence, § 476. Whether this section

is sustained in full or not by the authorities cited by the learned commentator, it is sufficiently sustained in well-considered decisions in this and courts of other jurisdiction to sustain the opinion that grounds alleged in the motion in arrest had been cured by the verdict. The void irregularities charged are not as void as alleged; they were voidable and could have been avoided on timely objection.

This case has received our most careful consideration. We have not found it possible to grant the relief asked.

The verdict and judgment, in our view of the law, cannot be reversed on the appeal.

For reasons stated, the verdict and judgment are affirmed.

PROVOSTY and MONROE, JJ., dissent.

(126 La.)

No. 18,270.

STATE v. VARNADO.

(Supreme Court of Louisiana. June 20, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1043*)—APPEAL—RESERVATION OF GROUNDS—SUFFICIENCY OF OBJECTION TO CHARGE.

A general objection to the charge of the court presents nothing for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.*]

2. HOMICIDE (§ 112*)—SELF-DEFENSE—INTENTIONALLY BRINGING ABOUT DIFFICULTY.

A person who intentionally brings about a difficulty by any wrongful act or means cannot avail himself of necessary self-defense, before abandoning the conflict and retreating in good faith.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

3. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS ON FACTS.

A special instruction that trenches on the facts should be refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

4. HOMICIDE (§ 107*)—EXCUSABLE HOMICIDE—PREVENTION OF COMMISSION OF FELONY.

The judge properly charged that homicide is excusable to prevent the commission of a felony, but that a man may not be lawfully slain for a felony already committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 137; Dec. Dig. § 107.*]

5. CRIMINAL LAW (§ 830*)—TRIAL—REFUSAL OF REQUESTS—REQUEST NEEDING MODIFICATION.

A special instruction that needs modification and qualification may be properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2013, 2017; Dec. Dig. § 830.*]

6. HOMICIDE (§ 300*)—INSTRUCTIONS—MODIFICATION OF REQUEST—SELF-DEFENSE.

Where the accused relies on a plea of self-defense, the judge may properly qualify a re-

quested instruction by the proviso that the accused was not the provoker of the difficulty.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

7. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICATION TO CASE.

A requested instruction that a conspiracy to set fire to a house ends with the burning of the structure is objectionable as an abstract proposition of law, when the bill recites no particular facts calling for such an instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.*]

8. INSTRUCTION PROPERLY QUALIFIED.

A qualification of such a requested instruction by the court adding that, in the case of arson, the perpetrator is responsible for the consequences that arise directly or indirectly from the felonious act, and if, as a consequence growing out of such a crime, the life of a human being is taken, the offense would be murder, *held* not prejudicial to the accused, when considered in connection with other charges that presented fairly and fully the law applicable to the facts of the particular case.

9. HOMICIDE (§ 276*)—PROSECUTION—QUESTION FOR JURY—APPARENT NECESSITY.

Where the deceased was disarmed of his weapon, and then killed by the accused, or his accomplice, or both, it was for the jury to determine under all the facts and circumstances of the case whether there was any real or apparent necessity for the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

10. CRIMINAL LAW (§ 508*)—EVIDENCE—ACCOMPLICES—COMPETENCY.

An accomplice is a competent witness. His connection with the crime and any inducements held out to him by the prosecution to obtain his testimony merely affect his credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1090-1123; Dec. Dig. § 508.* Witnesses, Cent. Dig. §§ 244-248.]

11. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF PROSECUTOR.

Where the accused objected to the remarks of the district attorney as commenting on the accused's failure to testify in his own behalf, and the trial judge, although not understanding the remarks as applying to the defendant, offered to charge the jury to disregard them, or to discharge the jury, and counsel for the accused objected to such discharge, and the judge thereupon properly charged the jury as to the rights of the accused in the premises, *held*, that the accused had no just cause of complaint.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

12. SUNDAY (§ 30*)—HOLIDAYS (§ 5*)—JUDICIAL PROCEEDINGS—RECEIVING AND RECORDING VERDICT.

A verdict may be lawfully received and recorded on a Sunday or other legal holiday.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 82; Dec. Dig. § 30.* Holidays, Cent. Dig. §§ 2, 4, 5; Dec. Dig. § 5.*]

13. CRIMINAL LAW (§ 1090*)—APPEAL—REVIEW—MOTION FOR NEW TRIAL—NECESSITY FOR BILL OF EXCEPTIONS.

The action of a trial judge on a motion for a new trial cannot be reviewed without a bill of exception on matters not disclosed by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2822; Dec. Dig. § 1090.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Will Varnado was convicted of manslaughter, and appeals. Affirmed.

See, also, 124 La. 711, 50 South. 661.

Jesse B. Webb and Richardson & Kemp, for appellant. Walter Guion, Atty. Gen., and W. H. McClendon, Dist. Atty. (R. R. Reid, Thos. M. Bankston, B. B. Purser, and R. G. Pleasant, of counsel), for the State.

LAND, J. Warren Ricks and Will Varnado were jointly indicted for the murder of Jeff Amacker on January 1, 1909. Ricks was granted a severance. Varnado was tried and convicted of manslaughter, and has appealed from a sentence of imprisonment at hard labor for 20 years.

A number of bills of exception are relied on for the reversal of the verdict and sentence. We will preface their consideration by a recital of the substance of the evidence as disclosed by the record. The most important witness for the state was Warren Ricks, who had agreed with the prosecuting officer to plead guilty to a charge of manslaughter. According to Ricks' version, he and Varnado conspired to burn a vacant negro cabin on the land of Amacker. Varnado was to set fire to the house, and then both were to appear on the scene, raise an alarm, and act as if they were trying to save the adjoining structures. This scheme was carried out. Amacker appeared and shot Varnado. The two parties clinched, and in the struggle for the pistol Varnado was also shot in the leg. He called on Ricks for help, and Ricks, responding, mortally wounded Amacker with a discharge from a shotgun, and Varnado then shot Amacker several times with a pistol. According to Ricks' version, the shotgun used by him must have been carried to the scene of the homicide by Varnado; but the sudden appearance of Amacker with his drawn pistol prevented Varnado from getting to his gun, and forced him to grapple with his adversary. There is evidence tending to support the contention of prosecution that Amacker was called out of his house by Ricks, or Varnado, or both of them, on the night of the homicide.

The theory of the prosecution was that the burning of the cabin was for the purpose of attracting Amacker to the scene of the fire with the view of making a deadly assault upon him; and counsel for the state argued that Varnado was, therefore, the aggressor in the difficulty and could not plead self-defense.

The contention of the defense was that the evidence did not show that Varnado set fire to the cabin, but that he appeared on the scene after the building had been fired, for the purpose of giving the alarm and preserving the adjacent structures; and, in the

alternative, that the alleged arson had been completed before the arrival of Amacker at the place of the fire, and that the deceased shot Varnado for the supposed offense of arson, without other provocation.

There appears in the record an unsigned bill of exception (No. 11) containing an omnibus objection to the general charge of the court. Even had the bill been signed, an objection of this kind is not reviewable.

Bill No. 12 was reserved to the refusal of the judge to give certain special instructions on behalf of the defendant.

Bill No. 13 was reserved to the modification of certain special instructions numbered 1, 2, 3, and 4.

Bill No. 14 was reserved to special charges granted on behalf of the state.

No complaint is made in this court of the general instructions given by the trial judge to the jury. Among other matters the judge charged as follows, to wit:

"Attack provoked by defendant. The court instructs the jury that a party charged with an unlawful or deadly assault upon another cannot avail himself of necessary self-defense if the necessity for such defense was brought on by his own deliberate, wrongful act."

This instruction is good law, and was amplified and explained in the special charges hereafter discussed.

Special charges 1, 2, 3, and 4, as shown by the record, do not disclose in what respect the instructions were modified, and the bills of exception do not recite the special charges as requested. Under the circumstances, the court finds itself unable to determine what modifications were interpolated by the judge.

Counsel for defendant say in their brief that special charge No. 3 read originally as follows:

"If the jury believes from the evidence that, at the time Amacker shot, Varnado was not attempting to commit a felony, Amacker was the aggressor in the difficulty."

Such a charge should have been refused because it makes the judge state that Amacker did shoot Varnado, a question of fact solely for the jury, and assumes that Varnado made no assault on Amacker and did nothing else to provoke the difficulty. The asserted modification was:

"And had not brought on or provoked the difficulty by word or deed."

On the same page of the record, we find that the judge also charged the jury that one can only kill to save life, or limb, or "prevent a great crime," and that homicide is justified when committed for the purpose of preventing a felony, but not when committed as a punishment for a felony already committed.

Special charge No. 1, as expurgated by counsel, reads as follows:

"The defendant asks the court to instruct the jury that, if they have a reasonable doubt as to whether or not the accused was actually

engaged in the commission of a crime or unlawful act at the time of the killing, then the accused is entitled to exercise the right of self-defense, and is justified in killing his assailant in defense of his life."

The alleged interpolation reads as follows:

"And further believes that the accused was acting in good faith and was not the provoker of the difficulty."

Doubt as to whether the accused was actually engaged in the commission of the crime of arson at the time of the homicide eliminates that feature of the prosecution, but leaves the case to be determined by the ordinary rules of self-defense, which were fully stated in the general and special charge. This right does not exist in favor of the provoker of the difficulty, and this we assume is what the court intended by the alleged modification.

Special charge No. 2, as expurgated, reads as follows:

"The defendant asks the court to instruct the jury that, if they believe from the evidence that a conspiracy was entered into by the accused to set fire to a house, the conspiracy terminated when the purpose for which said conspiracy was formed or entered into had been accomplished."

And it is asserted that the judge interpolated the following words:

"But that the defendants are responsible for whatever consequences arise directly or indirectly from said felonious act, and if, as a consequence of and growing out of the perpetration of a felony, the life of a human being is taken, the crime would be murder."

The requested charge consisted of the abstract proposition that a conspiracy terminates with the accomplishment of the purpose for which it was formed, and the alleged interpolation consists of the abstract proposition that defendants are responsible for the consequences arising directly or indirectly from a felonious act, and that if, as a consequence and growing out of the perpetration of a felony, the life of a human being is taken, the crime would be murder. We fail to see what practical bearing either proposition had on the issues before the jury. We are persuaded, however, that these abstractions did not influence the verdict of the jury, who were otherwise properly charged on the law applicable to the facts of the particular case.

The bill on page 11 of the record, and marked "3" in the margin, was properly refused, as trenching on the facts of the case.

Defendant excepted to a special charge given on behalf of the prosecution, as follows:

"A man has no right to assault another under even high provocation; but the law proper in its wisdom does not allow the person who provokes a difficulty to avail himself of the law of self-defense, and before he has that right he must use every available means in his power to escape the assault."

All the evidence that was adduced on the trial of the case is not in the record, and therefore there is no proper basis for the objection that the said special charge was not applicable to the facts of the case. We gather from the record that there was evidence tending to show that Varnado not only set fire to the building, but was there present armed with a shotgun when Amacker arrived on the scene. Moreover, there is evidence that Varnado and Ricks called Amacker out of his dwelling. It was for the jury to determine under all the facts and circumstances of the case whether the actions and conduct of Varnado on the occasion in question were intended to and did bring on the difficulty.

Defendant excepted to another special charge given on behalf of the prosecution, as follows:

"The right of self-defense lasts only as long as the necessity, real or apparent, for it exists. In other words, if A. is attacked by B. with a deadly weapon, and a struggle ensues, and during the struggle A. obtains possession of the weapon, thus disarming B., and upon obtaining possession of the weapon, B. being disarmed, A. shoots or stabs him, A. cannot avail himself of the plea of self-defense."

The proposition charged is sound law, and it was for the jury to determine whether there was any real or apparent necessity for the killing of Amacker by his two adversaries under the facts and circumstances of the case.

Defendant also objected to requested instructions on the part of the prosecution on the subject of self-defense, and more especially as to the rule that the accused must be without fault in bringing on the difficulty. The special paragraphs objected to read as follows:

"And where any pretext, design, contrivance, fraud, or excuse is resorted to, to bring on a difficulty or to provoke the occasion of one, the person using it will be regarded as the aggressor therein."

"And any act of a person by which he puts himself in the way of being assaulted, in order that when hard pressed he may have a pretext for taking the life of his assailant, amounts to the bringing on of a difficulty."

Both of these propositions are supported by decisions of courts of last resort in our sister states. The judge also charged:

"If the accused intended to provoke a difficulty, and used such means as he thought would provoke it, and they did provoke it, it is all that is necessary"—citing *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 672.

The objection that the above special charges and others are not applicable to the facts of the case is without merit on the face of the record, which does not contain all the evidence adduced on the trial of the case. The general charge and special charges taken together were fair to the accused, and we do not think that he has any just reason to complain of them.

The contention that the defendant was convicted on the uncorroborated evidence of his accomplice, Ricks, who was not worthy of belief, has no basis on the record before us, which shows that several other witnesses testified on the trial of the cause, among them the widow of the deceased.

Bill No. 3 was reserved to a ruling admitting the testimony of Mrs. Amacker, as to statements of other parties in the presence and hearing of Varnado immediately after the shooting. We see no error in the ruling. It was proper to admit the whole of the particular conversation in which Varnado, the witness, and the bystanders participated.

Bill No. 4 was reserved to the ruling of the judge in refusing to permit the defendant to question the witness Warren Ricks before his direct examination as to what inducements had been offered him to testify on behalf of the state. The judge reserved the right of the defendant to cross-examine the witness as to such inducements and all other matters. As the proposed questions did not go to the competency but to the credibility of the witness, the ruling was correct. The evidence of an accomplice given on the trial of the cause should not be confused with his confessions or admissions in or out of court.

Bill No. 7 was reserved to the cross-examination of a witness for the defendant recalled to impeach a witness for the prosecution. The cross-examination was admissible for the purpose of impeaching the impeaching witness.

Bill No. 9 was reserved to testimony offered in rebuttal, by the state to sustain the testimony of Ricks, which the defendant had sought to impeach by two witnesses. We see no reversible error in the ruling of the judge.

Bill No. 16 was taken to the refusal of the court to instruct the jury to disregard the testimony of Ricks because he was an accomplice. The judge properly charged the jury that the uncorroborated testimony of an accomplice should be received with great caution, and that it was unsafe to base a verdict on such testimony.

Bill No. 17 was reserved to certain remarks of the district attorney in his opening argument, in substance as follows:

"That the testimony of Ricks, or R. S. Varnado, or both, in regard to the killing of Amacker, was to be taken for true, because nobody had taken the stand to deny it."

The objection was that said remarks were a comment on the fact that the accused had not testified in his own behalf. The judge states that there were several other witnesses present at the scene of the killing, to wit, Mrs. Amacker and her children, and Mrs. Scott Varnado, and others, and that he understood that the district attorney alluded to the witnesses in the case. The judge further states that he offered to charge the

judge properly on the subject-matter, or to discharge the jury; but that counsel for the defendant objected to the discharge of the jury, and that he thereupon turned to the jury and charged them that the failure of the accused to testify must not be considered for or against him, and if he failed to take the stand, and the jury were to construe it against him, it would be a violation of their oaths. The same instructions were repeated in the general charge. Counsel for the accused in objecting to the discharge of the jury must have considered that any prejudicial effect of the remarks made by the prosecuting officer had been removed by the instruction of the court. It is not clear that the remarks were intended as a comment on the failure of the accused to testify, and we think that the prompt action of the court removed any possible prejudicial effect from the minds of the jury. The accused then refused the offer of a venire de novo, and took his chances of acquittal before the jury. He cannot now be permitted to urge that the trial jury was incompetent by reason of prejudice.

Bill No. 15 was reserved to the action of the trial judge in not discharging the jury and entering a mistrial, when the jury reported on a Sunday that they could not agree and were "hopelessly tied up," and also in recording the verdict and discharging the jury later on the same day. The judge states that on the Sunday in question, being notified that the jury was ready to report, he had the accused brought into court, his counsel being present, and had the jury polled, and the foreman informed him that they could not agree; that thereupon the judge stated that he could only convene court for the purpose of receiving a verdict, and ordered the jury to their room for further deliberation; that the jury, on the same day, finally agreed, and the verdict was received by the court and ordered recorded and the jury discharged.

In the *Fuselier Case*, 51 La. Ann. 1317, 26 South. 204, this court held that the discharge of a jury for disagreement is a matter in the discretion of the trial judge and not ordinarily subject to review. The detention of a jury for a few hours longer cannot be considered as coercion.

It is settled beyond controversy that the receiving and recordation of a verdict on a Sunday or other dies non juridicus is permissible. See *State v. Atkinson*, 104 La. Ann. 570, 29 South. 279, and authorities there cited.

There was no bill of exception taken to the overruling of the defendant's motion for a new trial, and therefore the action of the judge in overruling the motion cannot be reviewed quoad matters not embraced in the bills of exception, or patent on the face of

the record, such as the charge that a letter dehors the evidence was improperly read by the district attorney to the jury in the course of argument.

After a careful consideration of all the bills of exception discussed in the briefs of counsel for the accused, and a review of the entire record of the case, we are satisfied that the defendant has had a fair trial according to the laws of the land.

It is therefore ordered that the verdict and sentence below be affirmed.

(126 La.)

No. 17,701.

In re PLEASANT HILL LUMBER CO.,
Limited.

(Supreme Court of Louisiana. Jan. 17, 1910.
Rehearing Denied June 6, 1910.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 26*)—LABORERS' PRIVILEGES.

The Pleasant Hill Lumber Company went into the hands of a receiver, A. B. Ives, who sold to the Pleasant Hill Lumber Company for \$100,750.61 the lumber plant, including the lumber in stock, for which he received \$29,000 cash, the assumption by the company of a debt of his, and notes secured by a mortgage and vendor's privilege. However, he waived the vendor's lien on 1,550,000 feet of lumber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 60-66; Dec. Dig. § 26.*]

2. LOGS AND LOGGING (§ 26*)—LABORERS' PRIVILEGES.

The receiver entered into a contract with the laborers, by which he agreed to furnish them with supplies as part of their wages, and the balance to be paid when the company was more prosperous. These laborers have a privilege on the lumber in the mill in which they have worked for the payment of their wages, which privilege subsists for 30 days after the maturity of the debt. Act No. 145 of 1888.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 60-66; Dec. Dig. § 26.*]

3. RECEIVERS (§ 162*)—LABORERS' PRIVILEGES.

One who has worked for a receivership as a bookkeeper and clerk is entitled to a privilege for the payment of the amount due him, and this privilege is to be ranked as provided by paragraph 5, art. 3252, Civ. Code. If the movable property not subject to any privilege is sufficient to pay him he should be paid therefrom, and, if not, then in the order mentioned in the Code. If this is not sufficient, then the balance must be raised on the immovables of the debtor. Civ. Code, art. 3266.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 162.*]

4. PLEDGES (§ 11*)—ACTS CONSTITUTING.

The Pleasant Hill Lumber Company borrowed from the McCullough-Weaver Lumber Company \$17,000 for which they pledged all the lumber they had on hand and all the lumber that would be manufactured by them from April 1, 1907, to April 1, 1908, the pledge of this stock to go into effect as soon as the lumber was cut, and the contract declared that the lumber had been delivered. At the same time the Pleasant Hill Lumber Company leased to the McCullough-Weaver Lumber Company their yards, shed, and kiln, but the lessee never went

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

into possession. This did not constitute a pledge of the lumber, effective as against third persons. Pledge is grounded on possession, and the creditor, in order to have a pledge must remain in possession, and the property pledged must pass from the hands of the owner to those of the pledgee, and there must also be a complete separation of the property pledged from the other property of the pledgor. Possession is of the essence of pledge, and a mere agreement by the pledgor to let the pledgee have possession of the property pledged, without such actual possession, will not constitute a pledge as against third parties.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

5. PLEDGES (§ 5*)—ACTS CONSTITUTING.

The property to be pledged must exist at the time of the pledge, otherwise there cannot be the possession that is essential to the pledge. While the logs from which the lumber comes may be pledged, still pledging the lumber does not operate as a pledge of the logs.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 14, 15; Dec. Dig. § 5.*]

6. RECEIVERS (§ 81*)—NATURE OF POSITION.

A receiver represents both the creditors and their debtor, the insolvent corporation. He is the trustee of both and bound to serve both. High on Receivers, p. 22. His right to represent the creditors in opposing a contract entered into by the debtor is generally limited to questions of fraud, but he may be heard individually when he asserts a personal right, although precluded from being heard as a receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 150; Dec. Dig. § 81.*]

7. RECEIVERS (§ 154*)—LIABILITY FOR ATTORNEY'S FEES—PRIORITIES.

The services of the attorney for the receiver were rendered for the benefit of all parties in interest, and each should pay, as far as ascertainable, to the extent of his interest. As the debts of a receivership are of a higher dignity than those of the insolvent they are to be paid before those of the latter.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. § 154.*]

8. RECEIVERS (§ 200*)—LIABILITY FOR FEES.

The commissions of a receiver like those of an attorney must be prorated among the several interests.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 397-401; Dec. Dig. § 200.*]

9. RECEIVERS (§ 202*)—ACCOUNTING—PROCEEDINGS AND REVIEW.

Where it is urged that the receiver should be charged with the inventoried value of the property of the receivership, sold to him through an interposed person, the plea must be pleaded in the court a quo, and cannot be urged before this court in argument. Where the fact is ascertained only on the trial, the pleadings should then be amended.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 202.*]

10. RECEIVERS (§ 93*)—LIABILITY FOR EXPENSES OF OPERATION.

Where repairs are necessary to operate a planing mill and these repairs are made by the receiver, they are not chargeable to the permanent improvements, for it was to the interest of the creditors to operate the mill, but they must be charged to materials. Neither is the cost of keeping live stock used in hauling lumber to and from the mill chargeable to the immovable property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 171; Dec. Dig. § 93.*]

11. LOGS AND LOGGING (§ 26*)—LABORERS' PRIVILEGE—EXTENT OF RIGHT.

One who furnishes money, or supplies, or labor to "deaden, cut, haul, float, or raft any logs, or forest timber" has a privilege on the logs or timber under Act No. 33 of 1882, but this privilege does not extend to the lumber cut from them. The Legislature confined the privilege to logs, and as privileges are stricti juris, the court cannot extend the privilege to lumber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 60-66; Dec. Dig. § 26.*]

12. CORPORATIONS (§ 566*)—RECEIVERSHIP—RIGHT OF PRESIDENT AS CREDITOR.

The president of an insolvent corporation, who is also a stockholder and who acts in good faith, is entitled to stand with other creditors when he claims only as an ordinary creditor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.*]

13. RECEIVERS (§ 153*)—RECEIVERSHIP—LIABILITY FOR TAXES.

Taxes should be apportioned between the movables and immovables, but the realty will not be charged with insurance premiums on the lumber. The privilege for taxes on the realty is superior to the vendor's mortgage and privilege, but the claim for insurance premiums is not superior to these.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 153.*]

Appeal from Twelfth Judicial District Court, Parish of Sabine; Don E. So Relle, Judge.

In the matter of the receivership of the Pleasant Hill Lumber Company, Limited. To the account of the receiver, the McCullough-Weaver Lumber Company objected, and appealed from the judgment allowing and disallowing certain claims in the account. Account homologated with amendments.

Pugh, Thigpen & Herold, for appellants receiver and A. B. Ives. Hall & Jack, for appellants McCullough-Weaver Lumber Co., Ltd. C. W. Elam and R. A. Fraser, for appellants Earl H. Browne, J. J. Browne & Sons, D. A. Walker, and others. Lee & Pegues and C. W. Elam, for appellants Hardee, Gaddis & Co. and Brown-Timmons & Co.

BREAUX, C. J. The Pleasant Hill Lumber Company, in the autumn of 1907, owing to the financial depression, was embarrassed financially.

The company offered to continue its operations provided the mill hands consented to receive for their labor such provisions as the company might advance through merchants in the town of Pleasant Hill and the balance of their wages later when business brightened.

The employés consented.

The mill was operated from October of that year until March of the year succeeding.

In March the manager notified the hands and other employés that the company would not be able to pay them.

Those whose claims amounted to less than

\$100 filed suit in the magistrate's court, and those whose claims amounted to over that sum filed suit in the district court. Each claimed a privilege on the lumber manufactured during the period of his employment.

In some of the suits, sequestration issued and lumber on the yard was seized.

Shortly after these suits had been filed, on application of A. B. Ives, a creditor, the court appointed him receiver of the Pleasant Hill Lumber Company. He went into possession. The creditors who had brought suit did not seek to go further with their suits.

The creditors, those last above referred to, and others entered into an agreement with the receiver to enable the receiver to sell the lumber at private sale and at the same time in order to reserve the rights of all concerned in the proceeds of the sale.

In the agreement it was stipulated that separate accounts of the sales would be kept of the old lumber not subject to the privilege of these laborers and employes and of the new lumber subject to the privilege.

Originally, A. B. Ives, the receiver, became a creditor of the Pleasant Hill Lumber Company by selling to the company the lumber plant, including the lumber in stock, to the Pleasant Hill Lumber Company for \$101,752.61, \$29,000 of the amount cash, and the balance by assuming a debt of the vendor, Ives, and by executing notes for the balance over this debt.

Ives, the vendor, retained a mortgage and vendor's privilege on the property, but waived the vendor's lien on 1,550,000 feet of the lumber sold.

The Pleasant Hill Lumber Company, vendee, on the day it purchased from Ives, borrowed \$17,000 from the McCullough-Weaver Lumber Company, which the Pleasant Hill Lumber Company, purchaser, used in making its cash payment. To secure that amount, the Pleasant Hill Lumber Company pledged to McCullough-Weaver Lumber Company their stock, consisting of 1,700,000 feet in their mill yard and in their sheds and kiln at the time. The written pledge contained the declaration that the Pleasant Hill Lumber Company had delivered all this property to the McCullough-Weaver Lumber Company in pledge.

The first-named company also pledged all the lumber which they would cut at the mill from April 1, 1907, to April 1, 1908, the pledge of this stock to go into effect as fast as it could be delivered to the McCullough-Weaver Lumber Company.

The stock was insured by the Pleasant Hill Lumber Company for the benefit of their creditors just named.

On the day that this contract of pledge was signed, the Pleasant Hill Lumber Company leased to the McCullough-Weaver Lumber Company their lumber yards and kiln, for a period of one year from March 30, 1907, to April 1, 1908, for a monthly rental of \$2.

On the same day that the contract was signed, the Pleasant Hill Lumber Company entered into another contract with the McCullough-Weaver Lumber Company, in which the former agreed to intrust the McCullough-Weaver Lumber Company with the sale of all its lumber products for one year from April 1, 1907.

All these contracts were recorded.

The price agreed upon between these two companies was \$1 less than the price which McCullough-Weaver Lumber Company would obtain for it, and the latter company bound itself to pay cash 2 per cent. on the lumber as fast as shipped from the Pleasant Hill Lumber Company yards.

It was further stipulated that if the stock of lumber on hand on the first of the month was greater than the amount on hand at the date of the contract then McCullough-Weaver Lumber Company would advance \$10 for every 1,000 feet above the 1,700,000 feet it acquired of the Pleasant Hill Lumber Company, and if the amount were reduced below the 1,700,000 feet then the McCullough-Weaver Lumber Company would reduce its advances \$10 for every 1,000 feet of stock less than the 1,700,000 feet.

The Pleasant Hill Lumber Company bound itself to comply with the requirements of the McCullough-Weaver Lumber Company in matter of shipment, and also in regard to grading.

The insistence of the McCullough-Weaver Lumber Company is that they were in actual possession—did all that was required in order to go into actual possession—of all the stock pledged to them. The pledgees, the McCullough-Weaver Lumber Company, urge that which is correct, that the receiver had agreed with them and the laborers of the Pleasant Hill Lumber Company to see to the dressing and shipping of the lumber, dispose of it, and that he bound himself to keep a separate account of the lumber on hand, as before stated; that is, the new and the old lumber were to be kept separate.

This the receiver failed to do.

The property of the Pleasant Hill Lumber Company was adjudicated to the son of the receiver.

The receiver as a witness admitted that his son was not the real purchaser; that he was the real purchaser, and that his son was only a party interposed.

The receiver filed an account of gestion, in which he placed the price of the real estate to the credit of his mortgage and vendor's note which he held and had continued holding since the sale mentioned. He also credited himself with a commission of \$2,950 as due him as receiver. He allowed \$3,500 to his attorney.

Each, the commission and attorney's fee, was mentioned as secured by privilege.

The lumber sold by him in accordance with the agreement before mentioned netted \$8,341.28.

He placed the claim of McCullough-Weav-

er Lumber Company on the account for \$17,357.30 not secured by pledge or privilege.

McCullough-Weaver Lumber Company opposed the account on the ground that they had a pledge on all lumber; that a list was made on the 2d of January, 1908, showing 1,453,595 feet actually in their possession, as they contend.

They ask an amendment of the account recognizing them as having a pledge upon the price of the lumber, free from any expenses or costs of administration except the cost of dressing and preserving the lumber. Their contention is that it was in the agreement, heretofore referred to, that all parties should remain absolutely unaffected by the sale in the receivership, and that they would not be subject to any expense, fees, or commissions of the receivership. Further, these opponents set out that inasmuch as the receiver failed to keep separate the old and the new lumber he should be charged with the old lumber at the average price obtained by him for the lumber sold during his administration, to wit, 587,587 feet at \$8 a thousand.

These opponents further opposed the receiver's commission, to wit, \$2,950, and urged that it should be reduced from 5 per cent. to 3 per cent., if not entirely rejected, as the amount for distribution exceeds \$50,000.

The opponents questioned the receiver's right to traveling expenses and feed bills for mules, and the further contention was that an item of \$326.86 should be charged to the price of the real estate as they were repairs of a permanent nature.

Opponents complained of an item of \$2,221.80 (pay roll) as excessive; at any rate, there should be deducted from it whatever was spent for permanent improvements. They aver that the expenses for night watchman, \$372 plus \$102.70 should be apportioned between the price of the real estate and the other property as they inured equally to both; that from the \$2,221.80 there should be deducted \$330 for a transit dressing machine; that the insurance premiums paid on the lumber should be divided between the old and the new lumber; also the taxes.

There are other grounds. We pass them without further reference to them at this time.

At bar and in brief these opponents called attention to the difference between the inventory value of the property, to wit, \$73,600 (inventory made after the receiver went into possession) and the price paid by the receiver at the sale of \$54,000, to wit, \$19,600, and in this connection urged that the receiver, having bought the property through the interposition of his son, should be held liable to account for the difference between the inventory value and the price at which it was adjudicated to the son for him the receiver even in the absence of attack in the pleadings upon the sale for nullity.

It is in place to state here that the admission of the receiver was forced from him over his objection.

The opponents also urge that if the court should allow the claim of the president of the late company it should not be paid until all the other creditors are paid, as it is not right or equitable that the stockholders in the enterprise be paid concurrently with the creditors.

The judge of the district court did not allow the pledge claimed by the McCullough-Weaver Lumber Company, but recognized the claim and privilege of D. A. Walker and other employes, mechanics, and laborers, also the claim of E. H. Brown, bookkeeper, with privilege. He reduced the fee of attorney from \$3,500 to \$2,700, and the receiver's fees from \$2,900.50 to \$2,620. He rejected certain other claims for small amounts. The district court ordered the privilege recognized to be paid out of the proceeds of the sale of the lumber sold by the receiver, and if that amount proved insufficient then to be paid by the receiver individually.

McCullough-Weaver Lumber Company, opponents, have appealed.

A. B. Ives, receiver of the Pleasant Hill Lumber Company and individually, also appealed.

Claims of the Laborers.

The receiver in his account classed these laborers' claims under the head of ordinary.

They (the laborers) ask that the judgment of the district court recognizing their privileges before stated, be maintained in so far as they are concerned.

With reference to laborers, the law provides that they have a privilege on the lumber in the sawmill or planing mill in which they have worked for the payment of their wages for 30 days after the maturity of the debt. Act No. 145 of 1888.

In their opposition in the district court they ask for a judgment for the amount and privilege and personally against Ives, the receiver, in case the court found that the receiver had violated his agreement and had not kept the proceeds of the sale of the lumber upon which they had asserted a privilege.

The facts are, in regard to this claim of the laborers, that they offered in evidence the pay roll, which shows that amount due them for labor less the goods received by them as had been agreed upon, as before stated.

The mill was embarrassed financially; as before stated the laborers were notified by the manager that he did not think he could meet the October pay roll but that he would pay as soon as possible; that the company had claims out, and if they wanted to continue working he had contracted with merchants at Pleasant Hill to furnish the necessities of life in order that they might continue with their work and operate the mill.

As to the balance that would be due them, he could not state when it would be paid in cash.

They all went to work under the agreement, with the understanding that they would be paid as soon as the mill would recover from the effect of the financial panic which was then prevailing.

At the time that this agreement was entered into they had not earned the wages claimed by them in this litigation. They continued to work until they were notified that they should protect themselves as the company could not pay them.

It will not be presumed that the laborers in entering into this agreement intended to waive their rights and to work for nothing over and above the necessities of life. The intention seems to have been to the contrary. Now, as to the term of payment agreed upon in regard to which the receiver contends, it was too indefinite to be considered a stipulated time of payment.

Payment for work to be performed may be conditioned upon an event to happen.

In answer to the statement which counsel submit in the argument, by way of illustration, that if the laborers had brought suit immediately after the first month for their work and before the return of the expected normal condition of business, at which time the employer bound himself to pay, the employer would not have been heard to urge prematurity.

We can only say (however) that that may be; as relates to laborers, they should never be made to lose their hard earnings unless entirely unavoidable. Those who have more time to see to the protection of their rights than these laborers should be held strictly. Not so as to the mere toiler. He should, if reasonably possible, be paid.

A worthy feeling generally prompts the employer to see that those who have toiled in his employ be paid at the earliest opportunity. The agreement was legal and binding. It was entered into in good faith. It would be different if there was the least want of sincerity about it and it had been inspired by a desire of circumventing the statute.

Ed H. Brown, Clerk.

This creditor claims a privilege. He was bookkeeper of the company, and attended to other duties such as are attended to by clerks. He has a privilege for the payment of amount due to be ranked as provided by Civ. Code, art. 3252, par. 5.

The question as to his right has been argued, and contention urged, that he should be relegated in the end to the sale of the immovable property for payment.

We will state to the contrary if the movable property not subject to any special privilege is sufficient to pay the debt it should be paid from that class of property, and,

if not sufficient, then in the order mentioned in the Code, and then, if this is not sufficient, "balance must be raised on the immovable of the debtor" as hereafter provided. Civ. Code, art. 3266.

The Claim of McCullough-Weaver Lumber Company.

The act of pledge under which they claim is dated March 30, 1907. The evidence does not prove that they have gone into possession. It is not denied that to constitute a valid pledge there must be actual delivery to the pledgee. Their contention is that there was delivery and that they were in possession until the property was sold in accordance with the agreement, which protected their right as pledgees. The right is not apparent.

We have noted in the statement of the case that a lease was signed at the time that the act of pledge was passed. It was only recorded after the creditors had about acquired all the rights which they claimed. The rental per month in this lease was \$2. Although small, it was never paid. As a part of a scheme to the end of securing a pledge, it had no reality. Evidently it was never the intention of the lessee to take charge of the property leased.

It follows that the opponents' pledge must be considered as if no attempt had ever been made to write a lease.

Now, as relates to the pledge—without reference to said illegal lease—we will state that possession is a fact, and the pledge effective against third persons is grounded upon possession.

It was agreed between opponents and their debtor, the Pleasant Hill Lumber Company, that as the lumber came from the mill it would become burdened with the pledge.

It was the intention that the moment that the trees were converted into lumber they belonged to the owners of the mill. It was thereafter placed in the hands of the owners who held it in accordance with their agreement to pay their advances, as opponents contend. They, these opponents, were given a part of the proceeds and retained a fractional portion themselves. As the lumber was sold, other lumber was received by the opponents. It was proposed to make the pledge serve as a kind of blanket pledge, to use a word familiar to insurance people.

This cannot be done under the article of the Code.

The logs from which the lumber was sawed could have been pledged, but pledging the lumber did not have the effect of pledging the logs. Possession is essential. Civ. Code, art. 3152.

The creditor in order to have a pledge must remain in possession. Civ. Code, art. 3162.

The property pledged must pass from the hands of the owner to those of the pledgee.

The separation between other property of the debtor and the property he has pledged must be complete.

The decision in *Casey v. Cavaroc*, 96 U. S. 483, 24 L. Ed. 779, was well considered, and is pertinent to the issues in the pending case. It reviews Louisiana jurisprudence to the date it was rendered and decides, as has frequently been decided by this court, that possession is of the essence in matter of pledge.

It may, for instance, be given by delivering the keys of the building in which the property pledged is stored, but this pledge, by delivering the keys, would amount to very little against third persons if, after the delivery of the keys the owner of the property pledged, were to exercise rights over it or retain its control.

In the pending case for decision, it does not appear that any of the lumber was ever placed in the control of the creditor in the manner and to the extent required in pledging property.

The act does not cover any part of the property for the reason we have before stated. *Bank v. Janin*, 46 La. Ann. 995, 15 South. 471; *Succession of Lanaux*, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577; *Donoven & Daley v. Travers & Hermann*, 122 La. 462, 47 South. 769.

We have read the extracts from well-known commentators cited in the brief of learned counsel for the opponents. They seem at first blush favorable to an easy and convenient method of pledging property—perhaps advisable. With the advisability of the method we have naught to do. Our law seems plain as relates to the necessity of possession, and the interpretation heretofore given is, to our thinking, conclusive.

These commentators, referred to above, it must be said, do not go to the extent of expressing the opinion that a merchant who advances to a manufacturer can have himself recognized as pledgee against third persons by entering into a contract which does not give him control of the property pledged.

If the creditor had taken control under the lease, and had exercised his right as pledgee it would be different.

No contract can be legally maintained as a valid pledge when there is very great doubt as to whether it is to be considered a pledge or a contract with a customer to induce him to consign the products of his plant to the merchant to be sold for his account.

The contention of the opponents is that the receiver stands in the shoes of the insolvent corporation, and that he cannot attack the acts of the corporation.

The better doctrine is that the receiver represents the creditors and their debtor, the insolvent corporation. It is said that he is trustee for both, and that he is bound to serve the interest of each. *High on Receivers*, p. 22.

There is a limit to the extent that he can

represent the creditors in opposing a contract entered into by the debtor. It is generally limited to questions of fraud.

The question would be discussed further, and we would seek to establish wherein the receiver may or may not in this instance question the acts of the insolvent corporation; but we are relieved from the necessity of that investigation. The receiver presented his own account to the court. He has placed himself on that account as a creditor secured by mortgage and vendor's privilege in a large amount. From a judgment, which he must have deemed in some respects adverse to his interests, he has taken an appeal to this court individually. He is before us asserting a right personal to himself. He must be heard in his own behalf even if he cannot be heard as a receiver.

Fee of Attorneys.

The opponents do not complain of the amount for fee of attorneys; their contention is that the services were rendered at the request and for the exclusive benefit of the receiver.

The fact is that these services were rendered for the benefit of all parties in interest.

The interested parties should pay as far as ascertainable to the extent of their respective interest.

This was the gist of the decision in *Succession of Whitehead*, 3 La. Ann. 397.

The debts of a succession were considered of a higher dignity than those of the deceased; also the debts of the receiver to those of the insolvent, and they are to be paid before those of the deceased or the insolvent. *Friend v. Graham's Adm'r*, 10 La. 439.

To the same effect was the case of *Succession of P. O. Lauve*, 18 La. Ann. 722; that decision went far in applying article 3267 of the Civil Code to an attorney's fee as not being chargeable to the movable property.

We are not inclined to criticise the decisions of our predecessors or to overrule them, but as to this point, we must say that it is error.

In *Succession of Gale*, 21 La. Ann. 487, the administratrix proposed to pay the general privilege by preference over the proceeds of the movable.

The court held that this would be an injury to the creditors who had a special privilege on the movable.

The court applied article 3267 so as to secure both those who had a special and those who had a general privilege, by charging movable and immovable in proportion to each.

In *Succession of Wells*, 24 La. Ann. 163, the court followed the *Friend Case*, and held that they must be paid by preference.

In these decisions the question did not present itself of the entire exclusion from all participation in the proceeds of creditors who had a special privilege.

Originally the French Code was taken as the basis of our articles on the subject of privilege.

They have been very much amended since. Only a few articles remain unchanged or unamended.

None the less, the general plan is the same. Laurents, No. 523, vol. 29, refers to law charges to be distributed according to benefit received.

In the case before us each should pay \$2,700; the interest of \$54,000 to pay \$2,304.68, and the interest of \$9,262 the balance of \$395.32, to be ranked as law charges and with preference for payment of last sum of \$395.22, over all sums or claims on the movable property.

Receiver's Commission.

The receiver held a large claim secured by mortgage against the insolvent. True, it did not disqualify him from acting as receiver. It rendered it necessary, however, for him to be very careful in managing the property.

We have noted that an agreement was entered into between the receiver and the creditors. It should have been kept by the receiver. He should have separated and have kept separate the lumber, as was agreed upon, and the proceeds of the lumber after its sale.

Again, in operating the planing mill, there is evidence showing that the management was not economical.

We are not of the opinion that (in view of the issues raised before the district court, as presented before this court) he should be denied all commission.

The commission of the receiver must be prorated as above in matter of the fee of attorney; that is, \$2,600 is to the sum before mentioned.

In the case each should pay \$2,600; the first above-named interest should pay \$2,220.91, and the other \$379.09, the latter to be paid by preference over the movable property.

The Sale of the Mill.

The charge in argument by learned counsel for opponents was that the property was bought through a person interposed. The account was not opposed on that ground. The receiver, on cross-examination, in substance, stated that his son was an interposed party.

Objection was urged to the admissibility of his testimony.

In argument the attorney for the opponents urged that the receiver should be charged with the amount at which the property was appraised in the inventory of the insolvent instead of the amount at which the property was adjudicated to his son for his benefit.

That issue was not pleaded. The reason given for not pleading it is that the opponents did not know that the receiver had

bought for himself before he testified on cross-examination.

It remains, even at that late stage in the case, the offer to amend would have been in time. It would have been in time even on the rehearing. But in argument before this court such an issue comes too late. It cannot be entertained.

Opponents cite as authority, for amending the account at this time on an issue not raised, as this opponent contends the case of *Sheets Lumber Company*, 52 La. Ann. 1337. 27 South. 809, and urge that the precise point in that case was not made in opposition, but only in the brief and in argument in the Supreme Court.

We recall the facts in the just-cited case. There was a general opposition filed; fraud was charged, and, as we recall, the sale was attacked on different grounds.

The cases are not similar.

Repairs.

Objection was made by the opponents to the account in so far as the receiver charges for repairs made in the planing mill. The ground is that they are permanent improvements made to the planing mill and should be charged to the proceeds of the sale of the mill, diminishing by that much the amount realized by the receiver on his individual claim as a creditor with a mortgage.

The sawmill was not operated after the receiver qualified; but he did operate the planing mill in order to dress lumber for the market after having obtained an order from the court authorizing him to run this planer.

It became necessary to make some repairs in order to enable the receiver to carry out the order of the court and run this planer.

These repairs are not chargeable to permanent improvements. It was to the interest of the creditors to run this planing mill. Some profit we infer was realized therefrom by the receiver. The small amount required for its operation must be charged to the material worked in the planer.

If we were to attempt to deduct the amount from the item in question, as suggested by counsel for opponents, for permanent improvements, it would be a matter of impossibility to fix the amount with reasonable certainty. Moreover, the planer was operated in the interest of creditors; they should pay for the repairs.

The Feed Bill for Live Stock.

The contention is that the amount due as per this bill should be taken from the proceeds of the sale of the immovable property.

There is no authority for charging this to immovable property, although it is said that this stock was sold as part of the realty. The effect would be, if this claim were allowed, that the mortgage creditor would have to pay an amount due for taking care of some of the property. It was necessary to feed these animals; some one had to pay for it. The amount was properly taken from

the cash on hand. The creditors cannot now have it charged to the immovable property, for we do not recall that the evidence shows that this live stock was not in some way necessary in operating the plant, in hauling the lumber and other similar work at the planer.

Operating Expenses of Planing Mills.

The complaint of the opponents in regard to this item is that the amount charged is excessive. There was evidence introduced by opponents in support of the opposition to this claim.

Witnesses for the receiver also were heard.

The testimony is conflicting. The purpose, as stated in the opposition, was to have the amount deducted from the receiver's commission on the ground of his negligence.

The commission of the receiver is already sufficiently reduced.

We pass from this point without further comment, as it has no merit.

Merchant's Privilege.

The amount allowed by the district court to Brown, Timmons & Co. et al. on the account of goods and merchandise advanced is the only claim before us. (The other claims for advances and merchandise were not allowed by the judgment of the district court and are not before us.) The other merchants to whom there is an amount due have not appealed, and they have not answered the appeal. These last are passed over, and will not be noticed further.

With reference to the firm above named whose claim has been allowed by the district court, there is contradiction.

In the first opposition this firm claimed for goods and merchandise and groceries advanced to the Pleasant Hill Lumber Company during the six months next preceding the appointment of the receiver to enable it to continue to operate its business. They asked in this first petition to be recognized as creditors with a privilege. This firm subsequently filed an amendment in which it claimed, different from the first opposition, that it furnished money and necessary supplies to secure logs and timber to be cut into lumber by the sawmill.

There was a change as shown by the allegation above noted.

No objection was urged to the amendment. On the trial of the case the testimony was admitted without objection. That testimony did not identify the advances as made to the Pleasant Hill Lumber Company "to deaden, cut, haul, float or raft any logs or forest timber"; quoting from Act No. 33 of 1882.

One of the witnesses, a member of the said firm, said that the orders furnished by his firm were filled for supplies to laborers employed at the mill.

If advances were made to laborers at the mill they were not advances made to fell

trees and cut them into logs, and haul them away.

Another point is urged by the receiver and others to this claim. It is that the logs were brought to the mill and were sawed into lumber.

In considering this last point we find as a fact that the lumber was indifferently identified as the lumber from the logs. The testimony is not conclusive about this lumber.

The serious ground at this time is that, the logs having been sawed into lumber, the privilege was lost. In deciding, we will have to refer to section 1 of act No. 33 of 1882, cited supra. It provides for a privilege to secure supplies bearing upon the logs cut. The title and the act describe the privilege and the property specifically, but nothing is said of lumber. It is confined exclusively to the logs; i. e., to a privilege on the logs for labor done in cutting them into logs.

It has been decided repeatedly that privileges are stricti juris. Words cannot be supplied in order to recognize a privilege. But "lumber" (specific property) is not to be implied as having been intended by the legislator. Had he so intended he could easily have added the word "lumber," and would not have limited the statute to logs.

Counsel for this firm compare this asserted privilege to the privilege granted to the merchant and factor for money advanced to make and cultivate the crop of cotton. This last-mentioned privilege follows the product after it has been gathered, ginned, and baled, and has gone to the machine which separates the seed from the lint, thereby converting the raw material to another without a change of the thing itself.

The marked difference between this illustration of the learned counsel for the firm consists in the fact that "crop" is a general term, and includes cotton in the field as well as cotton after it has been ginned and baled, while the term "log" is limited in its meaning. After it is converted into lumber, lumber does not include the logs.

The same is true of crops of corn and cane. After the corn is gathered and put in sacks, it is still the crop, and the privilege follows the corn as well as the cane after it is ground into sugar, if it can be identified.

The Claim of J. A. Selvy.

This claim is for \$13,375.35. This creditor was president of the insolvent company. It figures on the account as an ordinary debt of the receiver.

The objection urged in argument by the McCullough-Weaver Lumber Company, opponents, was that no evidence was offered in support of this item.

It is sustained by the receiver's oath.

We think that this account has been sufficiently proven.

The opponents just named admit that there was no specific opposition to this particular

item. They claim the right to oppose this claim under some general averment in one of the oppositions.

We have carefully read those oppositions, and have not found any that we consider as directed against this claim.

But be that as it may, in answer to another contention of these opponents that this claim should not be paid until all the other creditors are paid, that it is not right or equitable that the stockholders in the enterprise be paid concurrently with the creditors.

We will state that the decisions of this court, two in number, the Cahill Case, 47 La. Ann. 1487, 17 South. 784; Cochran & Ocean Dry-Dock Co., 30 La. Ann. 1365, are not as far-reaching as opponents contend. The underlying idea in each of these cases was that the stockholders have no right to enter into a combination to obtain an advantage over creditors. That if they attempted it their claims would be subordinate to the claims of creditors.

But it is different as to the president of the company who has trusted his company for his salary or has made advances to the company to aid it; he should be paid if he has acted in good faith in the matter and only seeks his own, particularly when he claims as an ordinary creditor in insolvency proceedings.

Taxes and Insurance.

The realty should pay its proportionate share of the taxes. The privilege for the taxes on the realty is superior to the vendor's privilege. It follows the lumber was assessed at \$5,600 in 1907, and at \$4,200 in 1908; the rate of taxation, the evidence shows, was 23 mills, making \$128.08, plus \$96.60, total, \$225.40, which is deducted from the amount of taxes. The realty is charged with the balance, \$890.66 plus \$225.40, total, \$1,116.06.

The realty will not be charged with the amount of premiums paid for insuring the lumber. This claim is not superior to the mortgage and vendor's privilege.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be amended by rejecting the privilege claimed by the merchants on the lumber made from the logs.

The claim of the receiver, to be paid from the movable, is reduced, as mentioned in the body of the opinion.

The fee of the attorney for the receiver, also that portion to be paid from the movable, is prorated as in the body of the opinion.

The balance to be paid from the proceeds of the sale of immovable property.

It is ordered, adjudged, and decreed that the account be further amended by charging the immovable property with its proportion

of taxes, as before stated, and the balance is to be paid from the proceeds of the movable property, also as above stated.

With these amendments, the receiver's account is homologated. The costs of appeal to be paid by the mass of the estate.

(126 La.)

No. 17,908.

KREYE v. LONGVILLE LONG LEAF LUMBER CO.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT (§ 276*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a servant's action for injuries sustained by falling from a shafting while walking thereon from one beam to another, evidence held to show that plaintiff slipped from the shafting before he attempted to catch hold of a pulley wheel thereon, which turned and caused him to fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 959; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff and his brother, who were 6 feet 1½ inches high, were compelled to pass from the horizontal beam upon which they were standing in screwing nuts to bolts protruding from the ceiling, 9 feet 4½ inches above, to another parallel horizontal beam 8 feet ½ inch away, both beams being 6 feet 5½ inches from the ground floor. An iron shafting 31½/16 inches in diameter, which had been greased, extended from one beam to the other and there was a broad-rimmed iron pulley, 25 inches in diameter, on the shafting about half way between the beams. About 4 feet lower than the parallel beams, about 2 feet above the ground floor, was a platform extending between the two beams, and plaintiff could have either stepped down upon it and passed from one beam to the other, or could have done so by first letting himself to the ground floor and getting upon the other beam by a scaffold or ladder, but instead he attempted to walk across the shafting when he slipped and caught hold of the pulley to save himself, but it turned and let him fall. There was no rule requiring employees to walk across the shafting in doing such work though they frequently did so of their own volition, and no one had used the pulley as a handhold in doing so. The negligence claimed was in not having the pulley keyed so that it would not have turned when plaintiff took hold of it. Held, in view of the shafting being greased, plaintiff was negligent in attempting to cross between the beams thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 743-748; Dec. Dig. § 238.*]

3. MASTER AND SERVANT (§ 128*)—NEGLIGENCE—IMPROPER USE OF APPLIANCES.

Defendant was not negligent in not having the pulley wheel keyed of which plaintiff caught hold when falling, since the shafting was not intended to be used to walk across, and the pulley wheel was not provided for holding to when walking across the shafting; the master not being liable for injuries caused by the use of appliances for purposes for which he had no reason to believe they would be used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 256; Dec. Dig. § 128.*]

4. MASTER AND SERVANT (§ 213*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—SELECTING MORE DANGEROUS METHOD.

Plaintiff was also barred from recovering under the rule that a servant who selects an improper and dangerous route assumes the risk of resulting injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 560; Dec. Dig. § 213.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Charles Kreye against the Longville Long Leaf Lumber Company. From a judgment for plaintiff, defendant appeals. Judgment set aside, and suit dismissed.

Pujo, Moss & Miller, B. P. Finley, and W. R. Thurmond, for appellant. McCoy, Moss & Knox, for appellee.

PROVOSTY, J. A sawmill of the monster size was being constructed by the defendant company, in which there was no end of shaftings and pulleys, perhaps a thousand of the latter. Plaintiff and his brother, both of them tall men—6 feet 1½ inches—were mechanics employed in the work of construction. Their work necessitated their passing from one horizontal beam, upon which they were standing, 6 feet 5½ inches above the ground floor, to another parallel horizontal beam at the same level, 8 feet ½ inch away. Extending from one of those beams to the other, and resting on the top of them, was an iron shafting, 3½ inches in diameter. On this shafting, about midway the distance between the two beams, or some 4 feet from the beam upon which the men stood, was a pulley, or broad-rimmed iron wheel, 25 inches in diameter. Parallel with the shafting, about 6 feet higher than it and about 3 feet to the side of it, was another beam—the exact space between it and the iron shafting being 7 feet 7 inches. About 4 feet lower than the beam upon which the men were standing—that is to say, about 2 feet above the ground floor—there was a platform, composed of 3 loose planks each 12 inches wide, extending the entire distance between the beam upon which the men stood to that which they desired to reach. This platform had been placed there for the use of a colored workman, who at the moment was upon it at work; but nothing shows that plaintiff and his brother could not have stepped down and walked upon it for passing from one of the beams to the other. There was also nothing to prevent them from letting themselves down to the ground floor and getting to the other beam by means of a ladder or other convenient means. Instead of doing this, the brother sought to get across by resting his feet upon the iron shafting and his hands upon the beam which ran parallel with it, some 6 feet higher and some 3 feet to one side. This necessitated his spanning a

distance of 7 feet 7 inches (so that he could barely touch the beam with his fingers), and, as a consequence, came near resulting in his straining his back and falling. Plaintiff undertook to get across by walking on the shafting, and while doing so, lost his balance and fell, and suffered the injury for which he brings this suit in damages. If his statement is to be adopted, he put his left foot on the shafting, and, before lifting his weight from his right foot, leaned over and put his hand on the pulley, intending to steady himself by holding onto it; and, as he put his weight on it, it turned, and caused him to lose his balance and fall. In that statement he is corroborated by his brother; but he is contradicted by the colored man who was working on the platform, who says that plaintiff started out to walk upon the shafting and lost his balance, and only caught hold of the pulley in falling; and also by a physician who saw him immediately after the accident, and who testified that in explaining how the thing happened he had said that he went to step over a pulley and in so doing lost his balance and fell; and also by the physician who attended to him in the sanitarium, in Shreveport, who testified that he told him, "I was on a line shaft, and when I proceeded to walk it, my foot slipped"; and, finally, by the foreman of the mill, who testified that he went to him as soon as he fell, and that when asked how it had happened, he said that "he attempted to walk the shaft and his foot slipped." The preponderance of the evidence is here decidedly with defendant; and we think it is also with defendant going to show that the shaft had been greased; and that, therefore, to venture upon it was the height of imprudence.

In justification of their action in attempting to get across from one of the beams to the other in the way they did, plaintiff and his brother say that their work at that place consisted in putting and screwing nuts to a number of bolts which protruded through the ceiling, or floor overhead; and that so little time was required for doing this work, that the natural and practical way of doing it was simply to stand on the beams and put on and screw the nuts, without taking time to construct scaffolding for the purpose, or even for passing from one beam to another; that to have gone down to the ground floor and procured planks for these purposes would have been a useless and unjustifiable waste of time. This testimony on the part of these two men is irreconcilable with the fact that the bolts to which the nuts were to be added and screwed were at the ceiling, 9 feet 4½ inches above the beams they were standing on, and therefore out of their reach as they stood upon the cross-beams.

The negligence which plaintiff charges the defendant company with is alleged to consist in that the pulley had not been keyed, so as

to be made immovably fast to the shaft, which was itself immovably joined to the machinery. The contention is that the well-known custom is for workmen to use such shafting for standing, or walking, upon, in doing their work, instead of having recourse to regular scaffolding, whenever the work can be done in that way and is not of sufficient importance to justify scaffolding; and that the invariable rule and custom is to key the pulleys, and thereby bind them immovably to the shaft, as soon as they are put on the shaft, in the course of construction; and that the thousand pulleys already put on their shafts in this mill at the time of the accident had been keyed in that way; and that, therefore, it was natural for plaintiff to suppose, and he had a right to assume, that this particular pulley had been keyed and was fast, and that he could rely upon it for steadying himself, or holding onto, while walking upon this shaft; and that the failure to have thus keyed it was negligence on the part of the defendant company.

Plaintiff testified that most of the thousand or so pulleys that had been already put upon their shafts had been keyed and made fast. His brother testified that all of them had been. Plaintiff produced several experts to prove that the custom was for workmen to use the shafting in the way of scaffolding whenever convenient in the course of construction; and that the invariable custom was to key the pulleys at the time of putting them on their shafts.

Defendant produced a greater number of witnesses and experts to prove the very contrary of all this; and, there can be no doubt, did prove it by a decided preponderance of testimony.

How, under the circumstances, the jury came to give a verdict in favor of plaintiff, we cannot imagine. For several reasons, the plaintiff cannot recover.

The main reason is that, even conceding everything that plaintiff says, the defendant has not been guilty of any negligence. It cannot be negligence for defendant not to have made safe for walking a place not intended to be used for walking, nor to have failed to make this pulley safe for holding onto in performing the acrobatic feat of walking upon this iron shaft, when this pulley was never designed for that purpose.

If by any command, or rule, the workmen had been required to use the shafting for walking upon in that matter, there might be some reason for holding the employer to the duty of making these shaftings safe for walking; but nothing of that kind is pretended. If the workmen ever do walk or stand upon these shaftings for doing their work, it is simply because they choose to do so, and at their risk and peril. That they quite frequently do so, the evidence shows; but it does not show that they are under any obligation to do so. Nor does it show that on

any previous occasion the pulleys had been sought to be utilized as a handhold in accomplishing the dangerous feat of walking along the shafting. There was certainly no duty resting upon the employer to make these pulleys safe for this use. The learned counsel of plaintiff argue that it not being possible, or it being at any rate most difficult, for plaintiff to walk upon the shafting without steadying himself by holding on with his hands to something, it was the most natural thing in the world for him to catch hold of this pulley, especially after he had witnessed the danger his brother had gone through by trying to utilize the beam parallel with the shaft for steadying himself. And plaintiff produced several experts to testify that for him to have thus caught hold of this pulley for maintaining his balance while walking upon the shaft, was the natural thing to do. We agree with these experts that it was the natural thing to do—just as it is natural for drowning men to catch at straws; but we think it would have been much more natural and consonant with reason and ordinary prudence for the plaintiff to have gone about reaching the other beam in some less acrobatic fashion.

"It is well settled that, where the instrumentality which caused the injury was still incomplete at the time of the accident, and the injured servant was engaged in the work of bringing it to completion, the question whether the master was in the exercise of due care is determined with reference to a lower standard than that which is applied in the case of instrumentalities which have been put into a finished condition and are in regular use in the normal course of the business." 1 Labatt on Master and Servant, p. 66, § 29.

See, also, *Bedford Belt R. Co. v. Brown* (1895) 142 Ind. 639, 42 N. E. 359 (bridge carpenter not entitled to recover for an injury caused by the slipping out of a wedge used in the construction of a track for the carriage of heavy timbers); *Bennett v. Long Island R. Co.* (1900) 163 N. Y. 1, 57 N. E. 79 (use of switch without lock or target, on a road under construction held not to be negligent); *Allen v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 344, 37 S. W. 171 (recovery denied where the injured servant was engaged in constructing a bridge). 1 Labatt on Master and Servant, p. 66, notes.

"Although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they are not intended. It is not negligence to omit a precaution applicable only to a situation which did not exist." 1 Labatt on Master and Servant, p. 69, § 26.

"If the servants undertake to use machinery or instruments for purposes for which the employer had no reason to suppose they would be used, it is their own fault or folly if harm comes from it. *Felch v. Allen* (1868) 98 Mass. 572. See, to same effect, *Guenther v. Lockhart* (1891) [61 Hun, 624] 16 N. Y. Supp. 717, affirming (1893) 137 N. Y. 529, 33 N. E. 334." 1 Labatt on Master and Servant, p. 64, notes.

And again:

"An employé hauling buckets of tar up on a roof lost his balance, and, in falling, grasped a triangular wooden 'horse,' used as an appliance in hauling up the buckets. The 'horse' was insufficient to withstand the strain, and fell with him. Held, that a peremptory instruction for defendant was proper, since the fact that the 'horse' fell when jerked by plaintiff did not show that it was insufficient for the use for which it was intended. *Bell v. Refuge Oil Mill Co.* (1899) 77 Miss. 387, 27 South. 382. A workman cannot recover against his employer for injuries caused by falling from a scaffold on the giving way of a stay lath to which he was holding while leaning over to catch his tools thrown to him from below, where such stay lath was intended solely to keep the posts of the scaffold upright. *Creberry v. National Transit Co.* (1894) 77 Hun, 74, 28 N. Y. Supp. 291. A railroad company discharges its duty to an employé in furnishing a brake staff on a car sufficient for the use for which it is intended although it gives way when he attempts to use it as a handhold in climbing on the car while moving. *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17. See, also, to same effect, *Jayne v. Sebewaing Coal Co.* (1896) 108 Mich. 242, 65 N. W. 971 (miner when about to ascend in a cage took hold of a loose nut, not intended as a handhold, and not affecting the safe operation of the machine, and had his hand crushed when the cage started); *New York & N. J. Tel. Co. v. Speicher* (1896) 59 N. J. Law, 23, 39 Atl. 661 (lineman used a cross-bar carrying wires as a support in climbing a pole)." 1 Labatt on Master and Servant, pp. 60, 61, § 26, notes.

Another evident reason why plaintiff cannot recover is that embodied in the following extracts:

"A servant who selects an improper and dangerous route assumes the risk of resulting injury." *Antee v. Richardson Taylor Lbr. Co.*, 123 La. 118, 48 South. 785.

"A servant who, without inquiry, selects an improper and dangerous route, assumes the risks of resulting injury." *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 South. 566.

"Where there are two avenues of travel, the person choosing the more dangerous one assumes all of its attendant and incidental risks." *Settoon v. T. & P. Ry. Co.*, 48 La. Ann. 807, 19 South. 759. Also, see *Ederle v. V. S. & P. Ry. Co.*, 112 La. 729, 36 South. 664; *Dandie v. S. P. Ry. Co.*, 42 La. Ann. 686, 7 South. 792; *Jenkins v. Maginnis Cotton Mills*, 51 La. Ann. 1011, 25 South. 643; *Schultz v. Mfg. Co.*, 112 La. 568, 36 South. 593, 104 Am. St. Rep. 452; *Taylor v. Ry. Co.*, 121 La. 543, 46 South. 621.

And in the recent case of *E. L. Williams v. Arkansas, Louisiana & Gulf Railway Company* (decided on March 14, 1910) 51 South. 1027, the court, reversing the judgment below, says:

"Where a brakeman is injured in attempting to step on the pilot of a moving engine, and the evidence shows that it is more dangerous to attempt to get on there than upon steps, or rests, on the side, which project over the rails, and that his duty did not require such attempt, there can be no recovery for the injury."

Judgment set aside, and suit dismissed at plaintiff's cost.

(126 La.)

No. 17,844

HEBERT v. KINGSTON LUMBER CO.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT (§ 256*)—INJURIES TO SERVANT—NEGLIGENCE—PETITION.

Where, in an action for injuries to a servant, the petition alleged particularly the manner and cause of the accident, and that it was through no fault of plaintiff, but through defendant's negligence in failing to furnish plaintiff a safe place to work, it was not fatally defective for failure to allege that the danger was hidden or was not known of or assumed by plaintiff, or that he was inexperienced or not properly warned.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-854; Dec. Dig. § 256.*]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—CARE REQUIRED.

While a master is not an insurer of the safety of his servant, he must use ordinary care to furnish the servant with a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-184; Dec. Dig. § 101, 102.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE.

In an action by an engineer in defendant's employ, injured by getting his foot caught in certain gearing under a passage platform on the way from one engine to another, held, that the platform was dangerous, and that defendant was negligent in permitting it to remain so.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK.

The danger from a defective platform on which plaintiff worked held not so manifest or clear that plaintiff would be held as a matter of law to have seen and assumed it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

5. DAMAGES (§ 132*)—PERSONAL INJURIES—AMOUNT ALLOWED.

Plaintiff, a stationary engineer in defendant's employ taking care of two engines, had his right heel caught in the cogwheels under a platform, and his foot was so badly crushed that his leg had to be amputated. Plaintiff's sufferings were very great, and his earning capacity very greatly impaired, if not practically destroyed. Held, that plaintiff should be allowed \$8,000 damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Land, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Jude Hebert against the Kingston Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed, and judgment for plaintiff.

Williamson & Crain, for appellant. Thatcher & Welsh (Alexander & Wilkinson, of counsel), for appellee.

PROVOSTY, J. Plaintiff, aged 34, was engineer at the sawmill of the defendant com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pany. Two engines were in his charge; and the only way for him to go from one to the other was over a three by four foot platform, or boxing, three feet high, between two upright posts three feet apart. A six by six inch crossbeam at each end of the platform, about eighteen inches below the top of the platform, served as a step for going up or down. This passageway was used by all the employes. Under this platform were fast revolving cogwheels. Upon the crossbeam, in the center of the space between the upright posts rested the slender iron shaft which ran the cogwheels.

A little more than a week after plaintiff had entered on this employment, his right heel got caught in the cogwheels, as he was stepping down from the platform, and his foot was so badly crushed that his leg had to be amputated. "Q. Where? A. About the middle third about here (witness pointing to the leg)." In plaintiff's brief it is stated to have been between the knee and ankle.

The edge of the platform was on a perpendicular line with the inner side of the crossbeam; and, for a space of $7\frac{1}{2}$ inches, nothing intervened between the cogs and the foot of the person stepping down on the crossbeam. So that the situation was pretty much the same as if a staircase were constructed without risers, and with the outer edge of each tread on a perpendicular line with the tread below; that is to say, without the outer edge of each tread projecting over the inner edge of the tread below it, so that the heel of a person descending from one tread to the other would strike, not two inches or so from the inner edge of the tread, but, possibly, at the very inner edge itself of the tread. And the treads were six inches wide, instead of twelve or more, as usual, and were eighteen inches apart, instead of seven or eight or ten inches, as usual; and there were rapidly revolving cogwheels within, say, two inches of the inner edge of one of the treads.

The petition describes with great particularity and minuteness the manner and the cause of the accident, and alleges that it was through no fault of plaintiff's, but through the negligence of defendant in not furnishing plaintiff a safe place to work in. It does not contain, however, any allegation of the danger having been hidden; or of plaintiff's not having known of, and assumed, it; or of the plaintiff's having been inexperienced, or not properly warned; and because of the absence of these negative allegations defendant's learned counsel contend that the petition does not show a cause of action.

The petition has advised defendant of the nature of the demand and of the facts upon which it is founded; and our Code Prac. art. 172, does not require more. What more the defendant would have any interest in being advised of for making its defense we cannot imagine. If petitions were required to be sworn to, there would be some utility in re-

quiring them to negative all the facts whose existence might defeat the action; for then a plaintiff who should be unable to make under oath these negative allegations would be prevented from vexing defendant with the suit. But this verification of the petition is not required; and, rightly or wrongly, the practice has grown up of framing petitions with little regard to the plaintiff's ability to verify the allegations on the trial. This same question of whether a plaintiff is required, or not, to negative the facts whose existence would defeat his right of action, was considered by this court in the case of *Buechner v. City of New Orleans*, 112 La. 600, 38 South. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455, where it was held that a plaintiff need not allege the absence of contributory negligence on his part.

On the merits, the learned counsel for defendant argue that the master is not an insurer of the safety of his servant; but is held only to the exercise of ordinary care in discovering, and providing against, danger; and the learned counsel, with startling inconsistency, argue that the danger in this case was so evident that the plaintiff could not but have known of it and assumed it. The second alternative contention of the defendant is that if in stepping upon the crossbeam plaintiff had laid his foot to the left side of the iron shaft, instead of to the right side, he would have been safe, for then the cogs would have pushed his foot out instead of drawing it in; and that there having been a safe and an unsafe way, and the plaintiff having chosen the unsafe way, he cannot recover.

To our mind it is perfectly plain that, with the situation as described above, it was just a question of time when somebody's foot would get caught. The only wonder is that the thing did not happen sooner. Waiving the incongruity of arguing that the danger was so hidden that defendant could not have discovered it in the course of the construction of the mill, or in the months, or years, that followed, but that it was so evident that plaintiff could not but have discovered it in the week's time of his employment, we will say that the danger did not lay in the fact that there were cogs under the platform (a thing perfectly obvious, and which everybody knew; in fact, the so-called platform was nothing more than a boxing for the cogwheels), but lay in the dangerous proximity of the cogs to the crossbeam used as a step, and in the absence of any boxing at that point. We think that ordinary care on the part of defendant would have revealed this danger; and it could have been removed entirely by directing some one about the mill to pick up a piece of board and nail it there. At the same time, we do not think that this danger was so manifest or glaring that plaintiff must be held to have seen it and assumed it.

While the master is not an insurer of the

safety of his servant, he must use ordinary care in furnishing him a safe place to work in, and defendant has not done so in this case.

The foot of plaintiff was crushed to a pulp, and his sufferings were very great. His earning capacity is now very greatly impaired, if not practically destroyed. After consideration of all the circumstances of the case, we have concluded to fix the amount of the damages at \$6,000.

It is therefore ordered, adjudged, and decreed that the plaintiff, Jude Hebert, have judgment against the defendant, the Kingston Lumber Company, in the sum of \$6,000, with 5 per cent. per annum interest thereon from this date.

LAND, J., dissents on refusal to grant rehearing.

(126 La.)

No. 18,147.

MULHAUPT et al. v. CITY OF SHREVEPORT.

(Supreme Court of Louisiana. May 23, 1910.)

(Syllabus by the Court.)

On Motion to Dismiss.

1. APPEAL AND ERROR (§ 149*)—PARTIES—INTERVENTION.

When plaintiffs, who seek to have declared null a law providing for the holding of an election to determine whether new territory is to be annexed to a city, are in the appeal joined by taxpayers in the proposed extension, who adopt the allegations of the plaintiffs and appellants, these taxpayers are entitled to join in the appeal, and the original appellants cannot have their appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 933; Dec. Dig. § 149.*]

2. APPEAL AND ERROR (§ 361*)—RIGHT OF REVIEW—AFFIDAVITS.

An appealable interest may be shown by an affidavit filed in the district court (without objection on the part of any one).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.*]

On the Merits.

3. STATUTES (§ 8½*) — LOCAL OR SPECIAL LAWS—NOTICE OF INTENTION.

The exception to the inhibition placed on the power of the Legislature by article 48 of the Constitution of 1893 gives to the General Assembly the power to pass statutes relating to the charters of towns and cities having a population of not less than 2,500 without previous publication of intention to apply for such legislation having been made. Fortier Case, 104 La. 561, 29 South. 215.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 6; Dec. Dig. § 8½.*]

4. STATUTES (§ 75*)—SPECIAL OR LOCAL LAWS—ALTERATION OF MUNICIPAL BOUNDARIES.

Article 49 of the Constitution of 1893, which provides that the General Assembly shall not indirectly enact special or local laws by the repeal of a general law, is not violated by the enactment of a special statute for the extension of the limits of a city, when such special stat-

ute does not amend the general law on the subject.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 75.*]

5. ELECTIONS (§ 201*) — POLLING PLACES — POWER TO CHANGE.

Voters do not have an absolute right to vote at any particular place, and the polling places may be changed by legislative sanction. There is nothing to show that the law has been violated.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 177; Dec. Dig. § 201.*]

6. CONSTITUTIONAL LAW (§ 50*)—POWER OF LEGISLATURE.

Unless specially prohibited, the General Assembly has the right to make all laws, and was capable of enacting the law under which the election was held.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

7. ELECTIONS (§ 227*) — ANNULMENT — GROUNDS.

In the absence of proof that any one was denied the right to vote, the court will not annul an election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 227.*]

Appeal from First Judicial District Court, Parish of Caddo; A. J. Murff, Judge.

Action by J. T. Mulhaupt and others against the City of Shreveport, in which certain persons intervened. From the judgment, certain interveners appeal. Affirmed.

Emerson Bentley, for appellants Fisher and others. Lowell O. Butler, City Atty. (Blanchard, Barret & Smith, of counsel), for appellee City of Shreveport. Hall & Jack, for appellee Hodge. D. T. Land and T. F. Bell, Jr., for other appellees.

BREAUX, C. J. This is an action brought to have declared null a resolution of the council, the proclamation of the mayor calling an election, the promulgation of the election, and the election.

The election was held on the 1st day of September, 1908.

The petitioners represent that they are citizens and taxpayers in the territory annexed to the city of Shreveport, having been brought therein by the election, which they contend is null on a number of counts in their petition.

Inter alia that Act No. 309 of 1908, under which the election was held, is null and void, as it is a special law and was not published as directed by article 50 of the Constitution; also article 49 of that instrument; that by the terms a repeal of Act No. 105 of 1892 had been effected; that the city of Shreveport went beyond its jurisdiction entirely in ordering an election outside of its territorial limits.

Judgment was rendered against plaintiffs.

Third persons—i. e., taxpayers other than plaintiffs, alleging that they are aggrieved—presented a petition in open court for an

appeal, and produced affidavits in support of the petition.

No objection was raised; an appeal was granted.

Motion to Dismiss the Appeal.

Plaintiffs and appellants deny that appellants Fisher and others have any interest in the appeal, and urge that the ex parte affidavits filed by them are not sufficient to prove interest.

Plaintiffs who move to dismiss the appeal, and the intervener, whose appeal plaintiffs move to dismiss, cannot have any very great conflicting interest. They are all taxpayers complaining of the election held.

In appellant's petition of appeal, they adopt the averment of plaintiff's petition attacking the legality and constitutionality of Act No. 309 of the General Assembly of the session of 1908 and the action of the mayor and city council of the city of Shreveport in holding an election.

They reiterate substantially every allegation of plaintiffs in regard to the election; they are in matter of this, not in all respects, opponents to annexation.

We do not find the least difference. They aver that plaintiffs, having failed after considerable delay to take an appeal, they deem it to their interest to take and prosecute an appeal.

If there is any difference in the position of appellants and plaintiffs, it is not made evident by anything in the record.

Plaintiffs are unwilling to accept the appellants as allies, contending that they (plaintiffs) represent the taxpayers, and that there is no warranty for interference by appellees in their suit.

They do to some extent represent taxpayers in settling the law of the cases. It is not a representation which excludes others from taking part in opposing an election, particularly when they join in all that has been alleged as a ground of nullity.

Appellants are third persons and have a right of appeal.

As Relates to the Affidavits.

The correctness of the judgment appealed from is to be tested by the facts pleaded and the evidence; no new issue can be interjected into the cause on this appeal.

The following is sustained by a number of decisions. The grievance complained of may be established by affidavit. There was no objection made in the district court when the appeal was granted or at any time thereafter. Garland's Code of Practice, p. 671, No. 1, note C.

The motion to dismiss is overruled.

The necessity vel non of publishing notice of intention of applying for the enactment of an act such as No. 309 of 1906, it being a local or special act, is the next point.

That the extension of the city limits changes the Caddo parish lines is another ground.

The next ground is that the city had no authority to order an election beyond its limits.

That the city had no authority to change the polling places established by the police jury to other places of her own selection.

That the question should have been submitted to the qualified voters of the proposed extension, and not to the voters of the whole city, including those in the extension proposed.

That the city authorities paid no attention to the registration laws; dispensed with them altogether. There was no list of voters at precincts seven and eight.

That women in the proposed extension were denied the right to vote.

That they, plaintiffs and appellants, were deprived the right of representation at the polls.

The different pleas are abbreviated.

Opinion and Judgment.

We take up for decision the first point noted above.

At first blush the limitations of the Constitution, expressed in one of its articles, has an unfavorable bearing on the act of the General Assembly, viz. No. 309 of 1908, under which the election was held. Paragraph 12 of the article is quite prohibitive in its first two lines, but permissive in the lines which follow as a proviso.

The General Assembly is directed not to pass local laws creating corporations or amending or renewing or explaining their charters.

The last part of the article (the proviso) is permissive to the General Assembly, provided that this limitation cannot be made to apply to municipal corporations with a population of over 2,000 inhabitants.

It has been decided that corporations excepted by the proviso are emancipated from the effect of the other article (50) of the Constitution requiring notice before the bill passed can become a law. Fortier Case, 104 La. 561, 29 South. 215.

That decision is controlling unless we conclude to set it aside and overrule it, a step we are not inclined to take.

The court held in the cited case, substantially, that the reference in the first part of the paragraph of subdivision 12, art. 48, had an unfettering effect to the extent stated in the opinion.

The question is not free from difficulty in deciding it. We shall leave the decision as it is. It has been accepted as correct for a number of years. It has been acted upon, approvingly cited, and commented upon. It would serve no good purpose to undo that which has been done, or to recall that which has been said.

We are informed that it would have a disturbing effect on local conditions if we were to declare the statute null, passed, doubtless, on the faith in the decision.

Taxes have been collected, bonds issued, and other acts done that would have to be recalled, and much would have to be done to restore as far as possible the status quo ante electionem.

This applies to all acts to date.

We intend, none the less, to let this serve as a notice that it is advisable in doubtful cases to give the notice required by article 50 of the Constitution. The necessity of letting the Fortier Case, cited supra, remain as it is may in time strike others differently.

Having decided the first proposition as we have above, it follows that as to the second now before us, the decision must be similar.

2. The next contention of plaintiffs and intervener is that article 49 of the Constitution prohibits the extension of city limits by the passing of an act amending a general law.

That the general law upon the subject of extending city limits is Act No. 105 of 1892, and another law is Act No. 136 of 1898—a special law which repeals the general law.

That the effect of the act of the General Assembly assailed by plaintiffs and opponents is to amend this general law.

This is a *petitio principii* in assuming that the general law is repealed or amended by the special law. It is not repealed nor amended. It remains unaffected on the statute books. The only change is that those desiring to extend city limits, if they are in the majority, may extend them under the general law, or, if, as in this case, a majority of the citizens of Shreveport move to that direction they may avail themselves of the special law in question.

One law—the general law—does not stand in the way of the other; i. e., one does not conflict with the other.

The decisions upon that subject are very plain.

We will quote from one of the number; as the quotation is quite pertinent, it will suffice to maintain our view upon the subject:

"A special law granting to corporations a certain privilege or franchise, and which contains no express repealing clause, does not restrict or impair the operation of an existing general law which reserves to the Legislature the power to revoke franchise."

And in addition, as also pertinent, Welsh v. Gossens, 51 La. Ann. 852, 25 South. 472.

Article 49 and its prohibitive features cannot affect a special law which does not repeal or amend a general law, a purpose which cannot be accomplished, as the general law is entirely beyond the reach of the special law.

3. We will merely state the next point urged by plaintiffs and appellants, viz., that changing the city limits changes the lines of Caddo parish. It is not shown in what respect the lines are changed. The point has no merit.

4. Holding an election beyond the city limits.

That is the objection of plaintiffs and intervener, that the city could not hold an election in other territory than its own.

The enabling act authorized it to be held as it was held. The election was not held outside of the city. The voters from the annexed extension had to vote within the limits of the city as designated voting places nearest to the extension. There was no illegality in this and not even, a remote irregularity. There was no question of fraud raised.

As the voters do not have the absolute right to vote at a particular place, it may be changed with legislative sanction.

5. The General Assembly is not prohibited from passing laws unless there is an expressed constitutional inhibition upon the subject. There is here nothing of the kind.

Holding the election on the same day that a primary election was held to nominate city officers and by the same commissioners.

The day selected has legislative sanction as expressed in the statute.

The commissioners acted for both. It does not appear that any one was prejudiced in his right, nor does it appear that the commissioners had more to do than they should have had. There is no wrong or error to be corrected. The large majority in favor of the result seems to have been fairly obtained.

7. The registration laws overlooked.

This averment does not appear as sustained by the facts. The charge is general and not sustained. No one complains that he was denied the right to vote, and that his name was not in the registration list furnished to the commissioners.

8. Women excluded from voting.

No woman applied to vote. We will not assume that had a woman applied to vote, and had stated to the commissioners that she had a right to vote, and had pointed out the law giving her the right, that she would not have been permitted to vote.

In the absence of proof of a right denied, we will not annul an election.

For reasons stated, the judgment is affirmed.

LAND, J., recused.

(126 La.)

No. 18,078.

BURVANT et ux. v. WOLFE.

(Supreme Court of Louisiana. June 6, 1910.
Rehearing Denied June 28, 1910.)

(Syllabus by Editorial Staff.)

1. MUNICIPAL CORPORATIONS (§ 705*)—COLLISION OF AUTOMOBILE WITH BOY ON STREET—CONTRIBUTORY NEGLIGENCE.

A boy 11 years old, following others who had just preceded him, attracted by a large crowd around a police patrol wagon at the lower end of a block, and more largely on the other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

side of the street, ran along the sidewalk on the left side of the street in the direction he was going, till near the middle of the block, when he stepped into the street, running diagonally towards the wagon, and when out two to four feet from the curb was struck by an automobile coming from the rear, which was on that (the wrong) side of the street, because of the crowd at the lower end of the block being greater on the other side of the street. He apparently did not see the machine nor hear it, till just before it struck him, its tooting apparently having been at intervals and not continuous. Held, that no question of contributory negligence was involved.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—COLLISION OF AUTOMOBILE WITH BOY ON STREET—LAST-CHANCE DOCTRINE.

Even if a boy, who, in the middle of the block, running diagonally towards a crowd about a police patrol wagon at the lower end of the block, stepped into the street, and when two to four feet from the sidewalk was struck by an automobile coming from the rear, and on the wrong side of the street because of the crowd, was negligent, the driver of the machine, who did not see the boy, having his attention on the crowd ahead, was liable, under the last-chance doctrine, as had he been looking, as was his duty, he would have seen the boy, and that he was unaware of the danger; and this though possibly, even then, it would have been too late to have stopped, or sufficiently have changed the direction of the machine, so as to avoid a collision.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

3. DEATH (§ 98*)—INADEQUATE DAMAGES—DEATH OF CHILD.

A recovery of \$1,500 for death of plaintiffs' child, 11 years old, will be increased from \$1,500, as insufficient, to \$3,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 124; Dec. Dig. § 98.*]

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by George J. Burvant and wife against J. Townsend Wolfe. Judgment for plaintiffs. Defendant appeals. Judgment increased and affirmed.

Woodville & Woodville, for appellant. Armand Romain, for appellees.

PROVOSTY, J. The little 11 year old son of the plaintiffs was struck down by the automobile of the defendant, and died the next day. The street upon which defendant was driving his automobile was asphalted. It had no gutters and its surface was less than a foot lower than the sidewalk. As defendant entered the block, there was at the lower end of it a large crowd gathered around a police patrol wagon which had made an arrest, and more people were hastening towards this center of excitement. Defendant slackened speed to six or seven miles an hour; and, as the crowd was densest on the right-hand, or downtown, side of the street, where the patrol wagon stood, he steered towards the left, or uptown, side, hoping to be able to pass—tooting his horn, so as to give warning to the crowd to open a passage for him. The

accident occurred half way down the block, and two to four feet from the left-hand, or uptown, side curbing. The boy had run down with other boys from some distance up the street towards the scene of the excitement, and seems to have lagged behind, for we gather that at the moment of the accident he was alone in the middle part of the block, except that there were persons seated on their door-steps, or standing at their gates.

One witness, a colored woman, says that the boy was standing in the street when the automobile came from behind and struck him. Another witness, Mrs. Duker, says the boy was walking, not running; that he stepped from the sidewalk to the street, going in the direction of the patrol wagon; that he made two steps in the street and, as he was making the third, the automobile struck him. Another witness, Valcour, says that five little boys were running on the banquette towards the excitement; that, when they got in the middle of the block, "they jumped into the middle of the street, and the automobile came along and struck one and knocked him down; that he left the banquette 10 or 15 feet ahead of the automobile." A witness for defendant, Mrs. Oddo, says that the boy came running on the sidewalk, "looking at the patrol wagon; he stepped right in front of the automobile." Another witness for defendant, Police Officer Kiernan, says that "the boy ran right out, jumped out, into the street, and the automobile struck him; it was the wheel that struck him." Another witness for defendant, Police Officer Duffy, says that "this little boy, he must have come from the banquette, and was going to cross the street, and I think the lamp of the automobile struck him." Another witness for defendant, Galy, says "this little boy was standing on this side of Johnson street; the doctor was on the lower side, and he ran across the street, looking towards the patrol wagon, and not bothering about the automobile or anything else, and when he found himself in front of the automobile it looked like he fell back a little and the doctor ran this way, and he ran into the machine." Another witness for defendant, Mrs. Blanchard, one of the occupants of the automobile, says:

"The child was on the sidewalk, and he just crossed over right in front of the automobile, when it struck him."

Defendant himself says he was blowing his horn "in order to get an opening sufficient to go through this immense crowd that was there at the corner, and didn't see the boy until he was struck."

From this evidence we conclude that the child was at first going straight down the banquette on the uptown side, and that, when he got about the middle of the block, he slanted to the right, in the direction of the patrol wagon, which was at the downtown corner.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

so that his course and that of the automobile tended to converge. We find nothing to show that his course was squarely across the street. Therefore, had the defendant been duly observant, as any one using a death-dealing machine upon a public street is bound to be, he would have noticed that the course of the boy was convergent with his own, and that the boy was not paying attention. True, if the boy was running, there may have been very little time for stopping or shunting the machine; but the defendant should have been observant and allowed the child this chance for the saving of his life. *Crisman v. Shreveport Belt R. R. Co.*, 110 La. 640, 34 South. 718, 62 L. R. A. 747. Defendant's whole attention evidently was centered upon getting an opening through the crowd ahead; he became unmindful for the moment of the danger to which he might be exposing those who, like himself, from the same cause of the excitement ahead, might be in his way upon the street.

There can be no question of contributory negligence in the case. Cases of persons going upon railroad tracks have no analogy. The boy's attention was fixed upon the excitement ahead of him; as everybody else's was. He was simply following others who had just preceded him, going in the same direction. If he had thought of the matter at all, he would have had the right to assume that an automobile or other fast-moving private vehicle would not run him down.

But if there was contributory negligence, still the defendant would be responsible, under the last-chance doctrine, for had he been looking (as he was legally bound to be doing) he would have seen the boy, and seen that he was unaware of the danger into which he was going. Possibly it would, even then, have been too late; but defendant should have been sufficiently attentive to have been in a position to make the trial.

One thing is certain that the boy did not know that the machine was so near. Combining the testimony of the witnesses who say that the boy was "standing" in the street with that of Mr. Galy, that, "when he found himself in front of the automobile, it looked like he fell back a little," we would conjecture that a toot of the machine attracted the attention of the boy and checked his course, and that just then he was run over. In other words, that the tooting of the machine was not continuous, as one uninterrupted blowing, but consisted of successive tootings at short intervals; and that the quickly moving machine passed from the lower to the upper side of the street in the interval between two blowings.

This would account for the boy's not having heard. His not having seen is accounted for by the machine having been behind his back. The innate sense of self-preservation would have checked him, had he either seen or heard; hence, our assuming that he did neither.

Plaintiffs claim \$25,000 damages, distributed, as follows: For the loss of the society and affection of their child, and the future assistance and support they might expect to receive from him, \$5,000; for the sufferings of the child, \$5,000; for their own suffering, mental as well as physical, \$10,000; punitive damages, \$5,000.

There is no evidence of the child having suffered. His skull was so badly fractured that an operation was deemed inadvisable. From this we infer that he was unconscious and insensible from the moment of the blow.

Mr. Burvant testifies that the death of his boy has made "a wreck of his life"; that for nearly nine months he was "physically incapable of attending to my business, because to me life was not worth living." Mrs. Burvant is less exaggerated in her statement. She says that it made her "very nervous"; that for 15 days she was sick in bed, just getting in and out of bed, from nervous prostration. The plaintiffs are 44 and 45 years old, and the child was their youngest. How many more they had, the record does not show. Whether they were healthy, ordinarily constituted people, or of so nervous a temperament that a stroke of this kind would affect them to a greater extent than ordinary people, the record does not show.

The jury, who saw them on the witness stand, allowed them \$1,500. This was by a divided vote of nine for and three against.

The moderation of this allowance was doubtless responsive to a sentiment on their part that Dr. Wolfe was more unfortunate than culpable in this sad affair; as is in truth the case. The liability is more legal, or, we might say, technical, than moral. We realize this fully; at the same time there is a legal liability, and \$1,500 is not commensurate.

The feelings of a parent, especially of a mother, on such an occasion, are not susceptible of exact computation in dollars and cents; if an estimate were attempted, it would doubtless exceed the fortune of Dr. Wolfe. The physical suffering of plaintiffs we hardly can take into consideration alongside of their so incomparably greater mental suffering.

In the case of *Buechner v. City of New Orleans*, 112 La. 600, 36 South. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455, where the court allowed \$6,000, there was no question raised in connection with the amount allowed by the jury, and the court simply affirmed the verdict.

In the case of *Sundmaker v. Yazoo & Mississippi Valley R. R. Co.*, 106 La. 111, 30 South. 285, the court allowed \$4,000.

Considering all the circumstances of the case, we have concluded to fix the amount in this case at \$3,000.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be increased to \$3,000, and that, as thus amended, it be affirmed.

(126 La.)

No. 17,875.

YERGER v. MURDOCH.

(Supreme Court of Louisiana. June 6, 1910.
On Application for Rehearing, June
25, 1910.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 584*) — WEIGHT AND SUFFICIENCY.**

A claim for over \$500 must be established by the testimony of two witnesses, or of one witness and corroborating circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2427; Dec. Dig. § 584.*]

2. ASSIGNMENTS (§ 137*) — CONTRACTS — EVIDENCE TO ESTABLISH.

The testimony of the lessee of a cotton plantation, in the northern part of the state, to the effect that, about October 1st, in New York, the owner agreed to buy the tenants' accounts, at their face value, up to \$5,000, in order to regain possession, without litigation or delay, is insufficient to make out a case, when contradicted by the other contracting party, and when the evidence shows that it was not known what amounts the tenants then owed, or would owe at the end of the year, and when it does not show that the accounts were ever assigned to the alleged purchaser, that the debtors were ever notified that they could discharge their debts by payment to any other than the original debtor, that the alleged purchaser collected or attempted to collect said accounts, or that the alleged seller did not, after the alleged sale, collect such of them as he could.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 137.*]

3. SALES (§ 52*) — EVIDENCE TO ESTABLISH.

And so the unsupported testimony of a lessee, to the effect that the lessor agreed, with no information save the lessee's statement, to pay him over \$1,050 for peas alleged to have been purchased and planted, as a fertilizer, is insufficient for recovery, where it appears that peas had always been planted on the same land, for the same purpose, and that the property when surrendered by the lessee was in no better condition than when received by him, or than as required by his lease.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 136; Dec. Dig. § 52.*]

Appeal from Ninth Judicial District Court, Parish of Madison; F. X. Ransdell, Judge.

Action by George S. Yerger against A. A. Murdoch. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

E. C. Montgomery and Hudson, Potts & Bernstein, for appellant. Snyder & Gilfoil (M. M. Boatner, of counsel), for appellee.

Statement of the Case.

MONROE, J. Plaintiff alleges that up to January 1, 1906, he was the lessee of defendant's "Fortune Fork" and "Banner" plantations; that at or about the termination of this lease, he sold to defendant, represented by her agent, W. S. Holmes, certain live stock, farming implements, peas, oats, and cotton seed, and handed her cash, the whole amounting to \$2,127.45; that he also sold, assigned, and delivered to her certain accounts, due him by tenants on said plantations, amounting to \$4,668.01; that defendant has

paid him \$100, leaving due a balance of \$6,695.46, for which he prays that he have judgment, with interest. Plaintiff annexes to his petition, and makes part thereof, an account, which reads:

Account of George S. Yerger.

Mrs. A. A. Murdoch.

Fortune Fork and Banner Plantation to George S. Yerger, Dr.

1905.		
Aug.	Cash, handed you in New York	\$ 150 00
Jan. 1.	10 Double shovels at \$ 3 00	36 00
	14 plows " "	112 00
	6 cotton planters " "	66 00
	16 cultivators " "	112 00
	14 hogs	56 00
	17 pigs	8 50
	12 cows	180 00
	300 bu. peas & planting	1,050 00
	60 sacks oats, 330 bu., 54 cts.	178 20
	4 1/2 tons tools & Peterkin Co. seed	148 75
July	Cash handed you on train...	30 00
		<hr/>
	Tenants' accounts	\$2,127 45
		<hr/>
	By cash	4,668 01
		<hr/>
		\$6,795 46
		<hr/>
		100 00
		<hr/>
		\$6,695 46

Defendant pleads the general issue, and specially denies that her agent bought the tenants' accounts, as alleged, or that he was authorized so to do.

It appears that defendant was under interdiction, and that on November 22, 1904, her guardian, the Mississippi Bank & Trust Company of Mississippi (where she then lived), by written instrument, leased her plantation, in Madison parish, La., with certain reservations, to plaintiff, for one year, from January 1, 1905, at an annual rental of \$8,700, for which plaintiff gave his note, payable on November 1, 1905. The lease contained, among others, the following stipulation, to wit:

"And the party of the first part * * * hereby further covenants and agrees that it will, on or before November 1, 1905, if the party of the second part so desires and requests, grant and execute to him a new lease of the premises here demised for the said further term of five years, to commence from the expiration of the term hereby granted, the same to be at the same annual rental. * * * The party of the second part * * * agrees, at the end of this lease, to return possession of the premises and appurtenances herein leased in like good order as received, the usual decay, wear and tear and accidents of Providence, only, excepted."

Some time after the execution of the lease, defendant was relieved of the interdiction and reinvested with the control of her property, and in July, 1906, she appointed W. S. Holmes her agent and attorney in fact, with full power of administration. It appears, too, that, Fortune Fork plantation having been her home, she wished to return to it, and gave some intimation to that effect, which reached the negroes, and, through

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

them, the plaintiff. In the fall of 1905, therefore (say about the last of September or first of October), plaintiff went to New York, where defendant and Holmes were then sojourning, for the purpose of making some arrangement with regard to his interest; the position that he first assumed being that he had the right to avail himself of the option to extend his lease. He testifies, in effect, that, when he broached the subject, Holmes denied that he had any such right, and said that the option was not worth the paper upon which it was written, and plaintiff seems to have accepted that view of the matter and to have then offered \$1,500 as additional rent for the renewal of his lease, which offer was declined. He then took the position that he could retain possession of the property for some time and give defendant trouble, in one way or another, and would do so, unless she agreed to comply with certain demands with regard to advances which he had made to the tenants and to the reimbursement of money expended by him in the purchase and planting of a lot of peas. He testifies that the matter was discussed with both defendant and Holmes, and his first statement as to the result of the discussion is as follows:

"She (defendant) insisted that she was going to run the property another year, and I, very plainly, told her and Mr. Holmes that, unless they paid me the balance the negroes would owe, and for the peas I had planted, which benefited me none at all, in 1905, but I had planted them with the expectation of realizing a benefit by bringing up the land for the following year. Q. What did she agree to do, if anything? A. She finally agreed to pay for the peas and the planting, and agreed to the number of bushels, though I planted a great many more, and to pay the accounts, and for anything else that I might leave there, later on."

He subsequently testifies that the agreement was, not that defendant should pay the accounts, but that she should buy them, provided they did not exceed \$5,000, and he says, quite positively, that nothing else was discussed, at that time, save the questions of the termination of the lease, the accounts due by the tenants, and his claim with regard to the peas; defendant's obligation with respect to anything else having been assumed (according to such subsequent testimony) at a later period and after she had acquired possession of the property. Plaintiff admits that Holmes was, at first, wholly unwilling that defendant should pay anything in order to be restored to possession. He also admits that, upon the occasion of the alleged agreement in New York, he did not have the accounts of the tenants with him, and did not know how much they then owed, and, still less, how much they would owe at the end of the year. It does not appear that he ever made any assignment to defendant of his claims against the tenants; that the tenants were ever formally notified of the alleged change of creditors; or that their accounts on plaintiff's books were ever closed; nor does it ap-

pear that either defendant or plaintiff ever made any attempt to collect the accounts.

Holmes' version of the matter is that there were frequent discussions (in New York) between him and plaintiff, and two or three in which defendant participated; that plaintiff urged that he had put out a good deal of money with the expectation of renewing his lease and was entitled to reimbursement; that defendant was anxious to get her property back, without litigation or delay, and was willing to pay a few thousand dollars in order to do so; but that plaintiff was claiming very much more than the witness (to whom defendant left the settlement of the matter) was willing to advise his client to pay, particularly as he knew nothing about plaintiff's disbursements save what plaintiff then told him. He says, in his testimony:

"As I remember it, * * * I would not agree to let Mrs. Murdoch agree to pay any such amount. I think it was something like \$10,000 he would come out behind on the two places. * * * I said that, when we made a good crop, and got ahead, and Mrs. Murdoch wanted me to, I would agree to pay a reasonable amount, if he would turn the property over without any litigation and would not bother the negroes, cattle and hogs, and stock, and would not try to move any of the tenants. Q. I will ask you, Mr. Holmes, to state whether or not there was ever any definite agreement about what you would pay, later, on these accounts, if you made a good crop? A. No. * * * Q. State whether or not there was ever any attempt (agreement) on the part of Mrs. Murdoch to collect these accounts, and by whom it was entered into? A. I think that would be optional with her whether she wanted to do that. Mrs. Murdoch and I both felt very kindly towards Mr. Yerger and the Maxwell-Yerger Company, on account of favors shown to us, not only in getting tenants, but in any way he, or they, could, and we both felt very kindly to Mr. Yerger, and Mrs. Murdoch wanted him paid what he was out, in a reasonable amount."

He testifies that he considered that Mrs. Murdoch was under some moral obligation in the matter, but, whilst plaintiff insisted upon a larger amount, he (witness) always thought that \$2,000 would be what he would be willing to "stand for," to be paid, when collected, upon the making of a large crop; that no definite agreement on the subject was ever reached; that he had no recollection of having agreed to pay for any peas; that such an arrangement would not be customary; that he had never heard of its having been made by others; that, as to the farming implements, he told Oaks, the manager, that they would buy everything left by Yerger that they could use, but no price was agreed on; that (some months after the conversation in New York) he ascertained from Mr. Jones (who represented defendant's then guardian, the trust company) that he (Jones) had sold plaintiff certain cattle and hogs, which he (witness) then agreed with plaintiff to buy back, though there appears to have been no identification of the animals and no price fixed. He admits having ob-

tained \$150 from plaintiff, for defendant's account, in New York, and also admits that he paid plaintiff the \$100 with which the account sued on is credited, knowing that defendant owed him the \$150 and also owed him something for the cattle, hogs, and implements.

The witness testifies that he does not remember that any such account as that sued on was ever presented to him, or that he ever saw the tenants' accounts, save at the "store," where he "happened to look at the books to see what the various tenants owed him" (plaintiff). There is in evidence a letter from the witness to plaintiff reading as follows:

"July 29, 1908.

"Dear George: I have not collected the money due Mrs. M— from the party in Jackson, I do not see how I can settle the account until she gins. If I can borrow some money in the meantime, I will remit, but the money is not here to make good.

"Sincerely, [Signed] Wm. S. Holmes."

The writer testifies that he has no recollection of the letter and does not know to what account it refers, but that there was no one in Jackson from whom he could have expected to collect an amount sufficient to pay the account here sued on. Plaintiff testifies, with uncertainty, that, as he takes it, the letter refers to the account sued on. He does not, however, produce any copies of his own letters or of the letters of Maxwell-Yerger Company, of which concern he was an active member, and, as the evidence shows that Mrs. Murdoch, at that time, owed an account, or accounts, to the firm, in settlement of which her agent gave a note, our conclusion is that the letter referred to that business. Mr. Holmes' relations with the defendant terminated in July, 1907, and he was succeeded in his position, as her agent, by El C. Montgomery, who testifies that, although plaintiff spoke to him about Mrs. Murdoch's indebtedness, and though he represented that lady until March 20, 1908, he never heard of the account sued on until after this suit was filed (which was in November, 1908), and that, as Mrs. Murdoch had an unpaid account in one of the Maxwell-Yerger stores, he naturally assumed that plaintiff was referring to it; which testimony is in apparent conflict with that given by plaintiff, who says that he mailed to Judge Montgomery a copy of the account sued on. Towards the close of plaintiff's examination, we find the following:

"Q. On the 21st of February, 1906, there was an item, 'cash paid Maxwell-Yerger Company, store account, \$500,' on the account book of Holmes against Mrs. Murdoch, and there is another item, on the 27th day of February, 1906, in the same account of \$500, 'store account.' Can you tell whether any of the items going to make up these accounts were articles charged on the account sued on?"

To which the witness replied:

"I know, positively, not."

Counsel then said to him:

"Q. I will ask if you will look up the two accounts and file copies with these papers?"

To which he replied:

"Yes, I will have Maxwell-Yerger Company make a copy of those two accounts."

Immediately following the answer thus given, we find, on the face of the transcript, an interlineation, apparently made after the transcript was completed, reading:

"Witness Yerger produced the two documents, and they were filed June 12, 1909. [Signed] W. H. Harvey, Clerk."

At the date last mentioned, the case having been submitted, the record had been in the hands of the trial judge for a month or six weeks, and we infer that he never heard of the filing of the document (there being, in fact, but one), since he does not mention any such thing in his opinion.

"The two documents," as thus mentioned by the clerk, were not included in the transcript, and, some months after the appeal had been lodged in this court, plaintiff, through his counsel, applied for a writ of certiorari, alleging:

"That the transcript of appeal herein filed is incomplete, in this: That on the last day of the trial in the court a qua, the plaintiff, being on the stand as a witness, was called on by the defendant to produce a certain document, being an account of the items sued on in this cause, which he had testified was presented by him to W. S. Holmes, agent of the defendant, and which was approved by said agent by a written indorsement thereon, signed by said agent, and thereupon the plaintiff, yielding to said call, agreed to produce and file the said document, if it could be found. Petitioner shows that, subsequently, on the 12th day of June, 1909, he complied with the said call by producing and filing, in the office of the clerk of the court a qua, the said document, which was received by the said clerk and by him indorsed: 'Filed in evidence, June 12, 1909.' But petitioner alleges that, in making up the transcript of appeal herein, the said clerk omitted the said document therefrom."

And the prayer is that the clerk be ordered to send up a certified copy of the document thus described, which the clerk appears to have done; the document returned by him purporting to be a copy of an account against the defendant, and in favor of plaintiff, in which defendant is charged with "300 bu. of peas and planting, \$1,050," as in the account "B" annexed to the petition, and is further charged with the amounts due plaintiff by the tenants, the names of the latter, with the amounts due by each, being set forth in detail, the whole showing an indebtedness by defendant of \$5,718.01, of which \$4,668.01 appears to be due for tenants' accounts. Upon the face of this instrument, there appears the following:

"O. K. [Signed] Wm. S. Holmes."

Defendant, examined as a witness, says:

"I only recall having a social conversation with Mr. Yerger. It was down in a public hall, and it was no place to discuss business."

She positively denies having had any conversation with plaintiff concerning the termination of his lease, the tenants' accounts, the peas, or any other business matters, and denies having received from him the items of \$150 and \$80, in cash, for which she is charged, though she says that those amounts may have been given to Mr. Holmes. She also says that plaintiff gave her the hogs that he was leaving on the place, and that she returned thanks. The judge a quo rejected plaintiff's claim, as predicated upon the alleged purchase by defendant of the tenants' accounts and the alleged agreement to pay for the peas, and gave judgment in his favor for a balance of \$1,077.45, with interest. Defendant has appealed, and plaintiff has answered, praying for an amendment of the judgment.

Opinion.

A motion has been filed in this court suggesting the death of the defendant and making R. N. Farrar, her executor, a party to the appeal. Another motion has been filed, alleging that the document brought up by certiorari is no part of the record; "that it is an ex parte and unsworn statement, filed without the consent of, or notice to, defendant, more than a month after the case had been tried and submitted, and while the case was under advisement; and that the clerk had no authority to receive and file same, as part of the evidence in this case or otherwise"; further alleging that the averments contained in the petition for certiorari, to the effect that said document was called for and its filing authorized, are incorrect; and praying that said document be stricken from the record and not considered.

We are of opinion that this motion (last above mentioned) should be sustained. What plaintiff was authorized to file, after the submission of the case, were copies of two supposed accounts, to be taken from the books of Maxwell-Yerger Company; the one, showing a payment to that concern, by defendant, of \$500, on February 21, 1906, and the other showing payment of a like sum by defendant on February 27, 1906, and the purpose being to ascertain whether in those accounts, or either of them, defendant is charged with any of the items which go to make up the account sued on. And that plaintiff was aware that the call was for the two accounts of Maxwell-Yerger Company against defendant, and not for a copy of his account as sued on, appears evident from his answer to the request of defendant's counsel:

"I will ask if you will look at the two accounts and file (copies) with these papers."

The answer being:

"Yes, I will have Maxwell-Yerger Company make a copy of those two accounts."

Considering the case upon the basis of the evidence properly in the record, we find it

somewhat remarkable that plaintiff should have paid his rent note due November 1, 1905, without making some effort to collect the \$6,695.48 which he here claims. Passing on, however, to the consideration of the different items of his claim, and without going into the question of the authority of defendant's agent to bind her with respect to the tenants' accounts and the peas, we agree with our learned brother of the district court that, as to those items, plaintiff has failed to prove the contract relied on. Agreements between outgoing and incoming lessees of plantations, with respect to the debts due by the tenants, are, no doubt, common enough, though they are not matters of course, and plaintiff admits that, when he took the plantations in question, he assumed no obligation with respect to the debts due by the tenants to his predecessor. When first testifying, he stated that he visited New York in August, 1905, and that defendant and her agent then agreed to pay him the amounts due by the tenants, and also to pay him \$1,050 for peas which he had planted, including the cost of planting them. Somewhat later, and after an objection had been sustained to oral testimony of a promise to pay the debt of a third person, he corrected his former statement and said that his visit to New York was made, say, in the latter part of September, or about the first of October, and that defendant and her agent agreed to pay him for the tenants' accounts; that is to say, to buy them from him, provided they should not exceed, in the aggregate, \$5,000. He admits, however, that he did not have the accounts with him, and that he did not know the amount due by any one tenant, or by them all, and we infer that he would not have known the tenants, or many of them, if he had met them. Under such circumstances, it seems to us highly improbable that defendant and her agent, who were even more in the dark, would have agreed, as plaintiff testifies that they did, to pay him "for each and every one of the accounts, provided it (the aggregate account) was not over \$5,000"; the more particularly as, at that time (whether early in August or about October 1st), it is not likely that the crops had been marketed, or that there had been even such partial settlement as would have enabled plaintiff, though he had been at home, to determine how he and his tenants would stand at the end of the year. To this improbability we must add the direct testimony of the parties with whom plaintiff says he contracted, to the effect that no such contract as that testified to by him was made, and we must add the facts that it is not shown that the accounts alleged in the petition to have been "sold, assigned, and delivered" were ever identified or assigned, that the tenants were ever notified that they could discharge their debts to plaintiff by payments to defendant, that defendant ever collected, or attempted

to collect, any of the accounts, or that plaintiff, in his settlements with the tenants, after his negotiation with defendant, or her agent, in New York, did not collect some, or parts of some, of the accounts referred to in those negotiations.

The claim for the price of, and for the cost of planting, the peas, has no better support. Plaintiff says that defendant and her agent agreed to pay him \$1,050 for 300 bushels of peas which he had planted solely to fertilize the land. Defendant denies that she made any such agreement, and her agent says that he has no recollection of having done so, and that it would have been an unheard of thing; the fact being that cotton lands require fertilization year after year, and that a particular lessee, getting the benefit of the fertilization done by his predecessor, concedes to his successor the benefit of that which he does. William Oaks, plaintiff's manager, testifying, as a witness on his behalf, says that defendant's husband, Murdock, always planted peas, that they were planted on Fortune Fork and Banner plantations in 1904, and that those places were in about the same condition when plaintiff surrendered them as when he received them, which was no more than was required by plaintiff's contract.

The petition alleges that plaintiff "sold and delivered to said Mrs. A. A. Murdoch, through her agent and general manager, W. S. Holmes, certain farming implements, live stock, peas, oats, cotton seed, and handed her, in cash, items amounting to \$2,127.45," etc., and the account which is made part of the petition itemizes the articles said to have been sold and distinguishes them from the money said to have been handed to the defendant. The objection that there "is no allegation in the petition covering borrowed money" is, therefore, not well taken, and we think that the proof sustains the claim for the two items of \$150 and \$30, said to have been handed to the defendant; those amounts having been handed to her agent for her account. With regard to the items, aggregating, on the face of the account, \$326, for shovels, plows, cotton planters, and cultivators, we notice that 10 double shovels, at \$3, should result in a charge of \$30, and not \$36, as stated in the account; but the evidence fails to show either that the articles charged for were delivered, or that there was any price agreed on. Oaks, plaintiff's manager, testifies that plaintiff bought a good many implements, such as those mentioned in the account, and that he took none away; but he is unable to say how many were bought or how many survived the wear and tear of a year's use, no inventory having been taken when the plantations were surrendered. The same is true with regard to the cattle and hogs. Plaintiff bought certain live stock from defendant's guardian, and defendant, through her agent, agreed to repurchase it.

at the price paid; but plaintiff does not know how many hogs, pigs, cows, or heifers were on the places when he gave them up, and no one else appears to be much better informed. Oaks testifies, in effect, that defendant received three hogs and "some pigs," and four or six head of cattle, including both cows and calves; but whether there were four or six, and how many were cows and how many calves, we are not informed. As to live stock, therefore, the case is made out with respect only to three hogs and a plurality of, or, say, two, pigs. Plaintiff's testimony in regard to the items of \$178.20 for oats, and \$148.75 for "4½ tons of tools and Peterkin Co. seed," is not as definite as it should be; but, as there appears to be nothing to the contrary, it may be accepted as sufficient. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the principal amount awarded from \$1,077.45 to \$519.95, and by rejecting the demand for the value of agricultural implements and cows as in case of nonsuit; plaintiff to pay the cost of appeal.

On Application for Rehearing.

In writing up the decree, the organ of the court omitted to allow defendant credit for \$100 which plaintiff admits that he received.

It is therefore ordered that the decree heretofore handed down be amended, by reducing the amount awarded plaintiff by \$100.

Rehearing refused to both applicants.

(126 La.)

No. 18,223.

MONTELEONE v. SEABOARD FIRE & MARINE INS. CO.

In re SEABOARD FIRE & MARINE INS. CO.
(Supreme Court of Louisiana. June 20, 1910.
Rehearing Denied June 30, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 224*)—APPELLATE JURISDICTION—SUPREME COURT—REVIEW OF COURT OF APPEAL—DISCRETION.

The Supreme Court has the power and authority, when a case is brought before it for review under article 101 of the Constitution, to deal with it as if on appeal and pass on all issues involved in the litigation whether of law or fact; but whether it should do so is a matter of discretion with it.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 224.*]

2. CONSTITUTIONAL LAW (§ 240*)—CLASS LEGISLATION—DISCRIMINATION AGAINST INSURANCE COMPANIES—IMPOSING DAMAGES AND ATTORNEY'S FEES.

Act No. 168 of 1908 is not unconstitutional. It does not arbitrarily discriminate against insurance corporations and hamper their right to seek adequate remedy through the courts, nor require the latter by a fixed legislative ironclad rule to impose upon insurance companies which have defended themselves against claims based on policies issued by them and been cast in the action to pay, in addition to the sum found due

by them on the policies, 12 per cent. damages and attorney's fees.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-699; Dec. Dig. § 240.*]

3. CONSTITUTIONAL LAW (§§ 154, 169*)—OBLIGATION OF CONTRACT—REMEDIES—RIGHT OF PARTIES TO REGULATE.

Act No. 168 of 1908 is not unconstitutional as impairing the obligations of contracts. It deals with remedies, and not contract obligations. The furnishing of preliminary proofs of loss and the rules governing the same are remedial. Parties are freer to make contracts than they are to regulate and control remedies. When parties undertake to fix the remedies by which their rights and obligations are to be enforced, they do so subject to the paramount right of the state on the subject and its determination as to the policy which the general good requires to be done. It is not competent for parties by stipulation to bind the hands of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 474; Dec. Dig. §§ 154, 169.*]

4. CONSTITUTIONAL LAW (§ 70*)—RIGHT OF LEGISLATURE TO CLASSIFY BUSINESS OCCUPATIONS.

The constitutional right of the General Assembly in respect to the classification of business occupations has been repeatedly passed upon judicially. The exercise of the discretion of the legislative department on that subject cannot be interfered with by the courts so long as it is kept within the limit of constitutional legislative discretion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-137; Dec. Dig. § 70.*]

5. INSURANCE (§ 534*)—PAYMENT OF LOSSES—STATUTORY PROVISIONS.

The provisions of Act No. 168 of 1908 are not confined to policies which issued subsequently to the passage of that act.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 534.*]

6. INSURANCE (§ 558*) — PROOFS OF LOSS — WAIVER.

The defendant company, having failed to furnish the plaintiff with blank proofs of loss on being notified of the loss as required by section 1 of the act, must be held to have waived the furnishing by plaintiffs of such preliminary proof of loss. The rights and obligations of the parties to this litigation are governed and controlled by the act in question and by the decision of this court in the matter of Wholesale Mercantile Company v. Teutonia Insurance Company, 113 La. 1053, 37 South. 967.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1387; Dec. Dig. § 558.*]

Action by Gustave Monteleone against the Seaboard Fire & Marine Insurance Company. A judgment for plaintiff was affirmed by the Court of Appeal, and defendant applies for certiorari or writ of review to the Court of Appeal. Affirmed.

Edgar H. Farrar, Jr., for applicant. Benjamin R. Forman and Anthony J. Rossi, for respondent.

NICHOLLS, J. The judgment of the Court of Appeal brought up for review discloses clearly and concisely the issues which are submitted to us in this case for decision. It was as follows:

"Plaintiff sues to recover a total loss by fire on October 12, 1908, of household effects covered by policy of insurance for \$1,000 issued by defendant on April 14, 1908, and prays for judgment for the face of the policy, together with the attorney's fees and damages authorized to be recovered by Act 168 of 1908.

"The answer, after setting up a failure to submit proof of loss, denies liability on the ground that the loss was caused by explosion which preceded the fire, and that the building containing the property fell previous to the fire, in consequence of which insurance ceased under the express terms of the policy.

"There is conflict of evidence as to whether proofs of loss were furnished. It appears, however, that defendants tendered plaintiff for signature a nonwaiver agreement, which the latter refused to sign, whereupon defendant satisfied him it would have nothing more to do with the loss or the adjustment.

"This unauthorized and unwarranted withdrawal by the insurer was equivalent to a denial of liability and waived the requirement of the policy with respect to the necessity of furnishing proofs of loss. *St. Landry Wholesale Mercantile Co. v. Teutonia Insurance Co.*, 37 South. 967, 113 La. 1053.

"It is unnecessary to inquire whether the explosion did or did not precede the fire. It is sufficient to say that the only result of the explosion was the throwing from their bearings of a few doors and windows, and that the uncontradicted testimony of plaintiff is to the effect that the damage suffered was due exclusively to the fire. This is sufficient to show that the explosion had nothing to do with the loss.

"The value of the property destroyed is undisputed and exceeds the amount of insurance, and upon the facts of the case the plaintiff is entitled to judgment for the full amount of the policy and to the other claims, unless the legal defense interposed is well founded.

"This defense is that the provisions of Act No. 168 of 1908, allowing attorney's fees and 12 per cent. damages to be recovered by the plaintiff from any insurer failing to reasonably settle any just loss, are not retroactive so as to apply to policies issued prior to the enactment, and, even if intended to be so, they are void as impairing this obligation of the contract.

"No other feature of the act is attacked and no other ground of unconstitutionality is suggested. The only questions to be considered therefore are: (1) Is the statute constitutional? (2) Is it retroactive in its operation?

"The right of the Legislature to enact statutes of this character may not be disputed. If they are remedial and effect the enforcement only and not the substance of the contract, they constitute a valid exercise of the legislative authority and are a declaration of the public policy of the state.

"They may change the remedy or mode of enforcement of the contract or the penalties attending the breach of a contract already in existence without impairing its obligation unless such remedy or penalty forms part of the contract itself.

"To carry out their purposes, such statutes must be liberally construed and may properly be retroactive in their operation. *American Fire Ins. Co. v. Landfare*, 58 Neb. 482, 76 N. W. 1072; *Farmers' & Merchants' Insurance Company v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821.

"*Sutherland on Statutory Damages*, vol. 2, pp. 643, 1073; *Cooley's Constitutional Limitation* (7th Ed.) p. 410; *American Fire Ins. Co. v. Landfare*, 58 Neb. 482, 76 N. W. 1072.

"Passing now to the jurisprudence of our own state, we find that it is broader than that of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other jurisdictions in respect to the interpretation to be placed on remedial laws.

"In *Scott v. Duke*, 3 La. Ann. 253, the Supreme Court said:

"The distinction between laws impairing obligations and laws modifying the remedy given by the Legislature to enforce the obligation was fully recognized by Judge Marshall in the case of *Sturges v. Crowninshield*, 4 Wheat. 200 [4 L. Ed. 529]. * * * Laws regulating the form of judicial proceedings are remedial laws, and that form depends upon the law in force at the time the proceedings are instituted without regard to the law at the time of the occurrence or the facts upon which they are based. It may even vary, and it does actually vary, if, before the final decision, a new law intervenes which changes the form, unless that law expressly declares that the pre-existing form shall continue to be followed in the case then pending."

"In *Cassard v. Tracy*, 52 La. Ann. 856 [27 South. 368, 49 L. R. A. 272], after citing that and many other cases, Blanchard, J., said:

"The rule that the terms of a statute or Constitution are not to be interpreted as having a retrospective or retroactive operation, unless the language used plainly conveys that intention and is susceptible of no other interpretation, finds no application to remedial statutes or to the remedial provisions of organic laws. Remedial laws are an exception to the general rule and may have retroactive or retrospective force."

"Let us now examine the act in the light of the foregoing cases.

"Section 1 makes it the duty of the fire insurance company to furnish blank proofs of loss to the assured 'whenever any loss or damage shall be suffered in this state from fire.'

"Section 2 declares that the failure to furnish blanks will be considered as a waiver of proofs of loss. 'In case of loss,' the damage by fire is provided in the preceding section.

"Section 4 provides that 'insurance companies shall deliver to the insured with each policy issued a copy of this act.'

"We need not inquire whether or not those sections of the enactment are retrospective. They are not involved in this controversy, which rests conclusively on the provisions of section 3, which alone contains the provisions herein objected to.

"Conceding arguendo that some of them are intended to be prospective only in their operation, we see no reason why a law may not be properly prospective in some respects, and retrospective in others. Section 3 of this act, so far as pertinent, reads as follows:

"That whenever any loss or damage shall be suffered in this state from fire by any person, firm or corporation upon property insured under a policy of insurance of any fire insurance company doing business in this state, it shall be the duty of the fire insurance company that has issued the policy or policies upon receipt of proofs of loss from the assured, to pay the amount due under its policy or policies within sixty days thereafter. * * *

"And should the company fail to pay within said time, the amount due the insured under the policy after demand made therefor, such company shall be liable to pay the holder or holders of such policy in addition to the amount of the loss, twelve per cent. damages on the total amount of the loss * * * together with all reasonable attorney's fees for the prosecution and collection of such loss."

"The text of this section refers to loss or damage which shall be suffered, and not to a policy which should be issued. It makes no distinction between losses occurring under policies already issued and those occurring under policies to be issued thereafter. Had the Legislature intended to restrict the operation of the remedy to losses arising under policies to be

issued after the passage of the statute, it would have said so. Under the authorities cited, it is clear we must construe section 3 of Act No. 168 of 1908 as applying to policies issued before its enactment as well as those issued after it.

"Counsel for defendant admits that if the attorney's fees are exigible the liquidated damages also are.

"In this respect the judgment must be amended.

"The judgment is amended by adding thereto the amount of \$120 as liquidated damages, and, as amended, the judgment is affirmed."

In support of an application for a rehearing, the defendant urged the following grounds:

That the demander on the part of the adjuster for the plaintiff to sign a nonwaiver agreement, under the circumstances of this fire, was neither unauthorized nor unwarranted and did not under the law waive the requirement of furnishing proofs of loss.

That the fact of the whole premises in this case being totally consumed by fire was a judicial admission made by appellant in the original answer; but it was contended that the fire was preceded and caused by an explosion which damaged the building and contents. Plaintiff on the stand testified that everything was burned up, but did not testify that the property was not damaged at all. These being the facts under the rule laid down in the case of *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 16 L. R. A. (N. S.) 77, 94 Pac. 32, and cases there cited, the defendant was entitled to proof on the part of the plaintiff of the value of the property destroyed by fire in its then condition after the explosion. It was plaintiff's duty immediately to furnish this proof. Not having done so or attempted to do so the defendant is entitled to a judgment as in case of nonsuit. That act of 1908 impairs the obligation of the contract in a policy written before its passage. See *Arkansas Mut. Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226.

That the doctrine in *Cassard v. Tracy*, 52 La. Ann. 856, 27 South. 368, 49 L. R. A. 272, does not go so far as to allow this court to take one section out of an act which may from the language of that section be capable of retroactive construction, and apply that section of the statute to a policy written before its passage, when that section is merely a section imposing penalties for noncompliance with the other three sections of the statute is such as to be incapable of retroactive interpretation.

This case has been brought up to this court for review under an order of one of the associate justices.

An impression prevails, when a case is brought us under article 101 of the Constitution, we will as a matter of course deal with it as if it were on appeal and pass upon all issues involved in the litigation whether of law or fact. That is a mistake. We have the power and authority to do this; but it is a matter of discretion with the court as to

whether it is called on to examine into and dispose of the facts.

In the matter now before us, the facts have been passed upon in favor of the plaintiff by the judge of the district court and two of the judges of the Court of Appeal. Their conclusions are *prima facie* correct. We have examined the testimony in the record sufficiently to satisfy us that there is no necessity for us to go behind them. The plaintiff sues upon a policy of fire insurance issued on the 8th of April, 1908, by the defendant company, on furniture and fixtures for \$1,000. The fire which destroyed the articles insured occurred in October, 1908. Act No. 168 of 1908 of the General Assembly of Louisiana, the effect of which is called in question herein, went into effect in July, 1908. It repealed all laws and parts of laws in conflict with its provisions.

The questions of law submitted are whether the defendant company has or has not waived the furnishing to it preliminarily of proof of loss, and whether or not the defendant has subjected itself, under the circumstances of this case, not only to pay to the plaintiff the full amount of the policy found due under it, but additionally to 12 per cent. damages and a reasonable amount for attorney's fees under the third section of the act.

Defendant urges that the provisions of Act No. 168 apply only to policies of insurance which issued subsequently to the going into effect of the act; that is, to policies which issued after July, 1908.

We see no good reason for this contention. Insurance companies which had issued policies prior to July and the holders of such policies were notified by that act as to what would be required from that date forward in respect to the policies in which they were respectively interested. The furnishing of preliminary proof and the rules governing the same are matters involving remedies, and not matters in which the contract rights and obligations of the parties are concerned. Remedies to be followed in respect to rights and obligations are controlled by the Legislature. Parties are much more free to make contracts than they are to regulate and control remedies. *Solomon v. Diefenthal*, 46 La. Ann. 904, 15 South. 183; *Levicks, Barrett & Kuen v. Walker*, 15 La. Ann. 245, 77 Am. Dec. 187.

When parties undertake to provide for the remedies by which their rights and obligations are to be enforced, they do so subject to the paramount rights of the state on that subject and its determination as to what policy the general good demands. It is not competent for parties by stipulation between themselves to do so in such manner as to bind the hands of the state. Appellant claims that the statute of 1908 arbitrarily singles out insurance companies and subjects them to penalties to which other litigants are not subjected acting under similar cir-

cumstances; that by constitutional provision the courts are open alike for every citizen; and that the right to adequate remedy cannot be hampered by Legislatures attaching restrictions upon it through arbitrary classification.

There resides in every state not only the right but the duty of protecting citizens from unjust and harassing litigation. The General Assembly is presumed to be in touch with its citizens, and when it comes to the knowledge of that body that any business of a particular character carries with it in the manner and way as conducted prejudicial to the general public, it has the power and authority to remedy the mischief and force the business to be carried on within what it deems legitimate lines.

The exercise of this power is left to the discretion of the Legislature and cannot be interfered with by the courts, so long as it is kept within the limit of constitutional legislative discretion. The constitutional right of the General Assembly in respect to the classification of business occupations has been repeatedly adjudicated upon in the matter of the business of insurance corporations. Decisions of the court on this subject are very fully collated in the briefs attached to the transcript in this case.

Among them we may mention *Lancashire Insurance Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Farmers' Insurance Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821; *Id.*, 62 Neb. 216, 86 N. W. 1070, 97 Am. St. Rep. 624; *City v. Railroad Co.*, 35 La. Ann. 684-688; *Oriental Insurance Co. v. Dags*, 172 U. S. 566, 19 Sup. Ct. 281, 43 L. Ed. 552; *Insurance Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 755; *Insurance Co. v. Mattler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Union Central Life Ins. Co. v. Chouniny*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; *Supervisors of Onondaga v. Briggs*, 3 Denio (N. Y.) 173; *County of Kossuth v. Wallace*, 60 Iowa, 508, 15 N. W. 305; *Continental Ins. Co. v. Whitaker*, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 452, 105 Am. St. Rep. 916.

We are of the opinion that Act 168 of 1908 is constitutional; that it does not arbitrarily discriminate against insurance corporations and hamper their right to seek adequate remedy by resorting to the courts. We do not understand the statute to require courts through a fixed legislative ironclad rule (in all cases where insurance companies defend suits brought against them on policies, but where final judgment is rendered in favor of the plaintiff) to add 12 per cent. damages and attorney's fees to the amount which should be found due by them under the policies. The statute subjects the defendants to a liability to such an addition being imposed in cases before them when it should have been made manifest that the right of defense had been abused just as under the law as it now stands. Appellants,

taking frivolous appeals, subject themselves to a liability to damages.

So far as appellant advances, against the correctness of the judgment of the Court of Appeal, its overruling defendant's contention as to plaintiff's having failed to furnish with preliminary proof of loss, we think the conclusion of the Court of Appeal on that subject was correct.

The evidence discloses beyond dispute that the plaintiff on October 24, 1908, notified defendant company that a fire had occurred on the 15th of October, 1908, on the premises No. 600 North Claiborne street, and that the furniture in said premises covered by the policy sued on was totally destroyed; that the defendant company informed the plaintiff that the loss was in the hands of the adjuster, W. S. Campbell; that the matter was entirely in his charge and advised him to confer with him; that plaintiff's attorney had an interview with Mr. Campbell at which the latter insisted that he should sign a nonwaiver agreement, which he refused to do.

On the 19th of December Mr. Campbell wrote to the attorney that his refusal to allow his client to sign a nonwaiver agreement made it impossible for him to have any further discussion on his part, and that he could do nothing until his request had been acceded to.

It is not pretended that the defendant has ever furnished the plaintiff with blank proofs of loss, as required by the first section of Act No. 168 of 1908, and the company must be held to have waived the furnishing by plaintiff of preliminary proofs of loss. This case is governed on that point by the first section of the act referred to and by the decision of this court in the case of *St. Landry Wholesale Mercantile Co. v. Teutonia Insurance Co.*, 113 La. 1053, 37 South. 987.

The judgment of the Court of Appeal herein brought up for review is affirmed, with costs.

(126 La.)

No. 18,348.

FARMERS' UNION WAREHOUSE STOCK CO., Limited, v. RANDALL.

In re RANDALL.

(Supreme Court of Louisiana. June 25, 1910.)

(*Syllabus by the Court.*)

CORPORATIONS (§ 560*) — RECEIVERS — POWER OF COURT.

Where the manager of a corporation had settled his accounts with the board of directors and obtained his discharge before the appointment of a receiver, *held*, that the court having jurisdiction of the receivership is without power to issue an *ex parte* order directing the former manager to file an account of his administration.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 560.*]

Action by the Farmers' Union Warehouse Stock Company, Limited, against C. O. Randall. Application by defendant for writs of prohibition against Hon. D. N. Thompson, judge of the Eighth judicial district court, in and for the parish of Catahoula, and T. E. Owen, receiver of the plaintiff company. Writs granted.

John Dale, for applicant.

LAND, J. On the 19th day of April, 1910, the respondent judge, on the unverified petition of T. E. Owen, receiver of the Farmers' Union Warehouse Stock Company, Limited, appearing in his own proper person, and without previous notice or hearing, ordered the relator, C. O. Randall, former manager of the said corporation, on or before the second Monday in June, to make an accounting as prayed for by the receiver, with the production of such accounts, documents, and books and other items as set forth and prayed for in the petition.

The prayer of the petition referred to reads as follows, to wit:

"That there be an order of your honorable court directing and requiring the said C. C. Randall to make an accounting to your honorable court of all his transactions as manager of the said company, together with an itemized statement showing what property came into his hands of said company and what disposition was made of same by him, of all moneys coming into his hands as manager of said company and the place where the same was deposited and the disposition made of same, and of all cotton, staves, and other produce received by him as manager of said company from the stockholders, customers, or other persons, and the place to which same was consigned, the proceeds of the sale thereof, and the disposition made of such proceeds; that he deliver to your honorable court any and all statements, canceled checks and vouchers, bank books, and other memoranda kept by him or in his possession relating in any manner to his transaction as manager of said company, whether kept in the name of C. C. Randall, or Farmers' Union Warehouse Stock Company, Limited, or C. C. Randall, Manager, or in any name."

Relator appeared and excepted on the following grounds:

That the relator held no appointment from the court, and had been merely the manager of the corporation, acting under the board of directors thereof, and that his connection with the company had ended prior to the date of the appointment of the receiver.

That the court was without power or jurisdiction to grant the order as prayed for by the receiver.

That in September, 1909, he had rendered his account to the board of directors of said corporation, and had turned over to said board all the books, documents, and papers in his possession connected with his gestion as manager, and was thereupon discharged and acquitted of all of his obligations to said company, as shown by notarial act registered in the conveyance records of Catahoula par-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

ish, a copy of which act was annexed to relator's exception.

The exception was overruled, and an appeal denied by the respondent judge.

We know of no law or precedent, and have been referred to none, which justifies the order complained of by the relator, who at the time was a third person both as to the corporation and the receivership. The notarial act attached to the exception of relator shows that on September 2, 1909, he, as manager, fully accounted to the board of directors of the corporation, was granted full acquittance and discharge, and his bond was ordered canceled. The sole remedy of the receiver was by ordinary suit to cancel the discharge and release, and to recover whatever might be due the corporation by the former manager.

It is therefore ordered that the provisional writs of prohibition herein issued be made peremptory as prayed for by the relator, and that the receiver pay costs in both courts.

MEMORANDUM DECISIONS

ANDERSON v. POLLARD. (Supreme Court of Alabama. June 2, 1910.) Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge. Whatley & Corneliuss, for appellant. R. S. Pate, for appellee.

PER CURIAM. Affirmed, for want of assignment of errors.

ATLANTIC COAST LINE RY. CO. v. GASTON, Judge of Probate. (Supreme Court of Alabama. April 12, 1910.) Appeal from City Court of Montgomery; A. D. Sayre, Judge. Tyson, Wilson & Martin, for appellant. Alexander M. Garber, Atty. Gen., for the State.

PER CURIAM. Errors confessed. Reversed and remanded.

BAILEY v. STATE. (Supreme Court of Alabama. April 21, 1910.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. T. M. Ramey and Allen & Bell, for appellant. Alexander M. Garber, Atty. Gen., for the State.

PER CURIAM. Errors confessed. Reversed and remanded.

BRINDLEY v. LYON. (Supreme Court of Alabama. May 17, 1910.) Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor. P. M. Brindley, for appellant. E. W. Godbey, for appellee.

PER CURIAM. Abated by death of appellee on failure to revise.

BROCK v. LITTLEJOHN. (Supreme Court of Alabama. May 28, 1910.) Appeal from Circuit Court, Morgan County; D. W. Speake, Judge. John C. Eyster and Callahan & Harris, for appellant. E. W. Godbey, for appellee.

PER CURIAM. Appeal dismissed on appellant's motion.

CALDWELL v. CALDWELL. (Supreme Court of Alabama. May 19, 1910.) Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

PER CURIAM. Appeals dismissed by appellant.

CARTER v. STATE. (Supreme Court of Alabama. June 2, 1910.) Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. There being no bill of exceptions in this case, and no error apparent on the record, the judgment of the court is affirmed.

ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

CRANE et al. v. HALL et al. (Supreme Court of Alabama. April 20, 1910.) Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor. Thompson & Thompson and Gaston & Pettus, for appellants. George Huddleston, for appellees.

PER CURIAM. Appeal dismissed by appellant.

DINKINS v. LATHAM. (Supreme Court of Alabama. June 2, 1910. Rehearing Denied June 30, 1910.) Appeal from Circuit Court, Lowndes County; J. O. Richardson, Judge. Goodwyn & McIntyre and Evans Hinson, for appellant. J. M. Chilton and Gunter & Gunter, for appellee.

McCLELLAN, J. This appeal re-presents the questions presented in the first action by and against the same parties, decided in *Dinkins v. Latham*, 154 Ala. 90, 45 South. 60. A careful reconsideration of the premises does not convince that the previous decision is erroneous. The judgment is affirmed. All the Justices concur.

DORKENS v. STATE. (Supreme Court of Alabama. May 19, 1910.) Appeal from Criminal Court, Jefferson County; W. E. Fort, Judge. Tom Dorkens appeals from a conviction. Affirmed. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. Defendant was charged of violating the prohibition law. There is no bill of exceptions, and no error appears upon the record proper. The judgment of conviction must be affirmed.

DOWDELL, C. J., and SIMPSON and McCLELLAN, JJ., concur.

EDINS v. LOEB. (Supreme Court of Alabama. April 12, 1910.) Appeal from Chancery Court, Elmore County; W. W. Whiteside, Chancellor.

PER CURIAM. Appeal dismissed for want of prosecution.

ENTERPRISE LUMBER CO. v. ATLANTIC COAST LINE RY. CO. (Supreme Court of Alabama. June 9, 1910.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. Troy, Watts & Letcher, for appellants. R. P. Coleman and John R. Tyson, for appellee.

PER CURIAM. Appeal dismissed on authority of *Wagnon v. Keenan*, 77 Ala. 519.

FRANCIS et al. v. SHEATS. (Supreme Court of Alabama. June 7, 1910.) Appeal

from Chancery Court, Morgan County; W. H. Simpson, Chancellor. Callahan & Harris, for appellants. E. W. Godbey, for appellee.

PER CURIAM. Appeal dismissed on appellants' motion.

HALL et al. v. WOODWARD. (Supreme Court of Alabama. May 17, 1910.) Appeal from Circuit Court, Limestone County; D. W. Speake, Judge. Wert & Lynne, for appellants. W. T. Sanders, for appellee.

PER CURIAM. Settled between the parties, and the appeal dismissed.

HEADLEY v. STATE. (Supreme Court of Alabama. May 10, 1910.) Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge. Harmon Headley was convicted of a crime, and he appeals. Reversed. J. Osmond Middleton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. On the authority of Pope v. State (decided on December 21, 1909) 51 South. 521, the indictment in this case must be held void, and the judgment of conviction reversed, with direction that the defendant be held to answer any indictment that may be preferred against him. Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

HOME ICE CO. v. HOWELLS MINING CO. (Supreme Court of Alabama. May 19, 1910.) Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge. See, also, 157 Ala. 603, 48 South. 117.

PER CURIAM. Affirmed on certificate.

J. A. MAY CO. v. SCOTT. (Supreme Court of Alabama. June 7, 1910.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. R. D. Crawford, for appellant. E. H. Hill, for appellee.

PER CURIAM. Appeal dismissed by agreement of parties.

JOHNSTON v. SOUTHERN STEEL CO. et al. (Supreme Court of Alabama. April 19, 1910.) Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor. Tomlinson & McCullough, for appellant. Campbell & Johnston, for appellees.

PER CURIAM. Appeal dismissed by agreement.

JONES v. TYLER. (Supreme Court of Alabama. May 12, 1910.) Appeal from City Court of Birmingham; Charles A. Senn, Judge.

PER CURIAM. Affirmed for want of assignment of errors.

KILLIAN v. VANN. (Supreme Court of Alabama. May 12, 1910.) Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor. Suit by S. S. Killian against Laura S. Vann, in which defendant filed a cross-bill. From a judgment denying the relief prayed, and for defendant on his cross-bill, complainant appeals. Affirmed, as corrected. Isbell & Presley, for appellant. Howard & Hunt, for appellee.

ANDERSON, J. This appeal involves no legal questions, simply a question of facts. We are of the opinion that the chancellor properly denied the relief sought by the original bill and correctly granted the relief sought under the cross-bill, but erred in the amount ascertained to be due on the mortgage and in fixing the attor-

ney's fees. The amount due the respondent, the mortgagee, of this date, is \$447.32, and the attorney's fee is fixed at \$44.70. The decree of the chancery court is corrected and affirmed, and the appellee is taxed with the cost of the appeal. Corrected and affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

LONG & RICHARDSON MERCANTILE CO. v. MUSGROVE. (Supreme Court of Alabama. April 19, 1910.) Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge. Bankhead & Bankhead, for appellant. Ernest Lacy, for appellee.

PER CURIAM. Appeal dismissed.

LOUISVILLE & N. R. CO. v. DAVIS. (Supreme Court of Alabama. Dec. 16, 1910. Rehearing Denied June 30, 1910.) Appeal from City Court of Montgomery; A. D. Sayre, Judge. Goodwyn & McIntyre, for appellant. Coleman, Dent & Well and Phil H. Stern, for appellee.

DOWDELL, C. J. Affirmed.

On Rehearing.

STRINGFELLOW, Special Judge. Judgment affirmed.

DOWDELL, C. J., and SIMPSON and EVANS, JJ., concur. ANDERSON, McCLELLAN, and MAYFIELD, JJ., dissent. SAYRE, J., not sitting, having tried the original case.

LOUISVILLE & N. R. CO. v. PALETZ. (Supreme Court of Alabama. May 12, 1910.) Appeal from Circuit Court, Marengo County; John T. Lackland, Judge. A. D. Pitts and Daniel Partridge, Jr., for appellant. William Cunningham, for appellee.

PER CURIAM. Affirmed for want of assignment of errors.

MORRIS v. CHAMBERS. (Supreme Court of Alabama. Feb. 10 and June 7, 1910.) Appeal from Circuit Court, Henry County; A. A. Evans, Judge. Oates & Oates, for appellant. P. A. McDaniel & W. L. Lee, for appellee.

PER CURIAM. Motion to dismiss appeal denied. Motion to strike bill of exceptions granted, and bill stricken. Affirmed for want of assignment of errors.

NORDENBERG v. HOLSTEIN. (Supreme Court of Alabama. April 20, 1910.) Appeal from Chancery Court, Cullman County; W. H. Simpson, Chancellor. F. E. St. John and S. J. Griffin, for appellant. Brown & Kyle and Emil Ahlrichs, for appellee.

PER CURIAM. Appeal dismissed for want of prosecution.

PERSONS v. DAVIS. (Supreme Court of Alabama. June 2, 1910.) Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge.

PER CURIAM. Affirmed on certificate.

PLANTERS' TRADING CO. v. MOOKE. (Supreme Court of Alabama. June 9, 1910.) Appeal from Coffee County Court; J. N. Ham, Judge.

PER CURIAM. Affirmed on certificate.

ROBERSON v. STATE. (Supreme Court of Alabama. April 21, 1910.) Appeal from Criminal Court, Jefferson County; S. L. Weaver,

Judge. Alexander M. Garber, Atty. Gen., for the State.

PER CURIAM. Errors confessed. Reversed and remanded.

ROBERSON v. STATE. (Supreme Court of Alabama. June 16, 1910.) Appeal from Circuit Court, St. Clair County; John W. Inzer, Judge. M. M. Smith and Starnes & Greene, for appellant. Alexander M. Garber, Atty. Gen., for the state.

PER CURIAM. Appeal dismissed by appellant.

SIMMONS et al. v. METCALF. (Supreme Court of Alabama. June 9, 1910.) Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge. W. O. Mulkey, for appellee.

PER CURIAM. Affirmed for want of assignments of error.

STATE v. PELL CITY MFG. CO. (Supreme Court of Alabama. June 2, 1910.) Appeal from Circuit Court, St. Clair County; John W. Inzer, Judge. Alexander M. Garber, Atty. Gen., for the State. M. M. Smith and Victor Smith, for appellee.

PER CURIAM. Appeal dismissed on motion of appellant.

VERNON v. STATE. (Supreme Court of Alabama. April 21, 1910.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. Alexander M. Garber, Atty. Gen., for the State.

PER CURIAM. Errors confessed. Reversed and remanded.

WILDER v. LOONEY. (Supreme Court of Alabama. June 2, 1910.) Appeal from Circuit Court, Shelby County; John Pelham, Judge.

PER CURIAM. Affirmed on certificate.

WOOD v. ST. CLAIR COUNTY. (Supreme Court of Alabama. June 1, 1910.) Appeal from Probate Court, St. Clair County; W. S. Forman, Judge. N. B. Spears and Smith & Smith, for appellant. James A. Embry, for appellee.

PER CURIAM. Dismissed for want of prosecution.

CAMP et al. v. COOK et al. (Supreme Court of Florida. Jan. Term, 1910.) In Banc. Appeal from Circuit Court, Wakulla County; John W. Malone, Judge. A. B. Small and N. R. Walker, for appellants. Joseph A. Edmondson and Neeley & Simmons, for appellees.

PER CURIAM. Dismissed on præcipe of counsel for appellants.

COSMOPOLITAN FIRE INS. CO. v. PUTNAL. (Supreme Court of Florida. Jan. Term, 1910.) In Banc. Error to Circuit Court, Taylor County; B. H. Palmer, Judge. Hendry & McKinnon and Frazier & Mabry, for plaintiff in error.

PER CURIAM. Writ of error dismissed before the clerk on præcipe of counsel for plaintiff in error.

CREWS v. STATE. (Supreme Court of Florida. Jan. Term, 1910.) In Banc. Error to Circuit Court, Baker County; J. T. Wills, Judge. Park Trammell, Atty. Gen., for the motion.

PER CURIAM. Writ of error dismissed on motion of Attorney General.

DAVIS et al. v. MANATEE COUNTY et al. (Supreme Court of Florida. Jan. Term, 1910.) In Banc. Appeal from Circuit Court, Manatee County; J. B. Wall, Judge.

PER CURIAM. Appeal dismissed on præcipe of counsel.

LIDDON et al. v. ORAWFORDVILLE STATE BANK. (Supreme Court of Florida. Jan. Term, 1910.) In Banc. Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge. Paul Carter, for plaintiffs in error. Wm. B. Farley and Reeves & Watson, for defendant in error.

PER CURIAM. Dismissed on præcipe of counsel for plaintiffs in error.

MIAMI ELECTRIC RY. CO. et al. v. PIERCE et al. (Supreme Court of Florida. Jan. Term, 1910.) En Banc. Appeal from Circuit Court, Dade County; Minor S. Jones, Judge. Hudson & Boggs, for the motion.

PER CURIAM. Appeal dismissed on motion of counsel for appellees.

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ACCESSORIES.

Acts and declarations of conspirators and co-defendants as evidence, see Criminal Law, § 427.

Criminal responsibility, see Criminal Law, § 73.

Testimony of accomplices, see Criminal Law, § 508.

ACCIDENT.

Cause of death, see Death, §§ 98, 99.

Cause of loss within insurance policy, see Insurance, §§ 461, 462.

ACCIDENT INSURANCE.

See Insurance, §§ 461, 462.

ACCOMPLICES.

Criminal responsibility, see Criminal Law, § 73.

Testimony, see Criminal Law, § 508.

ACCORD AND SATISFACTION.

See Payment.

ACCOUNT.

See Account, Action on; Account Stated.

Accounting by particular classes of persons.

See Executors and Administrators, §§ 464, 509.

Co-tenant, see Tenancy in Common, § 37.

Receivers, see Receivers, §§ 200, 202.

ACCOUNT, ACTION ON.

Effect of stating and settling accounts, and actions on accounts stated, see Account Stated.

§ 6. A count in a complaint to recover a balance due on an account *held* insufficient.—*Smythe v. Dothan Foundry & Machine Co. (Ala.)* 398.

ACCOUNT RENDER.

Operation and effect of account rendered, see Account Stated.

ACCOUNT STATED.

Actions on accounts as such, see Account, Action on.

Proceedings in actions of assumpsit, see Assumpsit, Action of.

§ 6. To give an account rendered the force of an account stated because of silence on the part of the party sought to be charged, it must appear that the account was rendered to such person.—*United Hardware-Furniture Co. v. Blue (Fla.)* 364.

§ 19. Certain evidence *held* not to show that bills in question were rendered to defendant.—*United Hardware-Furniture Co. v. Blue (Fla.)* 364.

ACCRUAL.

Of right of action in general, see Action, § 61.

Of right of action or defense as affecting limitation, see Limitation of Actions, §§ 55, 56.

ACCUSATION.

Of crime, indictment or information, see Indictment and Information.

Of crime, preliminary complaint or affidavit, see Criminal Law, § 211.

ACKNOWLEDGMENT.

Allegation of acknowledgement in indictment for larceny of mortgage, see Larceny, § 30.

Operation and effect of admissions as evidence, see Evidence, §§ 217, 253.

II. TAKING AND CERTIFICATE.

§ 8. The taking and certification of an acknowledgment is a judicial function.—*Orendorff v. Suit (Ala.)* 744.

§ 19. A deed of gift *held* not sufficient to evidence a donation of immovables, under Civ. Code, art. 2234.—*Baker v. Baker (La.)* 115.

§ 24. The mere casual presence of a putative grantor and the possession of an instrument purporting to have been signed are not sufficient to confer jurisdiction upon the certifying officer, there must be an acknowledgment in some form by the grantor of the instrument signed.—*Orendorff v. Suit (Ala.)* 744.

III. OPERATION AND EFFECT.

§ 55. When the officer taking an acknowledgment acquires jurisdiction, and enters upon the exercise of his jurisdiction, the certificate is conclusive as to all the facts therein stated which the officer is authorized to state, until successfully assailed for duress or fraud participated in by the grantee, or brought to his

notice when parting with the consideration.—*Orendorff v. Suit (Ala.)* 744.

§ 56. A certificate of acknowledgment *held* conclusive as to all the facts therein stated which the officer is authorized to state, until successfully assailed for duress or fraud participated in by the grantee or brought to his notice when parting with the consideration.—*Orendorff v. Suit (Ala.)* 744.

IV. PLEADING AND EVIDENCE.

§ 62. Much weight is to be accorded to an official certificate of acknowledgment, and it may be impeached only by clear and convincing proof of its falsity.—*Orendorff v. Suit (Ala.)* 744.

ACQUIESCENCE.

As admission, see Criminal Law, § 407.

ACTION.

Abatement, see Abatement and Revival.

Accrual, as affecting limitations, see Limitation of Actions, §§ 55, 56.

Authority of attorney as to commencement and conduct of litigation, see Attorney and Client, § 88.

Damages recoverable, see Damages.

Election of remedy, see Election of Remedies.

Jurisdiction of courts, see Courts.

Laches, see Equity, §§ 67-70.

Limitation by statutes, see Limitation of Actions.

Malicious actions, see Malicious Prosecution.

Officious intermeddling in suits between others, see Champerty and Maintenance.

Pendency of other action ground for abatement, see Abatement and Revival, §§ 4-8.

Right to trial by jury, see Jury, § 25.

Validity of proceedings on Sunday, see Sunday, § 30.

Actions between parties in particular relations.

See Master and Servant, §§ 256, 296.

Corporate officers or agents and stockholders, see Corporations, § 320.

Co-tenants, see Partition, §§ 74, 114.

Husband and wife, see Husband and Wife, § 298½.

Husband and wife for annulment of marriage, see Marriage, §§ 58, 60.

Mortgagor and mortgagee, see Mortgages, §§ 380, 468, 614, 621.

Actions by or against particular classes of persons.

See Carriers, §§ 76, 94, 132, 136, 227, 229, 314, 321, 343; Corporations, §§ 503-518, 612, 614, 672; Executors and Administrators, § 443; Husband and Wife, § 270; Insane Persons, § 94; Master and Servant, §§ 256, 296, 325, 332; Municipal Corporations, §§ 816-822, 987, 1000, 1037, 1038; Partnership, §§ 216, 219; Railroads, §§ 282, 297, 345-351, 396-400, 439, 480-485; States, § 191; Street Railroads, § 118.

Assignees, see Assignments, § 137.

Banks, see Banks and Banking, § 226.

Board of levee commissioners, see Levees, § 11.

Co-tenants, see Tenancy in Common, § 55.

Foreign corporations, see Corporations, § 672.

Mortgagors or mortgagees, see Mortgages, §§ 380, 468, 614, 621.

Officers and agents of corporations in general, see Corporations, § 320.

Remainderman, see Remainders, § 17.

Stockholders, see Corporations, §§ 262, 320.

Sureties on bail bonds or undertakings, see Bail, § 94.

Taxpayers, see Municipal Corporations, §§ 967, 1000.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 65, 69.

Trustees in bankruptcy, see Bankruptcy, § 302.

Actions relating to particular species of property or estates.

See Waters and Water Courses, § 178.

Community or separate property of husband or wife, see Husband and Wife, § 270.

Mortgaged property, see Mortgages, §§ 380, 468.

Particular causes or grounds of action.

See Account Stated; Assault and Battery, §§ 19, 24; Bills and Notes, §§ 464-523; Conspiracy, § 17; Death, §§ 98, 99; False Imprisonment, §§ 20, 23; Forcible Entry and Detainer, §§ 4-17; Fraud, § 64; Fraudulent Conveyances, §§ 218-295; Insurance, §§ 608-668; Libel and Slander, §§ 77, 124; Malicious Prosecution, §§ 47, 72; Trespass, §§ 47, 68.

Appropriation of property for public use, see Eminent Domain, §§ 268, 284.

Bail bonds, see Bail, § 94.

Bond of treasurer of levee board, see Levees, § 11.

Breach of contract of sale, see Sales, §§ 382-388, 418.

Cloud on title, see Quieting Title.

Death of person attempting to board ferry, see Ferries, § 33.

Deceit, see Fraud, § 64.

Failure to deliver or misdelivery of goods, see Carriers, § 94.

Injuries at railroad crossings, see Railroads, §§ 345-351.

Injuries by servants, see Master and Servant, §§ 325, 332.

Injuries from accidents to trains, see Railroads, § 297.

Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 810-822.

Injuries from fires caused by operation of railroad, see Railroads, §§ 480-485.

Injuries from flowage, see Waters and Water Courses, § 178.

Injuries to animals on or near railroad tracks, see Railroads, § 439.

Injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.

Injuries to passengers, see Carriers, §§ 314, 321, 343.

Injuries to persons on or near railroad tracks, see Railroads, §§ 396-400.

Injuries to persons on or near street railroad tracks, see Street Railroads, § 118.

Injuries to servants, see Master and Servant, §§ 256, 296.

Injuries to servant on vessel, see Shipping, § 84.

Liabilities of stockholders, see Corporations, § 262.

Loss of or injury to goods in course of transportation, see Carriers, §§ 132, 136.

Loss of or injury to live stock in course of transportation, see Carriers, §§ 227, 229.

Loss of services of or injuries to child, see Parent and Child, § 7.

Negligence in general, see Negligence, §§ 119-138.

Negligence in operation of railroad, see Railroads, §§ 282, 297, 345-351, 390-400, 439, 480-485.

Negligence in operation of street railroad, see Street Railroads, § 118.

Negligence of master, see Master and Servant, §§ 256, 296.

Negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 63, 69.

Negligence or malpractice of physician or surgeon, see Physicians and Surgeons, § 18.

Negligence or misconduct of servant, see Master and Servant, §§ 325, 332.

Negligent or wrongful use of street, see Municipal Corporations, § 706.

Obstruction of highway, see Highways, § 160.

Purchase money on sale of goods, see Sales, §§ 340-364.

Services, and materials furnished incident thereto, see Work and Labor.

Wrongful attachment, see Attachment, §§ 373, 380.

Wrongful conversion of personal property, see Trover and Conversion, §§ 16-46.

Particular forms of action.

See Account, Action on; Assumpsit, Action of; Detinue; Ejectment; Forcible Entry and Detainer, §§ 4-17; Quieting Title; Real Actions; Replevin; Trespass, §§ 47, 68; Trover and Conversion.

Petitory actions, see Real Actions, § 8.

Particular forms of special relief.

See Divorce; Injunction; Mandamus; Partition, §§ 74, 114; Prohibition; Quo Warranto; Specific Performance.

Accounting by receiver, see Receivers, §§ 200, 202.

Alimony, see Divorce, §§ 215, 249.

Allowance and payment of claims against receivers, see Receivers, §§ 153-162.

Annulment of marriage, see Marriage, §§ 58, 60.

Annulment of sale of lands of levee district, see Levees, § 11.

Appointment of administrator, see Executors and Administrators, § 20.

Appointment of receiver, see Receivers, §§ 20-57.

Cancellation of instrument, see Cancellation of Instruments.

Cancellation of tax assessment, see Taxation, § 500.

Correction or setting aside of tax assessments, see Taxation, § 500.

Determination of adverse claims to real property, see Quieting Title, § 23.

Enforcement of assessments for public improvements, see Municipal Corporations, §§ 525, 586.

Enforcement of dissolution of corporations in general, see Corporations, §§ 612, 614.

Enforcement of mechanics' liens, see Mechanics' Liens, §§ 268, 304.

Enforcement of taxes, see Taxation, §§ 572, 679, 689.

Establishment and determination of claims to attached property, see Attachment, § 308.

Establishment and enforcement of trust, see Trusts, § 365.

Establishment of private roads, see Private Roads, § 2.

Foreclosure of mortgage, see Mortgages, §§ 380, 468.

Quieting title, see Quieting Title.

Redemption from mortgage sale, see Mortgages, §§ 614, 621.

Reformation of instrument, see Reformation of Instruments.

Removal of cloud, see Quieting Title.

Sale of property of decedent, see Executors and Administrators, §§ 332, 335.

Separate maintenance, see Husband and Wife, § 298½.

Setting aside transfers in fraud of creditors or subsequent purchasers in general, see Fraudulent Conveyances, §§ 218-295.

Trial of right of property, see Attachment, § 308.

Particular proceedings in actions.

See Costs; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Lis Pendens; Parties; Pleading; Reference; Stipulations; Trial; Venue.

Assessment of damages, see Damages, § 216.

Default, see Judgment, §§ 101-143.

Sales under judgment, order, or decree of court, see Execution, §§ 204-294; Judicial Sales; Mortgages, §§ 536, 544.

Transfer of causes from one state court to another, see Courts, §§ 486, 487.

Particular remedies in or incident to actions.

See Attachment; Discovery; Garnishment; Injunction; Receivers; Sequestration.

Proceedings in exercise of special or limited jurisdictions.

Courts of limited jurisdiction in general, see Courts, § 189.

Criminal prosecutions, see Criminal Law.

Suits in equity, see Equity.

Suits in justices' courts, see Justices of the Peace, §§ 75, 84.

Review of proceedings.

See Appeal and Error; Certiorari; Exceptions, Bill of; Judgment, §§ 336, 337; Justices of the Peace, §§ 174, 200; New Trial.

Bill of review, see Equity, §§ 442, 446.

I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1. If neither acts done nor the result accomplished are obnoxious to the law, they cannot be successfully attacked in the courts.—*Steege v. Leopold Weil Building & Improvement Co. (La.)* 232.

§ 13. Public wrongs are to be redressed by public officials unless individuals suffer or are threatened with some special injury.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

II. NATURE AND FORM.

To foreclose mortgages, see Mortgages, § 380.

§ 30. The distinction between "case" and "assumpsit" stated.—*Alabama Great Southern R. Co. v. Norris (Ala.)* 891.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 38. A count in which two causes of action are joined *held* subject to demurrer.—*Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.)* 69.

§ 38. A count in a complaint *held* not to join two distinct causes of action.—*Byrd v. Hickman (Ala.)* 426.

§ 38. In an action for injuries to passenger, complaint *held* to state a single cause of action.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 50. A complaint against a master and a servant for an assault and battery committed by the servant *held* bad for misjoinder of actions and parties.—*Southern Ry. Co. v. Hanby (Ala.)* 334.

§ 52. A petition *held* bad under Code Prac. art. 55, as joining petitory and possessory actions.—*Davidson v. McDonald (La.)* 758.

§ 52. A complaint to recover land against two defendants, between whom there was no connection, *held* objectionable for misjoinder of causes of action and parties.—*Davidson v. Fletcher (La.)* 761.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Authority of attorney as to commencement and conduct of litigation, see Attorney and Client, § 58.

Commencement within period of limitation, see Limitation of Actions, §§ 122, 127.

Evidence admissible under pleading, see Pleading, § 381.

Stay on appeal or writ of error, see Appeal and Error, § 492.

Stay until payment of costs, see Costs, § 277.

§ 61. In ordinary actions commenced by summons, plaintiff must show that his right of action was complete when the action was commenced.—*Giles v. Wilmott (Fla.)* 287.

§ 69. When a chancery case and a case at law involving the same questions between the same parties are pending in the same court, the law case should be continued until the chancery

case is disposed of.—*Connor v. Elliott (Fla.)* 729.

ACTION ON THE CASE.

Against master for assault by servant, see Master and Servant, § 325.

Distinctions between actions of assumpsit and case, see Action, § 30.

ACTS.

See Statutes.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction in equity, see Cancellation of Instruments, § 12; Quieting Title, § 13.

ADJOURNMENT.

Of criminal causes in general, see Criminal Law, §§ 575, 603.

ADJUDICATION.

Decisions of courts in general, see Judgment. Operation and effect of former adjudication, see Judgment, §§ 668-747.

ADMEASUREMENT OF DOWER.

See Dower, § 114.

ADMINISTRATION.

Of charity, see Charities, § 45.

Of estate of decedent, see Executors and Administrators.

Of property by receiver, see Receivers, §§ 81-96.

Of property of community on death of husband or wife, see Husband and Wife, § 276.

Of public finances, see Counties, §§ 152-178.

ADMIRALTY.

See Maritime Liens; Shipping.

ADMISSIONS.

See Stipulations.

As evidence, see Criminal Law, §§ 406, 407; Evidence, §§ 217, 253.

By witness of making inconsistent statements as affecting right to introduce evidence of statements, see Witnesses, § 389.

In pleadings, see Equity, § 239; Pleading, § 214.

ADOPTION.

Of statutes, see Statutes, §§ 8½, 28.

ADULTERATION.

Regulation of manufacture, sale, and use of articles of food or drink in general, see Food.

ADVANCEMENTS.

See Descent and Distribution, § 109.

ADVERSE CLAIM.

Determination of claims to real property, see Quieting Title.

To property levied on or garnished, see Attachment, § 306.

ADVERSE POSSESSION.

See Limitation of Actions.

By or under life tenant, see Life Estates, § 8.

Grants of lands held adversely, see Champerty and Maintenance, § 7.

I. NATURE AND REQUISITES.**(B) Actual Possession.**

§ 19. Fence around 2,500 acres of land *held* not such a substantial inclosure as gave the party erecting it adverse possession, under Gen. St. 1906, § 591.—*Adams v. Fryer* (Fla.) 611.

(C) Visible and Notorious Possession.

§ 32. One claiming land under a deed from the administrator of a decedent or as heir of the decedent *held* not required to record her claim of adverse possession under Code 1896, § 1541.—*Gilbert v. Pinkston* (Ala.) 442.

§ 33. In ejectment, the fact of plaintiff's adverse possession being otherwise established, its notoriety *held* admissible to show notice.—*Owen v. Moxom* (Ala.) 527.

(E) Duration and Continuity of Possession.

§ 42. Adverse possession will not begin to run against a surety's right to reimbursement until after he has paid the debt.—*Smith v. Pitts* (Ala.) 402.

§ 43. In ejectment, the fact that plaintiff's deed antedated his grantor's *held* not to deprive him of tacking his predecessor's title to his own.—*Owen v. Moxom* (Ala.) 527.

§ 57. One claiming full statutory possession must show legally recognized possession for the full statutory period.—*Adams v. Fryer* (Fla.) 611.

(F) Hostile Character of Possession.

§ 71. In ejectment, the fact that plaintiff's deed antedated his grantor's *held* not fatal to the use of the deed as color of title.—*Owen v. Moxom* (Ala.) 527.

§ 82. Code 1907, § 2830, *held* to apply only to one in possession as a trespasser or mere squatter, and not to one claiming under a bona fide claim of purchase.—*Owen v. Moxom* (Ala.) 527.

§ 84. An adjudicatee for taxes who in preparing the act of sale inserts a different description identifying property, possession of which he subsequently claims under the deed, *held* a possessor in bad faith under Civ. Code 1888, art. 3452.—*Guillory v. Elms* (La.) 767.

§ 85. In ejectment, it was not error to permit the son of the person through whom plaintiff derived title to testify that his father said that he felt he had the right to sell the land.—*Owen v. Moxom* (Ala.) 527.

II. OPERATION AND EFFECT.**(B) Title or Right Acquired.**

§ 106. One *held* to have acquired perfect title by adverse possession.—*Stewart v. Foxworth* (Miss.) 354.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114. Evidence *held* not to show title to land by adverse possession under color of title for seven years.—*McKinnon v. Johnson* (Fla.) 288.

§ 114. Certain evidence *held* not sufficient to show title by adverse possession.—*McKinnon v. Johnson* (Fla.) 288.

§ 116. In ejectment, the refusal to give a charge *held* not error.—*Owen v. Moxom* (Ala.) 527.

§ 116. In ejectment, a charge *held* not erroneous.—*Owen v. Moxom* (Ala.) 527.

ADVERTISEMENT.

In official newspapers, see Newspapers.

ADVICE OF COUNSEL.

Defense to action for malicious prosecution, see Malicious Prosecution, § 21.

AFFIDAVITS.

False affidavit, see Perjury.

Particular proceedings or purposes.

Allowance of appeal or writ of error, see Appeal and Error, § 361.

Preliminary affidavit in criminal prosecution, see Criminal Law, § 211.

Publication of notice of intention to apply for passage of local law, see Statutes, § 83½.

Verification of pleading, see Equity, § 313.

AFFINITY.

Affecting competency of justices of the peace, see Justices of the Peace, § 57.

AFFIRMANCE.

Of judgment or order in civil actions in general, see Appeal and Error, § 1135.

Of judgment or order in criminal prosecutions, see Criminal Law, § 1182.

AGENCY.

In general, see Principal and Agent.

AGREED CASE.

Scope of review, see Appeal and Error, § 845.

AGREEMENT.

See Contracts.

AGRICULTURE.

Certiorari to review order annulling proceedings, see Certiorari, § 33.

Drainage of lands, see Drains.

AIDER BY VERDICT.

In civil actions, see Pleading, § 438.

In criminal prosecutions, see Indictment and Information, §§ 196, 202.

AIDERS AND ABETTERS.

Criminal responsibility, see Criminal Law, § 73.

Violation of liquor laws, see Intoxicating Liquors, § 167.

ALCOHOLIC LIQUORS.

Regulation of manufacture, use and sale, see Intoxicating Liquors.

ALIENS.

Taxation of aliens' property, see Taxation, § 95.

ALIMONY.

See Divorce, §§ 215, 249.

Separate maintenance, see Husband and Wife, § 298¾.

ALLOWANCE.

Of alimony or counsel fees and expenses in divorce proceedings, see Divorce, §§ 215, 249.

Of appeal or writ of error, see Appeal and Error, § 361.

Of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, §§ 86-42.

Of separate maintenance to wife, see Husband and Wife, § 298¾.

ALMANAC.

Computation of time, see Time.

ALTERATION.

Of geographical or political divisions, see Municipal Corporations, §§ 33-36.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

Payment of altered paper by bank, see Banks and Banking, § 148.

AMBIGUITIES.

Parol or extrinsic evidence to construe ambiguous instruments, see Evidence, § 452.

AMENDMENT.

Of particular acts, instruments, or proceedings.

See Pleading, § 225.

Assessments, see Taxation, §§ 439, 500.

Pleading, see Pleading, §§ 236, 254.

Pleading affecting limitations, see Limitation of Actions, § 127.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Appeal and Error, § 50; Justices of the Peace, § 44.

ANGLISH.

Element of damages, evidence, see Damages, § 178.

ANIMALS.

Carriage of live stock, see Carriers, §§ 205, 229. Competency of evidence of trailing human beings by dogs, see Criminal Law, § 386.

Frightening animals on street, see Municipal Corporations, § 705.

Injuries to animals from operation of railroads, see Railroads, §§ 405, 439.

Liability of veterinarian for negligence, see Physicians and Surgeons, § 15.

Municipal regulations, see Municipal Corporations, §§ 594, 625, 629.

Necessity of showing jurisdiction of commissioner's court by record in proceedings for stock law election, see Counties, § 53.

Opinion evidence as to ability of dog to track human being, see Criminal Law, § 465.

§ 27. A complaint for damages in case of injury to a hired horse held sufficient.—Weller & Co. v. Camp (Ala.) 929.

§ 27. Where the owner of a horse lets him for a certain purpose, a material departure from the contemplated use amounts to a conversion for which the bailee will be liable in trover if the horse is injured or destroyed while being so used.—Weller & Co. v. Camp (Ala.) 929.

§ 27. Parties to a contract of hiring of a horse must be held, as affecting liability for putting it to a use not contemplated, to have had in mind such contingencies as may and do naturally occur in course of the use contracted for, unless specifically excluded, and the manner of rightful use is to be ascertained from the agreement as rationally interpreted.—Weller & Co. v. Camp (Ala.) 929.

§ 27. Facts held not to show conversion of a hired horse.—Weller & Co. v. Camp (Ala.) 929.

§ 27. Where a horse is injured while in possession of bailees, and nothing else appears, they have the burden of showing it was not injured by their negligence.—Weller & Co. v. Camp (Ala.) 929.

§ 45. Under Code 1907, §§ 6230, 7132, and 7161, subd. 71, an affidavit in a prosecution for maliciously disabling stock held valid.—Thomas v. State (Ala.) 34.

§ 45. Where an affidavit in a prosecution for maliciously disabling stock is void, it will not support a conviction.—Thomas v. State (Ala.) 34.

§ 50. An order of the commissioners' court, proceeding under Gen. Acts 1903, p. 431, authorizing elections to determine whether the stock law shall be enforced, held to rescind an order calling for an election and reciting the jurisdictional facts for an election.—McKinney v. Commissioners' Court of Bibb County (Ala.) 756.

§ 50. The commissioners' court held not authorized to exercise the power conferred by Gen. Acts 1903, p. 431, to order an election to determine whether the stock law shall be enforced unless a petition for an election is signed as required by the act.—McKinney v. Commissioners' Court of Bibb County (Ala.) 756.

ANNEXATION.

Of chattels to real property, see Fixtures.

ANNULMENT.

Actions to annul written instruments, see Cancellation of Instruments.

Of marriage, see Marriage, §§ 58, 60.

ANSWER.

In general, see Pleading, §§ 80, 136, 400.

Of garnishee, see Garnishment, §§ 144, 148.

To writ of mandamus, see Mandamus, § 164.

APPEAL AND ERROR.

See Certiorari; Criminal Law, § 260; Exceptions, Bill of; New Trial.

Appellate jurisdiction of particular state courts, see Courts, § 224.

Costs on appeal or error in general, see Costs, §§ 256, 260.

Remedy by appeal or writ of error as affecting right to mandamus, see Mandamus, § 4.

Review in particular civil actions.

For dissolution of insurance company, see Insurance, § 49.

Review in special proceedings.

Certiorari proceedings, see Certiorari, § 70.

Contempt proceedings, see Contempt, § 66.

To establish private roads, see Private Roads, § 2.

Review of criminal prosecutions.

See Criminal Law, §§ 1019, 1188; Homicide, §§ 325, 340.

By habeas corpus, see Habeas Corpus.

Review of proceedings of justices of the peace.

See Justices of the Peace, § 174.

I. NATURE AND FORM OF REMEDY.

§ 14. A judgment dismissing an appeal for omission of any legal formality does not preclude appellant from taking a second appeal within the year.—McGaw v. O'Beirne (La.) 775.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

Criminal prosecutions, see Criminal Law, § 1019.

III. DECISIONS REVIEWABLE.

Proceedings to establish private roads, see Private Roads, § 2.

(C) Amount or Value in Controversy.

§ 50. Jurisdiction of the Supreme Court in a contest over the administration of a fraud is determined by the amount of the fund to be administered.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans (La.)* 763.

(E) Nature, Scope, and Effect of Decision.

§ 105. In the absence of statute, an appeal or writ of error will not lie from a voluntary nonsuit.—*Engle v. Patterson (Ala.)* 397.

§ 122. An appellant *held* to have the right to appeal from part of the judgment rendered on separate demands.—*Cox v. First Nat. Bank of Lake Charles (La.)* 227.

(F) Mode of Rendition, Form, and Entry of Judgment or Order.

§ 123. An order directing execution against plaintiffs' sureties for costs without judgment *held* unappealable.—*Butterworth & Lowe v. Cathcart (Ala.)* 896.

IV. RIGHT OF REVIEW.**(A) Persons Entitled.**

Proceedings for dissolution of insurance company, see Insurance, § 49.

§ 149. Interveners *held* entitled to join in an appeal.—*Mulhaupt v. City of Shreveport (La.)* 1023.

§ 150. Pledgor *held* to have no appealable interest in a rule directing payment of the deposit to certain persons, on the ground that they were not shown to be proper parties to receive it.—*Ansley v. Stuart (La.)* 545.

§ 151. Plaintiffs *held* not entitled to appeal from an order directing execution against plaintiffs' sureties for costs; the same not being prejudicial to plaintiffs.—*Butterworth & Lowe v. Cathcart (Ala.)* 896.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Criminal prosecutions, see Criminal Law, §§ 1031, 1064.

(A) Issues and Questions in Lower Court.

§ 169. A question not raised in the lower court will not be considered on appeal.—*Haigler v. Goldsmith (Ala.)* 736.

(B) Objections and Motions, and Rulings Thereon.

Criminal prosecution, see Criminal Law, §§ 1031, 1045.

§ 195. A request for the general affirmative charge cannot serve in lieu of objection to the allowance of an amendment alleged to introduce a new cause of action, or of a motion to strike on that account.—*Byrd v. Hickman (Ala.)* 426.

§ 216. Since the company in an action on a policy could have requested a charge limiting the effect of a policy as evidence to a count in the complaint declaring on an accident policy, where the policy was in effect an accident and not a life policy, it cannot complain of the court's failure to so limit the effect of the policy, where it did not request it to do so.—*National Life & Accident Ins. Co. v. Lokey (Ala.)* 45.

§ 230. Objections to the remarks of counsel must be made at the time, and cannot be made available by objection made for the first time on motion for new trial.—*Alabama Steel & Wire Co. v. Sells (Ala.)* 921.

§ 242. An objection to testimony is not subject to review, where the record shows no ruling by the trial court.—*Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.)* 953.

(C) Exceptions.

Criminal prosecutions, see Criminal Law, § 1056.

§ 260. Where no exception is reserved to the action of the court in sustaining an objection to a question asked at the trial, the objection to the question cannot be considered on appeal.—*Grasselli Chemical Co. v. Davis (Ala.)* 35.

(D) Motions for New Trial.

§ 304. A motion for new trial presents nothing for review on appeal in the absence of a ruling thereon.—*Roy v. O'Neill (Ala.)* 946.

VI. PARTIES.

§ 322. A defendant, who did not demur, *held* not a necessary party to an appeal from a decree overruling the demurrer of his codefendant.—*Washington v. Arnold (Ala.)* 463.

§ 327. All parties interested in a decree and benefited thereby should be made parties on appeal, if they were parties below.—*Nichols & Johnson v. Frank (Fla.)* 146.

§ 327. Where, on appeal in equity, the appellants asked for reversal of the decree, all interested parties must be before the court.—*Nichols & Johnson v. Frank (Fla.)* 146.

§ 335. The court *held* not authorized, in view of the record, to dismiss an appeal on the ground that the appeal was taken by only one of the parties against whom the joint judgment appealed from was rendered.—*McKinney v. Commissioners' Court of Bibb County (Ala.)* 756.

§ 336. Where all the appellees interested in a decree on which the rights of all of them depend are not made parties, the appeal will be dismissed.—*Nichols & Johnson v. Frank (Fla.)* 146.

§ 336. Where cause was dismissed as to one of the appellees, the main equities of the cause, on which the rights of all the appellees depend, will not be considered.—*Nichols & Johnson v. Frank (Fla.)* 146.

§ 336. Where counsel for the parties agree that two of the parties are parties to the appeal, the court will not sustain their motion to dismiss.—*Christina v. Cusimano (La.)* 159.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

Criminal prosecutions, see Criminal Law, § 1069.

On certiorari, see Certiorari, § 40.

(A) Time of Taking Proceedings.

Computation of time, see Time, § 10.

Criminal prosecutions, see Criminal Law, § 1069.

On certiorari, see Certiorari, § 40.

§ 337. That a judgment appealed from was prematurely signed, and that the appeal was taken the day before the judgment should have been signed, was no ground for dismissing the appeal.—*Madere v. Alexandre (La.)* 535, 537.

§ 339. Judgment granting a new trial *held* the final action of the court, and an appeal therefrom is governed by Code 1907, § 2868, as amended by Acts 1909, Sp. Sess. p. 165.—*Woodward Iron Co. v. Brown (Ala.)* 829.

§ 345. A motion for new trial suspends the judgment until disposed of and until then the judgment does not become effective for appeal.—*Woodward Iron Co. v. Brown (Ala.)* 829.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 361. An appealable interest may be shown by affidavit filed in the district court where

there is no objection.—*Mulhaupt v. City of Shreveport* (La.) 1023.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

Prohibition against proceedings in lower court, see Prohibition, § 10.

(B) Jurisdiction Acquired by Appellate Court.

Prohibition against proceedings in lower court, see Prohibition, § 10.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 492. In a case appealable to the Supreme Court, the court may order the erasure from the mortgage books of a judgment recorded thereon before taking of a suspensive appeal, where the appeal was taken and granted after the inscription of the judgment.—*Cluseau v. Wagner* (La.) 547.

§ 492. A judgment debtor, who has appealed suspensively from the judgment, can compel the erasure of the judgment from the mortgage books, even though the inscription was made before the appeal was taken.—*Cluseau v. Wagner* (La.) 547.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

Expenses of record as items of costs, see Costs, § 256.

Review of criminal prosecutions, see Criminal Law, §§ 1088, 1128.

(A) Matters to be Shown by Record.

Incorporation of evidence in bill of exceptions, see Exceptions, Bill of, § 16.

Review of criminal prosecutions, see Criminal Law, §§ 1088, 1128.

§ 503. The appellate jurisdiction of the Supreme Court, *ratione materiae*, should appear on the face of the record.—*Shreveport Bridge & Terminal Co. v. State Board of Appraisers* (La.) 129.

(B) Scope and Contents of Record.

Review of criminal prosecutions, see Criminal Law, § 1088.

§ 529. On motion to set aside an execution and judgment, the judgment and verdict should be exhibited on writ of error in the record proper, and if shown only in the transcript they cannot be considered.—*McCulloch v. Dekle* (Fla.) 610.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

Making and filing of bill of exceptions, see Exceptions, Bill of.

Review of criminal prosecutions, see Criminal Law, §§ 1080, 1092.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 565. Under Code 1906, § 797, where the stenographer's notes are in fact approved by a party litigant, the benefit intended by the notice has been conferred.—*Scarborough v. Harrison Naval Stores Co.* (Miss.) 143.

(G) Authentication and Certification.

§ 612. A certificate to a transcript of record on appeal held insufficient.—*McRainey v. Jarrell* (Fla.) 10.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 627. When the transcript on appeal is filed in the Supreme Court after the return day, the

appeal must be dismissed.—*Girod v. Monroe Brick Co.* (La.) 550.

§ 628. Delay of clerk held not to excuse appellant's failure to transmit transcript to Supreme Court in time.—*Girod v. Monroe Brick Co.* (La.) 550.

(I) Defects, Objections, Amendment, and Correction.

Including unnecessary matter in record as affecting costs, see Costs, § 256.

§ 635. An appeal by the state tax collector from a decision that there is no claim for taxes against certain property held to be dismissed on a certain transcript.—*Lewis v. McLellan Dock Co.* (La.) 666.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

Review of criminal prosecutions, see Criminal Law, § 1111.

§ 663. The bill of exceptions stating that it contains all the evidence, the Supreme Court cannot deal with it on any contrary hypothesis.—*Excelsior Steam Laundry Co. v. Lomax* (Ala.) 347.

(K) Questions Presented for Review.

Review of criminal prosecutions, see Criminal Law, §§ 1120, 1122.

§ 671. Where the records of the Supreme Court did not show the submission of a motion for dismissal, but only a submission on the merits, the questions raised by the motion cannot be considered.—*North Italian Colonial Co. v. Janovich-Calafiore Co.* (Ala.) 339.

§ 680. Rulings on demurrers cannot be reviewed where the demurrers do not appear in the transcript.—*Louisville & N. R. Co. v. McCool* (Ala.) 656.

§ 681. The overruling of a demurrer to an amended plea cannot be reviewed when the amendment does not appear of record.—*McAlister-Coman Co. v. Mathews* (Ala.) 416.

§ 692. Before the Supreme Court can review the court's action in proceeding to judgment, notwithstanding a party's offer to introduce further testimony, the bill of exceptions must set out the testimony.—*United Hardware-Furniture Co. v. Blue* (Fla.) 364.

§ 695. The sufficiency of the evidence to support the conclusion of the court on the issues of fact cannot be reviewed on appeal where the finding is not sufficiently shown in the bill of exceptions.—*Baumbauer v. Mobile Electrical Supply Co.* (Ala.) 732.

§ 704. Denial of a motion for judgment in default of full answer to interrogatories cannot be reviewed where the interrogatories were not in the record.—*Carlisle v. Alabama Great Southern R. Co.* (Ala.) 341.

XI. ASSIGNMENT OF ERRORS.

§ 720. Assignments of error of a defendant, not a party to the decree appealed from, nor affected by it, will not be considered.—*Washington v. Arnold* (Ala.) 463.

§ 731. An assignment of error that "the master erred in the report which he made to the court" cannot be considered.—*McMillan v. Warren* (Fla.) 825.

§ 736. In preparing assignments of error, each error relied upon should be clearly specified and separately assigned.—*McMillan v. Warren* (Fla.) 825.

§ 736. Where a single assignment of error attacks a plurality of rulings, a determination that one of them is correct disposes of the assignment.—*McMillan v. Warren* (Fla.) 825.

§ 740. Where a single assignment of error attacks a plurality of rulings as to the findings of a master, a determination that one of them is correct disposes of the assignment.—*McMillan v. Warren* (Fla.) 825.

XII. BRIEFS.

§ 755. Counsel for defendant in error or appellee should file in the Supreme Court a brief in support of the judgment or decree brought up for review.—*Gillespie v. Chapline* (Fla.) 722.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

Dismissal of certiorari, see *Certiorari*, § 60.

§ 792. In the absence of a judgment in the transcript, the Supreme Court is bound to dismiss the appeal *ex proprio motu*.—*Eckhardt v. Materne* (La.) 172.

§ 797. A motion to dismiss an appeal comes too late when filed after answer to the appeal.—*Cox v. First Nat. Bank of Lake Charles* (La.) 227.

§ 801. Motion to dismiss appeal because of proceedings below after taking the appeal denied.—*Ex parte Ryan* (La.) 573.

§ 801. On appeal from an order directing a delivery of the assets of a dissolved corporation to liquidators appointed by the stockholders, instead of by the Governor, whether the state was entitled to have the property delivered to a liquidator appointed by the Governor could not be determined on a motion to dismiss the appeal.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans* (La.) 763.

XVI. REVIEW.

Criminal prosecutions, see *Criminal Law*, §§ 1134, 1177.

(A) Scope and Extent in General.

Cases certified by court of appeals to Supreme Court, see *Courts*, § 224.

Criminal prosecutions, see *Criminal Law*, § 1134.

§ 837. In reviewing rulings upon a demurrer, the record proper will be looked to, and not the bill of exceptions.—*Birmingham & A. R. Co. v. Mattison* (Ala.) 49.

§ 843. Where everything contained in a special plea in an action for malicious prosecution was admissible under the general issues, it need not be decided on appeal whether it was error to sustain a demurrer to the plea.—*Abingdon Mills v. Grogan* (Ala.) 596.

§ 845. In reviewing a decree in an agreed case, the Supreme Court can look only to the facts agreed on.—*Grant v. Independent Order of Sons and Daughters of Jacob* (Miss.) 698.

§ 854. Where for any reason a question asked a witness was properly sustained, the general objection to the question was sufficient.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 863. Where an appeal is taken from part of the judgment rendered on separate demands, no question as to the correctness of the finding on the other demand can be raised.—*Cox v. First Nat. Bank of Lake Charles* (La.) 227.

§ 866. Code 1907, § 3017, authorizing review of a ruling which compels the entry of a voluntary nonsuit, *held* not to authorize the review of questions or rulings which did not superinduce the nonsuit.—*Engle v. Patterson* (Ala.) 397.

§ 867. Where a new trial is granted only such errors as affect the granting of the motion can be considered on appeal.—*Woodward Iron Co. v. Brown* (Ala.) 829.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 874. Judgment in petitory action dismissing the suit as to defendants not alleged to be in possession *held* proper.—*McQueen v. Fladdick-Black Land & Lumber Co.* (La.) 781.

(C) Parties Entitled to Allege Error.

§ 878. On appeal from judgment of dismissal, action of the lower court in entertaining jurisdiction *held* not reviewable.—*State v. Tensas Delta Land Co.* (La.) 216.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

Trial *de novo* on appeal from justices' courts, see *Justices of the Peace*, § 174.

Trial *de novo* on appeal in proceedings to establish private roads, see *Private Roads*, § 2.

(E) Presumptions.

Review of criminal prosecutions, see *Criminal Law*, § 1144.

§ 900. In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge.—*McMillan v. Warren* (Fla.) 825.

§ 901. A party resorting to an appellate court must make the errors complained of clearly appear.—*McMillan v. Warren* (Fla.) 825.

§ 907. Where the bill of exceptions does not set out all the testimony of a certain witness, it must be presumed on appeal that such testimony tended to support defendant's contentions in some manner.—*Hamrick v. Shipp* (Ala.) 932.

§ 909. Presumption to be indulged in favor of a decree stated.—*Vary v. Thompson* (Ala.) 951.

§ 926. It cannot be presumed on appeal, in the absence of evidence thereof in the record, that an insurance company was informed of insured's death in writing, in order to put the trial court in error for permitting a question as to when the company was informed of insured's death, on the ground that it called for hearsay, and not the best evidence of the facts sought to be elicited.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 926. Where neither an overruled question to a party as to a certain agreement nor the record discloses the nature or relevancy to any issue of any agreement proposed to be shown, error cannot be imputed.—*Phillips v. Bradshaw* (Ala.) 662.

§ 926. Error in excluding evidence will not be imputed if the ruling can be sustained on any ground.—*Phillips v. Bradshaw* (Ala.) 662.

§ 928. Presumption on appeal, as to instructions stated.—*Owen v. Moxom* (Ala.) 527.

§ 928. A recital in a bill of exceptions *held* not to overcome an assumption that the court in ejectment charged as to the constituents of adverse possession.—*Owen v. Moxom* (Ala.) 527.

§ 935. Under the facts, *held* it was to be presumed that leave to respondents in default to answer under Code 1907, § 3167, was granted, and default was set aside, or that the default was waived by complainant.—*Smith v. Hill* (Ala.) 949.

§ 936. The court, on appeal from a judgment of the circuit court retaxing the fees of witnesses and reducing the fees certified to by the clerk, will presume the existence of acts justifying the action of the court.—*Terry v. Montgomery* (Ala.) 314.

§ 936. Where the circuit court retaxes the fees of witnesses as costs, the presumption is that the court is free from error.—*Terry v. Montgomery* (Ala.) 314.

§ 938. Recitals of a bill of exceptions *held* not to raise the presumption that it did not contain all the interrogatories and answers in a deposition that were offered at the trial.—*Butterworth & Lowe v. Cathcart* (Ala.) 896.

(F) Discretion of Lower Court.

§ 955. The appointment of a receiver, though a matter of sound judicial discretion, is revisable by the Supreme Court.—*Albritton v. Lott-Blackshear Commission Co.* (Ala.) 653.

§ 956. The extending of time for taking testimony in an equity case rests within the discretion of the trial court, which will not be disturbed unless an abuse thereof clearly appears.—*McMillan v. Warren* (Fla.) 825.

§ 959. Discretion in allowing amendments will not be interfered with by the appellate court in the absence of gross and flagrant abuse.—*Morgan v. Eaton* (Fla.) 305.

§ 970. Where no abuse of discretion is shown in extending the time for taking testimony in an equity case, the order will not be reversed on appeal.—*Spencer v. Spencer* (Fla.) 146.

(G) Questions of Fact, Verdicts, and Findings.

Review of criminal prosecutions, see Criminal Law, § 1158.

§ 1001. In an action against a railroad company for the death of plaintiff's intestate by being struck by one of its engines, the Supreme Court on appeal could not pass upon the sufficiency of certain evidence tending to show wanton or willful injury by defendant's agent, incredible as the evidence may seem.—*Birmingham Southern R. Co. v. Fox* (Ala.) 889.

§ 1001. In reviewing the sufficiency of the evidence, *held*, that the question for determination is whether as reasonable men the jury could have found the verdict from the evidence adduced.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 1002. The issues on conflicting evidence are for the jury, and a verdict supported by evidence, if credited by the jury, will not be disturbed on appeal.—*Woodward Iron Co. v. Sheehan* (Ala.) 24.

§ 1002. A judgment on conflicting evidence will not be reversed, unless clearly against the weight of evidence.—*Coleman v. New Orleans Ry. & Light Co.* (La.) 386.

§ 1003. Statement of when a verdict will be disturbed on appeal as insufficiently supported by evidence.—*Home Telephone Co. v. Robertson* (Ala.) 655.

§ 1004. Finding as to the amount to be allowed for personal injuries will not be disturbed, unless some rule of law has been violated, and the jury were not governed by the evidence.—*Harby v. Florida East Coast Hotel Co.* (Fla.) 193.

§ 1004. The amount of recovery for personal injuries and physical pain is within the province of the jury, subject to such review as is necessary to prevent an abuse of their discretion.—*Harby v. Florida East Coast Hotel Co.* (Fla.) 193.

§ 1004. A verdict will not be disturbed for inadequacy of damages, where the jury could reasonably have placed on the injury and suffering the amount allowed.—*Harby v. Florida East Coast Hotel Co.* (Fla.) 193.

§ 1004. Where there is no certain, uncontradicted evidence that the verdict was excessive, the judgment will not be reversed.—*Atlantic Coast Line R. Co. v. Turner* (Fla.) 586.

§ 1004. Where damages allowed are not clearly excessive, an appellate court will not disturb

a finding sustained by the evidence.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 1005. Where the trial judge has directed the filing of remittitur, but has otherwise refused to interfere with the judgment, an appellate court will do likewise unless the amounts of the verdict are still such as to shock its judicial conscience.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 1009. A final decree will not be reversed, where the conflicting evidence does not preponderate against the conclusions of the chancellor.—*Slorah v. Wilcox* (Fla.) 12.

§ 1009. The findings of a chancellor, where the testimony is not taken before him, should not be disturbed on appeal unless clearly shown to be erroneous.—*McMillan v. Warren* (Fla.) 825.

§ 1009. Decree for defendant in foreclosure *held* sustained by the evidence.—*Bludworth v. Bray* (Fla.) 957.

§ 1017. A referee's findings based on his examination of witnesses orally, with opportunity to observe their manner, are presumed on appeal to be correct.—*Roy v. O'Neill* (Ala.) 946.

§ 1017. The findings of a referee on questions of fact where witnesses are examined before him are as conclusive as the verdict of a jury.—*Humphreys v. Drew* (Fla.) 362.

§ 1017. In an action against a carrier for injuries to stock, a certain question *held* one of fact for the referee acting as a jury.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

§ 1020. Question whether a shipper consented to a specified valuation *held* for a referee acting as a jury.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

§ 1024. Finding that managing partner of firm was a resident of the state will not be disturbed when not against weight of evidence.—*Weil Bros. & Bauer v. C. N. Adams & Son* (La.) 737.

(H) Harmless Error.

Criminal prosecutions, see Criminal Law, §§ 1162, 1177.

§ 1026. An appellate court should not reverse a judgment for an erroneous ruling, where it clearly appears that the party complaining was not injured thereby.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 1031. Under the statute the error in admitting evidence in a case tried by the court *held* to require a reversal.—*Brandon v. Progress Distilling Co.* (Ala.) 640.

§ 1031. Where a special instruction announces an erroneous proposition, it must affirmatively appear that the presumptive harm has been entirely removed.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 1032. A party complaining of the sustaining of an objection to a question asked a witness *held* required to show what the answer of the witness would have been had he been permitted to answer.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 1033. A party cannot complain that instructions are contradictory when the erroneous instruction is favorable to him.—*Robert M. Green & Sons v. Lineville Drug Co.* (Ala.) 433.

§ 1033. In attachment proceedings, in which others intervened as claimants of the goods, any error in admitting evidence of a claim of exemptions was favorable to claimants, if the exemption involved the goods sought to be attached.—*M. Weinstein & Sons v. Yielding Bros. & Co.* (Ala.) 591.

§ 1040. The error, if any, in rulings on demurrers to pleadings, was not prejudicial, where

the party was entitled under other pleadings to introduce all the evidence that he could introduce under all his pleadings.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 76.

§ 1040. Error in sustaining a demurrer to a replication to a plea *held* harmless.—*Broyles v. Central of Georgia Ry. Co.* (Ala.) 81.

§ 1040. Any error in sustaining a demurrer to a plea *held* harmless, in view of other pleas allowed to stand which contained the same matters.—*State Life Ins. Co. of Indianapolis v. Westcott* (Ala.) 344.

§ 1040. Error, if any, in sustaining demurrers to special pleas to a complaint for slander, because not sufficiently specific to comply with Code 1907, § 5340, *held* to be without injury.—*Schuler v. Fischer* (Ala.) 390.

§ 1040. The sustaining of a general demurrer to a plea incapable of amendment so as to make it good *held* not prejudicial.—*Staples v. Steed* (Ala.) 646.

§ 1040. Any error in overruling a demurrer to a cross-bill *held* harmless.—*Brown v. Powers* (Ala.) 647.

§ 1040. Any error in sustaining a demurrer to a special plea is harmless, where the matter pleaded can be shown under general issue.—*Louisville & N. R. Co. v. McCool* (Ala.) 656.

§ 1040. If pleas are so defective that a motion to strike would be proper, sustaining a demurrer thereto *held* not reversible error.—*Humphreys v. Drew* (Fla.) 362.

§ 1041. Refusal of a referee to allow filing of additional pleas, if error, *held* not prejudicial.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

§ 1042. Where testimony covered by special pleas is admitted under a plea of general issue, the action of the court in striking the special pleas need not be reviewed, since no harm could have resulted from striking the special pleas.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 1048. A question and answer of a witness *held* not prejudicial error.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 1048. Certain evidence, though in response to a question calling for a conclusion, *held* not prejudicial.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 1048. A question and answer of a witness *held* not to constitute reversible error.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 1050. The error in admitting certain evidence *held* prejudicial.—*Brandon v. Progress Distilling Co.* (Ala.) 640.

§ 1050. For error in admitting testimony of the good reputation of an unimpeached witness, the judgment will be reversed, where the evidence is evenly balanced.—*Brewer v. Mullins* (Miss.) 257.

§ 1051. Any error in permitting a witness to state that another signed a receipt was harmless, where the latter subsequently testified that he did so.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 1053. Erroneous rulings on the admissibility of evidence cannot be cured by charges.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 1053. Where counts are withdrawn and evidence introduced thereunder excluded, exceptions to the introduction of the evidence are rendered unavailable.—*Alabama Steel & Wire Co. v. Sells* (Ala.) 921.

§ 1053. In an action for injuries to a railroad switchman, reception of certain testimony *held* not reversible error.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 1056. In detinue, the exclusion of certain evidence *held* not prejudicial.—*Kern v. Cox* (Ala.) 401.

§ 1056. In attachment proceedings, in which certain persons intervened as claimants, *held*, that the court could not be put in error for excluding evidence of the sale of certain goods to claimants.—*M. Weinstein & Sons v. Yielding Bros. & Co.* (Ala.) 591.

§ 1056. Where the part of the excluded evidence remaining after the part thereof excluded as being a conclusion, was irrelevant and immaterial, the court will not be put in error for excluding all the testimony, though no part of it was objected to as being irrelevant and immaterial.—*Abingdon Mills v. Grogan* (Ala.) 596.

§ 1056. In an action on an insurance policy, error in the exclusion of evidence of other insurance *held* harmless, under the circumstances.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

§ 1057. The error, if any, in excluding evidence of a fact subsequently proved is not prejudicial.—*Kramer v. Compton* (Ala.) 351.

§ 1057. Plaintiffs *held* not entitled to object to the exclusion of certain evidence, the substance of which was thereafter admitted without objection.—*Butterworth & Lowe v. Cathcart* (Ala.) 896.

§ 1058. The error, if any, in excluding the answer of a witness to a question put to him is without injury where the witness subsequently without objection gave his answer to the question.—*Kramer v. Compton* (Ala.) 351.

§ 1058. An improper objection to a question asked a witness is harmless error, where the witness had already answered the question.—*United Hardware-Furniture Co. v. Blue* (Fla.) 364.

§ 1064. Where the general affirmative charge should be given for defendant, the error, if any, in the manner in which it was given, or in any other instruction, was without injury to plaintiff.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§ 1064. In an action for issuing without probable cause, and maliciously, a search warrant, an instruction, erroneous because argumentative, *held* not prejudicial.—*Gulshy v. Louisville & N. R. Co.* (Ala.) 392.

§ 1064. In ejectment, though a charge is not commendable, its giving *held* not reversible error.—*Owen v. Moxom* (Ala.) 527.

§ 1068. Those parts of the charge which related to the measure of damages, if error, were without injury, where the jury found for the defendants.—*Huson Ice & Machine Works v. Bland & Chambers* (Ala.) 445.

(I) Error Waived in Appellate Court.

§ 1079. An assignment of error on the record, without more, does not amount to insistence in argument, and the assignment will be regarded as waived.—*Alabama Steel & Wire Co. v. Sells* (Ala.) 921.

§ 1079. Assignments of error *held* not to amount to an insistence in argument, and to be a waiver of error.—*Alabama Steel & Wire Co. v. Sells* (Ala.) 921.

(J) Decisions of Intermediate Courts.

§ 1085. The judgment of the district court, which has supervision over justice of the peace courts, that an irregularity has been committed in such a court greater than believed by the Supreme Court, will not be changed.—*Le Blue v. Le Smith* (La.) 683.

(K) Subsequent Appeals.

§ 1098. The judgment on a first appeal is not res judicata on a subsequent appeal as to one not a party to the first appeal.—*Lee v. Powell Bros. & Sanders Co. (La.)* 214.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Review of criminal prosecutions, see Criminal Law, §§ 1182, 1188.

(A) Decision in General.

§ 1105. Where on appeal certain causes between the same parties have been consolidated only for the purpose of argument, the Supreme Court will not withhold its judgment in the one to await the final determination of the other suit.—*Concrete Construction & Contracting Co. v. Pratt (La.)* 153.

§ 1106. On appeal in proceedings to procure the cancellation of assessments, *held*, that the case must be remanded by the Supreme Court upon determining that such assessments were improper; it being unable to determine what to deduct from the total assessment because of the improper assessments.—*Fidelity Mut. Life Ins. Co. v. Fitzpatrick (La.)* 118.

§ 1106. Where appellee moves to dismiss on the ground of acquiescence by appellant by unnecessarily paying the costs, the case will be remanded that evidence may be introduced to establish such facts.—*Sims v. Jeter (La.)* 247.

§ 1119. Appeal from order dismissing suit as to certain defendants affirmed so far as it maintains the suit against a sole defendant.—*McQueen v. Fladick-Black Land & Lumber Co. (La.)* 781.

(B) Affirmance.

Review of criminal prosecutions, see Criminal Law, § 1182.

§ 1135. Where there is evidence to support findings and the decree, and no error appears, the decree will not be disturbed.—*Tatum v. Price-Williams (Fla.)* 3.

§ 1135. Where the proof sustained the allegations of a bill for specific performance, the decree awarding it will be sustained on appeal.—*Golson v. Boyett (Fla.)* 141.

§ 1135. Where no errors of law appear, and there is testimony to support the verdict, and it does not appear that the jury were not governed by the evidence, the judgment will be affirmed.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

(D) Reversal.

Review of criminal prosecutions, see Criminal Law, § 1188.

§ 1166. Appointment of a receiver before bill filed will be revoked on appeal without reference to the merits of the application.—*Howell & Howell v. Harris, Cortner & Co. (Ala.)* 935.

§ 1178. Plaintiff *held* entitled to amend his pleadings after reversal and remand so as to ask for a reduction of an assessment as alternative relief in a suit for cancellation of a tax.—*Fidelity Mut. Life Ins. Co. v. Fitzpatrick (La.)* 118.

APPEARANCE.

In justices' court, see Justices of the Peace, § 84.

APPLIANCES.

Defective and dangerous appliances, liability of master for injuries to servant, see Master and Servant, §§ 101, 129, 208.

For transportation of passengers, sufficiency and safety, see Carriers, § 290.

APPLICATION.

For enactment of special or local law, notice of intention, see Statutes, § 8½.

Of assets of partnership to liabilities, see Partnership, § 183.

Of instructions to case, see Criminal Law, § 814; Trial, §§ 252, 253.

For particular remedies or forms of relief.

See Injunction, §§ 143, 148.

Allowance of appeal or writ of error, see Appeal and Error, § 361.

Continuance, see Criminal Law, § 603.

New trial, see New Trial, §§ 117-162.

Sale of property of decedent, see Executors and Administrators, §§ 332, 335.

Striking out pleading or defense, see Pleading, §§ 356, 362.

Vacation or dissolution of injunction, see Injunction, § 172.

APPOINTMENT.

Of executors and administrators, see Executors and Administrators, §§ 20, 29.

Of receivers, see Receivers, §§ 29-57.

Of receivers for insolvent corporations, see Corporations, § 553.

Of receivers in foreclosure proceedings, see Mortgages, § 468.

APPORTIONMENT.

Of costs, see Costs, § 61.

APPRAISAL.

Adjustment of loss under insurance policy, see Insurance, § 565.

APPROPRIATION.

Of property to public use, see Eminent Domain.

APPURTENANCES.

Description in deed, see Deeds, § 111.

ARBITRATION AND AWARD.

See Reference.

Adjustment of loss under insurance policy, see Insurance, § 565.

ARGUMENTATIVENESS.

In instructions, see Criminal Law, § 807; Trial, § 240.

ARGUMENT OF COUNSEL.

In civil actions, see Trial, § 121.

In criminal prosecutions, see Criminal Law, §§ 699, 730.

ARRAIGNMENT.

See Criminal Law, § 279.

ARRAY.

Challenge to array of jurors, see Jury, §§ 116, 117.

ARREST.

See Bail.

Evidence of resistance, see Criminal Law, § 351.

Illegal arrest, see False Imprisonment.

II. ON CRIMINAL CHARGES.

Warrant for arrest in criminal prosecutions, see Criminal Law, §§ 217, 218.

ASSAULT AND BATTERY.**I. CIVIL LIABILITY.**

Assault on convict, see *Convicts*, § 10.
 Corporal punishment of convict, see *Convicts*, § 10.
 On passenger, liability of carrier, see *Carriers*, § 284.

(B) Actions.

Form of action against master for assault by servant, see *Master and Servant*, § 325.
 Misjoinder of causes of action, see *Action*, § 50.

§ 19. A person assaulted without provocation in a public street *held* entitled to compensation in money.—*Carrick v. Joachim* (La.) 173.

§ 24. Compensatory damages may not be recovered in an action for assault and battery, unless specially claimed.—*Sloss-Sheffield Steel & Iron Co. v. Dickinson* (Ala.) 564.

II. CRIMINAL RESPONSIBILITY.

Assault with intent to kill, see *Homicide*, § 100.

ASSEMBLY.

Legislative, see *States*, § 37.

ASSENT.

Of parent to employment of child, see *Parent and Child*, § 7.
 Of parties to contracts in general, see *Contracts*, § 15.
 Of state to be sued, see *States*, § 191.

ASSESSMENT.

Of damages in general, see *Damages*, § 216.
 Of expenses of public improvements, see *Municipal Corporations*, §§ 406-495, 525, 586.
 Of taxes, see *Schools and School Districts*, § 103; *Taxation*, §§ 348, 500.

ASSETS.

Of estate of decedent, see *Executors and Administrators*, § 39.
 Of partnership, see *Partnership*, § 183.

ASSIGNMENT OF DOWER.

See *Dower*, § 114.

ASSIGNMENT OF ERRORS.

See *Appeal and Error*, §§ 720, 740.

ASSIGNMENTS.

For benefit of creditors, see *Assignments for Benefit of Creditors*.
 Specific performance of contract to assign contract for personal services, see *Specific Performance*, §§ 14, 73.
 Validity as to creditors or subsequent purchasers, see *Fraudulent Conveyances*.

Transfers of particular species of property, rights, or instruments.

See *Bills and Notes*, §§ 324, 326; *Chattel Mortgages*, § 211.
 Debts secured by mortgage, see *Chattel Mortgages*, § 211.
 Insurance policy, see *Insurance*, § 122.

I. REQUISITES AND VALIDITY.

Priority of equitable assignment over garnishment, see *Garnishment*, § 108.

(A) Property, Estates, and Rights Assignable.

§ 10. An agreement *held* valid by which a debtor transfers to his creditor a credit which is to mature at some future time in satisfaction of a debt not yet matured, or even not yet in existence.—*Cox v. First Nat. Bank of Lake Charles* (La.) 227.

II. OPERATION AND EFFECT.

Priority of equitable assignment over garnishment, see *Garnishment*, § 108.

IV. ACTIONS.

§ 137. Evidence *held* insufficient to show a sale by the lessee of a plantation of his outstanding accounts to his lessor.—*Yerger v. Murdoch* (La.) 1028.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See *Bankruptcy*, §§ 164-302.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 184. A general assignment of all a debtor's property to pay debts generally vests in grantee the entire, indefeasible title, leaving to grantor no title, legal or equitable.—*Butt v. McAlpine* (Ala.) 420.

VI. RIGHTS AND REMEDIES OF ASSIGNOR.

Laches in enforcing right of assignor to surplus, see *Trusts*, § 365.

ASSOCIATIONS.

Mutual benefit insurance associations, see *Insurance*, §§ 693, 793.

ASSUMPSIT, ACTION OF.

Distinctions between actions of assumpsit and case, see *Action*, § 30.
 Particular implied contracts as grounds of action, see *Account Stated*; *Work and Labor*.

§ 5. The common counts cannot be properly applied to an action for breach of an implied warranty.—*Austin v. Beall* (Ala.) 657.

ASSUMPTION.

As to facts by trial court in instructing jury, see *Trial*, § 191.
 Of risk by employé, see *Master and Servant*, §§ 203, 226, 288.

ATTACHMENT.

See *Execution*; *Garnishment*; *Sequestration*.
 Exemptions, see *Homestead*.

I. NATURE AND GROUNDS.

Attachment against partnership, see *Partnership*, § 208.

II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see *Homestead*.

VIII. CLAIMS BY THIRD PERSONS.

§ 308. A claim of exemptions by defendant in attachment, which was contemporaneous with her sale of the attached goods to claimant and defendant's failure, *held* properly admitted in evidence in proceedings to try the right of prop-

erty between plaintiff and claimant.—*M. Weinstein & Sons v. Yielding Bros. & Co. (Ala.)* 591.

§ 308. In proceedings on a claim by third parties to property levied on by plaintiff in attachment against S. L. W., it was immaterial whether S. L. W. was a man or woman; no question of coverture being involved.—*M. Weinstein & Sons v. Yielding Bros. & Co. (Ala.)* 591.

§ 308. On the trial of the right of property between a claimant of attached property and plaintiff in attachment, plaintiff must prove the levy of process to make out a prima facie case, and was not entitled to recover where no attachment or levy was shown to have been made.—*M. Weinstein & Sons v. Yielding Bros. & Co. (Ala.)* 591.

XL. WRONGFUL ATTACHMENT.

§ 373. A plea in trover *held* not to state a defense.—*Mattingly v. Houston (Ala.)* 78.

§ 380. In an action of trover, a charge *held* properly refused.—*Mattingly v. Houston (Ala.)* 78.

ATTENDANCE.

Of witnesses, see Witnesses, §§ 2-32.

ATTESTATION.

Acknowledgments in general, see Acknowledgment.

ATTORNEY AND CLIENT.

Advice of counsel instituting prosecution, as constituting probable cause, see Malicious Prosecution, § 21.

Argument and conduct of counsel at trial, see Criminal Law, §§ 699, 730; Trial, § 121.

Attorneys in fact, see Principal and Agent.

II. RETAINER AND AUTHORITY.

§ 88. The acts of an attorney, so far as the procedure in a case is concerned, are binding on his client.—*Scarborough v. Harrison Naval Stores Co. (Miss.)* 143.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Attorney's fees as damages, see Damages, § 71.

Attorney fees of receiver, see Receivers, § 154.

ATTORNEYS IN FACT.

See Principal and Agent.

AUCTIONS AND AUCTIONEERS.

Compensation of auctioneer to sell property in hands of receiver, see Receivers, § 96.

Sale of property in hands of receiver, see Receivers, § 134.

AUDITA QUERELA.

Bill of review in equity, see Equity, §§ 442, 446.

Relief against execution in general, see Execution, § 163.

Relief against judgment by equitable proceedings, see Judgment, §§ 407-460.

Relief against judgment by motion or other proceedings in same action, see Judgment, §§ 336, 337.

AUDITORS.

See Reference.

AUTHENTIC ACT.

Acknowledgment of gift of land, see Acknowledgment, § 19.

Deed of gift, see Gifts, § 26.

AUTHENTICATION.

Of documents offered in evidence, see Evidence, § 378.

Of record for purpose of review, see Appeal and Error, § 612.

AUTHORITY.

Of agents, see Principal and Agent, §§ 70, 99, 150.

Of attorneys, see Attorney and Client, § 88.

Of executors or administrators, see Executors and Administrators, §§ 129-151.

Of judges, see Judges, § 26.

Of justices of the peace, see Justices of the Peace, §§ 44, 60.

Of officers and agents of corporations in general, see Corporations, §§ 423-432.

Of officers to take acknowledgment, see Acknowledgment, § 19.

Of partner to represent firm, see Partnership, §§ 161, 164.

Of receivers, see Receivers, §§ 81-96.

To make admission binding another, see Evidence, § 253.

AUTOMOBILES.

On streets, liabilities for injuries, see Municipal Corporations, § 705.

AUTREFOIS ACQUIT AND CONVICT.

See Criminal Law, § 200.

AVOIDANCE.

Of contract, see Contracts, § 261.

Of insurance policy, see Insurance, §§ 229, 281, 282.

Pleading matter in avoidance, see Pleading, § 136.

AWARD.

Of municipal contract to lowest bidder, see Municipal Corporations, § 336.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

§ 43. A person charged with a capital offense is not entitled to bail, if the proof is evident or the presumption great, except under extraordinary circumstances.—*Martin v. State (Miss.)* 258.

§ 44. Under Gen. Acts Sp. Sess. 1909, p. 62, one convicted of murder in the second degree and sentenced to imprisonment for 15 years *held* not entitled to bail pending his appeal.—*State v. Weaver (Ala.)* 638.

§ 94. A judgment on a forfeited bond against principal and surety cannot be appealed from except in a criminal case when the crime committed is punishable by death or hard labor.—*State v. Dykes (La.)* 245.

§ 94. The forfeiture of an appearance bond falls within the criminal jurisdiction of the court, so that an appeal does not lie to the Court of Appeal.—*State v. Dykes (La.)* 245.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Depositaries; Pledges.

Carriage of goods, see Carriers, §§ 39-188.

Hiring and use of animals, see Animals, § 27.

§ 22. A compress company receiving cotton from the owner *held* not relieved from liability to the owner by his exchanging the compress company's receipts with the railroad company for bills of lading and assigning them to the consignee of the cotton.—Southern Ry. Co. v. Jones Cotton Co. (Ala.) 899.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 164. Under the facts, *held*, that payments made not by virtue of a transfer of credit were a preferential payment under Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314).—Cox v. First Nat. Bank of Lake Charles (La.) 227.

§ 164. A transaction *held* a sale of credit in due course of business and not a preferential payment of a debt within Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314).—Cox v. First Nat. Bank of Lake Charles (La.) 227.

§ 165. A bank's right of set-off as against money deposited therein under Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), stated.—Cox v. First Nat. Bank of Lake Charles (La.) 227.

(E) Actions by or Against Trustees.

§ 302. In an action by a trustee in bankruptcy, a clause in a contract entered into by the bankrupt *held* not in the case because not pleaded.—Cox v. First Nat. Bank of Lake Charles (La.) 227.

BANKS AND BANKING.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 109. A bank *held* bound by acts of its cashier, who was permitted to have complete control over its business.—Pensacola Bank & Trust Co. v. National Bank of St. Petersburg (Fla.) 294.

§ 114. Attempt by a bank cashier to secure himself after having been fraudulently induced to make a loan *held* not to constitute a ratification of the transaction.—Bank of Coffee Springs v. W. A. McGilvray & Co. (Ala.) 473.

(C) Deposits.

Forgery of checks, see Forgery.

§ 119. The relation between a bank and a general depositor is that of debtor and creditor.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 138. The currency delivered by a bank in payment of a check is the money of the bank, and not money of the drawer.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 138. A bank *held* to extinguish its liability to a depositor by paying checks, if free from fraud or other vitiating circumstances affecting its rights.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 148. If banks had no notice of fraud in procuring issuance of checks, *held*, that they were not negligent in honoring them, and that the checks were not forgeries in such sort as to render the banks liable for paying them.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

(D) Collections.

§ 165. In the absence of a controlling statute or agreement, where a check is deposited with a bank, the bank is liable upon its payment, though the collecting agent does not remit the collection.—Brown v. People's Bank for Savings of St. Augustine (Fla.) 719.

§ 165. Laws 1909, c. 5951, relating to the liability of banks receiving negotiable instruments for collection, *held* not retrospective in effect.—Brown v. People's Bank for Savings of St. Augustine (Fla.) 719.

(E) Loans and Discounts.

Defenses against bank as assignee of chattel mortgage, see Chattel Mortgages, § 211.

(F) Exchange, Money, Securities, and Investments.

§ 189. In an action against a bank on a cashier's check, certain pleas alleging plaintiff's fraud in procuring the check *held* a complete defense.—Bank of Coffee Springs v. W. A. McGilvray & Co. (Ala.) 473.

§ 189. Where, after a cashier's check had been obtained, and transferred to plaintiff by plaintiff's fraud, the cashier took a mortgage from the payees, it was not thereby estopped to plead fraud as a defense to the check.—Bank of Coffee Springs v. W. A. McGilvray & Co. (Ala.) 473.

(H) Actions.

§ 226. In an action against a bank on a cashier's check, replications to certain pleas alleging plaintiff's fraud in procuring the checks *held* demurrable.—Bank of Coffee Springs v. W. A. McGilvray & Co. (Ala.) 473.

BAR.

Of action by laches or staleness of demand, see Equity, §§ 67-70.

Of prosecution by limitation, see Criminal Law, § 154.

BARROOMS.

See Intoxicating Liquors.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

§ 13. Under Civ. Code, art. 204, no illegitimate child can inherit from his parents unless they were capable of contracting marriage; Acts 1870, No. 63, not applying to a case where the parents had not availed themselves of the benefit of the statute.—Succession of Davis (La.) 266.

IV. PROPERTY.

§ 102. The child of a woman slave by a white man cannot inherit the succession of the mother opened in Louisiana since Acts 1894, No. 54, prohibiting marriage between white persons and persons of color.—Succession of Davis (La.) 266.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance association, see Insurance, §§ 693, 793.

BENEFICIARIES.

Of insurance, see Insurance, § 793.
Of trust, see Trusts.

BENEFITS.

From public improvements, ground for assessment of expenses, see Municipal Corporations, § 439.
Mutual benefit insurance, see Insurance, § 793.

BENEFIT SOCIETIES.

See Insurance, §§ 693, 793.

BEQUESTS.

See Wills.
Payment or delivery in distribution of estate, see Executors and Administrators, § 314.
To charities, see Charities.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, §§ 398, 400; Evidence, §§ 158-183.

BETTERMENTS.

Liens for improvements on real estate, see Mechanics' Liens.
Public improvements, see Drains; Highways; Levees; Municipal Corporations, §§ 265-586.

BIDS.

For contracts with municipal corporations, see Municipal Corporations, § 336.

BILL.

Introduction and passage of legislative bills, see Statutes, §§ 8½, 28.

BILL IN EQUITY.

See Equity, §§ 133-149.

BILL OF DISCOVERY.

See Discovery, §§ 3-20.

BILL OF EXCEPTIONS.

See Criminal Law, §§ 1000, 1092; Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF LADING.

See Carriers, §§ 51, 62.
Parol or extrinsic evidence to contradict or vary, see Evidence, § 407.

BILL OF REVIEW.

See Equity, §§ 442, 446.

BILL OF RIGHTS.

See Constitutional Law.

BILLS AND NOTES.

Bills of lading, see Carriers, §§ 51, 62.
Forgery, see Forgery.
Premium notes, see Insurance, § 187.

I. REQUISITES AND VALIDITY.**(B) Form and Contents of Promissory Notes and Duebills.**

Trade check as subject of forgery, see Forgery, § 7.

(D) Acceptance.

Acceptance as admission of liability, see Evidence, § 217.

§ 60. Acceptance of a bill of exchange must be in writing signed as required by Code 1896, § 890.—Faircloth-Byrd Mercantile Co. v. Adkinson. (Ala.) 419.

(F) Validity.

§ 104. Checks held to be utterly void as between payee and drawer if issuance be procured by duress.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(B) Indorsement for Transfer.**

§ 290. Liability of an indorser of a check payable in another city on deposit with a bank to be credited to him stated.—Brown v. People's Bank for Savings of St. Augustine (Fla.) 719.

(C) Assignment or Sale.

§ 324. Act of the transferee of a forged note and mortgage in taking interest on the note and extending it held not to preclude his recovery against the transferor on his warranty.—Cluseau v. Wagner (La.) 547.

§ 326. One who sells a credit or incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned.—Cluseau v. Wagner (La.) 547.

VII. PAYMENT AND DISCHARGE.

Payment of checks by bank, see Banks and Banking, § 138.

Payment of forged or altered paper by bank, see Banks and Banking, § 148.

Rights, duties, and liabilities of bank receiving bill or note for collection, see Banks and Banking, § 165.

VIII. ACTIONS.

§ 464. Written acceptance of a bill of exchange need not be alleged, though it must be proved.—Faircloth-Byrd Mercantile Co. v. Adkinson (Ala.) 419.

§ 495. Where two names are signed to a note, there is an evidential, rebuttable presumption that they are co-makers and equally bound.—Smith v. Pitts (Ala.) 402.

§ 520. In an action on certain rent notes, defense of fraud held unsustainable.—Tribble v. Crestline Land Co. (Ala.) 600.

§ 523. In an action on a note, where plaintiff introduced the note, with an indorsement transferring it to him, and testified that he bought it in due process of business, before maturity, for its face value, he made out a prima facie case.—Tapia v. Baggett (Ala.) 834.

BINDING SLIPS.

Extension of term of insurance, see Insurance, § 177.

BLANKS.

Blank proofs of loss under insurance policy, see Insurance, § 534.

BLASPHEMY.

Profane swearing as disorderly conduct, see Disorderly Conduct.

BLOODHOUNDS.

Evidence of trailing persons accused of crime, see Criminal Law, § 386.
Opinion evidence as to ability of dog to track human being, see Criminal Law, § 465.

BOARDS.

Health boards, see Health, § 7.
Levee boards, see Levees, §§ 10, 11.

BOATS.

Ferryboats, see Ferries.

BONA FIDE PURCHASERS.

Mortgagees, see Mortgages, § 154.
Of personal property in general, see Sales, §§ 234, 235.
Of property of decedent at sale under order of court, see Executors and Administrators, § 388.
Of property sold on execution, see Execution, § 272.
Of real property in general, see Vendor and Purchaser, §§ 220, 233.

BONDS.

County bonds, see Counties, § 178.
Municipal bonds, see Municipal Corporations, § 918.
Sureties on bonds, see Principal and Surety.
To prevent or discharge mechanics' liens, see Mechanics' Liens, § 229.

Bonds for performance of duties of trust or office.

See Notaries, § 11; Officers, § 126.
Treasurer of levee board, see Levees, § 10.

Bonds in judicial proceedings.

See Bail; Injunction, § 148.

BOROUGHES.

See Municipal Corporations.

BOUNDARIES.

Of cities, see Municipal Corporations, §§ 33-36.

BOUNTIES.

Rewards offered for performance of single and special services, see Rewards.

BREACH.

Of conditions of insurance policies, see Insurance, §§ 281, 282.
Of contract in general, see Contracts, §§ 277, 321.
Of contract of sale, see Sales, §§ 161-179; Vendor and Purchaser, §§ 128, 176.
Of contract of sale as ground for rescission, see Sales, §§ 116-119.
Of contract, restraining, see Injunction, § 60.

BREACH OF THE PEACE.

See Disorderly Conduct.

BRIBERY.

Proceedings for contempt for attempting to bribe witness, see Contempt, § 53.

BRIDGES.

Exemption of railroad bridges from taxation, see Taxation, § 231.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Subjects and titles of acts relating to bridges, see Statutes, § 123.

BRIEFS.

On appeal or writ of error, see Appeal and Error, § 755.

BROKERS.

Insurance brokers, see Insurance, § 73.

IV. COMPENSATION AND LIEN.

§ 54. Plaintiff held not entitled to commissions for procuring a purchaser of flour for defendant; the prospective purchaser having canceled the order.—Richardson v. Olathe Milling & Elevator Co. (Ala.) 659.

§ 63. If the seller refuses to deliver goods sold for him by a broker or improperly prevents the consummation of the sale he is liable to the broker for commissions.—Richardson v. Olathe Milling & Elevator Co. (Ala.) 659.

§ 66. In order to entitle broker to recover on agreement to divide commission, commission must have been actually received by the defendant whom it is sought to charge.—Giles v. Wilmott (Fla.) 287.

§ 67. In an action by the purchaser of land to recover a commission paid a broker for breach of his contract, the declaration held to state a cause of action.—Burnham City Lumber Co. v. Rannie (Fla.) 617.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 96. An agent to sell real estate held not authorized to collect any part of the purchase price.—White v. Lee (Miss.) 206.

BUILDING CONTRACTS.

Liens for labor and materials, see Mechanics' Liens.

BUILDINGS.

Fixtures, see Fixtures.

Lien for construction or repair, see Mechanics' Liens.

BURDEN OF PROOF.

In civil actions, see Evidence, § 90.

In criminal prosecutions, see Criminal Law, § 331.

Showing error on appeal or writ of error, see Appeal and Error, §§ 901, 1032.

BURGLARY.**II. PROSECUTION AND PUNISHMENT.**

Rights of infants as to prosecutions, see Infants, § 68.

BUSINESS.

License taxes for occupations, see Licenses, §§ 7, 32.

BY-LAWS.

Of corporations or associations, see Insurance, § 693.

BYSTANDERS.

Summoning as jurors, see Jury, § 72.

CALENDARS.

Computation of time, see Time.

CANCELLATION OF INSTRUMENTS.

See Quieting Title; Reformation of Instruments.

Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 218-236.

Grounds for cancellation, and cancellation or rescission of particular instruments by act of parties.

Contracts of sale, see Sales, §§ 116-119; Vendor and Purchaser, §§ 105, 108.

Insurance policies, see Insurance, § 229.

I. RIGHT OF ACTION AND DEFENSES.

§ 4. Facts stated *held* to entitle one to cancellation of instruments under which he was fraudulently deprived of title to land.—Gewin v. Shields (Ala.) 887.

§ 12. Instruments, though void, will be canceled in proper cases if they cast a cloud upon title to land.—Gewin v. Shields (Ala.) 887.

§ 20. One in possession of land need not first test his title in an action at law before suing to cancel an instrument as a cloud.—Gewin v. Shields (Ala.) 887.

II. PROCEEDINGS AND RELIEF.

§ 32. Cancellation of instruments *held* an equitable remedy.—Gewin v. Shields (Ala.) 887.

CAPITAL.

Corporate capital in general, see Corporations, §§ 151, 155.

CARELESSNESS.

See Negligence.

CARNAL KNOWLEDGE.

See Rape; Seduction.

CARRIERS.

As employers, see Master and Servant.

Construction, regulation, and operation of railroad in general, see Railroads.

Construction, regulation, and operation of street railroads in general, see Street Railroads.

Construction, regulation, and operation of telegraph and telephone lines, see Telegraphs and Telephones.

Delivery of liquors to carrier as delivery to consignee, see Intoxicating Liquors, § 147.

Matters peculiar to transportation of goods or passengers by water, see Ferries, § 33.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Statutory and municipal regulation of railroads in general, see Railroads, § 237.

(A) In General.

Denial of equal protection of laws, see Constitutional Law, § 241.

Deprivation of property without due process of law, see Constitutional Law, § 297.

Imposition of penalty for failure to settle claims for damages for loss of freight as denial of equal protection of law, see Constitutional Law, § 247.

§ 2. Laws 1907, c. 5624, amending Gen. St. 1906, § 2910, relating to suits against railroads for violation of rates, did not revive a cause of action that had become extinguished under the

terms of the amended section.—*La Floridienne, J. Buttgenbach Co., Société Anonyme, v. Seaboard Air Line Ry.* (Fla.) 298.

§ 11. Railroad Commissioners' Rule 15A, prescribing rates for switching cars of lumber, *held* to contemplate a service in the nature of a special privilege which the shipper cannot demand as matter of right.—*State v. Atlantic Coast Line R. Co.* (Fla.) 4.

§ 12. Railroad Commissioners' Rule 15A *held* merely to fix a rate for switching cars of rough lumber and not to compel a service.—*State v. Atlantic Coast Line R. Co.* (Fla.) 4.

§ 12. It is not essential to the validity of Railroad Commissioners' Rule 15A, providing rates for the privilege of milling lumber in transit at a certain place, that one rate be prescribed for such service in all markets and localities.—*State v. Atlantic Coast Line R. Co.* (Fla.) 4.

§ 12. Where a carrier voluntarily grants the privilege of milling lumber in transit, whether it be a duty of the carrier or not, it may be regulated and charges prescribed by the Railroad Commissioners.—*State v. Atlantic Coast Line R. Co.* (Fla.) 4.

§ 13. Carriers may not discriminate between markets or individuals in granting the privilege of milling lumber in transit, nor may railroad commissioners in regulating such privileges unjustly discriminate.—*State v. Atlantic Coast Line R. Co.* (Fla.) 4.

§ 19. Actions under Gen. St. 1906, § 2910, against railroads for violation of regulations of railroad commissioners, must be brought within 12 months after the alleged injury.—*La Floridienne, J. Buttgenbach Co., Société Anonyme, v. Seaboard Air Line Ry.* (Fla.) 298.

§ 20. Laws 1907, c. 5618, *held* a valid exercise of the state's police power.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

§ 20. The 50 per cent. per annum interest imposed by Laws 1907, c. 5618, upon carriers failing to settle claims within 60 days, *held* not so unreasonable as to render the statute unconstitutional.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

§ 20. The reasonableness of a penalty for failure to perform a public duty rests primarily in the discretion of the Legislature, and courts cannot interfere simply because they consider the Legislature's acts inexpedient or illogical.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

II. CARRIAGE OF GOODS.

Delivery to carrier as delivery to buyer under contract within statute of frauds, see Frauds, Statute of, § 89.

(A) Delivery to Carrier.

Delivery of goods to carrier as delivery to buyer, see Sales, § 161.

§ 39. A common carrier is in general bound to transport all goods that are properly offered for that purpose.—*Atlantic Coast Line R. Co. v. Rice* (Ala.) 918.

§ 39. A carrier has the right to inspect proffered shipments and to refuse them when not in fit condition for transportation.—*Atlantic Coast Line R. Co. v. Rice* (Ala.) 918.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

Parol evidence to explain bill of lading, see Evidence, § 407.

§ 51. A bill of lading is of a dual character and effect.—*Alabama Great Southern R. Co. v. Norris* (Ala.) 891.

§ 62. A contract of shipment need not be in writing.—Alabama Great Southern R. Co. v. Norris (Ala.) 891.

(C) **Custody and Control of Goods.**

§ 76. A cotton company selling and shipping cotton *held* entitled to recover for loss resulting from exposure to the weather while the cotton was held by a compress company, although the cotton company had received the purchase price of the cotton.—Southern Ry. Co. v. Jones Cotton Co. (Ala.) 899.

(D) **Transportation and Delivery by Carrier.**

§ 77. The duties of a carrier may arise out of usage as well as from statutory enactments.—State v. Atlantic Coast Line R. Co. (Fla.) 4.

§ 94. A carrier, in defense for freight, *held* entitled to show stated defensive matter under the general issue.—Louisville & N. R. Co. v. McCool (Ala.) 656.

(E) **Loss of or Injury to Goods.**

Act limiting time for payment of claim as denial of equal protection of laws, see Constitutional Law, § 241; as deprivation of property without due process of law, see Constitutional Law, § 297.

§ 107. Exceptions other than by contract to common-law liability of carrier of goods *held* to be the acts of God and of the public enemy.—Atlantic Coast Line R. Co. v. Rice (Ala.) 918.

§ 111. Where a carrier accepts goods improperly packed, their condition being open to ordinary observation, the duty attaches of using due care for their safe carriage, and the carrier is subject to all the liabilities ordinarily attaching to a shipment of the same character.—Atlantic Coast Line R. Co. v. Rice (Ala.) 918.

§ 114. The liability of a carrier as the insurer of goods continues after their arrival until notice to the consignee, and until he has had a reasonable time to remove them.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.) 797.

§ 114. The reasonable time after notice that must be allowed by a railroad company for a consignee to remove his goods from its depot applies to every one, regardless of the consignee's distance from the depot.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.) 797.

§ 114. The liability of a carrier as insurer of goods after their arrival at their destination, until notice to the consignee and until he has had a reasonable time in which to remove them, may reasonably be said to be within the terms of the contract of carriage.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.) 797.

§ 118. A railway company, in accepting warehouse receipts of a compress company and issuing bills of lading thereon, *held* to have recognized the compress company as its agent.—Southern Ry. Co. v. Jones Cotton Co. (Ala.) 899.

§ 118. A railway company and a compress company *held* liable for damages to cotton resulting from exposure to the weather.—Southern Ry. Co. v. Jones Cotton Co. (Ala.) 899.

§ 132. Burden *held* on carrier to trace loss or damage of goods to negligence of shipper, or one of the exceptions with which its negligence did not concur.—Atlantic Coast Line R. Co. v. Rice (Ala.) 918.

§ 132. In a suit against a railroad company because of the loss of goods by fire in its depot, *held*, that the burden of proof was on the plaintiff to show that defendant was guilty of neg-

ligence.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.) 797.

§ 136. What is a reasonable time for the consignee to remove his goods from a carrier's depot is a question for the jury, with reference to one residing in the vicinity of such depot.—Gulf & C. Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.) 797.

(J) **Charges and Liens.**

§ 188. A carrier stopping cars loaded with lumber at planing mills for treatment, and then transporting them to another place, *held* entitled as compensation to a reasonable profit beyond the mere cost of the extra service.—State v. Atlantic Coast Line R. Co. (Fla.) 4.

III. CARRIAGE OF LIVE STOCK.

§ 205. Carrier *held* liable for such loss or damages to live animals received for shipment, as do not arise from acts of God or the public enemy, or propensities of animals.—Atlantic Coast Line R. Co. v. Rice (Ala.) 918.

§ 207. Rights of a shipper under the rules of the Railroad Commission prescribing the maximum valuation in the shipment of horses and mules for a released rate, stated.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 217. That a shipper of dogs delivered them to a carrier in defective crate *held* not contributory negligence exonerating carrier from liability for loss of a dog.—Atlantic Coast Line R. Co. v. Rice (Ala.) 918.

§ 218. Contracts limiting the common-law liability of carriers are not favored by the courts.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 218. A contract between a shipper and carrier fixing the valuation of property and a freight rate based thereon *held* valid.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 218. Effect upon a shipper of rules of a carrier or published schedules of tariff rates whereby its liability is fixed by the freight rate paid, stated.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 227. Matters stated by way of inducement in an action on the case *held* not to be considered under a plea of not guilty.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 228. Exemption of carriers from the common-law liability as such will not be presumed, but must be found clearly expressed in the contract.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 228. In the absence of evidence to the contrary, it will be assumed that property accepted by a carrier is taken under its common-law liability as modified by statute.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 229. Laws 1907, c. 5618, allowing an attorney's fee in a suit against a carrier upon a claim for freight lost or damaged, construed.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

IV. CARRIAGE OF PASSENGERS.

(A) **Relation Between Carrier and Passenger.**

Act authorizing street railroad company to make rules regulating transfers as delegation of legislative power, see Constitutional Law, § 64.

§ 239. A person riding on a pass which was issued to another *held* not entitled to recover for personal injuries.—Broyles v. Central of Georgia Ry. Co. (Ala.) 81.

§ 239. A person on a train *held* presumed to intend paying fare, in the absence of conduct

showing a different intent.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 241. Mail agents, postal clerks, and express messengers are passengers on the train on which they ride, and may rely upon the legal duty of one undertaking to perform even a gratuitous service to exercise the care which the nature of the undertaking requires.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 246. In an action for injuries to a passenger, testimony of the conductor as to whether he knew that plaintiff was not the proper person to present a pass *held* admissible.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 246. A plaintiff suing for injuries *held* not entitled to testify that it was customary for her to ride on a pass.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 247. One going to a depot, intending to take passage on a train to arrive in 15 minutes, *held* a passenger.—*Metcalf v. Yazoo & M. V. R. Co. (Miss.)* 355.

§ 247. Under Code 1906, §§ 4854, 4867, an intending passenger, entering the depot within a reasonable time before the arrival of the train, *held* a passenger.—*Metcalf v. Yazoo & M. V. R. Co. (Miss.)* 355.

§ 247. The relation of carrier and passenger *held* to arise when a person intending to become a passenger resorts to the depot for that purpose.—*Metcalf v. Yazoo & M. V. R. Co. (Miss.)* 355.

(C) Performance of Contract of Transportation.

Act authorizing street railroads to make rules regulating transfers as delegation of legislative power, see Constitutional Law, § 64.

(D) Personal Injuries.

Application of instructions to evidence, see Trial, § 252.

Effect of difference in degree of negligence, see Negligence, § 101.

Evidence as to intent, see Evidence, § 151.

Joinder of causes of action, see Action, § 38.

Res gestæ, see Evidence, § 121.

§ 280. In an action for injuries to a passenger, the question whether the railroad company has exercised all ordinary care is to be determined from the duty imposed by law on the company under the facts of each case.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 280. At common law carrier *held* not an insurer of safety of passengers, but required to exercise the highest degree of care for their safety.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 280. An ordinary local freight train *held* not one intended for passengers and freight, within Code 1906, § 4054.—*Illinois Cent. R. Co. v. White (Miss.)* 449.

§ 284. Carrier's employes *held* not justified in permitting other passengers to use profane and indecent language in their effort to compel a colored servant accompanying a white passenger to leave the coach.—*Southern Ry. Co. v. Lee (Ala.)* 648.

§ 284. It is the duty of a carrier's employes to prevent use by passengers of profane and insulting language in the presence of a female passenger.—*Southern Ry. Co. v. Lee (Ala.)* 648.

§ 290. Railroad company *held* required to warm its mail cars occupied by postal clerks, etc.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 303. The unnecessary sudden jerking of a train while a passenger is alighting is negligence.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 303. Where a person is entitled to passage on a train he has a right to the protection due a passenger until he has safely alighted by the

proper egress.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 303. It is the duty of a railroad company to give a reasonably sufficient time at its stopping places for its passengers to safely alight.—*Florida Ry. Co. v. Dorsey (Fla.)* 963.

§ 314. A count in a complaint against a carrier for injuries charging only simple negligence *held* insufficient.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 314. A count in a complaint against a carrier for injuries *held* to charge simple negligence only.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 315. In a passenger's action against a railroad for indignities, failure to prove certain allegations of the complaint *held* not fatal to the cause of action.—*Southern Ry. Co. v. Lee (Ala.)* 648.

§ 316. Where a passenger was injured without his fault by derailment of a train, defendant must show that the accident resulted from circumstances against which human care could not guard.—*Reems v. New Orleans G. N. R. Co. (La.)* 681.

§ 317. In an action by a railroad postal clerk against a railroad company for damages for illness caused by defendant's failure to heat its mail car, plaintiff could show that the car was wet and damp as tending to show that it would be thereby rendered uncomfortable.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. In an action by a railroad postal clerk against a railroad company for damages resulting from illness claimed to have been caused by failure to heat the mail car in which plaintiff worked, evidence that plaintiff was a "chronic kicker" *held* properly excluded.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. In an action by a railroad postal clerk for damages by illness claimed to have resulted from the railroad company's failure to heat a mail car in which plaintiff worked, evidence *held* not relevant as to the temperature of express car in same train.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. In an action for damages by illness occurring on three days in January by defendant's negligence, defendant could not show that plaintiff brought another suit against it to recover for illness occurring thereafter in February.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. In an action by a railroad postal clerk for damages caused by illness due to working in an unheated car, plaintiff could testify as to his duties as postal clerk in the car, and how long he was compelled to remain therein.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. In an action by a railroad postal clerk for damages caused by illness resulting from a railroad company's failure to heat a mail car, plaintiff could show that he complained to defendant of the unheated condition of the car to show actual notice thereof.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 317. Where the issue was whether persons riding on a train were trespassers because riding on a pass which was issued to others, the conductor of the train may properly testify as to what a passenger must have, to entitle him to ride.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 317. In an action for injuries to a passenger, testimony of the conductor *held* admissible to show that he did not knowingly permit plaintiff to ride on a pass not issued to her.—*Broyles v. Central of Georgia Ry. Co. (Ala.)* 81.

§ 317. In an action for injuries to a passenger, certain evidence *held* not subject to a

general objection.—*Broyles v. Central of Georgia Ry. Co.* (Ala.) 81.

§ 317. In an action for injuries to a passenger, testimony of the conductor as to his duty to identify persons riding on a pass *held* admissible.—*Broyles v. Central of Georgia Ry. Co.* (Ala.) 81.

§ 320. Under Gen. St. 1906, § 3148, creating the presumption that one injured by a railroad is injured through the negligence of the railroad company, *held*, that it is primarily for the jury whether the railroad company has met the burden of showing that its agents exercised ordinary care.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 320. Where the testimony is conflicting, reasonableness of the time allowed for passengers to alight from a railroad train is not a question of law.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 321. In an action for injury to passenger, instruction as to duty of carrier *held* not error.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 321. In action for injuries to passenger, charge as to right of railroad company to promulgate rules limiting its liability *held* not error.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 321. There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor should avoid all injury to a passenger that he "possibly can when he knows or sees that she is about to suffer damage."—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 321. In action for injuries to passenger, instructions as to determination of reasonableness of time train should stop to permit passengers to alight *held* not erroneous.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

(E) Contributory Negligence of Person Injured.

§ 333. If the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.—*Florida Ry. Co. v. Dorsey* (Fla.) 963.

§ 333. A carrier *held* not liable for injury to an alighting passenger in stated circumstances.—*McMellon v. Illinois Cent. R. Co.* (La.) 783.

§ 337. A passenger cannot recover for injuries caused by failure to heat the coach if his contributory negligence proximately caused the injury, and the passenger's failure to protect himself from unnecessary cold or provide sufficient clothing may or may not be contributory negligence according to the circumstances.—*Southern Ry. Co. v. Harrington* (Ala.) 57.

§ 337. Since a postal clerk is required to remain in the mail car while on duty, he is not *prima facie* guilty of contributory negligence by remaining in the car knowing that it is so insufficiently heated as to be uncomfortable.—*Southern Ry. Co. v. Harrington* (Ala.) 57.

§ 343. In an action against a railroad for injuries to a postal clerk, contributory negligence *held* not available to bar the action unless pleaded.—*Southern Ry. Co. v. Harrington* (Ala.) 57.

CARS.

In general, see Carriers; Railroads.
Duty of carrier to heat mail cars, see Carriers, § 290.

CASE ON APPEAL.

Contents, making, and settlement, see Appeal and Error, § 565.

CATTLE.

See Animals.

CAUSE.

Probable cause for prosecution, see Malicious Prosecution, §§ 19, 21.

CAUSE OF ACTION.

See Action; Malicious Prosecution, §§ 19, 21.

Joinder, see Action, § 50.

Single and entire, see Action, § 38.

CEMETERIES.

Dedication of graveyard, see Dedication, § 16.

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Of allegations of pleading, see Pleading, § 18.

Of contracts of sale, see Sales, § 1.

Of language used in alleged libel or slander, see Libel and Slander, § 19.

CERTIFICATE.

Of case for question of law for determination by higher court, see Courts, § 224.

Of indebtedness of county, see Counties, § 164.

Of record for purpose of review, see Appeal and Error, § 612.

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Review of proceedings before justices of the peace, see Justices of the Peace, §§ 192, 200.

I. NATURE AND GROUNDS.

§ 28. If a judgment is void on the face of the record, it may be reviewed and annulled by common-law certiorari.—*Ex parte Allen* (Ala.) 44.

§ 28. An amendment to the complaint in detinue *held* immaterial so that any error in not serving the amended complaint before rendering judgment did not make the judgment void so as to be reviewable by common-law certiorari.—*Ex parte Allen* (Ala.) 44.

§ 33. A person *held* to have such individual interest in the subject as authorizes him to apply for writ of certiorari.—*St. John v. Richter* (Ala.) 465.

II. PROCEEDINGS AND DETERMINATION.

§ 40. Under Const. art. 101, an application for writ of review must be filed with the clerk of the Supreme Court 30 days after the decision of the Court of Appeal has been noted, or after refusal of a rehearing.—*Evangeline Oil Co. v. Trahan* (La.) 388.

§ 60. Certiorari should not be quashed and the petition therefor dismissed, before return is made to the writ.—*St. John v. Richter* (Ala.) 465.

§ 70. Though for error in dismissing certiorari the judgment will be reversed, *held*, that, further prosecution of the certiorari being useless, the cause will not be remanded.—*St. John v. Richter* (Ala.) 465.

CESTUI QUE TRUST.

See Trusts.

CHAMPERTY AND MAINTENANCE.

§ 7. Effect of grant of land held adversely prior to Code 1907, § 3839, stated.—*Gilchrist v. Atchison* (Ala.) 955.

§ 7. In unlawful detainer, a deed from defendant's grantor, whom defendant claimed had been in possession before plaintiff, to defendant, was admissible in evidence; it being a question for the jury whether plaintiff was in adverse possession of the land when the deed was made.—*Gilchrist v. Atchison* (Ala.) 955.

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See Equity.

CHANGE.

Of terms of insurance policy on renewal, see Insurance, § 145.

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Admissibility of evidence in action for slander, see Libel and Slander, § 103.
Of witness, see Witnesses, §§ 337, 362.

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By carrier, see Carriers, §§ 12, 13, 188.
Criminal accusation, see Indictment and Information.
For water supply, see Waters and Water Courses, § 203.
Instructions to jury, see Criminal Law, §§ 756, 763, 764, 769, 814, 829, 830, 841; Trial, §§ 186-296.
Of indebtedness on married women's separate property, see Husband and Wife, § 151.

CHARITIES.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 45. The Fire Insurance Patrol of the City of New Orleans, not being a public charitable association, is liable for injuries caused by the negligence of its servants in driving its wagon into a truck of the fire department.—*Rady v. Fire Ins. Patrol of New Orleans* (La.) 491.

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Corporate charters in general, see Municipal Corporations, §§ 44, 49.

CHATTEL MORTGAGES.

See Pledges.
Execution against interest of mortgagor, see Execution, § 37.
Power of husband to mortgage separate property of wife, see Husband and Wife, § 137.
Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 17. Under Code 1907, § 4743, a contract with the owner of land to raise a crop held to be one of hiring, and that the one who raised the crop had no interest in it which could be the subject of a valid mortgage.—*Foust v. Bains Bros.* (Ala.) 743.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 211. Assignee of a chattel mortgage held not a bona fide purchaser entitled to enforce the mortgage for an amount greater than the true debt evidenced thereby.—*People's Bank of Evergreen v. Robbins* (Ala.) 412.

CHATELS.

In general, see Property.
Annexation to real property, see Fixtures.
Gift, see Gifts.
Pledge, see Pledges.
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In general, see Bills and Notes.
Cashier's check, see Banks and Banking, § 189, 228.
Forgery, see Forgery.
Payment of, by bank, see Banks and Banking, § 138.
Recovery of proceeds in detinue, see Detinue, § 5.
Trade check as subject of forgery, see Forgery, § 7.

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Deprivation of life, liberty, or property without due process of law, see Constitutional Law, §§ 278, 297.
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See Conspiracy.

CONFESSION.

Admissibility in evidence, see Criminal Law, §§ 517-531.
 Pleading by way of confession and avoidance, see Pleading, § 136.

CONFIDENTIAL RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.

CONFIRMATION.

Of sale of property of decedent, see Executors and Administrators, § 375.

CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.

CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see Courts, §§ 475-487.

CONJUGAL RIGHTS.

See Husband and Wife.

CONSANGUINITY.

Affecting competency of justices of the peace, see Justices of the Peace, § 57.

CONSENT.

Of parent to employment of child, see Parent and Child, § 7.

Of parties to contracts in general, see Contracts, § 15.

Of state to be sued, see States, § 191.

CONSEQUENTIAL DAMAGES.

See Damages, §§ 15, 40.

CONSIDERATION.

Of contracts in general, see Contracts, §§ 57, 75. Of contract for water supply, see Waters and Water Courses, § 203.

Of conveyance or other transfer, sufficiency as to creditors of grantor or subsequent purchasers, see Fraudulent Conveyances, § 87.

CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general, see Criminal Law, § 427; Evidence, § 253.

I. CIVIL LIABILITY.**(B) Actions.**

§ 17. If defendants maliciously conspired together to injure plaintiff's business, all of defendants were properly joined in an action against them for damages; the conspiracy making the wrongful acts the joint wrong of all of them.—*Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co.* (Miss.) 454.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.*Provisions relating to particular subjects.*

See Courts, § 79; Highways, § 122; Taxation, § 45.

Carriers, control and regulation, see Carriers, § 2.

Enactment and validity of statutes, see Statutes, §§ 8½, 28.

Exemption from public improvement assessments, see Municipal Corporations, § 434.

Licenses for occupations and privileges, see Licenses, § 7.

Rules of court and conduct of business, see Courts, § 79.

Subjects and title of statutes, see Statutes, §§ 118, 124.

Taxation for highways, see Highways, § 122.

Rights of persons accused or convicted of crime.

Violation of constitutional right as harmless error, see Criminal Law, § 1162.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 48. Before a statute can be declared unconstitutional, it must clearly and unavoidably appear to have been without the power of the Legislature to enact.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

§ 48. While every possible intentment must be indulged in favor of the constitutionality of an enactment, plain provisions of the Constitution must be enforced.—*City of Ensley v.*

Simpson (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

§ 48. A law should be upheld when it is capable of being construed so as to harmonize with the Constitution without doing violence to the legislative intent.—*Whaley v. State* (Ala.) 941; *Hawkins v. Same* (Ala.) 946.

§ 48. Where a statute is attacked as unconstitutional, it should be liberally construed to uphold its validity.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

§ 50. In the absence of special prohibition, the General Assembly has the right to make all laws.—*Mulhaupt v. City of Shreveport* (La.) 1023.

§ 64. Sp. Sess. Laws 1907, p. 89, authorizing street railroad companies to make reasonable rules regarding transfers, and prescribing a penalty for violation of such rules held not unconstitutional.—*Whaley v. State* (Ala.) 941; *Hawkins v. Same* (Ala.) 946.

(B) Judicial Powers and Functions.

§ 68. The amount of a license tax to be imposed on hawkers and peddlers is for the Legislature, and not for the courts.—*Flournoy v. Walker* (La.) 673.

§ 70. The propriety and wisdom of a statute held exclusively for decision by the Legislature.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

§ 70. The General Assembly may classify business occupations, and the exercise of its discretion on that subject cannot be interfered with by the courts so long as it is within the limit of constitutional legislative discretion.—*Monteleone v. Seaboard Fire & Marine Ins. Co.* (La.) 1032.

IV. POLICE POWER IN GENERAL.

See Carriers, § 2; Intoxicating Liquors, § 10.

§ 81. The police power of a state embraces regulations designed to promote the public convenience, general prosperity, or the public welfare.—*Atlantic Coast Line R. Co. v. Coachman* (Fla.) 377.

VII. OBLIGATION OF CONTRACTS.**(B) Contracts of States and Municipalities.**

§ 121. The remedies for the enforcement of obligations assumed by municipal corporations cannot be impaired by the Legislature.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

(C) Contracts of Individuals and Private Corporations.

§ 154. Act No. 168 of 1908 held not unconstitutional as impairing the obligation of contracts.—*Monteleone v. Seaboard Fire & Marine Ins. Co.* (La.) 1032.

§ 169. Right of parties to fix the remedies by which their rights and obligations are to be enforced, stated.—*Monteleone v. Seaboard Fire & Marine Ins. Co.* (La.) 1032.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Special or local laws, see Statutes, §§ 75, 90.

§ 206. Code 1907, §§ 4572, 4583, restricting the effect of a breach of warranty or misrepresentation in an application for insurance, held

valid, and not violative of Const. U. S. art. 14, § 1.—State Life Ins. Co. of Indianapolis v. Westcott (Ala.) 344.

X. EQUAL PROTECTION OF LAWS.

§ 212. Essentials of a statute passed in the exercise of the police power, stated.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 240. Act No. 168 of 1908 held not unconstitutional.—Monteleone v. Seaboard Fire & Marine Ins. Co. (La.) 1032.

§ 241. Laws 1907, c. 5618, held not violative of the provisions of the state Constitution (Bill of Rights, § 1), and Const. U. S. Amend. 14, guaranteeing full protection of the laws.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

§ 247. Laws 1907, c. 5618, held not violative of the equal protection clause of the state Constitution (Bill of Rights, § 1), and Const. U. S. Amend. 14, in so far as it permits recovery of interest and attorney's fees.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

XI. DUE PROCESS OF LAW.

§ 278. An act operating to destroy an incorporated city held not to deprive it of its property in violation of Const. U. S. Amend. 14.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

§ 290. Acts 1902, No. 147, relating to the levy of local assessments on abutting real estate for street improvements, is not a violation of Const. 1898, arts. 2, 232, and the fourteenth amendment of the Constitution of the United States, as a deprivation of property without due process of law.—Fourmy v. Town of Franklin (La.) 249.

§ 297. Laws 1907, c. 5618, held not violative of the constitutional provision relating to due process of law.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

CONSTRUCTION.

Of language used in alleged libel or slander, see Libel and Slander, § 19.

Parol or extrinsic evidence to aid construction of written instruments, see Evidence, § 452.

Of contracts, instruments, or judicial acts or proceedings.

See Dedication, § 60; Sales, §§ 68, 82, 467; Statutes, §§ 181, 241; Stipulations, § 14; Wills, §§ 483, 688.

Assignments for benefit of creditors, see Assignments for Benefit of Creditors, § 184.

Bills of lading, see Carriers, § 51.

Constitutional provisions, see Constitutional Law, § 48.

Contracts, see Contracts, §§ 143, 226.

Contracts of insurance, see Insurance, §§ 146, 177.

Deeds, see Deeds, §§ 111, 127.

Instructions, see Trial, §§ 295, 296.

Leases, see Landlord and Tenant, §§ 40, 47;

Mines and Minerals, §§ 62, 70.

Mortgages, see Mortgages, § 137.

Warranties, see Sales, § 279.

Of buildings or other works.

See Railroads, § 113.

CONSTRUCTIVE NOTICE.

Of termination of authority of insurance agent, see Insurance, § 375.

To purchaser of land of claims or liens against property, see Vendor and Purchaser, § 231.

To purchaser of personal property, see Sales, § 235.

CONTEMPT.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 37. That certain acts were criminal misdemeanors would not prevent one committing them from being punished for criminal contempt.—Durham v. State (Miss.) 627.

§ 53. Where accused was charged by information with attempting to bribe a witness, the proper course was taken by citing him and having him answer the charge, and investigating the charge by taking the testimony of witnesses offered by the state and accused upon the denial of the allegations of the information.—Durham v. State (Miss.) 627.

§ 66. The court being the trier of facts in criminal contempt proceedings, it is presumed that he followed the evidence in finding facts showing guilt.—Durham v. State (Miss.) 627.

CONTEST.

Of local option election, see Intoxicating Liquors, § 37.

CONTINGENT REMAINDERS.

Construction of wills, see Wills, § 634.

CONTINUANCE.

Of criminal prosecutions, see Criminal Law, §§ 575, 603.

Review of discretionary rulings, see Criminal Law, § 1151.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Assignment, see Assignments.

Best and secondary evidence of contract, see Evidence, § 165.

Cancellation of written contracts, see Cancellation of Instruments.

Impairing obligations, see Constitutional Law, §§ 121, 154.

Operation and effect of champerty, see Champerty and Maintenance.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, § 452.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 390-425.

Parol or extrinsic evidence to show invalidity of written contract, see Evidence, § 434.

Reformation, see Reformation of Instruments.

Restraining breach, see Injunction, § 60.

Separate or subsequent oral agreement affecting written contract, see Evidence, § 442.

Specific performance, see Specific Performance.

Subrogation to rights or remedies of creditors, see Subrogation.

Contracts of particular classes of persons.

See Brokers, § 96; Carriers, §§ 51, 62, 207.

218; Counties, §§ 113, 124; Landlord and Tenant, § 323; Municipal Corporations, § 336.

Attorney, with client, see Attorney and Client, § 83.

Insurance companies, see Insurance.

Mortgagees, assignment of mortgage or debt secured thereby, see Chattel Mortgages, § 211.

Officers and agents of banks, see Banks and Banking, §§ 109, 114.

Officers and agents of corporations in general, see Corporations, §§ 423-432.

Contracts relating to particular subjects.

See Insurance; Marriage.

Compensation of broker, see Brokers, §§ 54-67.

Convict labor, see *Convicts*, § 10.
 Limitation of liability of carrier in respect to live stock, see *Carriers*, § 218.
 Public improvements, see *Municipal Corporations*, § 336.
 Renting on shares, see *Landlord and Tenant*, § 323.
 Standing timber, see *Logs and Logging*, § 3.
 Transportation of goods, see *Carriers*, §§ 51, 62.
 Transportation of live stock, see *Carriers*, § 207.

Particular classes of express contracts.

See *Bailment*; *Bills and Notes*; *Deeds*; *Depositories*; *Guaranty*; *Partnership*; *Rewards*; *Sales*.

Agency, see *Principal and Agent*.
 Assignment of mortgage or debt secured thereby, see *Chattel Mortgages*, § 211.
 Bills of lading, see *Carriers*, §§ 51, 62.
 Indorsement of bill or note, see *Bills and Notes*, § 280.

Insurance policies, see *Insurance*.
 Leases, see *Landlord and Tenant*.
 Sales of realty, see *Vendor and Purchaser*.
 Sales of standing timber, see *Logs and Logging*, § 3.

Stipulations in actions, see *Stipulations*.
 Suretyship, see *Principal and Surety*.

Particular classes of implied contracts.

See *Account Stated*; *Assumpsit*, *Action of*; *Interest*; *Work and Labor*.

Particular modes of discharging contracts.

See *Payment*.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

Certainty of contract of sale, see *Sales*, § 1.

§ 1. That a contract, offending against no law, is peculiar and may bear grievously upon one of the parties thereto, will not render it invalid.—*Byrd v. Hickman* (Ala.) 426.

(B) Parties, Proposals, and Acceptance.

§ 15. Where parties are merely negotiating, there is no contract while the agreement is incomplete.—*Ocala Cooperage Co. v. Florida Cooperage Co.* (Fla.) 13.

(C) Formal Requisites.

Of deed, see *Deeds*, §§ 31, 32, 56, 59.

Of mortgage, see *Mortgages*, § 42.

§ 32. Where parties intend that their verbal negotiations shall be reduced to writing, there is nothing binding until the writing is executed.—*Ocala Cooperage Co. v. Florida Cooperage Co.* (Fla.) 13.

§ 32. Where it is intended that a verbal contract shall be reduced to writing, the contract is not complete until so reduced and acquiesced in by both parties.—*Ocala Cooperage Co. v. Florida Cooperage Co.* (Fla.) 13.

(D) Consideration.

Of contract for water supply, see *Waters and Water Courses*, § 203.

Sufficiency as to creditors and subsequent purchasers, see *Fraudulent Conveyances*, § 87.

§ 57. A contract held not to be invalid, as lacking in mutuality.—*Healy v. Southern States Alcohol Mfg. Co.* (La.) 150.

§ 75. A promise by one owing a debt to make a payment thereon held no consideration for a promise of the creditor to pay a debt of the promisor to a third person.—*Byrd v. Hickman* (Ala.) 426.

(E) Validity of Assent.

Parol or extrinsic evidence to show invalidity, see *Evidence*, § 434.

To bill or note, see *Bills and Notes*, § 104.
 To deed, see *Deeds*, § 70.

(F) Legality of Object and of Consideration.

Champertous contracts, see *Champerty and Maintenance*.

§ 108. Lease of space between high and low water mark, a part of the bed of a navigable stream, held illegal and contrary to public policy.—*Escambia Land & Mfg. Co. v. Ferry Pass Inspectors' & Shippers' Ass'n* (Fla.) 715.

§ 116. A contract held to be valid.—*Healy v. Southern States Alcohol Mfg. Co.* (La.) 150.

§ 138. The courts will take notice of their own motion, of illegal contracts coming before them for adjudication, and will leave the parties where they have placed themselves.—*Escambia Land & Mfg. Co. v. Ferry Pass Inspectors' & Shippers' Ass'n* (Fla.) 715.

II. CONSTRUCTION AND OPERATION.

Particular classes of contracts.

See *Insurance*, §§ 146, 177; *Mortgages*, §§ 137, 154; *Sales*, §§ 63, 82, 467; *Stipulations*, § 14.

Assignments for benefit of creditors, see *Assignments for Benefit of Creditors*, § 184.

Bills of lading, see *Carriers*, § 51.

Deeds, see *Deeds*, §§ 111, 127.

Leases, see *Landlord and Tenant*, § 40.

Mines and Minerals, §§ 62, 70.

Warranties, see *Sales*, § 279.

(A) General Rules of Construction.

Leases, see *Landlord and Tenant*, § 40.

Parol or extrinsic evidence to construe and apply language of written contract, see *Evidence*, § 452.

Parol or extrinsic evidence to contradict or vary written contract, see *Evidence*, §§ 390-425.

Separate or subsequent oral agreement affecting written contract, see *Evidence*, § 442.

§ 143. Rule for construing contracts, stated.—*Lower Terrebonne Refining & Mfg. Co. v. Barrow* (La.) 487.

§ 145. A contract to purchase property held to be a contract of the place where accepted, where the cause of action to enforce it accrued within Gen. St. 1906, § 1383.—*Morgan v. Eaton* (Fla.) 305.

§ 167. All provisions of a contract should be considered and construed with reference to controlling provisions and principles of law.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

§ 167. Provisions of law applicable to the subject-matter of contracts are parts of the contracts, whether so expressed or referred to in the contract or not.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

(D) Place and Time.

§ 213. A contract as to payment of taxes construed in view of Gen. St. 1906, § 541.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

(E) Conditions.

In insurance policies, see *Insurance*, §§ 281, 282.

§ 226. Forfeitures not being favored, the provisions upon which they are based must be strictly construed.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

III. MODIFICATION AND MERGER.

§ 245. Negotiations as to a contract held merged in the written contract, so that a provision in the bid for the work contracted for, not having been incorporated in or referred to

by the contract, became no part of it.—*Bratton v. Howard* (Miss.) 210.

IV. RESCISSION AND ABANDONMENT.

Cancellation of written contracts in equity, see Cancellation of Instruments.

Rescission of contract of sale, see Sales, §§ 116-119; Vendor and Purchaser, §§ 105, 108. Rescission of insurance policy, see Insurance, § 229.

§ 261. A contract can only be rescinded by the joint will of the two parties, but one may so wrongfully repudiate it as to authorize the other to renounce it and refuse to be longer bound, as when acts and conduct evince an intent to no longer be bound.—*McAllister-Coman Co. v. Mathews* (Ala.) 416.

§ 261. Merely because one party's act or course of conduct is inconsistent with the contract does not authorize the other to renounce it, but it must be inconsistent with intent to be longer bound, and, while every breach is inconsistent with it, every breach by one party does not authorize the other to renounce in toto.—*McAllister-Coman Co. v. Mathews* (Ala.) 416.

V. PERFORMANCE OR BREACH.

Enforcement of specific performance, see Specific Performance.

Measure of damages for breach, see Damages, § 125.

Relief against forfeitures, see Equity, § 24.

Restraining breach, see Injunction, § 60.

Particular classes of contracts.

Employment of broker, see Brokers, § 54.

Sales, see Sales, §§ 161-179; Vendor and Purchaser, §§ 128, 176.

§ 277. To put one in default for alleged breach of a commutative contract, a demand for compliance must be accompanied by a tender of compliance by the one by whom the demand is made.—*Darragh v. Vicknair* (La.) 264.

§ 278. Plaintiff, the manager of an opera troupe, held not entitled to recover against defendant, in whose house the troupe was playing, for the part of the receipts of a performance called for by his written contract with defendant, where defendant contracted with plaintiff's agent and the members of the troupe to withhold a certain percentage to pay arrears in the actors' salaries to avoid a strike.—*Rothenberg v. Packard* (Miss.) 458.

§ 279. To put one in default for alleged breach of a commutative contract, a tender of compliance must be made by the one demanding performance.—*Darragh v. Vicknair* (La.) 264.

§ 321. A covenant to pay taxes being in the nature of a covenant to pay money, a forfeiture incurred by a breach thereof may be relieved against.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

VI. ACTIONS FOR BREACH.

Actions of assumpsit, see Assumpsit, Action of.

Damages, measure, see Damages, § 125.

Damages, natural and probable consequences, see Damages, § 23.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, § 452.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 390-425.

Parol or extrinsic evidence to show invalidity of contract, see Evidence, § 434.

Restraining breach, see Injunction, § 60.

Separate or subsequent oral agreement affecting written contract, see Evidence, § 442.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 82-101, 122.

CONTROL.

Of wife's separate property by husband, see Husband and Wife, § 137.

CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see Appeal and Error, § 50; Justices of the Peace, § 44.

CONVERSION.

Change of form of property, see Property, § 5. Of chattels into realty, see Fixtures.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

Absolute deed as mortgage, see Mortgages, §§ 32, 33.

As preference by debtor, see Bankruptcy, §§ 164, 165.

Contracts to convey, see Vendor and Purchaser.

Estoppel by deed, see Estoppel, §§ 25, 32.

Fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

Parol or extrinsic evidence to show invalidity, see Evidence, § 434.

Priorities between judgments and conveyances, see Judgment, §§ 787, 788.

Reformation, see Reformation of Instruments.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Conveyances by or to particular classes of persons.

See Infants, § 30.

Insolvent debtors, see Bankruptcy, §§ 164, 165.

Purchasers at tax sales, see Taxation, § 788.

Conveyances of particular species of, or estates or interests in, property.

See Homestead, §§ 119, 123, 167.

Lands held adversely, see Champerty and Maintenance, § 7.

Personal property, in general, see Chattel Mortgages; Sales.

Real property in general, see Deeds; Mortgages; Vendor and Purchaser.

Standing timber, see Logs and Logging, § 3.

Swamp lands, see Public Lands, § 61.

Particular classes of conveyances.

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Mortgages.

In trust, see Trusts, §§ 17, 18.

Tax deeds, see Taxation, § 788.

CONVICTS.

§ 10. If the servants of defendant, to whom plaintiff, a convict, was hired, wrongfully caused the latter to be whipped, defendant was liable for the assault, though the whipping was done by a state deputy warden.—*Sloss-Sheffield Steel & Iron Co. v. Dickinson* (Ala.) 594.

§ 10. The whipping for neglect of duty of plaintiff, a convict hired to defendant corporation, was unreasonable, if not for a proper cause, and it was for the jury whether it was cruel.—*Sloss-Sheffield Steel & Iron Co. v. Dickinson* (Ala.) 594.

§ 10. In an action by a convict for assault and battery, where it appeared that defendant corporation authorized such punishment, defendant was not entitled to the general charge on the ground that a corporate wrong was alleged.—*Sloss-Sheffield Steel & Iron Co. v. Dickinson* (La.) 594.

CORPORAL PUNISHMENT.

Of convict, see *Convicts*, § 10.

CORPORATIONS.

Creation and regulation by special or local laws, see *Statutes*, § 80.

Exchange of estate for stock in corporation as creation of prohibited substitution or fidei commissum, see *Perpetuities*, § 4.

Particular classes of corporations.

See *Carriers*; *Municipal Corporations*; *Railroads*.

Banks, see *Banks and Banking*.

Charitable societies, see *Charities*, § 45.

Insurance companies, see *Insurance*.

Mutual benefit insurance associations, see *Insurance*, §§ 693, 793.

School districts, see *Schools and School Districts*, §§ 29, 159.

Street railroad companies, see *Street Railroads*.

Telegraph or telephone companies, see *Telegraphs and Telephones*.

I. INCORPORATION AND ORGANIZATION.

Of municipalities, see *Municipal Corporations*, § 1.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(E) Interest, Dividends, and New Stock.

§ 151. Ground upon which the court will interfere in the management of a corporation and cause a distribution of its surplus at the instance of a stockholder, stated.—*Marks v. American Brewing Co.* (La.) 983.

§ 155. That a corporation has a large surplus will not justify an interference by the courts to compel a distribution thereof.—*Marks v. American Brewing Co.* (La.) 983.

§ 155. Where large dividends received by plaintiff on the stock of a corporation are due to the large surplus kept by the corporation, stockholder cannot complain on the ground that the surplus was not distributed among the stockholders.—*Marks v. American Brewing Co.* (La.) 983.

§ 155. Contracts of third persons with a defendant corporation held not affected by an action without giving them a hearing.—*Marks v. American Brewing Co.* (La.) 983.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

§ 220. Stockholders of a proposed corporation executing a note in its name prior to incorporation held liable as partners on the note under Gen. St. 1906, § 2652.—*Humphreys v. Drew* (Fla.) 362.

§ 228. A stockholder of a corporation held liable to its receiver on his subscription to the stock.—*Webre v. Chastant* (La.) 672.

§ 262. Creditors dealing with a concern as a corporation held not estopped from enforcing the personal liability of stockholders for failing to comply with requirements of Gen. St. 1906, § 2652.—*Humphreys v. Drew* (Fla.) 362.

VI. OFFICERS AND AGENTS.

Of insurance companies, see *Insurance*, § 73.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308. That one is a stockholder and vice-president of a corporation without salary held not to preclude him from being employed as a salesman therefor and drawing a reasonable salary.—*Friedrichs v. Friedrichs, Young & Taney* (La.) 996.

§ 320. Before individual stockholders can sue to remedy corporate wrongs, they must first apply to the directors for redress, unless facts are shown which would render an application to the directors useless.—*Minona Portland Cement Co. v. Reese* (Ala.) 523.

VII. CORPORATE POWERS AND LIABILITIES.

Of banks, see *Banks and Banking*, §§ 109–226.

(A) Extent and Exercise of Powers in General.

§ 387. If a corporation has violated the Gay-Shattuck bill (Act 176 of 1906), held, that it is for the state to invoke its remedy and not for a stockholder.—*Marks v. American Brewing Co.* (La.) 983.

(B) Representation of Corporation by Officers and Agents.

Bank officers and agents, see *Banks and Banking*, §§ 100, 114.

§ 423. A corporation may become responsible in cases for the crimes of its agents, but the corporation is bound only when its vice principal acts in the execution of the corporate functions.—*Johnson v. Alabama Fuel & Iron Co.* (Ala.) 812.

§ 426. The directors of a corporation held not authorized to disaffirm a contract of purchase made originally by the president of the corporation, subject to the approval of the corporation, and approved by officers having authority so to do.—*Perryman & Co. v. Farmers' Union Ginning & Mfg. Co.* (Ala.) 644.

§ 426. The act of the directors of a corporation in disaffirming a contract of purchase made on behalf of the corporation by the purchasing officers thereof held not to affect the validity of the contract of purchase.—*Perryman & Co. v. Farmers' Union Ginning & Mfg. Co.* (Ala.) 644.

§ 432. In an action against a corporation on a contract executed in its name by its officers, the want of authority to make the contract must be shown by special pleas.—*Perryman & Co. v. Farmers' Union Ginning & Mfg. Co.* (Ala.) 644.

§ 432. Executory process on a notarial act of mortgage executed by the president of a private corporation will not lie, in the absence of authentic proof of the president's authority.—*Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.* (La.) 179.

(E) Torts.

Pleading in action for malicious prosecution, see *Malicious Prosecution*, § 47.

Particular classes of corporations or associations.

See *Carriers*, §§ 107–136, 205, 229, 280, 321; *Railroads*, §§ 113, 282, 297, 303–351, 355–400, 405, 459, 469–485; *Street Railroads*, §§ 81, 118.

§ 492. Where the vice principal of a corporation does an act to gratify personal malignity, or to accomplish another purpose personal to himself and having no relation to the corporate business, the corporation is not responsible.—*Johnson v. Alabama Fuel & Iron Co.* (Ala.) 812.

(F) Civil Actions.

Relationship to corporate officer as affecting competency of justice of the peace, see *Justices of the Peace*, § 57.

By or against particular classes of corporations or associations.

See *Carriers*, §§ 20, 76, 94, 132, 136, 227, 229, 314, 321, 343; *Railroads*, §§ 282, 297, 345-351, 396-400, 439, 480-485; *Street Railroads*, § 118.

Banks, see *Banks and Banking*, § 226.

Insurance companies, see *Insurance*, §§ 608-668. *Pleading in action for malicious prosecution*, see *Malicious Prosecution*, § 47.

§ 503. Under Code 1907, § 6112, it is sufficient to authorize a suit against a corporation for personal injuries in a certain county if the injuries partly occurred therein.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 508. Under Code 1907, § 6112, it is sufficient to authorize an action for personal injuries against a corporation in a certain county, if plaintiff resides in the county when the suit is begun, though not at the time of the injury.—*Southern Ry. Co. v. Harrington (Ala.)* 57.

§ 507. Under Code 1906, § 3932, a return of summons served on a corporation held insufficient.—*Watkins Machine & Foundry Co. v. Cincinnati Rubber Mfg. Co. (Miss.)* 629.

§ 518. The want of authority of the officers of a corporation to bind it by contract purporting on its face to be executed in its name held defensive matter.—*Perryman & Co. v. Farmers' Union Ginning & Mfg. Co. (Ala.)* 644.

VIII. INSOLVENCY AND RECEIVERS.

§ 553. The appointment of a receiver for a corporation at the instance of a stockholder held under the facts proper, under Act No. 159 of 1898, § 1, par. 2.—*Varnado v. Banner Cotton Oil Co. (La.)* 777.

§ 560. An officer or stockholder of a corporation in the hands of a receiver may be appointed auctioneer to sell the property, and upon making a sale is entitled to his commissions.—*Friedrichs v. Friedrichs, Young & Taney (La.)* 996.

§ 560. Where the manager of a corporation had settled his accounts with the directors and obtained his discharge, the court having jurisdiction of a subsequent receivership cannot issue ex parte order directing the former manager to account for his former administration.—*Farmers' Union Warehouse Stock Co. v. Randall (La.)* 1036.

§ 566. The president of an insolvent corporation, who is also a stockholder, is entitled to stand with other creditors when he claims only as an ordinary creditor.—*In re Pleasant Hill Lumber Co. (La.)* 1010.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 592½. Where a corporation was chartered subsequent to Acts 1908, No. 124, providing for the dissolution of corporations, such act must be read into the charter and is paramount to provisions therein for voluntary dissolution.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans (La.)* 763.

§ 612. A court of equity is the proper place to have decreed the dissolution of a nongovernment corporation and the distribution of its assets among those entitled thereto.—*Minona Portland Cement Co. v. Reese (Ala.)* 523.

§ 614. Stockholders of a nongovernment corporation, which has failed of the objects for which it was formed, and which owes no debts, may sue for dissolution of the corporation and the

distribution of its assets, without first applying to the directors.—*Minona Portland Cement Co. v. Reese (Ala.)* 523.

§ 614. Allegations of a bill by stockholders to dissolve a corporation that it was a failure, and setting up facts which, if true, show conclusively that it was a failure, and that the business for which it was formed could never be inaugurated or carried on, gave the court jurisdiction.—*Minona Portland Cement Co. v. Reese (Ala.)* 523.

§ 619. Under Acts 1908, No. 124, the taking of voluntary dissolution proceedings by a corporation after the institution of a suit for forfeiture of the corporation's charter by the Attorney General held ineffective to authorize delivery of the corporation's property to liquidators appointed in such voluntary proceedings, instead of to a liquidator to be appointed by the Governor.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans (La.)* 763.

XII. FOREIGN CORPORATIONS.

§ 672. A foreign corporation's bill for discovery held to sufficiently allege compliance with the Alabama laws authorizing foreign corporations to do business therein.—*Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co. (Ala.)* 751.

CORPUS DELICTI.

Evidence, see *Criminal Law*, § 563; *Larceny*, § 56.

CORRECTION.

Of assessment of taxes, see *Taxation*, §§ 459, 500.

Of erroneous instructions by other instructions, see *Trial*, § 296.

CORROBORATION.

Of testimony of female in prosecution for seduction, see *Seduction*, § 46.

Of testimony of witnesses in general, see *Witnesses*, § 318.

CORRUPTION.

In general, see *Fraud*.

CO-SERVANTS.

See *Master and Servant*, §§ 159, 198.

COSTS.

In partition, see *Partition*, § 114.

Presumptions on appeal or writ of error, see *Appeal and Error*, § 936.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 61. Where the chancery court properly awarded the complainant in a suit to quiet title relief only as to a small portion of the land, it properly, in its discretion, divided the costs between the parties.—*Brown v. Powers (Ala.)* 647.

§ 61. Apportionment of costs, where defendant becomes plaintiff in reconvention, and judgment taxes plaintiff with costs of the reconvention and defendant with costs of the main demand, determined.—*Cook & Laurie Contracting Co. v. Denis (La.)* 560.

V. AMOUNT, RATE, AND ITEMS.

§ 184. The taxation in the bill of costs of the fees of witnesses summoned by the successful party and not examined is *prima facie* excessive.—*Terry v. Montgomery (Ala.)* 314.

VI. TAXATION.

Suit to prevent execution for judgment for costs as bar to proceeding for second taxation, see Abatement and Revival, § 4.

§ 216. The court, on retaxing the fees of witnesses, may act on its knowledge whether the witnesses were sworn or not.—Terry v. Montgomery (Ala.) 814.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 256. Where a bill of exceptions violates Code 1907, p. 1528, rule 32, providing that bills of exceptions shall not contain a statement of testimony in extenso, except in cases specified, the costs of the appeal will be taxed against the appellant.—Grasselli Chemical Co. v. Davis (Ala.) 35.

§ 260. In view of Code Prac. art. 890, appellee is not entitled to damages for a frivolous appeal, where he did not answer the appeal.—Ansley v. Stuart (La.) 545.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

§ 277. Where suit of the trustee in bankruptcy to set aside sales of the property of the partnership of which bankrupt was a member and to subject the property to the claims of the partnership creditors was dismissed on the ground that he could not maintain it, *held*, the creditors, as a condition to prosecuting a subsequent suit for the same relief, could not be required to pay the costs adjudged against the trustee (Code 1907, §§ 2490, 3667).—Jos. Rosenheim & Sons v. Lacey (Ala.) 833.

IX. IN CRIMINAL PROSECUTIONS.

Remand for correction of sentence as to costs, see Criminal Law, § 1188.
Statement of costs in sentence, see Criminal Law, § 995.

CO-TENANCY.

See Tenancy in Common.

COTTON MILLS.

License and privileged taxes, see Licenses, § 18.

COUNSEL.

See Attorney and Client.

COUNTERFEITING.

See Forgery.

COUNTIES.

See Municipal Corporations; Schools and School Districts, §§ 29, 154.
County in which to sue, see Venue.
Highways, see Highways.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

Special or local laws, see Statutes, § 90.

II. GOVERNMENT AND OFFICERS.**(C) County Board.**

Canvass of returns of local option elections, see Intoxicating Liquors, § 35.
Powers as to streets, see Municipal Corporations, § 265.

§ 47. A police jury possesses only delegated powers defined by statute, and cannot act as

individuals.—Whitney v. Parish of Vernon (La.) 176.

§ 58. The commissioners' court in exercising the powers conferred by Gen. Acts 1906, p. 431, relating to the stock law, *held* one of limited jurisdiction so that its record must affirmatively show the existence of the facts necessary to give it jurisdiction.—McKinney v. Commissioners' Court of Bibb County (Ala.) 756.

(D) Officers and Agents.

Sheriffs, see Sheriffs and Constables.

III. PROPERTY, CONTRACTS, AND LIABILITIES.**(A) Public Buildings and Other Property.**

Liability for municipal assessments, see Municipal Corporations, § 439.

(B) Contracts.

§ 113. Where a police jury passes an ordinance for a courthouse, and provides for payment in installments, the contract for its erection cannot be changed to provide for a cash payment.—Whitney v. Parish of Vernon (La.) 176.

§ 124. A person contracting with parish authorities *held* deemed to have knowledge of their authority, and that an ordinance passed by them was void, so that the parish will not be estopped by such ordinance.—Whitney v. Parish of Vernon (La.) 176.

§ 124. A police jury cannot ratify a void contract which originally had no validity.—Whitney v. Parish of Vernon (La.) 176.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Taxes for highway purposes, see Highways, §§ 122, 151.

§ 152. A contract for the erection of a parish courthouse may provide for payment in cash, or from funds to be realized from certificates.—Whitney v. Parish of Vernon (La.) 176.

§ 164. No warrant can be issued by a parish unless provision has been made to meet it by laying aside sufficient funds.—Whitney v. Parish of Vernon (La.) 176.

§ 178. Gen. St. 1906, § 788, as to publication of notices of election to authorize the issue of county bonds, *held* satisfied by publication in newspapers circulated among all classes of people, and not to require publication in publications designed for only a portion of the public.—Tylee v. Hyde (Fla.) 968.

§ 178. Gen. St. 1906, § 788, requires publication of notices of an election to authorize the issue of county bonds only in newspapers printed in the county.—Tylee v. Hyde (Fla.) 968.

VI. ACTIONS.

Against county to enforce lien for special assessments, see Municipal Corporations, § 525.

COUNTS.

Separate counts in pleading, see Pleading, §§ 54, 64.

COUNTY BOARD.

See Counties, §§ 47, 53.

COUNTY COMMISSIONERS.

See Counties, §§ 47, 53.

COUNTY ROADS.

See Highways.

COURT COMMISSIONERS.

Commissioners in equity, and proceedings, before them, see Equity, § 404.

COURTHOUSES.

Construction by parish, see Counties, § 152.
Exemption of courthouse square from assessment for local improvements, see Municipal Corporations, § 426.

COURTS.

See Judgment.

Constitutional exercise of judicial powers in general, see Constitutional Law, §§ 68, 70.

Contempt of court, see Contempt.

Judges, see Judges.

Judicial supervision of municipal corporations, see Municipal Corporations, § 63.

Province of court and jury, see Criminal Law, §§ 736, 763, 764; Trial, §§ 134-171, 186-199.

Right to trial by jury, see Jury, § 25.

Subjects and titles of acts relating to courts, see Statutes, § 124.

Validity of proceedings on Sunday, see Sunday, § 30.

Jurisdiction of particular actions or proceedings.

On bond of treasurer of levee board, see Levees, § 11.

Special jurisdictions and particular classes of courts.

See Justices of the Peace, §§ 44, 60.

Commissioner's court, necessity of showing by record, see Counties, § 53.

Equity jurisdiction, see Equity, §§ 3-66.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Commissioner's court, see Counties, § 53.

Review of questions of jurisdiction, see Appeal and Error, § 1166.

Want of jurisdiction ground for habeas corpus, see Habeas Corpus, § 27.

Want of jurisdiction ground for prohibition, see Prohibition, § 10.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

Judges, see Judges.

§ 42. Acts 1880, No. 98, providing for the organization of the criminal district court of the parish of Orleans, is constitutional.—State v. Brown (La.) 176.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

Construction of courthouses by counties, see Counties, § 152.

Exemption of courthouse square from assessment for local improvements, see Municipal Corporations, § 426.

§ 62. Under Code 1907, § 3245, a judgment held not void, as rendered at a time not authorized by law.—Oliver v. Veazey (Ala.) 590.

(C) Rules of Court and Conduct of Business.

§ 79. Under Const. art. 104, and Act No. 223 of 1908, fixing the delay for rehearing in the Supreme Court at 15 days, held not to repeal a rule of the Court of Appeal on the subject.—Smith v. Cumberland Telephone & Telegraph Co. (La.) 255.

(D) Rules of Decision, Adjudications, Opinions, and Records.

Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, § 1098.

Record of drawing of jury, see Jury, § 66.

Record of judgments, see Judgment, §§ 272, 282.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 189. Under the practice act of the city court of Birmingham (Acts 1888-89, p. 992), that court cannot reinstate a suit dismissed, on motion made more than 30 days after the final judgment of dismissal.—Ex parte Smith (Ala.) 895.

V. COURTS OF PROBATE JURISDICTION.

Sale of property of decedent, see Executors and Administrators, §§ 332, 335.

VI. COURTS OF APPELLATE JURISDICTION.

Decisions reviewable, see Appeal and Error, §§ 50, 123.

(B) Courts of Particular States.

§ 224. Damage to property resulting from a trespass to the right of property, and not the value of property, is the basis of the jurisdiction of the Supreme Court.—Wels v. New Orleans Board of Trade (La.) 130.

§ 224. Where there is nothing to show that the right invaded by defendant is in excess of \$2,000, the Supreme Court cannot take jurisdiction, especially where plaintiff merely prays for an injunction.—Wels v. New Orleans Board of Trade (La.) 130.

§ 224. A joint demand by plaintiffs for \$5,000 in action for libel held not inflated for purpose of vesting jurisdiction in Supreme Court.—Madere v. Alexandre (La.) 535, 537.

§ 224. In a case brought to the Supreme Court for review under Const. art. 101, held, that the court may deal with it as if on appeal and pass on all issues of law or fact in its discretion.—Monteleone v. Seaboard Fire & Marine Ins. Co. (La.) 1062.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

Sufficiency of allegations of bill of discovery to warrant transfer from probate to chancery court, see Discovery, § 19.

§ 475. Where a court's jurisdiction of plaintiff's right to prosecute therein once attaches, that right cannot be taken away by proceedings in another court, but, if the court first taking jurisdiction has not adequate jurisdiction to grant relief, the rule does not apply.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 475. The probate court having first acquired jurisdiction of the administration of an estate, could not be deprived thereof except on equitable grounds, disclosed in the bill for such relief.—Kirkbride v. Kelly (Ala.) 660.

§ 475. As between courts of co-ordinate power, the one first acquiring jurisdiction of the subject-matter should as a general rule be permitted to retain it to the end.—Ray v. Williams Phosphate Co. (Fla.) 589.

§ 480. One court of equity should not enjoin a party from proceeding in another court of equity of equal and co-ordinate jurisdiction merely because of convenience.—Ray v. Williams Phosphate Co. (Fla.) 589.

§ 481. A master's sale under foreclosure *held* not to be declared void in another circuit in behalf of one not a party with actual knowledge of the proceedings on allegations of fraud between the original parties.—*Ray v. Williams Phosphate Co. (Fla.)* 589.

§ 485. Where an administratrix had filed her accounts for a settlement, and the time had been set up for the hearing, and a bill had been filed against her, setting up the necessity of a discovery as an independent equity, it was sufficient ground for removing the estate into the chancery court.—*Townsend v. Miles (Ala.)* 651.

§ 487. The right of an heir, legatee or distributee to have the administration of the estate removed to the chancery court without assigning any reason therefor does not extend to the administrator.—*Kirkbride v. Kelly (Ala.)* 660.

COVENANTS.

Conditions and provisos in contracts in general, see *Contracts*, § 226.

COVERTURE.

See *Husband and Wife*.

CREDIBILITY.

Of witness, see *Witnesses*, §§ 318, 390.

Of witnesses as affecting weight and sufficiency of evidence, see *Evidence*, § 588.

CREDITORS.

See *Assignments for Benefits of Creditors*; *Attachment*; *Bankruptcy*; *Execution*; *Fraudulent Conveyances*; *Garnishment*; *Homestead*; *Payment*.

Application of firm assets to liabilities, see *Partnership*, § 183.

Interest on default or delay in payment of obligation, see *Interest*.

Of decedent, see *Executors and Administrators*, § 226.

Of married woman, rights as to separate property, see *Husband and Wife*, § 151.

Subrogation to rights of creditor, see *Subrogation*.

CREDITORS' SUIT.

Remedies in cases of fraudulent transfers, see *Fraudulent Conveyances*, §§ 218-295.

CRIMES.

See *Criminal Law*.

CRIMINAL LAW.

Bail, see *Bail*, §§ 43-94.

Competency and challenge to jurors, see *Jury*, §§ 83, 117.

Conviction of offense included in that charged, see *Indictment and Information*, § 189.

Convicts, see *Convicts*.

Cross-examination of accused, see *Witnesses*, § 277.

Grand jury, see *Grand Jury*.

Habeas corpus to review proceedings, see *Habeas Corpus*.

Impanelling jury, see *Jury*, § 144.

Indictment, information, or complaint, see *Indictment and Information*.

Malicious prosecution, see *Malicious Prosecution*.

Qualifications of jurors, and exemptions, see *Jury*, § 47.

Restraining criminal prosecutions, see *Injunction*, § 105.

Subjects and titles of acts relating to crimes and criminal prosecutions and punishments, see *Statutes*, § 118.

Summoning, attendance, discharge, and compensation of jurors, see *Jury*, §§ 66, 80.

Words imputing crime as constituting libel or slander, see *Libel and Slander*, § 7.

Offenses by particular classes of persons.

See *Infants*, § 68.

Particular offenses.

See *Contempt*; *Disorderly Conduct*; *Embezzlement*; *Forgery*; *Homicide*; *Larceny*; *Miscegenation*; *Obstructing Justice*; *Perjury*; *Receiving Stolen Goods*; *Seduction*, §§ 37, 46; *Trespass*, §§ 81, 88.

Assault with intent to kill, see *Homicide*, § 100.

Failure to work on roads, see *Highways*, § 151.

Injuring or killing animals, see *Animals*, § 45.

Interference with relation of master and servant, see *Master and Servant*, § 343.

Negligence, see *Negligence*, § 144.

Violations of laws for protection of children, see *Infants*, § 20.

Violations of liquor laws, see *Intoxicating Liquors*, §§ 140-167, 233, 236.

Violations of municipal regulations, see *Municipal Corporations*, §§ 639, 641.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

Special laws, see *Statutes*, § 86.

Subject and title of statute, see *Statutes*, § 118.

§ 13. A criminal statute must be construed against the making of two separate offenses of the same act.—*McInnis v. State (Miss.)* 634.

§ 23. Gross and culpable negligence will supply criminal intent.—*State v. Irvine (La.)* 567.

§ 27. Offense punishable by imprisonment in the parish prison or hard labor in the penitentiary *held* a "minor offense," and not a felony.—*State v. Wall (La.)* 556.

§ 31. Inconsistent defenses to being an accessory before the fact *held* not permissible.—*State v. Kinchen (La.)* 185.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 48. However horrible the crime, there would be no responsibility for it if the evidence shows accused was insane at the time of its commission, or even raises a reasonable doubt as to his sanity.—*Bishop v. State (Miss.)* 21.

III. PARTIES TO OFFENSES.

Accessories before the fact to manslaughter, see *Homicide*, § 83.

§ 73. Evidence, on a prosecution for being an accessory before the fact in procuring two persons to commit a murder, that defendant countermanded his order with one of them *held* of no avail.—*State v. Kinchen (La.)* 185.

IV. JURISDICTION.

Juvenile courts, see *Infants*, § 18.

Want of jurisdiction as ground for writ of habeas corpus, see *Habeas Corpus*, § 27.

§ 94. The First city criminal court has no jurisdiction of a charge of embezzlement.—*State v. Wall (La.)* 556.

V. VENUE.**(A) Place of Bringing Prosecution.**

§ 107. Const. art. 9, as to venue in criminal cases, *held* to control, notwithstanding any statute.—State v. Kinchen (La.) 185.

VI. LIMITATION OF PROSECUTIONS.

§ 154. Under Rev. St. § 3541, a deputy sheriff *held* empowered to direct a public prosecution, as affecting bar of prosecution by prescription.—State v. Stelly (La.) 864.

VII. FORMER JEOPARDY.

§ 200. Code 1906, § 1141, *held* to create one offense of unlawful misappropriation by officers of public funds, either by converting the same or by failing to turn the same over when required by law.—McInnis v. State (Miss.) 634.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 207. Loc. Acts 1903, p. 379, although construed as dealing with justices of the peace instead of inferior court, authorized by Const. 1901, § 168, *held* not to increase jurisdiction of justices of the peace in violation of section 104, subd. 21.—Red v. State (Ala.) 885.

§ 211. An affidavit upon which a criminal prosecution in a court of limited jurisdiction is based must set forth the facts showing jurisdiction.—State v. Rose (La.) 165, 167.

§ 217. Inferior courts created by Legislature as authorized by Const. 1901, § 168, *held* properly authorized to take affidavits in misdemeanor cases, and to issue warrants returnable to the proper courts.—Red v. State (Ala.) 885.

§ 218. The irregularity in a warrant failing to comply with Loc. Acts 1903, pp. 371, 381, *held* immaterial.—Red v. State (Ala.) 885.

§ 240. Under Const. 1901, § 157, judges *held* to have right to hold a party for trial, irrespective of the validity of the warrant for arrest.—Knox v. State (Ala.) 526.

§ 260. Accused having appealed from a conviction before a justice, and his appeal having been dismissed for his default, evidence *held* to entitle him to a vacation of the default and to a hearing.—Develling v. State (Miss.) 484.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 279. The court had discretion to refuse to receive a plea in abatement and motion to quash an indictment, not filed until after plea of not guilty.—Rogers v. State (Ala.) 33.

X. EVIDENCE.

Competency of witnesses in general, see Witnesses, §§ 37, 150.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 318, 390.

Cross-examination of witnesses, see Witnesses, §§ 267-287.

Examination of witnesses, see Witnesses, §§ 236, 290.

In particular criminal prosecutions.

See Homicide, §§ 145, 237; Larceny, §§ 43, 64; Rape, § 48; Seduction, §§ 40, 46; Trespass, § 88.

Violations of liquor laws, see Intoxicating Liquors, §§ 233, 236.

(A) Judicial Notice, Presumptions, and Burden of Proof.

In prosecution for homicide, see Homicide, §§ 145, 151.

§ 831. Accused *held* bound to sustain a plea of not guilty by reason of insanity to the reasonable satisfaction of the jury, as required by Code 1907, § 7175.—Rayfield v. State (Ala.) 831.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338. In a murder case, testimony as to the time within which, after death, blood flows from bodies, *held* incompetent.—Clemmons v. State (Ala.) 467.

§ 338. Scope of admissibility of circumstantial evidence, stated.—White v. State (Fla.) 845.

§ 351. In a prosecution for violating a city ordinance by conducting a gambling house, evidence that defendant on his arrest had a gun and pointed it at the officers *held* admissible.—Rosetto v. City of Bay St. Louis (Miss.) 785.

§ 354. All that was said and done in a room wherein an alleged confession was made was plainly competent to show whether accused was sane or insane, on which issue the defense was based.—Bishop v. State (Miss.) 21.

§ 363. In a prosecution for assault with intent to murder, certain evidence *held* admissible as part of the res gestæ.—Harmon v. State (Ala.) 348.

§ 363. A question *held* admissible in a homicide case as calling for res gestæ evidence.—Jackson v. State (Ala.) 835.

§ 365. In a prosecution for homicide by dynamiting house No. 158 belonging to a mining company, claimed to have been done by accused and other striking miners, evidence *held* admissible as res gestæ that there were persons injured in other houses.—Jackson v. State (Ala.) 835.

(C) Other Offenses, and Character of Accused.

Character of accused as ground of impeachment as witness, see Witnesses, § 337.

(D) Materiality and Competency in General.

§ 383. Questions asked in a homicide case *held* proper as calling for admissions, or statements, made by others in accused's presence tending to implicate him, the answers to which were admissible.—Jackson v. State (Ala.) 835.

§ 383. The admissibility of testimony does not depend upon its sufficiency.—Sims v. State (Fla.) 198.

§ 386. To justify proof of the acts of dogs in trailing human beings, it must appear that the dogs were trained to take the scent of human beings.—Gallant v. State (Ala.) 739.

§ 390. Excluding a question to defendant as to why he did a particular act *held* not error.—Crumpton v. State (Ala.) 605.

(E) Best and Secondary and Demonstrative Evidence.

§ 398. Testimony of witness as to bullet holes in hat *held* admissible without producing the hat.—State v. Tomsa (La.) 988.

§ 400. The court *held* required to presume confession of accused made while testifying at the preliminary trial was reduced to writing as required by Code 1907, § 7600, so that parol evidence of the confession was inadmissible in the absence of a proper predicate for the admission of secondary evidence.—Davis v. State (Ala.) 939.

§ 404. In a murder case it was not error to admit in evidence the clothes of deceased.—Crumpton v. State (Ala.) 605.

(F) Admissions, Declarations, and Hearsay.

Complaints and declarations of female in prosecution for rape, see Rape, § 48.
Dying declarations, see Homicide, §§ 203, 218.

§ 406. Statement by accused *held* an implied admission that he participated in the crime charged.—*Jackson v. State* (Ala.) 835.

§ 406. Statements made by accused concerning the killing of deceased after the shooting, not induced or invited by any improper word or act, *held* admissible.—*James v. State* (Ala.) 840.

§ 407. The silence of accused when asked where he got a stolen gun found in his house after stating that it belonged to him, *held* admissible.—*Jackson v. State* (Ala.) 730.

§ 407. In a prosecution for murder, claimed to have been committed by accused and other striking miners by dynamiting the mining company's house in which decedent was, the officer who arrested accused *held* properly allowed to testify that he referred to the condition of accused's pants, and charged him with having committed the crime, to which accused did not reply.—*Jackson v. State* (Ala.) 835.

§ 412. Statement of defendant, when a stolen gun was found in his house, that it was his *held* admissible.—*Jackson v. State* (Ala.) 730.

§ 413. A declaration of defendant, sought to be proved by him, *held* self-serving.—*State v. Kinchen* (La.) 185.

§ 415. Declarations of deceased, after he received the wound from which he died *held* inadmissible as hearsay.—*Pressley v. State* (Ala.) 337.

§ 415. Statements, not dying declarations, made by decedent the day after the cutting are hearsay and inadmissible.—*Moore v. State* (Fla.) 971.

§ 418. In a prosecution for homicide, evidence of a declaration of C. made in defendant's presence, that they were going to whip deceased, *held* admissible.—*Lowman v. State* (Ala.) 638.

§ 418. Evidence of conversations and statements in defendant's presence, relative to the author of the pregnancy of defendant's niece, out of which the state claimed arose the animus leading to the homicide, *held* admissible.—*James v. State* (Ala.) 840.

§§ 419, 420. A question to a witness in a homicide case for what purpose the state had subpoenaed him as a witness, was properly excluded.—*May v. State* (Ala.) 602.

§§ 419, 420. Testimony of a witness as to protest of citizens against a person being made a marshal *held* objectionable as hearsay.—*Crumpton v. State* (Ala.) 605.

§§ 419, 420. What the landowner's overseer told witness as to warning defendant against trespass *held* inadmissible as hearsay.—*Arrington v. State* (Ala.) 928.

§ 421. In a prosecution for conducting a gambling house, evidence that defendant's house had the reputation of being a gambling house *held* hearsay.—*Rosetto v. City of Bay St. Louis* (Miss.) 785.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 427. A conspiracy may be proved by circumstantial evidence.—*Harmon v. State* (Ala.) 348.

(I) Opinion Evidence.

§ 448. One may testify that another is drunk or drinking.—*May v. State* (Ala.) 602.

§ 448. A question asked in a homicide case *held* not to ask whether certain persons were drunk so as not to be objectionable as calling for conclusion, even if an answer that they were drunk was objectionable as such.—*May v. State* (Ala.) 602.

§ 451. A witness may testify on observation that defendant appeared like he was a pretty mad man.—*Sims v. State* (Fla.) 198.

§ 452. A witness *held* not competent to testify as an expert.—*Clemmons v. State* (Ala.) 467.

§ 452. In a case wherein insanity was the defense, *held*, that a witness who stated that he had known accused intimately from his youth should have been allowed to give his opinion as to whether he was sane or insane.—*Bishop v. State* (Miss.) 21.

§ 459. Opinion as to identity of gun found in defendant's possession with one claimed to have been stolen *held* admissible.—*Jackson v. State* (Ala.) 730.

§ 465. A witness testifying to the ability of a dog to trail human beings *held* properly permitted to make a statement to show his qualification from observation to give an opinion as to when a dog is trained to track human beings.—*Gallant v. State* (Ala.) 789.

§ 465. A nonexpert can only testify to accused's insanity after having had an opportunity to form a judgment and on stating the facts on which the opinion is based.—*James v. State* (Ala.) 840.

§ 478. Qualifications of an expert witness, stated.—*Clemmons v. State* (Ala.) 467.

(J) Testimony of Accomplices and Codefendants.

Corroboration of testimony of female in prosecution for seduction, see Seduction, § 46.

§ 508. An accomplice is a competent witness.—*State v. Varnado* (La.) 1006.

(K) Confessions.

§ 517. The court may permit a witness testifying to a confession of accused voluntarily made to state the entire confession forming a part of the *res gestæ*.—*Davis v. State* (Ala.) 939.

§ 517. Where a homicide is shown, a voluntary confession by accused is admissible to show his connection with the crime.—*Sims v. State* (Fla.) 198.

§ 517. In a prosecution for murder, a confession voluntarily made is admissible, as in other criminal cases.—*Sims v. State* (Fla.) 198.

§ 519. A confession made while under arrest is admissible, if voluntarily made, and not influenced by any inducement.—*Sims v. State* (Fla.) 198.

§ 519. A confession which comes from a mere sense of guilt is admissible.—*Sims v. State* (Fla.) 198.

§ 519. A confession, to be admissible, must be shown to be freely made, uninfluenced by threat, promise, hope, or other inducement.—*Sims v. State* (Fla.) 198.

§ 527. Code 1907, § 6464, prohibiting the admission of confessions and admissions of children under 14, *held* applicable to the trial of an indictment of a child under that age for burglary.—*Hampton v. State* (Ala.) 650.

§ 531. A question whether any promises, threats, or inducements were made to accused before he made the statements sought to be proved *held* not objectionable as calling for a conclusion.—*Crain v. State* (Ala.) 31; *Graves v. Same* (Ala.) 34.

§ 531. Questions and answers to a witness in a murder case *held* to lay a predicate for proving a confession, so that a general objection thereto was properly overruled.—*Jackson v. State* (Ala.) 835.

§ 531. When a confession *prima facie* appears to have been freely made, the burden is

on defendant to show it was not voluntary.—*Sims v. State* (Fla.) 198.

§ 531. All that was said and done in a room wherein an alleged confession was made was plainly competent, as going to show whether the confession was free and voluntary.—*Bishop v. State* (Miss.) 21.

(M) Weight and Sufficiency.

Credibility, impeachment, corroboration, and contradiction of witnesses, see *Witnesses*, §§ 318, 390.

In particular criminal prosecutions.

See *Homicide*, § 237; *Larceny*, §§ 55, 64; *Se-duction*, § 46.

Violations of liquor laws, see *Intoxicating Liq-uors*, § 236.

§ 563. A criminal charge involves the com-mission of an offense and the guilt of accused.—*Sanders v. State* (Ala.) 417.

§ 570. Under Code 1907, § 7175, an instruc-tion requiring accused to establish insanity "to the satisfaction of the jury" held erroneous.—*James v. State* (Ala.) 840.

XI. TIME OF TRIAL AND CONTIN-UANCE.

§ 575. There is no rule of law whereby a tri-al for indictment found at one term cannot be had at such term, whether a continuance should be had depending upon the circumstances.—*Moore v. State* (Fla.) 971.

§ 577. Accused and his counsel are entitled to a reasonable time to prepare for trial after ac-cusation is made, and what is a reasonable time is to be determined from the facts of the case.—*Moore v. State* (Fla.) 971.

§ 586. Motions for continuance are in the discretion of the trial court.—*Moore v. State* (Fla.) 971.

§ 589. Members of a venire held not dis-qualified as jurors.—*Whitehead v. State* (Miss.) 259.

§ 594. Refusal to grant a continuance on the ground of the absence of a witness held erro-neous.—*Knox v. State* (Miss.) 695.

§ 597. Where it clearly appears that the sup-posed testimony of an alleged absent witness could not reasonably affect the result, the ap-pellate court will not disturb an order denying a continuance.—*Moore v. State* (Fla.) 971.

§ 599. Where testimony should reasonably have been anticipated, it will not warrant a continuance for surprise.—*Moore v. State* (Fla.) 971.

§ 603. The rulings as to granting continu-ance are substantially the same in civil and criminal cases, but should be scanned more close-ly in criminal cases because of the superior temptation to delay.—*Moore v. State* (Fla.) 971.

§ 603. Essentials of an application for con-tinuance for an absent witness stated.—*Moore v. State* (Fla.) 971.

XII. TRIAL.

Competency of and challenge to jurors, see *Ju-ry*, §§ 83, 117.

Impaneling jury, see *Jury*, § 144.

Qualifications of jurors, and exemptions, see *Jury*, § 47.

Summoning, attendance, discharge, and compen-sation of jurors, see *Jury*, §§ 66, 80.

In particular criminal prosecutions.

See *Disorderly Conduct*, § 11; *Homicide*, §§ 276, 309; *Larceny*, § 68.

Violations of municipal ordinances, see *Muni-cipal Corporations*, § 641.

(A) Preliminary Proceedings.

§ 622. Under court rule 31 (Code 1907, p. 1525), a motion for severance, after arraignment and plea of not guilty, held properly denied.—*Rogers v. State* (Ala.) 33.

(B) Course and Conduct of Trial in Gen-eral.

§ 655. The casual remark of a trial judge not calculated to influence the jury is not ground for setting aside a verdict.—*State v. Tomsa* (La.) 988.

(C) Reception of Evidence.

Examination of witnesses, see *Witnesses*, §§ 236, 290.

§ 673. Proof of sexual intercourse between defendant's niece and decedent's son held prop-erly limited to its effect on the issue of defend-ant's plea of insanity.—*James v. State* (Ala.) 840.

§ 680. On a trial for receiving stolen goods, evidence of the possession by accused of the goods alleged to have been stolen and received by him was inadmissible, where there was no evi-dence authorizing an inference that the goods had been stolen.—*Sanders v. State* (Ala.) 417.

§ 682. In a prosecution for a peculiarly hor-rible offense, wherein defendant relies solely on insanity, the trial court should give defendant all the latitude the law allows, rather than re-strict him unduly in the introduction of testi-mony.—*Bishop v. State* (Miss.) 21.

§ 683. Where accused had denied remaining silent when charged with committing a crime, the state could offer evidence in rebuttal tend-ing to show the contrary.—*Jackson v. State* (Ala.) 835.

§ 683. Where, in a homicide case, accused's witness had stated who was at the place where accused was arrested at that time, and named accused and another, the state could inquire into the same matter on rebuttal.—*Jackson v. State* (Ala.) 835.

§ 686. The trial court could in its discretion allow additional evidence concerning a matter already testified to by witnesses for the state be-fore the state first rested.—*Jackson v. State* (Ala.) 835.

§ 686. While it is usually the better practice to compel the state to offer all its evidence upon a given matter, in making out its case in the first instance, it is within the trial court's dis-cretion to admit it afterwards if the state does not do so.—*Jackson v. State* (Ala.) 835.

§ 686. The court in its discretion may permit the state to recall and examine a witness con-cerning new matter after defendant had rested.—*Pressley v. State* (Ala.) 337.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 693. Where evidence is admitted without objection, it is then too late to object.—*Sims v. State* (Fla.) 198.

§ 695. General grounds that the proffered testimony is irrelevant or immaterial will not avail, if the evidence is admissible for any pur-pose.—*Sims v. State* (Fla.) 198.

§ 696. A motion to strike evidence in gross, a part of which was admissible, was properly denied.—*Arrington v. State* (Ala.) 923.

§ 696. A motion to strike out testimony cannot be based on the ground that it is in-sufficient.—*Sims v. State* (Fla.) 198.

§ 696. A motion to strike all the testimony of a witness is properly denied, where some of it is admissible.—*Sims v. State* (Fla.) 198.

§ 696. Where evidence is admitted without objection, a motion may be made to strike.—*Sims v. State* (Fla.) 198.

§ 696. Where some of the testimony of a witness is admissible, a motion to strike the whole of such testimony is too broad.—*Clark v. State* (Fla.) 518.

§ 696. In a murder trial, *held* error to exclude accused's evidence of insanity.—*Jones v. State* (Miss.) 791.

§ 698. Evidence admitted without objection is regarded as having been received by consent.—*Sims v. State* (Fla.) 198.

(E) Arguments and Conduct of Counsel.

§ 699. District attorneys are as subject to restraint by the court in their argument as other members of the bar.—*Guest v. State* (Miss.) 211.

§ 713. The argument of the solicitor for the state in a criminal case wherein he states his relation to organized society and his duty in the prosecution of the case is not erroneous.—*Gallant v. State* (Ala.) 739.

§ 730. In view of subsequent proceedings, accused *held* to have no cause of complaint relative to remarks of the district attorney.—*State v. Varnado* (La.) 1006.

(F) Province of Court and Jury in General.

In prosecution for homicide, see Homicide, §§ 276, 281.

In prosecution for larceny, see Larceny, § 68.

§ 736. Where a legal foundation for a confession is laid, it is admissible; its probative force being for the jury.—*Sims v. State* (Fla.) 198.

§ 737. Evidence *held* sufficient to authorize the submission to the jury of the question of the offense having been committed in the parish of the trial.—*State v. Kinchen* (La.) 185.

§ 741. Where there is any evidence on which a conviction can be based, the general affirmative charge for defendant is properly refused.—*Tucker v. State* (Ala.) 464.

§ 756. It is not error for the court in its general charge to state the tendencies of the evidence for the state and defendant.—*Crain v. State* (Ala.) 31; *Graves v. State* (Ala.) 34.

§ 758. An instruction that the jury must consider the interest of accused in weighing his testimony *held* an invasion of the province of the jury.—*Tucker v. State* (Ala.) 464.

§ 759. In a prosecution for murder, a requested charge *held* properly refused as invading province of jury.—*Harrell v. State* (Ala.) 345; *Crumpton v. State* (Ala.) 605.

§§ 763, 764. A charge affirmative of guilt, predicated upon a belief of the testimony by the jury, should not be given where there is any evidence upon which an acquittal could be based, or where the facts pointing to guilt rest in inference only.—*Clemmons v. State* (Ala.) 467.

§§ 763, 764. In a criminal case, a charge given *held* improper if it had been requested by the state.—*Clemmons v. State* (Ala.) 467.

§§ 763, 764. A charge in a criminal case *held* erroneous as upon the weight of evidence in violation of Code 1907, § 5362, and invading the province of the jury.—*Clemmons v. State* (Ala.) 467.

§§ 763, 764. Requested charge in a homicide case *held* properly refused as assuming that the evidence of accused's guilt was of an unsatisfactory character.—*May v. State* (Ala.) 602.

§§ 763, 764. A special instruction that trenchances on the facts should be refused.—*State v. Varnado* (La.) 1006.

(G) Necessity, Requisites, and Sufficiency of Instructions.

In prosecution for homicide, see Homicide, §§ 285, 309.

§ 769. A charge permitting the jury to consider the effect of a conviction as to the promotion of public peace and good order *held* properly refused.—*Crumpton v. State* (Ala.) 605.

§ 773. Where accused pleaded not guilty, and not guilty by reason of insanity, an instruction that, if the jury believed the evidence beyond a reasonable doubt, they could not acquit, did not conclude defendant on his plea of insanity.—*Rayfield v. State* (Ala.) 833.

§ 778. A charge in a criminal case *held* erroneous, as shifting the burden of proof to accused.—*Clemmons v. State* (Ala.) 467.

§ 778. In a murder case, *held*, that there was no error in refusing to give certain charges as to the burden of proof.—*Crumpton v. State* (Ala.) 605.

§ 782. A charge as to amount of proof to authorize the jury to convict *held* properly refused.—*Whitmore v. State* (Ala.) 900.

§ 789. A charge to acquit unless the evidence against defendant should be such as to exclude to a moral certainty every hypothesis but that of his guilt *held* properly refused.—*Crumpton v. State* (Ala.) 605.

§ 789. In a prosecution for homicide, the court erred in refusing to charge that if, on consideration of all the evidence, the jury had a reasonable doubt of guilt, arising from the testimony, they should acquit.—*Davidson v. State* (Ala.) 751.

§ 789. In a prosecution for assault, a requested instruction *held* properly refused.—*Roux v. City of Gulfport* (Miss.) 485.

§ 791. Statement of what the jury should be charged on the submission to them of the question of the offense having been committed in the parish of the trial.—*State v. Kinchen* (La.) 185.

§ 798. Instructions requiring an acquittal, if any one of the jury had a reasonable doubt, *held* properly refused.—*Crain v. State* (Ala.) 31; *Graves v. State* (Ala.) 34.

§ 799. A charge to disregard part of the argument of accused's counsel *held* an invasion of defendant's right to be heard by counsel.—*Tucker v. State* (Ala.) 464.

§ 805. In a murder case, *held*, that a charge was properly refused as incomplete and not stating a proposition.—*Crumpton v. State* (Ala.) 605.

§ 807. Charges *held* properly refused as argumentative.—*Crumpton v. State* (Ala.) 605.

§ 811. A requested charge in a homicide case *held* properly refused as unduly emphasizing special features of the evidence.—*May v. State* (Ala.) 602.

§ 811. Rule stated as to allusion in instructions to particular facts or groups of facts.—*State v. Irvine* (La.) 567.

§ 814. A request to charge that there was no evidence in the case of a particular fact *held* properly refused.—*Steele v. State* (Ala.) 907.

§ 814. A requested charge that a conspiracy to set fire to a house ends with the burning of the structure is objectionable when the bill recites no particular facts calling for such a charge.—*State v. Varnado* (La.) 1006.

§ 815. An argumentative request to charge is properly refused.—*Steele v. State* (Ala.) 907.

(H) Requests for Instructions.

§ 829. No error can be predicated on a refusal of a charge covered or substantially cov-

ered by a charge given.—*Lang v. State* (Ala.) 340; *Crumpton v. Same* (Ala.) 605.

§ 830. If some of charges asked in bulk are clearly bad and properly refused, that would justify the court in refusing all.—*Colley v. State* (Ala.) 832.

§ 830. A special instruction that needs modification and qualification may be properly refused.—*State v. Varnado* (La.) 1006.

(I) **Objections to Instructions or Refusal Thereof, and Exceptions.**

§ 841. The refusal to give a requested charge should be excepted to at the time, and cannot be excepted to in a motion for a new trial.—*Clark v. State* (Fla.) 518.

(K) **Verdict.**

Operation and effect as curing defects in pleading, see Indictment and Information, §§ 196, 202.

Reception on holiday, see Holidays, § 5.

Reception on Sunday, see Sunday, § 30.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 911. In a criminal case, the court *held*, under the evidence, not to have abused its discretion in denying a new trial.—*State v. Latham* (La.) 113.

§ 923. Under Const. 1890, § 26, one convicted of murder *held* entitled to a new trial for prejudice of juror.—*Jones v. State* (Miss.) 791.

§ 945. Denial of a new trial for newly discovered evidence *held* error.—*McCearley v. State* (Miss.) 796.

§ 968. If an affidavit upon which a criminal prosecution in a court of limited jurisdiction is based does not set forth the facts showing jurisdiction, the question may be raised by motion in arrest.—*State v. Rose* (La.) 165, 167.

§ 968. If accused had any objection to the selection of jurors, *held*, that he should have urged it upon their examination, and an objection after verdict comes too late.—*State v. Owen* (La.) 857.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 995. Where the sentence fails to stipulate the amount of the costs, or the time of labor necessary for working them out, the case will be sent back for correction.—*Taylor v. State* (Ala.) 730.

XV. APPEAL AND ERROR, AND CERTIORARI.

In prosecution for homicide, see Homicide, §§ 325, 340.

(A) **Form of Remedy, Jurisdiction, and Right of Review.**

§ 1019. Under Const. 1898, art. 85, the Supreme Court has no jurisdiction on appeal in a misdemeanor case, where no sentence has been imposed and no law or ordinance declared unconstitutional.—*State v. Richart* (La.) 985.

(B) **Presentation and Reservation in Lower Court of Grounds of Review.**

§ 1031. If an affidavit upon which a criminal prosecution in a court of limited jurisdiction is based does not set forth the facts showing jurisdiction, the question may be raised on appeal.—*State v. Rose* (La.) 165, 167.

§ 1038. An objection to the sufficiency of the instructions cannot be raised for the first time on appeal.—*Middleton v. State* (Miss.) 258.

§ 1043. A question in a homicide case *held* susceptible of being answered by competent tes-

timony so as to be proper.—*Jackson v. State* (Ala.) 835.

§ 1043. An objection to a charge *held* too vague and general for consideration on appeal.—*State v. Irvine* (La.) 567.

§ 1043. An objection to a charge should be so framed as to enable the judge to correct his mistake if he has made one.—*State v. Irvine* (La.) 567.

§ 1043. An objection to a charge that it is contrary to the law governing the case is too vague to be available on appeal.—*State v. Irvine* (La.) 567.

§ 1043. A general objection to the charge presents nothing for review.—*State v. Varnado* (La.) 1006.

§ 1045. A mere objection to the manner of conducting a cross-examination, with no ruling and exception, cannot be considered on appeal.—*Sims v. State* (Fla.) 198.

§ 1056. An error in an instruction, to which no exception is reserved, *held* unavailing on appeal.—*Tucker v. State* (Ala.) 464.

§ 1064. Exception to language of trial judge *held* waived; the language not having been made one of the grounds of the motion for new trial.—*Bond v. State* (Miss.) 585.

(C) **Proceedings for Transfer of Cause, and Effect Thereof.**

§ 1060. The Supreme Court *held* to be without jurisdiction to entertain an appeal taken subsequent to a year after rendition of judgment, the time limited therefor by statute.—*Rowell v. State* (Ala.) 310.

(D) **Record and Proceedings Not in Record.**

§ 1088. An assignment of error based upon the refusal of a request cannot be considered where the transcript does not show, except by the motion for new trial, that the charge was requested.—*Clark v. State* (Fla.) 518.

§ 1090. Where a requested charge is refused, it must be set out in the bill of exceptions with the refusal and the exception thereto.—*Clark v. State* (Fla.) 518.

§ 1090. The action of a trial judge on a motion for a new trial cannot be reviewed without a bill of exception on matters not disclosed by the record.—*State v. Varnado* (La.) 1006.

§ 1091. An exception to a ruling permitting a witness "to testify relative to said matter" is not well taken.—*Sapp v. State* (Fla.) 2.

§ 1092. Under Code 1907, §§ 3019, 6248, the trial judge in a criminal case has no power to extend the time for presenting a bill of exceptions.—*Smith v. State* (Ala.) 396.

§ 1111. On appeal, a recital in the bill of exceptions will be deemed correct, in support of a ruling of the court.—*Clemmons v. State* (Ala.) 467.

§ 1120. The court on appeal *held* not authorized, in view of the record, to adjudge that the trial court erred in allowing a witness to testify as to a confession of accused.—*Davis v. State* (Ala.) 939.

§ 1121. On exception to jurisdiction of the district court on the ground that accused was under 17 years, where the evidence is not in the record, the ruling of the district court will not be disturbed.—*State v. Wilson* (La.) 981.

§ 1122. An assignment of error to the modification of an instrument will not be considered, where there is nothing in the record to show that any modifications were made, except a statement in appellant's brief.—*Middleton v. State* (Miss.) 258.

§ 1125. A motion in arrest of judgment, and the ruling thereon, must be shown in the record proper.—*Thomas v. State* (Ala.) 34.

§ 1128. Any tenable ground will justify a ruling excluding evidence; the record not showing the ground upon which the trial court acted.—*May v. State* (Ala.) 602.

(G) Review.

In prosecutions for homicide, see Homicide, §§ 338, 340.

§ 1134. Under Gen. St. 1906, §§ 1693, 1694, and 4044, *held*, that the appellate court could review by writ of error and a bill of exceptions a refusal of a continuance and other matters in pais subject to Bill of Rights, § 4.—*Moore v. State* (Fla.) 971.

§ 1134. A complaint that the corpus delicti was not proven beyond a reasonable doubt raises no question of law for review.—*State v. Brown* (La.) 176.

§ 1144. In the absence of a showing to the contrary, the court on appeal will presume that the trial court complied with Code 1907, § 7267, in supplying the place of a juror discarded on the ground of a mistake in his name as drawn.—*Davis v. State* (Ala.) 939.

§ 1144. To justify reversing a ruling denying continuance, facts necessary to show a clear abuse must be presented.—*Moore v. State* (Fla.) 971.

§ 1151. Motions for continuance being in the discretion of the trial court, its action will not be reversed in the absence of palpable abuse.—*Moore v. State* (Fla.) 971.

§ 1151. Sufficiency of a showing to obtain a continuance on the ground that public sentiment against accused was such that he could not obtain a fair trial in the county, stated.—*Moore v. State* (Fla.) 971.

§ 1156. The Supreme Court will ordinarily not reverse the ruling of the trial court in granting or denying a motion for a new trial.—*State v. Latham* (La.) 113.

§ 1158. A finding of the trial judge on a trial for selling spirituous liquors in violation of Rev. St. § 910, *held* not reviewable in the Supreme Court on certiorari.—*State v. Le Blanc* (La.) 114.

§ 1158. The Supreme Court *held* unable to review a question of fact on a criminal appeal.—*State v. Stelly* (La.) 864.

§ 1162. Violation of a constitutional right cannot be harmless error.—*Jones v. State* (Miss.) 791.

§ 1166. Improper arrest before issuance of warrant in a criminal case *held* not to affect the merits of the case.—*Knox v. State* (Ala.) 526.

§ 1166½. A conviction of a capital crime will not be set aside, because the jury was drawn under the invalid act of 1907 (Loc. Acts 1907, p. 238), where the previous law, as shown by the record, was complied with.—*Rogers v. State* (Ala.) 83.

§ 1166½. Under Const. 1890, § 26, *held*, that a conviction by a jury which included a prejudiced juror will be reversed, though accused's guilt is conclusively shown.—*Jones v. State* (Miss.) 791.

§ 1169. Admission of evidence of acts of an alleged conspirator before proof of conspiracy *held* not reversible error.—*Harmon v. State* (Ala.) 348.

§ 1169. Overruling objection to part of witness' testimony as his conclusion *held* harmless.—*Lollar v. State* (Ala.) 745.

§ 1169. In a prosecution for the sale of liquor in violation of law, *held*, that error in ad-

mitting evidence as to the arrest and trial of another for the same offense was cured by a subsequent limitation as to its purpose.—*Colley v. State* (Ala.) 832.

§ 1169. An objection that evidence was hearsay will not avail when the party making the remark immediately testified thereto.—*Flowers v. State* (Fla.) 11.

§ 1170. Exclusion of a question in a homicide case as calling for a conclusion *held* not to have prejudiced accused.—*May v. State* (Ala.) 602.

§ 1170. In a prosecution for trespass after warning, defendant *held* not prejudiced by the exclusion of the owner's custom to let his tenants work the land for succeeding years.—*Arington v. State* (Ala.) 928.

§ 1170½. In a prosecution for homicide, accused was not prejudiced by the court's refusal to permit a witness on cross-examination to be asked where the hands of the clock, at which he looked just prior to the shooting, were pointing at the time.—*Crain v. State* (Ala.) 31; *Graves v. Same* (Ala.) 34.

§ 1170½. Accused *held* not prejudiced by a question asked him as a witness whether he had testified in the federal court, nor by his answer that he had at one time.—*Lowman v. State* (Ala.) 638.

§ 1170½. Bill of exceptions complaining of interference with cross-examination to test memory *held* insufficient in not showing witness availed himself of the court's direction.—*Jackson v. State* (Ala.) 730.

§ 1171. A verdict will be set aside for remarks of prosecuting counsel, only where they are not only improper, but were calculated to influence the jury.—*State v. Brown* (La.) 176.

§ 1172. Erroneous instruction *held* harmless in view of the evidence.—*Sapp v. State* (Fla.) 2.

§ 1172. Instructions that evidence need not be positive, and that the jury should not be prejudiced because it is an information, as distinguished from an indictment, *held* not reversible error.—*Sapp v. State* (Fla.) 2.

§ 1172. A charge defining larceny as a "taking and carrying," omitting the word "away," is harmless where the asportation is admitted.—*Flowers v. State* (Fla.) 11.

§ 1173. Accused, having only been convicted of petit larceny, was not harmed by the court's refusal to charge on grand larceny.—*Phillips v. State* (Ala.) 746.

§ 1177. Where the fine imposed in a prosecution for larceny is less than the maximum for either grand or petit larceny, accused cannot complain that the value of the property did not justify the verdict.—*Clark v. State* (Fla.) 518.

(H) Determination and Disposition of Cause.

§ 1182. Where there is evidence to support the verdict, and it does not appear that reversible errors were committed, the judgment will be affirmed.—*Clark v. State* (Fla.) 518.

§ 1182. Where the evidence sustains the verdict, and no errors of procedure appear, the judgment will be affirmed.—*Moore v. State* (Fla.) 971.

§ 1188. Where the sentence fails to stipulate the amount of the costs, or the time of labor necessary for working them out, the case will be sent back for correction.—*Taylor v. State* (Ala.) 736.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

Convicts, see Convicts.

Disposition of property seized under search warrant, see Searches and Seizures, § 5.

CROPPERS.

Renting on shares, see Landlord and Tenant, § 323.

CROPS.

Power of husband to mortgage separate property of wife, see Husband and Wife, § 137.

CROSS-APPEAL.

See Appeal and Error, § 14.

CROSS-BILL.

For discovery, see Discovery, § 19.

CROSS-EXAMINATION.

Of expert witnesses, see Evidence, § 558.

Of witnesses in general, see Witnesses, §§ 267, 290, 387.

CROSSINGS.

Railroad crossings, accidents at, see Railroads, §§ 303-351.

CUMULATIVE EVIDENCE.

Newly discovered cumulative evidence as ground for new trial, see New Trial, § 104.

CUMULATIVE REMEDIES.

See Election of Remedies.

Discovery under statutory provisions and in chancery, see Discovery, § 3.

CURATOR AD HOC.

See Insane Persons, § 94.

CURATORS.

Ad litem, in action by or against insane persons, see Insane Persons, § 94.

CURSING.

See Disorderly Conduct.

CURTESY.

See Dower.

Rights of surviving husband in respect of community property, see Husband and Wife, § 273.

CUSTODIA LEGIS.

Replevy of goods in custody of law, see Replevin, § 5.

CUSTODY.

Of children, see Infants, §§ 18, 20; Parent and Child, § 2.

Of children, determination on habeas corpus, see Habeas Corpus, § 99.

Of children on divorce of parents, see Divorce, §§ 297, 301.

Of goods in course of transportation, see Carriers, § 76.

CUSTOMS AND USAGES.

Customary use of railroad tracks by public, see Railroads, § 391.

CUTTING TIMBER.

See Logs and Logging, § 3.

DAIRIES.

Regulation and inspection of dairy products, see Food.

DAMAGES.

Effect of difference in degree of negligence, see Negligence, § 101.

Damages for particular injuries.

See Death, §§ 98, 99; Libel and Slander, §§ 120, 121; Malicious Prosecution, § 68.

Breach of contract for education of children on divorce of parents, see Divorce, § 297.

Breach of contract of sale, see Sales, §§ 384, 418.

Frivolous appeal or delay, see Costs, § 260.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 69.

Injuries from negligence or malpractice by physician or surgeon, see Physicians and Surgeons, § 18.

Injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.

Injuries from public improvements, see Municipal Corporations, § 392.

Loss of or injury to live stock in course of transportation, see Carriers, § 229.

Obstruction of highway, see Highways, § 160.

Overflow, see Waters and Water Courses, § 178.

Taking or detention of personal property, see Trover and Conversion, § 46.

Trespass, see Trespass, § 47.

Recovery in particular actions or proceedings.
See Trespass, § 47; Trover and Conversion, § 46.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) *Direct or Remote, Contingent, or Prospective Consequences or Losses.*

Loss of profits as element of damages for breach of contract by purchaser, see Sales, § 384.

Mental suffering as element of damages for trespass, see Trespass, § 47.

§ 15. The measure of damages for a wrong, the result of mere negligence, stated.—*Mattingly v. Houston (Ala.) 78.*

§ 23. A party contracting to advance money for the construction of certain work held not liable for money expended by the borrower.—*Bixby-Theison Lumber Co. v. Evans (Ala.) 843.*

§ 23. Where the special purposes of a party in making a contract are disclosed to the adverse party at the time special damages held recoverable in case of a breach.—*Bixby-Theison Lumber Co. v. Evans (Ala.) 843.*

§ 30. One contracting with a parish held not entitled upon breach of the contract to recover damages to his reputation.—*Whitney v. Parish of Vernon (La.) 176.*

§ 40. The measure of damages for the failure of a party to advance money to another to construct a dam to create power for a mill held not to include profits expected to be realized from the operation of the mill.—*Bixby-Theison Lumber Co. v. Evans (Ala.) 843.*

§ 40. Right to recover for profits upon breach of contract, stated.—*Whitney v. Parish of Vernon (La.) 176.*

(B) *Aggravation, Mitigation, and Reduction of Loss.*

§ 62. A party breaching his contract to advance money to another for a specified purpose

held liable to certain damages.—Bixby-Thelson Lumber Co. v. Evans (Ala.) 843.

(C) Interest, Costs, and Expenses of Litigation.

§ 71. Where the terms of a contract are doubtful as to the inclusion of attorneys' fees as damages, such a demand will be rejected.—Godchaux v. Hyde (La.) 269.

V. EXEMPLARY DAMAGES.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 69.

VI. MEASURE OF DAMAGES.

For particular injuries.

See Detinue, § 19; Trover and Conversion, § 46.

Trespass, see Trespass, § 47.

(A) Injuries to the Person.

§ 98. Plaintiff in an action for injuries *held* entitled to recover \$3,000, in addition to the actual expenses incurred in maintaining and effecting a cure.—Hanna v. New Orleans Ry. & Light Co. (La.) 855.

(B) Injuries to Property.

§ 106. In an action against a carrier for damages to a shipment of cotton, complainant *held* entitled to recover the loss on the cotton although there was no evidence to support its allegation of loss by reason of an advance in price.—Southern Ry. Co. v. Jones Cotton Co. (Ala.) 899.

(C) Breach of Contract.

§ 125. Measure of damages for breach of contract to pay money determined.—Bixby-Thelson Lumber Co. v. Evans (Ala.) 843.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

For causing death, see Death, § 99.

For libel or slander, see Libel and Slander, § 121.

Ground for new trial, see New Trial, § 76.

§ 132. A verdict in a personal injury action *held* not excessive.—Woodward Iron Co. v. Sheehan (Ala.) 24; Lee v. Powell Bros. & Sanders Co. (La.) 214.

§ 132. A verdict for \$20,078 for the loss of an arm and leg by a brakeman on a logging train was excessive and should be reduced to \$12,000.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

§ 132. A recovery of \$4,500 for certain personal injuries *held* excessive.—Reems v. New Orleans G. N. R. Co. (La.) 681.

§ 132. In an action for injuries to a servant resulting in the loss of a leg below the knee, plaintiff *held* entitled to an allowance of \$6,000.—Hebert v. Kingston Lumber Co. (La.) 1021.

§ 138. In an action for the destruction of orchard trees by fire starting from the right of way of the railroad, an award of about \$150 per tree *held* not excessive.—Alabama & V. Ry. Co. v. Baldwin (Miss.) 358.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

Grounds for demurrer, see Pleading, § 193.

Motions to strike matter from pleading, see Pleading, § 362.

Objections to evidence on ground of insufficiency of pleading, see Pleading, § 423.

§ 150. A pleading containing a demand for liquidated damages must aver that the debtor is in default.—Godchaux v. Hyde (La.) 269.

§ 158. The complaint in an action for injuries to a servant *held* sufficient to cover muscular contraction of the knee and a fracture of the hip.—Grasselli Chemical Co. v. Davis (Ala.) 35.

(B) Evidence.

§ 166. In an action for injuries to plaintiff on a defective city sidewalk, evidence of plaintiff's physician that such injury was likely to develop rheumatism *held* admissible.—City of Birmingham v. Gordon (Ala.) 430.

§ 171. The financial condition of the child, but not the source of any estate it has *held* a proper element of inquiry, in an action for loss to the parent from the child's injury.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 178. In an action of trover, *held* error to allow plaintiff to testify that she suffered and nearly worried to death.—Mattingly v. Houston (Ala.) 78.

(C) Proceedings for Assessment.

§ 216. An instruction on damages *held* not erroneous, because omitting the word "reasonably" before the word "compensate."—Louisville & N. R. Co. v. Elliott (Ala.) 28.

(D) Computation and Amount, Double and Treble Damages, and Remission.

Remission of excess as condition of denying motion for new trial, see New Trial, § 162. Review of amount of recovery, see Appeal and Error, § 1004.

DEATH.

Dying declarations in prosecutions for homicide, see Homicide, §§ 203, 218.

Of witness as ground for admission of evidence given at former trial or in other proceeding, see Evidence, § 576.

Testimony as to transactions with persons since deceased, see Witnesses, § 150.

II. ACTIONS FOR CAUSING DEATH.

Passengers on ferries, see Ferries, § 33.

(E) Damages, Forfeiture, or Fine.

Computation of time, see Time, § 9.

§ 98. A recovery of \$1,500 for death of a boy 11 years old will, as inadequate, be raised to \$3,000.—Burvant v. Wolfe (La.) 1025.

§ 99. A recovery of \$10,000 for personal injury *held* not excessive.—Moren v. New Orleans Ry. & Light Co. (La.) 106.

(F) Trial, Judgment, and Review.

Instructions ignoring issues, see Trial, § 253.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Execution; Fraudulent Conveyances; Garnishment; Homestead; Payment.

Application of firm assets to liabilities, see Partnership, § 183.

Interest on default or delay in payment of obligation, see Interest.

Subrogation to rights of creditors, see Subrogation.

DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators; Wills.

Testimony as to transactions with persons since deceased, see Witnesses, § 150.

DECEIT.

See Fraud.

DECEPTION.

See Fraud.

DECLARATION.

In pleading, see Pleading.

DECLARATIONS.

As evidence, see Criminal Law, §§ 415, 418, 427; Evidence, § 273.

Dying declarations, see Homicide, §§ 203, 218.

DECREE.

In equity, see Equity, § 418.

Judgments in general, see Judgment.

DEDICATION.

I. NATURE AND REQUISITES.

§ 16. Facts *held* not to constitute a dedication of a tract as a graveyard.—Dumont v. Barrett (La.) 248.

II. OPERATION AND EFFECT.

§ 60. Where one devotes his property to a public use, he must submit to be controlled by the public for the common good.—State v. Atlantic Coast Line R. Co. (Fla.) 4.

DEDUCTIONS.

From price of land sold, see Vendor and Purchaser, § 176.

DEEDS.

Absolute deed as mortgage, see Mortgages, §§ 32, 33.

Acknowledgment of execution, see Acknowledgment.

Color of title, see Adverse Possession, § 71.

Estoppel by deed, see Estoppel, §§ 25, 32.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Parol or extrinsic evidence to show invalidity, see Evidence, § 434.

Preferences by debtor, see Bankruptcy, §§ 164, 165.

Priorities between judgments and conveyances, see Judgment, §§ 787, 788.

Reformation, see Reformation of Instruments.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Deeds by or to particular classes of persons.

See Infants, § 30.

Insolvent debtors, see Bankruptcy, §§ 164, 165.

Purchasers at tax sales, see Taxation, § 788.

Deeds of particular species of, or estates or interest in, property.

See Homestead, §§ 119, 123, 167.

Lands held adversely, see Champerty and Maintenance, § 7.

Standing timber, see Logs and Logging, § 3.

Particular classes of deeds.

Of trust, see Assignments for Benefit of Creditors; Trusts, §§ 17, 18.

Tax deeds, see Taxation, § 788.

Trust deeds, see Chattel Mortgages; Mortgages.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 31. A deed to a firm by the firm name, instead of to the individual members of the firm,

is not for that reason void.—*La Fayette Land Co. v. Caswell* (Fla.) 140.

§ 32. A deed without a grantee named therein is void.—*Bardin v. Grace* (Ala.) 425.

(C) Execution.

Acknowledgment, see Acknowledgment.

(D) Delivery.

§ 56. Title to property *held* not to pass to the grantee in a deed, where there has been no voluntary delivery of the deed.—*Bender v. Barton* (Ala.) 26.

§ 59. Notwithstanding recordation of a deed, *held*, if there was merely a sham delivery, no title passed.—*Coulson v. Scott* (Ala.) 436.

(E) Validity.

Cancellation for invalidity in general, see Cancellation of Instruments, § 32.

Parol or extrinsic evidence to show invalidity, see Evidence, § 434.

§ 70. The grantee in a deed of property of a negro woman *held* to have overreached her so as to make a deed invalid.—*Yarbrough v. Harris* (Ala.) 916.

II. RECORDING AND REGISTRATION.

Necessity of record to constitute color of title, see Adverse Possession, § 82.

Priorities between judgment and prior unrecorded deed, see Judgment, § 788.

III. CONSTRUCTION AND OPERATION.

Dedication of property to public use, see Dedication, § 60.

Estoppel by deed, see Estoppel, §§ 25, 32.

(A) General Rules of Construction.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

(B) Property Conveyed.

§ 111. A deed cannot extend possession to lands not described therein.—*Brown v. Powers* (Ala.) 647.

(C) Estates and Interests Created.

§ 127. A deed, though controlled by the Statute of 1812 (Clay's Dig. p. 157, § 37) *held* to vest in the grantee a life estate, with remainder to his children living at his death.—*Deason v. Stone* (Ala.) 307.

IV. PLEADING AND EVIDENCE.

Parol evidence to explain latent ambiguity, see Evidence, § 452.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

Parol or extrinsic evidence to show invalidity, see Evidence, § 434.

§ 196. In an action to set aside a deed, the burden of proof *held* to be on the grantee to prove that the transaction was fair.—*Yarbrough v. Harris* (Ala.) 916.

DEEDS OF TRUST.

See Trusts, §§ 17, 18.

DE FACTO JUDGES.

See Judges, § 26.

DE FACTO JUSTICES.

See Justices of the Peace, § 6.

DE FACTO OFFICERS.

See Officers, § 41.

DEFALCATION.

In general, see Embezzlement.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Decree in equity pro confesso, see Equity, § 418.
In performance of contracts in general, see Contracts, §§ 277, 321.

Judgment, see Judgment, §§ 101-143.

DEFEASANCE.

Constituting absolute deed a mortgage, see Mortgages, § 33.
Leases, see Landlord and Tenant, § 40.

DEFECTS.

In parties, see Parties, § 93.
In record on appeal or writ of error, see Appeal and Error, § 635.

DEFENDANTS.

See Parties, § 25.

DEFICIENCY.

On enforcement of mechanic's lien, see Mechanics' Liens, § 304.

DEFILEMENT.

Of female, see Rape; Seduction.

DEFINITIONS.

In instructions to jury, see Trial, § 219.

DEFRAUD.

See Fraud.

DEGREES.

Of crime, see Homicide, §§ 307, 309.
Of crime, conviction of lesser degree than that charged, see Indictment and Information, § 189.

DELAY.

Hindering and delaying creditors by fraudulent transfers, see Fraudulent Conveyances.
In delivery of goods sold, see Sales, §§ 175, 176.
In transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 54-69.
Laches, see Equity, §§ 67-70.

DELEGATION.

Of duty of master to protect servant from injury, see Master and Servant, § 103.
Of legislative power, see Constitutional Law, § 64.
Of power to control traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

DELIBERATION.

Element of murder, see Homicide, §§ 156, 158, 288.

DELIVERY.

Of deed, see Deeds, §§ 56, 59.
Of goods by carrier, see Carriers, §§ 77, 94.
Of goods sold, see Sales, §§ 161-179, 201.
Of goods to carrier, see Carriers, § 39.
Of property pledged, see Pledges, § 11.
Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 54-69.

DEMAND.

For jury, see Jury, § 25.

DEMISE.

See Landlord and Tenant.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

DEMURRER.

See Equity, §§ 219-241; Pleading, §§ 195, 223, 254.

Review of decisions, see Appeal and Error, §§ 680, 1040.

To evidence, see Trial, § 156.

DENIALS.

In pleading, see Pleading, § 115.

DEPOSITARIES.

Bailment in general, see Bailment.
Deposits incident to particular occupations, see Banks and Banking.

§ 6. Under Code 1906, § 3316, a city had power to pass an ordinance providing for the establishment of city depositories, fixing securities, and prescribing the mode of determining the interest rates.—*Montgomery v. State* (Miss.) 357.

§ 8. Under an ordinance establishing city depositories, when the city treasurer has paid the money to the depositories, *held*, that he cannot longer be held responsible.—*Montgomery v. State* (Miss.) 357.

DEPOSITIONS.

See Discovery; Witnesses.
Impeachment of witnesses, see Witnesses, § 324.

DEPOSITS.

See Bailment; Depositories.
In bank, see Banks and Banking, §§ 119-148.

DEPOSITS IN COURT.

Duties and liabilities of depositories of public moneys, see Depositories.

DEPOTS.

See Carriers, § 247.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Homestead, §§ 136, 150; Wills.
Distribution by executor or administrator, see Executors and Administrators, § 314.
Inheritance by, from or through bastards, see Bastards, § 102.

I. NATURE AND COURSE IN GENERAL.

§ 6. The capacity of heirs to inherit must be determined by the laws in force at the date of

the opening of the succession.—Succession of Davis (La.) 266.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(B) Surviving Husband or Wife.

Rights as to homestead, see Homestead, §§ 136, 150.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

Partition among coheirs, see Partition.

(A) Nature and Establishment of Rights in General.

Community and separate property of husband and wife, see Husband and Wife, § 273.

(B) Advancements.

§ 109. Rights of a child bringing an advancement into hotchpot, under Gen. St. 1900, § 2302, stated.—Taylor v. Everett (Fla.) 980.

DESCRIPTION.

Of devisees or legatees in will, see Wills, § 529.
Of parties to appeal or writ of error, see Appeal and Error, § 335.

Of parties to deeds, see Deeds, §§ 31, 32.

Of property conveyed, see Deeds, § 111.

Of property devised or bequeathed, see Wills, §§ 561, 588.

Of property in claim or statement of mechanic's lien, see Mechanics' Liens, § 136.

Of property in contract of sale, see Sales, § 68.

Of property in indictment for larceny, see Larceny, § 30.

Of territory in proceedings to extend city limits, see Municipal Corporations, § 33.

DESTRUCTION.

Of writing as ground for admission of secondary evidence, see Evidence, § 183.

DETAINDER.

See Forcible Entry and Detainer.

DETINUE.

Actions for damages only, for injuring, taking, converting, or detaining personalty, see Trespass; Trover and Conversion.

Actions for recovery of personalty founded on right of possession, see Replevin.

Certiorari to review judgment, see Certiorari, § 23.

Instructions giving undue prominence to particular matters, see Trial, § 244.

§ 1. One wrongfully deprived of possession of his property may recover it in detinue when it can be identified.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 5. In case of the issuance of checks fraudulently secured and the wrongful payment thereof so far as the payee was concerned, *held*, that the legal title to the money paid and right to its immediate possession was in the drawer, and that the latter might recover in detinue from payee the identical money paid.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 5. Where plaintiff's sole reliance in detinue is title, comparative right as between the parties is not always the test of recovery *vel non*.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 16. When a defendant, substituted in detinue pursuant to Code 1907, § 6051, came into the case and propounded her claim to money obtained on a search warrant, *held*, that the proceeding became a civil cause between her and

plaintiff.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 16. In detinue against a sheriff, *held*, that he properly brought in an adverse claimant pursuant to Code 1907, § 6051.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 19. Measure of damages in detinue, stated.—*Ex parte Allen* (Ala.) 44.

DEVISES.

See Wills.

DIES NON JURIDICUS.

See Holidays; Sunday.

DILATORY PLEAS.

See Pleading, § 106.

DILIGENCE.

Affecting adverse possession, see Adverse Possession, § 84.

Affecting right to equitable relief in general, see Equity, §§ 67-70.

Affecting right to new trial, see New Trial, § 102.

DIMINUTION OF RECORD.

See Appeal and Error, § 635.

DIRECTING VERDICT.

See Trial, §§ 169-171.

DISABILITIES.

Affecting limitation of actions, see Limitation of Actions, § 72.

Contributory negligence of persons under disability, see Negligence, § 85.

Particular classes of persons.

See Bastards, § 102; Convicts; Infants; Insane Persons.

Witnesses, ground for admission of evidence given at former trial or in other proceeding, see Evidence, § 576.

DISBURSEMENTS.

Costs in general, see Costs.

DISCHARGE.

From liability as guarantor, see Guaranty, § 50.

From liability as warrantor on assignment of note, see Bills and Notes, § 324.

Of injunction, see Injunction, § 172.

Of mechanic's lien see Mechanics' Liens, § 229.

Of witness as affecting competency as juror, see Jury, § 83.

DISCLOSURE.

By garnishee, see Garnishment, § 144, 148.

DISCOVERED PERIL.

Injury avoidable notwithstanding contributory negligence, see Railroads, § 390; Street Railroads, § 103.

DISCOVERY.

Dismissal of action on failure of discovery, see Equity, § 41.

I. IN EQUITY.

Verification of bill for discovery and accounting, see Equity, § 313.

§ 3. Discovery in equity is not affected by the statutory discovery by interrogatories to the adverse party.—*Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co.* (Ala.) 751.

§ 8. Scope of examination of adverse party before trial stated.—*Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co.* (Ala.) 751.

§ 13. Where complainants make charges of certain irregularities on information and belief, and there is nothing to show that without discovery they could make legal and accurate proof of the facts alleged a discovery will be granted.—*Townsend v. Miles* (Ala.) 651.

§ 19. A bill *held* to sufficiently allege the necessity of a discovery.—*Townsend v. Miles* (Ala.) 651.

§ 19. A bill by an employer's liability insurance company for inspection of insured's books, *held* not demurrable for want of discovery.—*Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co.* (Ala.) 751.

§ 20. Although the claimant of lands is ignorant of the territorial extent of the claim of one in possession, or of the source of his title, yet the jurisdiction of the chancery court cannot be sustained on the ground that the bill seeks discovery.—*Sayers v. Tallassee Falls Mfg. Co.* (Ala.) 802.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 79. Answers to interrogatories by a mother, codefendant, in a suit, *held* not to affect the interest of her minor children.—*Mailey v. Helm* (La.) 671.

§ 79. Answers by a mother, codefendant, to interrogatories in an action, *held* not to shift the burden of proof to her minor children as codefendants.—*Mailey v. Helm* (La.) 671.

DISCRETION OF COURT.

Amendment of pleadings, see Pleading, § 238.

Appointment of receiver, see Receivers, § 8.

Continuance, see Criminal Law, § 586.

Cross-examination of witnesses, see Witnesses, § 267.

New trial, see Criminal Law, § 911.

Order of proof, see Criminal Law, §§ 680, 686.

Reopening case for further evidence, see Criminal Law, § 686; Trial, § 68.

Review of discretion in civil actions, see Appeal and Error, §§ 955, 970.

Review of discretion in criminal prosecutions, see Criminal Law, §§ 1151, 1156.

DISCRIMINATION.

By carriers, see Carriers, § 13.

Constitutional requirement of equality and uniformity of taxation, see Taxation, § 45.

Denial of equal protection of laws, see Constitutional Law, §§ 212, 247.

Special privileges or immunities and class legislation, see Constitutional Law, § 206.

DISEASE.

See Health.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see Appeal and Error, §§ 792, 801.

Dismissal of certiorari, see Certiorari, § 60.

In city courts, see Courts, § 189.

Practice in equity, see Equity, §§ 363, 367.

Review of decisions, see Appeal and Error, § 105.

II. INVOLUNTARY.

In city courts, see Courts, § 189.

§ 56. Where an exception of misjoinder of defendants is sustained, the court cannot discriminate by dismissing the suit as to one defendant, but must, ordinarily, dismiss it as to all.—*Davidson v. Frost-Johnson Lumber Co.* (La.) 759.

DISORDERLY CONDUCT.

§ 11. Whether certain language used by accused to prosecutrix was insulting, within Code 1907, § 6217, *held* for the jury.—*Turney v. State* (Ala.) 910.

DISPATCH.

See Telegraphs and Telephones.

DISPOSSESSION.

See Forcible Entry and Detainer.

DISPUTE.

Amount in dispute as affecting jurisdiction of courts, see Appeal and Error, § 50; Justices of the Peace, § 44.

DISQUALIFICATION.

Of jurors, see Jury, §§ 47, 116.

Of jurors, ground for continuance, see Criminal Law, § 589.

Of jurors, ground for new trial, see Criminal Law, § 923.

Of jurors, summoning bystanders, see Jury, § 72.

Of justice, see Justices of the Peace, § 60.

Of officers summoning jurors, see Jury, § 67.

DISSEISIN.

See Forcible Entry and Detainer.

DISSOLUTION.

Of corporation or association, see Corporations, §§ 592½-619.

Of injunction, see Injunction, § 172.

DISTRIBUTION.

Of estate of decedent, see Descent and Distribution; Executors and Administrators, § 314.

Of governmental powers and functions, see Constitutional Law, §§ 50, 70.

DISTRICT AND PROSECUTING ATTORNEYS.

Control by court of arguments in criminal prosecutions, see Criminal Law, § 699.

Necessity and sufficiency of signature to indictment, see Indictment and Information, § 33.

DISTRICTS.

Drainage or reclamation districts, see Drains, § 18.

Levee districts, see Levees, §§ 10, 11.

School districts, see Schools and School Districts, §§ 29, 154.

Stock law districts, see Animals, § 50.

DITCHES.

See Drains.

DIVIDENDS.

On stock, see Corporations, §§ 151, 155.

DIVIDING COMMISSIONS.

See Brokers, § 66.

DIVORCE.

Annulment of marriage, see Marriage, §§ 58, 60.
Separation agreements and separate maintenance, see Husband and Wife, § 298¾.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

§ 124. In an action by a wife for separation from bed and board, judgment for plaintiff *held* sustained by the evidence.—*Delsa v. Raymond* (La.) 240.

(F) Judgment or Decree.

§ 174. In an action to recover the amount of a mutual benefit certificate, evidence *held* to show that insured was not divorced from his first wife before marrying the second time, so that the second marriage was invalid.—*Sullivan v. Grand Lodge, K. P.* (Miss.) 300.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

Actions for separate maintenance, see Husband and Wife, § 298¾.

§ 215. A wife suing for divorce *held* entitled to \$50 per month alimony pending the suit.—*Williamson v. Gruaz* (La.) 240.

§ 249. A decree of separation from bed and board carries with it a separation of goods, under Civ. Code, art. 155, and the community cannot be re-established by reconciliation of the parties; Code Napoleon, art. 1451, not being in effect in Louisiana.—*Crochet v. Dugas* (La.) 495.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 297. Upon breach of a contract by a former husband with his divorced wife to educate the children, *held*, that the wife could recover damages as for the total breach of an entire contract.—*McGaw v. O'Beirne* (La.) 775.

§ 297. A certain education *held* a compliance with a contract between a divorced husband and wife that the husband should give the children a "complete education."—*McGaw v. O'Beirne* (La.) 775.

§ 301. On a separation from bed and board, the judge may order a family meeting to advise as to the permanent custody of minor children, under Civ. Code, art. 157.—*Crochet v. Dugas* (La.) 495.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

As evidence, see Evidence, §§ 355, 378.
Best and secondary evidence, see Criminal Law, §§ 398, 400; Evidence, §§ 158-183.

DOGS.

Competency of evidence of trailing human being, see Criminal Law, § 386.
Injuries from operation of railroads, see Railroads, § 405.
Opinion evidence as to ability of dog to track human being, see Criminal Law, § 465.

DOMESTIC ANIMALS.

See Animals.

DOMICILE.

§ 4. In order to constitute an abandonment of residence, considerable time must elapse after leaving, together with some evidence of intention to abandon.—*State v. Tomsa* (La.) 988.

DONATIONS.

See Gifts.

DORMANT PARTNERS.

See Partnership, § 164.

DOWER.

Rights of widow in respect of community property, see Husband and Wife, § 273.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 114. The conveyance by a widow of the lands of which she is endowed passes only her life estate, though expressed to be in fee, and the grantee will not hold adversely to the remainderman until the widow's death.—*Anglin v. Broadnax* (Miss.) 865.

DRAFTS.

See Bills and Notes.

DRAINS.

I. ESTABLISHMENT AND MAINTENANCE.

§ 18. The statute, as amended, under which bonds were being attempted to be issued by the Tallahatchie Drainage Commission, must be complied with before a valid issue of bonds can be made by the drainage commission.—*James v. Tallahatchie Drainage Commission* (Miss.) 453.

DRAMSHOPS.

See Intoxicating Liquors.

DRAWING JURORS.

See Jury, § 80.

DRUGGISTS.

Regulations of manufacture and sale of poisons, see Poisons.

DRUNKARDS.

Intoxication affecting credibility of witness, see Witnesses, § 337.
Opinion evidence of intoxication, see Criminal Law, § 448.

§ 10. Defendant's drunkenness in a public place may be manifested by his language, so as to be punishable under Code 1907, § 6770, though his language be caused by anger.—*Lollar v. State* (Ala.) 745.

DUE COURSE OF LAW.

See Constitutional Law, §§ 278, 297.

DUPLICITY.

In indictment or information, see Indictment and Information, § 125.
In pleading, see Pleading, § 64.

DURESS.

Affecting validity of bill or note, see Bills and Notes, § 104.

Ground for annulment of marriage, see Marriage, § 58.

DWELLING PLACE.

See Domicile.

DYING DECLARATIONS.

See Homicide, §§ 203, 218.

EASEMENTS.

Grant of right of way to railroad, see Railroads, § 72.

Public easements.

See Dedication; Highways.

Streets, see Municipal Corporations, §§ 647-706.

EDUCATION.

See Schools and School Districts.

EJECTMENT.

See Forcible Entry and Detainer, §§ 4-17; Real Actions.

Election of remedy, see Election of Remedies, § 3.

I. RIGHT OF ACTION AND DEFENSES.

§ 16. Under the general rule, that in ejectment the plaintiff may recover upon prior possession as against a defendant who has a mere subsequent possession, plaintiff's recovery cannot be defeated by showing an outstanding title in another, does not prevail against a defendant who acquires the possession peaceably and in good faith under color of title.—Owen v. Moxom (Ala.) 527.

§ 16. In unlawful detainer, the older possession gives the better right, which is not defeated by a subsequent entry and occupation by the opposing claimant until it has ripened into title by adverse possession.—Gilchrist v. Atchison (Ala.) 955.

§ 16. Mere payment of taxes, tracing of boundaries, and watching for trespassers do not constitute actual possession of land and timber thereon.—Albert Hanson Lumber Co. v. Baldwin Lumber Co. (La.) 537.

§ 16. Under Code Prac. art. 49, plaintiff cannot maintain a possessory action unless he has real and actual possession of the property.—Albert Hanson Lumber Co. v. Baldwin Lumber Co. (La.) 537.

§ 16. "Natural possession" defined.—Albert Hanson Lumber Co. v. Baldwin Lumber Co. (La.) 537.

§ 19. Where the claimant of certain land is in doubt as to the territorial extent of the possessor's claim or possession, he may include in his complaint at law all possible territory.—Sayers v. Tallassee Falls Mfg. Co. (Ala.) 892.

III. PLEADING AND EVIDENCE.

Hearsay evidence, see Evidence, § 324.
Res geste, see Evidence, § 121.

§ 90. In unlawful detainer, evidence of the possession of defendant's grantor prior to plaintiff's possession was admissible.—Gilchrist v. Atchison (Ala.) 955.

§ 95. Matters held evidence in ejectment that one bought land and did not redeem from execution sale for the benefit of his wife's heirs.—Coulson v. Scott (Ala.) 436.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Conclusiveness of judgment, see Judgment, § 747.

Submission of questions of law, see Trial, § 199.

§ 106. Whether plaintiff in ejectment should or should not have filed a declaration under Acts 1893, p. 478, as to an adverse claim, held a question of fact for the jury.—Owen v. Moxom (Ala.) 527.

ELECTION OF REMEDIES.

§ 3. Restitution proceedings and ejectment are consistent and cumulative remedies, so that the election of one would not preclude resort to the other.—McKinnon v. Johnson (Fla.) 288.

§ 9. Where a party has several consistent remedies, the mere adoption and use of one will not preclude the use of the others under appropriate circumstances.—McKinnon v. Johnson (Fla.) 288.

§ 9. Where a party has elected a remedy which assumes existence of a particular relation of the party to the subject-matter, he cannot afterwards pursue another remedy assuming an inconsistent relation.—McKinnon v. Johnson (Fla.) 288.

§ 12. Where a party elects to adopt one of several inconsistent remedies, he cannot thereafter pursue the others or either of them.—McKinnon v. Johnson (Fla.) 288.

ELECTIONS.

To determine particular questions.

Adoption of local option law, see Intoxicating Liquors, §§ 35, 37.

Issuance of drainage bonds, see Drains, § 18.

Issue of municipal bonds, see Municipal Corporations, § 918.

Levy of school taxes, see Schools and School Districts, § 103.

II. ORDERING OR CALLING ELECTION, AND NOTICE.

Election to determine issuance of county bonds, see Counties, § 178.

Order for stock law election, see Animals, § 50.

IV. QUALIFICATIONS OF VOTERS.

Right of women to vote at school tax election, see Schools and School Districts, § 103.

School tax elections, see Schools and School Districts, § 103.

V. REGISTRATION OF VOTERS.

§ 115. A registered voter, whose registration papers are destroyed, held entitled to have his name placed on the new book of the registrar by application at any time more than 48 hours preceding the opening of the polls.—State ex rel. Reid v. Le Blue (La.) 849.

VIII. CONDUCT OF ELECTION.

§ 201. As voters have no absolute right to vote at any particular place, polling place may be changed by legislative sanction.—Mulhaupt v. City of Shreveport (La.) 1023.

§ 227. In the absence of proof that any one was denied the right to vote or that women applied to vote, an election will not be annulled on the ground that the registration laws were not observed, and that women were excluded from voting.—Mulhaupt v. City of Shreveport (La.) 1023.

X. CONTESTS.

Examination of ballots in local option election contest, see *Intoxicating Liquors*, § 37.
 School tax election, see *Schools and School Districts*, § 103.

ELECTRICITY.

Amendment of pleading in action for fires caused by electricity, see *Pleading*, § 248.
 Electric railroads, see *Street Railroads*.
 Telegraph and telephone lines, see *Telegraphs and Telephones*.

§ 16. The use of a cheap insulation becoming worthless within a few months held a violation of a city ordinance requiring insulation of electric light wires.—*Moren v. New Orleans Ry. & Light Co. (La.)* 106.

§ 16. That an insulation required by a city ordinance was unnecessary and expensive would be no ground for avoiding a death caused by violation of the city ordinance requiring certain insulation.—*Moren v. New Orleans Ry. & Light Co. (La.)* 106.

ELIGIBILITY.

Of witnesses, see *Witnesses*, §§ 37, 150.

EMBANKMENTS.

See *Levees*.

EMBEZZLEMENT.

See *Larceny*.

Civil liability for conversion, see *Trover and Conversion*.

Former jeopardy, see *Criminal Law*, § 200.

Jurisdiction of prosecution, see *Criminal Law*, § 94.

§ 1. Embezzlement is a statutory and not a common-law crime.—*McInnis v. State (Miss.)* 634.

§ 2. At the enactment of Act No. 107 of 1902, embezzlement was not a minor offense, and could not be made so, nor was it a misdemeanor through such act.—*State v. Wall (La.)* 556.

EMINENT DOMAIN.

Dedication of property to public use, see *Dedication*.

Public improvements by municipalities, see *Municipal Corporations*, §§ 265-586.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 268. Where an owner of land fails to object in due time to appropriation by a railroad, he is relegated to an action for damages.—*Taylor v. New Orleans Terminal Co. (La.)* 562.

§ 284. Right to damages for taking of land by railroad is personal and does not pass to successive owners of land.—*Taylor v. New Orleans Terminal Co. (La.)* 562.

EMPLOYERS' LIABILITY INSURANCE.

See *Insurance*, §§ 177, 383, 512, 565.

EMPLOYÉS.

See *Master and Servant*.

ENACTMENT.

Of statutes, see *Statutes*, §§ 8½, 28.

ENCROACHMENT.

By judiciary on Legislature, see *Constitutional Law*, § 70.

On highway, see *Highways*, §§ 153, 160.

On street, see *Municipal Corporations*, § 692.

ENDOWMENT.

See *Dower*.

ENGLISH LANGUAGE.

Sufficiency of publication of notice in paper printed in foreign language, see *Newspapers*, § 3.

ENROLLMENT.

Of judgment, see *Judgment*, §§ 272, 282.

Of voters, see *Elections*, § 115.

ENTRY.

Of judgment, see *Judgment*, §§ 272, 282.

On land, by force, see *Forcible Entry and Detainer*.

ENTRY, WRIT OF.

Actions for damages for wrongful entry upon or injury to real property, see *Trespass*.

Actions for forcible entry and detainer, see *Forcible Entry and Detainer*, §§ 4-17.

Actions for recovery of possession of real property, and damages for detention thereof, see *Ejectment*.

Real actions founded on right of property, see *Real Actions*.

EQUALITY.

Constitutional requirement as to equality and uniformity of taxation, see *Taxation*, § 45.

EQUAL PROTECTION OF THE LAWS.

See *Constitutional Law*, §§ 212, 247.

EQUITABLE ESTATES.

See *Mortgages; Trusts*.

EQUITY.

Equitable estates, see *Mortgages; Trusts*.

Of redemption, see *Mortgages*, §§ 591, 621.

Particular subjects of equitable jurisdiction and equitable remedies.

See *Cancellation of Instruments; Discovery*, §§ 3-20; *Fraudulent Conveyances*, §§ 218-295; *Injunction; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Subrogation; Trusts*.

Establishment and enforcement of trust, see *Trusts*, § 365.

Relief from judgment, see *Judgment*, §§ 407-460.

Review on appeal.

Scope and extent of review in equitable actions, see *Appeal and Error*, § 1009.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

Priority of jurisdiction of probate court, see *Courts*, § 475.

Transfer of administration proceedings from probate court, see *Courts*, §§ 485, 487.

(A) *Nature, Grounds, Subjects, and Extent of Jurisdiction in General.*

§ 3. Ordinarily, equity will relieve against fraud, but not against every neglect of duty.—*Gewin v. Shields (Ala.)* 887.

§ 24. Forfeitures, not being favored in equity, will not be enforced if couched in ambiguous language.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

§ 24. Equity always mitigates forfeitures or relieves against them when it can be done without doing violence to the contracts of the parties.—*McCaskill v. Union Naval Stores Co.* (Fla.) 961.

§ 39. Where the court takes jurisdiction for the purpose of dissolving a nongovernment corporation and distributing its assets in accordance with a bill filed by stockholders, it will settle all the equities arising out of the subject-matter of the bill.—*Minona Portland Cement Co. v. Reese* (Ala.) 523.

§ 41. Discovery cannot be used as a mere pretext for bringing a common-law action in a court of chancery; and, if the discovery fails, the suit should be dismissed.—*Sloes-Sheffield Steel & Iron Co. v. Maryland Casualty Co.* (Ala.) 751.

(B) Remedy at Law and Multiplicity of Suits.

See Quietting Title, § 13.

Multiplicity of suits ground for suit to quiet title, see Quietting Title, § 5.

Remedy at law as bar to suit to cancel written instrument, see Cancellation of Instruments, § 12.

Remedy at law as bar to suit to set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 239.

§ 44. The original jurisdiction of a court of equity held not affected by a statute conferring similar jurisdiction on courts of law.—*Evans v. Wilhite* (Ala.) 845.

(C) Principles and Maxims of Equity.

§ 66. Plaintiffs held not entitled to enjoin the execution of a judgment against them for defendant, under the maxim that one seeking equity must do equity.—*Walker-Durr Co. v. Mitchell* (Miss.) 583.

II. LACHES AND STALE DEMANDS.

To establish and enforce trust, see Trusts, § 365.

§ 67. An equitable right to land recognizes title in another, and a timely appeal to equity is essential.—*Butt v. McAlpine* (Ala.) 420.

§ 69. The presumption of extinguishment of an equity in land arising from laches does not depend on action or inaction of the bona fide claimant of the title, unless infected with fraud or deception.—*Butt v. McAlpine* (Ala.) 420.

§ 70. Laches rests in a large degree on acquiescence, and that presupposes notice of a status opposed to the title or equity sought to be enforced.—*Butt v. McAlpine* (Ala.) 420.

III. PARTIES AND PROCESS.

§ 94. All those against whom relief is prayed in equity are proper and necessary parties.—*Murrell v. Peterson* (Fla.) 726.

IV. PLEADING.

In particular proceedings.

See Quietting Title, §§ 35, 52.

For injunction, see Injunction, § 118.

For relief against judgment, see Judgment, § 460.

To enforce mechanic's lien, see Mechanics' Liens, §§ 271, 277.

To enforce specific performance, see Specific Performance, § 114.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 263, 266.

(A) Original Bill.

Bill for discovery, see Discovery, § 19.

In suits for injunction, see Injunction, § 118.

In suits for specific performance, see Specific Performance, § 114.

In suits to enforce mechanics' liens, see Mechanics' Liens, § 271.

In suits to quiet title, see Quietting Title, §§ 35, 52.

In suits to set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

§ 133. Essentials of a bill in equity stated.—*Gillespie v. Chapline* (Fla.) 722.

§ 147. A bill held not objectionable as being multifarious.—*Washington v. Arnold* (Ala.) 463.

§ 148. A bill is multifarious when it states distinct, separate, and independent equities that can better be adjudicated in more than one suit.—*Arcadia Mercantile Co. v. Branning* (Fla.) 588.

§ 149. Certain bill held not multifarious.—*Arcadia Mercantile Co. v. Branning* (Fla.) 588.

(C) Cross-Bill and Plea and Answer Thereto.

Cross-bill for discovery, see Discovery, § 19.

(E) Demurrer, Exceptions, and Motions.

§ 219. A bill without equity is subject to demurrers under Code 1907, § 3121.—*City of Huntsville v. County of Madison* (Ala.) 326.

§ 223. Unless multifariousness clearly appears from the allegations of the bill, it is not subject to demurrer on that ground.—*Arcadia Mercantile Co. v. Branning* (Fla.) 588.

§ 233. A general demurrer to a bill for want of equity should be overruled, where the case made entitles complainant to any substantial relief.—*La Fayette Land Co. v. Caswell* (Fla.) 140.

§ 237. Where defendant, under Gen. St. 1906, § 1871, incorporates a demurrer to the bill in the answer, the demurrer is not overruled by the answer.—*McRaney v. Jarrell* (Fla.) 304.

§ 239. The facts alleged are taken as confessed on demurrer to the bill.—*Washington v. Arnold* (Ala.) 463.

§ 239. On demurrer to a bill, the averments of the bill must be treated as true.—*Evans v. Wilhite* (Ala.) 845.

§ 239. Averments of a plea are taken as true on demurrer.—*Gewin v. Shields* (Ala.) 887.

§ 241. A demurrer incorporated in the answer to a bill can be called up for disposition only at final hearing.—*McRaney v. Jarrell* (Fla.) 304.

(G) Signature, Verification, Filing, and Service.

§ 313. A bill held not for discovery only, and therefore not required to be sworn to.—*Sloes-Sheffield Steel & Iron Co. v. Maryland Casualty Co.* (Ala.) 751.

(H) Issues, Proof, and Variance.

In suits to enforce mechanics' liens, see Mechanics' Liens, § 277.

V. EVIDENCE.

In particular proceedings.

For divorce, see Divorce, § 124.

To enforce mechanics' liens, see Mechanics' Liens, § 280.

To reform written instrument, see Reformation of Instruments, § 45.
To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 271, 295.

VII. DISMISSAL BEFORE HEARING.

§ 363. On motion to dismiss for want of equity the averments of the bill must be treated as true.—*Evans v. Wilhite* (Ala.) 845.

§ 367. Where a cross-bill in equity alleges new matter and asks affirmative relief, dismissal of the original bill does not of itself dismiss the cross-bill.—*Spencer v. Spencer* (Fla.) 146.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Reference in action at law, see Reference.
Review of questions of fact, see Appeal and Error, §§ 1017, 1020.

§ 404. Certain testimony held admissible upon a hearing to settle an account between parties before a master.—*Taylor v. Cummer Lumber Co.* (Fla.) 614.

X. DECREE AND ENFORCEMENT THEREOF.

In particular proceedings.

See Quieting Title, § 52.
For divorce, see Divorce, § 174.
To redeem from mortgage sale, see Mortgages, § 621.

§ 418. Code 1907, § 3133, held to deal alone with notices where the party to whom directed is in default, and not to the period after the elapsing of which from perfected notice decree pro confesso may be taken.—*Vary v. Thompson* (Ala.) 951.

XI. BILL OF REVIEW.

§ 442. Nature and office of a bill of review stated.—*Vary v. Thompson* (Ala.) 951.

§ 442. Errors subject to revision on appeal or on other like procedure may be the basis of a bill of review, but not every irregularity available to reverse on appeal will support a bill of review.—*Vary v. Thompson* (Ala.) 951.

§ 446. A certain irregularity held not ground for a bill of review.—*Vary v. Thompson* (Ala.) 951.

§ 446. The fact that a decree pro confesso was entered prematurely was not ground for a bill of review.—*Vary v. Thompson* (Ala.) 951.

EQUITY OF REDEMPTION.

See Mortgages, §§ 591, 621.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

Of private roads, see Private Roads, § 2.
Of streets, see Municipal Corporations, § 647.
Of trusts, see Trusts, § 365.

ESTATES.

Bankrupts' estates, see Bankruptcy.
Created by deed, see Deeds, § 127.
Decedents' estates, see Descent and Distribution; Executors and Administrators; Wills.
Restrictions on creation of perpetuities, see Perpetuities.

Particular estates.

See Dower; Homestead; Life Estates; Remainders.

Estates for years, see Landlord and Tenant.
Tenancy in common, see Tenancy in Common.

ESTOPPEL

See Election of Remedies.

I. BY RECORD.

By judgment, see Judgment, §§ 668-747.

II. BY DEED.

Estoppel of tenant to dispute title of landlord, see Landlord and Tenant, § 63.

(A) Creation and Operation in General.

§ 25. In a suit by a mortgagor for an accounting and to redeem, complainant held not estopped to controvert the sum for which a prior mortgage for which the mortgage was a renewal was given.—*People's Bank of Evergreen v. Robbins* (Ala.) 412.

§ 32. Forthcoming bond in replevin held to estop defendant from denying his possession of the property at the institution of the suit and service of the writ.—*Furst v. Pease* (Miss.) 257.

III. EQUITABLE ESTOPPEL.

Of particular classes of persons or persons in particular relations.

Insurance companies, see Insurance, § 565.
Tenant, to dispute title of landlord, see Landlord and Tenant, § 63.

To assert or deny particular facts, rights, claims, or liabilities.

Defects in or objections to notice and proof of loss under insurance policy, see Insurance, §§ 556, 558.

Grounds for avoidance or forfeiture of insurance policy, see Insurance, §§ 375-388.

Invalidity of receiver's appointment, see Receivers, § 57.

Right to homestead, see Homestead, § 145.
Right to proceeds of insurance policy, see Insurance, § 793.

Right to require notice and proof of loss under insurance policy, see Insurance, §§ 556, 558.

Title of landlord, see Landlord and Tenant, § 63.

To enforce liability of stockholders, see Corporations, § 262.

Validity of insurance policy, see Insurance, §§ 375-388.

EVIDENCE.

See Discovery; Witnesses.

Absence of evidence ground for continuance, see Criminal Law, §§ 594, 597.

Admissibility under pleadings, see Pleading, § 381.

Applicability of instructions to evidence, see Criminal Law, § 814; Trial, § 252.

Comments by counsel on evidence or failure to produce evidence or call witness, see Trial, § 121.

Exceptions to evidence, see Trial, § 105.

False swearing, see Perjury.

Incorporating evidence in bill of exceptions, see Exceptions, Bill of, § 16.

Instructions as to rules of evidence, see Criminal Law, §§ 778, 789.

Instructions ignoring, see Trial, § 253.

Instructions on evidence or witnesses as invasion of province of jury, see Trial, §§ 186-194.

Motion to strike out evidence, see Criminal Law, § 696; Trial, §§ 89, 91.

Newly discovered evidence ground for new trial, see Criminal Law, § 945; New Trial, §§ 102, 104.

Objections to evidence, see Criminal Law, §§ 693, 698; Trial, §§ 76-80.
 Objections to evidence on ground of insufficiency of pleadings, see Pleading, § 428.
 Objections to evidence on ground of variance, see Pleading, § 430.
 Offer of proof, see Trial, §§ 45, 46.
 Questions of fact for jury, see Criminal Law, § 736; Trial, §§ 134-145.
 Reception at trial, see Criminal Law, §§ 673, 686; Trial, §§ 45-105.
 Verdict or findings contrary to evidence ground for new trial, see New Trial, § 71.

As to particular facts or issues.

See Adverse Possession, §§ 33, 57, 85, 114; Guaranty, § 25.
 Acknowledgment of written instruments, see Acknowledgment, § 62.
 Authority of corporate officer or agent, see Corporations, § 432.
 Bar of statute of limitations, see Limitation of Actions, § 197.
 Contributory negligence, see Negligence, § 122.
 Contributory negligence of servant injured, see Master and Servant, § 274.
 Creation, existence, and validity of trust, see Trusts, § 89.
 Damages, see Damages, §§ 166, 178.
 Fraudulent conveyance, see Fraudulent Conveyances, §§ 271, 295.
 Incompetency of fellow servant, see Master and Servant, §§ 271, 279.
 Loss of or injury to goods in course of transportation, see Carriers, § 132.
 Marriage, see Marriage, § 40.
 Negligence of fellow servant, see Master and Servant, § 279.
 Negligence of hirer of horses, see Animals, § 27.
 Negligence of master causing injury to servant, see Master and Servant, §§ 270, 278.
 Relation of carrier and passenger, see Carriers, § 246.
 Testamentary capacity, see Wills, § 55.
 Transfer and ownership of bill or note, see Bills and Notes, § 523.
 Validity of contract of sale, see Sales, § 52; Vendor and Purchaser, § 44.
 Validity of deed, see Deeds, § 196.

In actions by or against particular classes of persons.

See Carriers, §§ 132, 228, 316, 317; Ferries, § 33; Master and Servant, §§ 265, 279; Municipal Corporations, § 818; Parent and Child, § 7; Partnership, § 217; Railroads, §§ 347, 396, 397, 480, 481.
 Assignees, see Assignments, § 137.

In particular civil actions or proceedings.

See Ejectment, § 90; Habeas Corpus, § 85; Quietening Title, § 44; Real Actions, § 8; Replevin, § 72; Work and Labor, § 28.
 By parent for injuries to child, see Parent and Child, § 7.
 For breach of contract of sale, see Sales, § 382.
 For death of person attempting to board ferry, see Ferries, § 33.
 For divorce, see Divorce, § 124.
 For false imprisonment, see False Imprisonment, § 23.
 For injuries at railroad crossings, see Railroads, § 347.
 For injuries from defects or obstructions in streets, see Municipal Corporations, § 818.
 For injuries from fires caused by operation of railroads, see Railroads, §§ 480, 481.
 For injuries from negligence, see Negligence, §§ 121-134.
 For injuries to licensees on railroad property, see Railroads, § 282.
 For injuries to passengers, see Carriers, §§ 316, 317.
 For injuries to persons on or near railroad tracks, see Railroads, §§ 396, 397.

For injuries to servant on vessel, see Shipping, § 84.
 For injuries to servants, see Master and Servant, §§ 265, 279.
 For libel or slander, see Libel and Slander, §§ 101, 109.
 For loss of or injury to goods in course of transportation, see Carriers, § 132.
 For loss of or injury to live stock in course of transportation, see Carriers, § 228.
 For malicious prosecution, see Malicious Prosecution, §§ 56, 64.
 For possession of child, see Parent and Child, § 2.
 For price or value of goods sold, see Sales, § 358.
 On account stated, see Account Stated, § 19.
 On assigned claims, see Assignments, § 137.
 On bills or notes, see Bills and Notes, §§ 495-523.
 To enforce mechanic's lien, see Mechanics' Liens, § 280.
 To establish claim to attached property, see Attachment, § 308.
 To reform written instrument, see Reformation of Instruments, § 45.
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 271, 295.

In criminal prosecutions.

See Criminal Law, §§ 331-570; Homicide, §§ 145, 237; Larceny, §§ 43, 64; Rape, § 48; Seduction, §§ 40, 46.
 Violations of liquor laws, see Intoxicating Liquors, §§ 233, 236.

Review and procedure thereon in appellate courts.

Matters considered in determining questions, see Appeal and Error, § 837.
 Presumptions as to admissibility on appeal or writ of error, see Appeal and Error, § 926.
 Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, §§ 1048, 1058.
 Review of rulings as dependent on presentation of evidence in record, see Appeal and Error, § 692; Criminal Law, §§ 1120, 1121.
 Review of rulings as dependent on taking of exception in lower court, see Appeal and Error, § 260.
 Review of rulings involving discretion of court, see Appeal and Error, § 970.
 Review of sufficiency of evidence, see Appeal and Error, §§ 695, 1001, 1024; Criminal Law, § 1158.

I. JUDICIAL NOTICE.

§ 20. That it is the duty of a railroad section master to supervise the right of way, so that fires would not extend from it, and to extinguish such fires when set out, is a matter of common knowledge, of which the court will take judicial notice.—Alabama & V. Ry. Co. v. Baldwin (Miss.) 358.

§ 32. Courts of this state do not take judicial notice of municipal ordinances.—Excelsior Steam Laundry Co. v. Lomax (Ala.) 347.

II. PRESUMPTIONS.

As to particular facts or issues.

See Marriage, § 40.
 Capacity of minor, see Infants, § 2.
 Constitutionality of statutes, see Constitutional Law, § 48.
 Negligence of hirer of horses, see Animals, § 27.
 Prejudice from error in trial court, see Appeal and Error, § 1031.

In particular civil actions or proceedings.

For injuries from negligence, see Negligence, §§ 121, 122.
 For injuries to hired horses, see Animals, § 27.

For injuries to persons on or near railroad tracks, see Railroads, § 396.
For libel or slander, see Libel and Slander, § 101.
On bills or notes, see Bills and Notes, § 495.

§ 67. The rule that, when a condition is proven to have once existed, there is a presumption of its continued existence, does not apply in 1909 to a field crop raised in 1907.—Bludworth v. Bray (Fla.) 957.

§ 78. Refusal of a defendant corporation to produce its books which have been kept out of the state justifies the application of the maxim of omnia præsumuntur contra spoliatores.—Varnado v. Banner Cotton Oil Co. (La.) 777.

§ 83. The execution sale having been 60 years ago, and the purchaser having later recovered in ejectment, *held*, it is presumed the sheriff gave a deed to the purchaser.—Coulson v. Scott (Ala.) 436.

§ 83. The inspectors at a local option election are presumed only to allow legally qualified electors to vote.—Sullivan v. Orange County Com'rs (Fla.) 517.

III. BURDEN OF PROOF.

In criminal prosecutions, see Criminal Law, § 331.

As to particular facts or issues.

See Marriage, § 40.

Error in trial court, see Appeal and Error, § 901.

Fraudulent conveyance, see Fraudulent Conveyances, § 271.

Loss of or injury to goods in course of transportation, see Carriers, § 132.

Negligence of hirer of horses, see Animals, § 27.

Prejudice from error in trial court, see Appeal and Error, § 1032.

Validity of deed, see Deeds, § 196.

In particular civil actions or proceedings.

For injuries from fires caused by operation of railroads, see Railroads, § 480.

For injuries from negligence, see Negligence, §§ 121, 122.

For injuries to hired horses, see Animals, § 27.

For injuries to licensees on railroad property, see Railroads, § 282.

For injuries to passengers, see Carriers, § 316.

For injuries to persons on or near railroad tracks, see Railroads, § 396.

For injuries to servants, see Master and Servant, § 265.

For loss of or injury to goods in course of transportation, see Carriers, § 132.

For malicious prosecution, see Malicious Prosecution, § 56.

To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 271.

§ 90. The term "burden," or "burden of proof," is frequently used to signify the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) *Facts in Issue and Relevant to Issues.*

In criminal prosecutions, see Criminal Law, §§ 338-365.

(B) *Res Gestæ.*

In criminal prosecutions, see Criminal Law, §§ 363, 365.

§ 121. In an action for injuries to a passenger, evidence as to whether plaintiff's mother indicated that she was tendering a pass for the

plaintiff *held* admissible.—Broyles v. Central of Georgia Ry. Co. (Ala.) 81.

§ 121. In ejectment, it was not error to permit a witness to testify that the persons through whom the plaintiff derived title had been trying to sell witness' father the land.—Owen v. Moxom (Ala.) 527.

§ 122. In an action against a railroad company for the death of plaintiff's intestate by being struck by one of defendant's engines, evidence whether the bell was rung, or the whistle blown, was admissible as part of the *res gestæ*.—Birmingham Southern R. Co. v. Fox (Ala.) 889.

§ 122. In a suit for the accidental death of a horse hired from plaintiff, a remark by bystanders *held* admissible to show a driver's knowledge of danger of the situation he was in.—Weller & Co. v. Camp (Ala.) 929.

§ 128. In an action for injuries to a servant, evidence whether the servant complained of any suffering *held* admissible.—Grasselli Chemical Co. v. Davis (Ala.) 35.

(C) *Similar Facts and Transactions.*

§ 130. In an injury action by a servant, evidence of compensation from a benefit association for his injury *held* improperly admitted.—Pace v. Louisville & N. R. Co. (Ala.) 52.

(D) *Materiality.*

In criminal prosecutions, see Criminal Law, § 383.

(E) *Competency.*

In criminal prosecutions, see Criminal Law, §§ 383-390.

Of impeaching evidence, see Witnesses, § 390.

§ 151. On an issue of the right to ride on a pass, a witness *held* not entitled to testify whether she thought she had a right to ride on the pass.—Broyles v. Central of Georgia Ry. Co. (Ala.) 81.

§ 151. Testimony as to uncommunicated intentions *held* not admissible.—Broyles v. Central of Georgia Ry. Co. (Ala.) 81.

V. BEST AND SECONDARY EVIDENCE.

In criminal prosecutions, see Criminal Law, §§ 398, 400.

§ 158. A sale and delivery of goods need not be proved by the introduction of the bill of lading.—M. Weinstein & Sons v. Yielding Bros. & Co. (Ala.) 591.

§ 165. A purchaser of car loads of hay, insisting that consignment was to be made to the seller's order "Notify J. E. C.," could not show by its general manager that the commercial agent of the carrier phoned him that such was the fact, since the contract of shipment was the best evidence.—St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co. (Ala.) 904.

§ 181. In an action for false imprisonment and malicious prosecution, secondary evidence of the affidavit and warrant of arrest *held* not admissible without first laying a proper predicate.—Engle v. Patterson (Ala.) 397.

§ 183. Papers left with a justice of the peace *held* not to be proved by secondary evidence in a subsequent suit.—Sibley & Sibley v. Smith (Ala.) 27.

§ 183. In a prosecution for malicious prosecution, a sufficient showing of the loss of affidavits and warrants therein *held* not to have been made so as to admit secondary evidence of their condition.—Abingdon Mills v. Grogan (Ala.) 596.

VI. DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see Criminal Law, § 404.

VII. ADMISSIONS.**(A) Nature, Form, and Incidents in General.**

§ 217. Evidence of defendant's verbal acceptance of an order for the rent of certain mules *held* admissible to show defendant's original promise to pay the rent, though not to establish a cause of action on the order.—*Faircloth-Byrd Mercantile Co. v. Adkinson* (Ala.) 419.

(D) By Agents or Other Representatives.

§ 253. In an action for malicious prosecution for enticing away defendant's laborers, in view of the evidence tending to show conspiracy between C. and plaintiff to entice away defendant's laborers, *held* error to exclude testimony as to what C. told witness as to why plaintiff came to a certain place.—*Abingdon Mills v. Grogan* (Ala.) 596.

VIII. DECLARATIONS.**(A) Nature, Form, and Incidents in General.**

§ 273. A party in possession of land may make declarations explanatory of his possession, either in claim or disclaim of ownership, and such declarations are admissible as part of the *res gestae* on an issue of disputed ownership, no matter who may be parties.—*Owen v. Moxom* (Ala.) 527.

IX. HEARSAY.

§ 317. The secondary statement of what the successor of a justice of the peace said about the authenticity of the docket of the former justice is not proof that the docket was that of the former justice.—*Sibley & Sibley v. Smith* (Ala.) 27.

§ 317. In an injury action by a servant, certain evidence *held* not inadmissible as hearsay.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 317. To prove that a consignment of goods sold was to the seller's order "Notify J. E. C.," testimony of the purchaser's general manager that the commercial agent of the carrier notified him over phone that such was the fact *held* inadmissible as hearsay.—*St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.* (Ala.) 904.

§ 324. It is not competent to show, by reputation or general understanding in the neighborhood, that plaintiff in ejectment owned or had title to the land.—*Owen v. Moxom* (Ala.) 527.

X. DOCUMENTARY EVIDENCE.

Admissibility of grand jury's docket to show termination of prosecution, see Malicious Prosecution, § 61.

(C) Private Writings and Publications.

§ 355. A memorandum containing matter testified to by witness *held* not admissible in evidence.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 355. An unsworn memorandum *held* inadmissible to prove a firm's indebtedness.—*Brandon v. Progress Distilling Co.* (Ala.) 640.

(D) Production, Authentication, and Effect.

§ 378. Letters alleged to have been received by defendant *held* inadmissible without some proof of authenticity in addition to their contents.—*Butterworth & Lowe v. Cathcart* (Ala.) 896.

§ 378. Evidence that a letter offered in evidence was "received by defendant" without

proof that it was received in due course through the mails *held* insufficient to establish authenticity.—*Butterworth & Lowe v. Cathcart* (Ala.) 896.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

Parol evidence as to nature of instrument as will, see Wills, § 93.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 390. In a suit to quiet title, complainant *held* unable to show by parol, over 20 years after the execution of a deed, that he contracted for and bought other land than that described.—*Brown v. Powers* (Ala.) 647.

§ 407. A bill of lading as a receipt is open to explanation or modification by parol evidence.—*Alabama Great Southern R. Co. v. Norris* (Ala.) 891.

§ 407. A bill of lading as a contract *held* not open to parol modification.—*Alabama Great Southern R. Co. v. Norris* (Ala.) 891.

§ 425. In a slander case, *held*, that an objection to a question to plaintiff that it sought to vary by parol the terms of a written contract was untenable, and that there would have been no error had the court overruled it.—*Phillips v. Bradshaw* (Ala.) 662.

(B) Invalidating Written Instrument.

§ 434. On a charge that fraud was practiced in inserting in a tax deed a description of property not assessed or adjudicated, certain parol testimony *held* admissible.—*Guillory v. Elms* (La.) 767.

(C) Separate or Subsequent Oral Agreement.

§ 442. Certain evidence *held* not inadmissible as modifying a bill of lading.—*Alabama Great Southern R. Co. v. Norris* (Ala.) 891.

(D) Construction or Application of Language of Written Instrument.

§ 452. Where a deed is made to a firm by the firm name, it is a latent ambiguity that may be explained by parol.—*La Fayette Land Co. v. Caswell* (Fla.) 140.

XII. OPINION EVIDENCE.

Appointment of handwriting experts, see Reference, § 25.

In criminal prosecutions, see Criminal Law, §§ 448-478.

(A) Conclusions and Opinions of Witnesses in General.

Repetition of questions, see Witnesses, § 245.

§ 471. A question to a witness *held* objectionable as calling for a conclusion.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 471. Question, asked of a witness as to whether he looked and listened "carefully" before traversing a railroad crossing, was not objectionable as calling for a conclusion.—*Southern Ry. Co. v. Stollenwerck* (Ala.) 204.

§ 471. Testimony, in an action for malicious prosecution, that defendant's agent made a full and fair statement of the facts to an attorney before instituting the prosecution, was a conclusion.—*Abingdon Mills v. Grogan* (Ala.) 596.

§ 471. On the issue whether a third person was a member of a firm a witness may not state his judgment that the third person was a partner.—*Brandon v. Progress Distilling Co.* (Ala.) 640.

§ 472. A witness *held* not authorized to state his conclusion as to the very fact in issue.—*Brandon v. Progress Distilling Co.* (Ala.) 640.

§ 472. A nonexpert *held* entitled to testify as to the proper way of hobbling and throwing a horse so as not to injure it, but not that a method used was negligent.—*Staples v. Steed* (Ala.) 646.

§ 472. Mere conclusions of witnesses as to questions for the jury to decide on consideration of facts in detail are inadmissible.—*Weller & Co. v. Camp* (Ala.) 929.

(B) **Subjects of Expert Testimony.**

§ 505. A question to an expert witness in a personal injury action, whether plaintiff was able at a certain time to walk, calls for a fact, and is properly excluded.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

(C) **Competency of Experts.**

In criminal prosecutions, see **Criminal Law**, § 478.

§ 539½. Test for determining the qualifications of an expert witness stated.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 545. One surgeon *held* not competent to testify as to the competency of another surgeon.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

(D) **Examination of Experts.**

§ 553. A hypothetical question to a physician in an action for injuries to a servant *held* proper.—*Grasselli Chemical Co. v. Davis* (Ala.) 35.

§ 553. Scope of hypothetical question presented to an expert witness, stated.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

§ 558. The trial court may widen the range of cross-examination of an expert to embrace matters not strictly pertinent to the issues.—*Pensacola Electric Co. v. Bissett* (Fla.) 367.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 576. Testimony given in a prior suit involving the present issue *held* admissible, where witness is dead.—*Coulson v. Scott* (Ala.) 436.

XIV. WEIGHT AND SUFFICIENCY.

Credibility, impeachment, contradiction, and corroboration of witnesses, see **Witnesses**, §§ 318, 390.

Effect of tax deeds as evidence, see **Taxation**, § 788.

In criminal prosecutions, see **Criminal Law**, §§ 563, 570.

Questions for jury, see **Trial**, §§ 139-143.

Review as dependent on presentation of question in record, see **Appeal and Error**, § 695.

Scope and extent of review, see **Appeal and Error**, §§ 1001, 1024.

Verdict contrary to evidence ground for new trial, see **New Trial**, § 71.

As to particular facts or issues.

See **Adverse Possession**, § 114.

Bar of statute of limitations, see **Limitation of Actions**, § 197.

Contributory negligence of person attempting to board ferry, see **Ferries**, § 33.

Creation, existence, and validity of trust, see **Trusts**, § 89.

Fraudulent conveyance, see **Fraudulent Conveyances**, § 295.

Incompetency of fellow servant, see **Master and Servant**, § 279.

Negligence of fellow servant, see **Master and Servant**, § 279.

Negligence of master causing injury to servants, see **Master and Servant**, § 278.

Testamentary capacity, see **Wills**, § 55.

Transfer and ownership of bill or note, see **Bills and Notes**, § 523.

In particular civil actions or proceedings.

See **Ejectment**, § 95; **Replevin**, § 72; **Work and Labor**, § 28.

By parent for injuries to child, see **Parent and Child**, § 7.

For death of person attempting to board ferry, see **Ferries**, § 33.

For divorce, see **Divorce**, § 124.

For injuries from negligence, see **Negligence**, § 134.

For injuries to servants, see **Master and Servant**, §§ 276, 279.

For injuries to servant on vessel, see **Shipping**, § 84.

For malicious prosecution, see **Malicious Prosecution**, § 64.

For possession of child, see **Parent and Child**, § 2.

On assigned claims, see **Assignments**, § 137.

On bills or notes, see **Bills and Notes**, §§ 520, 523.

To reform written instrument, see **Reformation of Instruments**, § 45.

To set aside transfer in fraud of creditors or subsequent purchasers, see **Fraudulent Conveyances**, § 295.

§ 584. A claim for over \$500 must be established by the testimony of two witnesses, or of one witness and corroborating circumstances.—*Yerger v. Murdoch* (La.) 1028.

§ 586. Affirmative testimony supported by corroborating circumstances is more convincing than the negative testimony of one who does not remember.—*Lower Terrebonne Refining & Mfg. Co. v. Barrow* (La.) 487.

§ 588. The jury need not take the version of any one witness, but may consider the entire evidence and accept or reject any part of the testimony in arriving at a verdict.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 595. "Inference" defined.—*Miller-Brent Lumber Co. v. Douglas* (Ala.) 414.

EXAMINATION.

Of adverse party before trial, see **Discovery**, § 79.

Of ballots in local option election contest, see **Intoxicating Liquors**, § 37.

Of expert witnesses, see **Evidence**, §§ 553, 558.

Of witnesses, see **Witnesses**, §§ 236, 290.

EXCEPTIONS.

In contracts and conveyances.

Risks and causes of loss excepted in insurance policy, see **Insurance**, §§ 461, 462.

In judicial proceedings.

Bill of exceptions in general, see **Exceptions**, **Bill of**.

Necessity and sufficiency for purpose of review in civil cases, see **Appeal and Error**, § 280.

Necessity and sufficiency for purpose of review in criminal cases, see **Criminal Law**, § 1056.

To evidence, see **Criminal Law**, § 698.

To instructions, see **Criminal Law**, § 841.

To pleadings, review of decisions, see **Appeal and Error**, § 1040.

EXCEPTIONS, BILL OF.

In criminal cases, see **Criminal Law**, §§ 1060, 1062.

Presumptions as to making and contents, see **Appeal and Error**, § 938.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

Incorporation of unnecessary matter in bill of exceptions as affecting liability for costs, see **Costs**, § 256.

§ 16. A bill of exceptions *held* not to violate rule of court 32 (Civ. Code p. 1526).—Baumhauer v. Mobile Electrical Supply Co. (Ala.) 732.

II. SETTLEMENT, SIGNING, AND FILING.

In criminal cases, see Criminal Law, § 1092.

§ 36. A bill of exceptions signed more than six months after the trial and after the commencement of a subsequent term of court, and before the adoption of the present Code, is not available under rule 30, Circuit Court Practice, Code 1896, p. 1200.—Alabama Steel & Wire Co. v. Sells (Ala.) 921.

§ 40. Under Code 1906, §§ 797, 4790, 4791, the stenographer's notes *held* filed too late.—Chenault v. W. T. Adams Mach. Co. (Miss.) 189.

§ 42. An indorsement upon stenographer's notes *held* not an agreement that the notes could be filed out of time, and not to refer to a waiver of the right to object to the filing of the notes.—Chenault v. W. T. Adams Mach. Co. (Miss.) 189.

§ 56. The so-called "bill of exceptions" *held* not sufficient to be considered on appeal.—State ex rel Martin v. Webster Parish School Board (La.) 553.

EXCESSIVE DAMAGES.

See Damages, §§ 132, 138.

For libel, see Libel and Slander, § 121.

For wrongful death, see Death, § 99.

Ground for new trial, see New Trial, § 76.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCUSABLE HOMICIDE.

See Homicide, §§ 112, 119, 151, 297, 300.

EXCUSE.

For delay in filing record on appeal or writ of error, see Appeal and Error, § 628.

EXECUTION.

See Attachment; Garnishment; Judicial Sales. Exemptions, see Homestead.

Of contracts, see Contracts, § 32.

II. PROPERTY SUBJECT TO EXECUTION.

§ 37. A chattel mortgagee *held* entitled to leave the chattels in the possession of the mortgagor after execution levied without destroying his right or without creating a leviable interest in the mortgagor.—Hartselle v. Bibb (Ala.) 642.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 163. A motion by a judgment debtor to recall an execution must, under Code 1907, § 3256, as regulated by section 4141, be determined on the equitable principles applicable to proceedings under the writ of supersedeas.—Smith, Stewart & Co. v. Dean (Ala.) 335.

§ 163. On an application for an order recalling an execution on the ground that it had been satisfied by the assignee before the issuance of the execution, the court *held* authorized, on the showing made, to a finding for the movant.—Smith, Stewart & Co. v. Dean (Ala.) 335.

§ 163. A judgment for a judgment debtor moving for an order recalling an execution on

the judgment, on the ground that the judgment had been satisfied by the owner before the issuance of the execution, does not destroy the original judgment, or determine anything more than the issues litigated on the motion.—Smith, Stewart & Co. v. Dean (Ala.) 335.

VII. SALE.

(B) Title and Rights of Purchaser.

§ 264. A purchaser at execution sale *held* not limited to the rights of seized debtor in the property as affected by his admissions or acts which might estop a third person.—Roberts v. Edwards (La.) 272.

§ 272. Under an execution, the public has the same right to purchase the property where there was no evidence of adverse possession on the records that the sheriff has to sell it.—Roberts v. Edwards (La.) 272.

(C) Redemption.

§ 294. Execution defendant, by joining with the purchaser at execution sale in a deed of part of the property to a third person, *held* not to waive right to redeem the rest of the property.—Francis v. White (Ala.) 349.

(D) Conveyance to Purchaser.

Presumption of conveyance, see Evidence, § 83.

VIII. RETURN.

§ 333. The law does not require a sheriff to return a writ of seizure and sale within 70 days.—Brooks v. Magee (La.) 551.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Administration of community property, see Husband and Wife, § 276.

Concurrent jurisdiction of courts, see Courts, § 475.

Statement of lien as against administrator, see Mechanics' Liens, § 137.

Testamentary trustees, see Trusts.

Testimony as to transactions with persons subsequently deceased, see Witnesses, § 150.

Transfer of administration proceedings to court of chancery, see Courts, §§ 485, 487.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 20. A nephew of one of the heirs of a decedent has no standing in court to file an opposition to the appointment of an administrator and a denial of his opposition is not res adjudicata as against the heirs.—Thibodeaux v. Thibodeaux (La.) 773.

§ 29. A person *held* to be deemed to be the administrator of the successions of his parents.—Succession of Landers (La.) 545.

§ 29. A suit by heirs of a decedent and by a purchaser of the interest of some of the heirs against the administrator *held* not a collateral attack on the appointment of the administrator.—Thibodeaux v. Thibodeaux (La.) 773.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 39. Land descends to the heirs and not to the personal representative, and every step he takes, in regard to the land, is an interference with the rights of the heirs.—Creel v. Creel (Ala.) 902.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(B) Real Property and Interests Therein.

Necessity of record by purchaser of claim of adverse possession, see Adverse Possession, § 32.

§ 129. All the powers conferred and duties imposed, upon personal representatives, by statute, as to the land, are in the interest of the creditors of the estate, and are antagonistic to the rights of the heirs.—*Creel v. Creel* (Ala.) 902.

§ 130. Heirs obtaining a decree putting them in possession of real estate of decedent *held* not subject to be disposed of by proceedings taken ex parte in the succession closed by the decree.—*Thibodeaux v. Thibodeaux* (La.) 773.

§ 137. A personal representative can do nothing not expressly authorized by statute to divest the title to real estate descending to the heir or devisee.—*Kirkbride v. Kelly* (Ala.) 660.

§ 137. The administrator has no duty or power to sell the lands of the estate, except for the purpose and in the manner prescribed by statute, unless needed for some purpose of administration.—*Creel v. Creel* (Ala.) 902.

§ 148. A bill to enjoin an administrator's sale of land and to remove the settlement of the estate from the probate to the chancery court *held* demurrable.—*Creel v. Creel* (Ala.) 902.

§ 151. A personal representative can do nothing not expressly authorized by statute to incur the title to real estate descending to the heir or devisee.—*Kirkbride v. Kelly* (Ala.) 660.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

§ 226. An administrator's notice to creditors *held* not void for using the word "file," instead of "register."—*Stokes v. Lemon & Gale* (Miss.) 457.

VII. DISTRIBUTION OF ESTATE.

Partition of property of estate, see Partition.

§ 314. Petition by some of the heirs for judgment putting the heirs in possession of the property on a compliance with Rev. Civ. Code, arts. 1012, 1671, *held* not subject to be defeated on the ground that there must be an account under Code Prac. art. 1000; but the court must order the executors to retain an amount sufficient to pay the claims against the succession and the legacy and the highest possible amount due for taxes, and put the heirs in possession of the remainder.—*Succession of Burbank* (La.) 175.

§ 314. Executors cannot by agreement among themselves divest their seisin as executors, and turn the property over to themselves as heirs; and the court may not divest the seisin of the executors without a compliance by the heirs with Rev. Civ. Code, arts. 1012, 1671.—*Succession of Burbank* (La.) 175.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 328. An heir cannot maintain a bill for the sale of the intestate's real estate to pay debts.—*Kirkbride v. Kelly* (Ala.) 660.

§ 329. The right to the use of a franchise is the property of the grantee, and may be sold by judicial decree for payment of his debts where the use continues for the public good as originally designed by the grant.—*Leonard v. Baylen Street Wharf Co.* (Fla.) 718.

(B) Application and Order.

§ 332. An administrator alone can maintain a suit to sell lands for the payment of debts.—*Kirkbride v. Kelly* (Ala.) 660.

§ 335. The administrator and an heir cannot join in a bill to sell lands of the intestate to pay debts.—*Kirkbride v. Kelly* (Ala.) 660.

(C) Sale.

§ 375. Confirmation of sale of lands of an estate for distribution is largely discretionary with the chancellor.—*Roy v. O'Neill* (Ala.) 946.

§ 377. Plaintiff heirs *held* to have waived nullities in the sale of property in the succession of their mother where they suffered it to be had without opposition.—*Estrade v. Kaack* (La.) 181.

§ 377. Heirs accepting the benefits of a succession sale and becoming tenants of the purchaser *held* estopped to deny the validity of the sale.—*Estrade v. Kaack* (La.) 181.

§ 379. A sale of lands for distribution is unaffected by offer of a larger price by the heirs, made after confirmation of the sale.—*Roy v. O'Neill* (Ala.) 946.

§ 382. On vacating a sale of lands for distribution, a chancellor *held* unable to order conveyance to heirs making a better offer.—*Roy v. O'Neill* (Ala.) 946.

§ 388. A sale of property under order of court by an administrator to a third person interposed for the administrator *held* not void as to subsequent purchasers in good faith without knowledge.—*Bell v. Lafosse* (La.) 687.

X. ACTIONS.

Evidence in action to enforce mechanic's lien, see *Mechanics' Liens*, § 280.

Judgment in proceedings to enforce mechanic's lien, see *Mechanics' Liens*, § 304.

§ 443. In a mechanic's lien proceeding, a certain plea, though not an answer to the complaint, *held* improperly adjudged subject to demurrer in view of Code 1907, §§ 2794, 2795.—*Lavergne v. Evans Bros. Const. Co.* (Ala.) 318.

XI. ACCOUNTING AND SETTLEMENT.

(A) Duty to Account.

§ 464. An obligation to account imposed by judgment on an administrator who dies pending appeal will be transferred to his widow, who makes herself party to the appeal as administratrix of his succession and natural tutrix of their minor children.—*Succession of Landers* (La.) 545.

(B) Settling, Settling, Opening, and Review.

§ 509. In a suit to set aside a probate decree, the bill *held* to contain equity in so far as it sought to impeach a settlement for fraud in concealing an investment in bonds.—*Martinez v. Meyers* (Ala.) 592.

§ 509. Code 1907, § 3914, was not intended merely to authorize the chancery court to revise a probate decree by correcting errors committed when all the parties are cognizant of the facts.—*Martinez v. Meyers* (Ala.) 592.

EXECUTORY CONTRACTS.

In general, see *Contracts*.

EXEMPLARY DAMAGES.

For failure to deliver telegram, see *Telegraphs and Telephones*, § 69.

For libel, see *Libel and Slander*, § 120.

For malicious prosecution, see *Malicious Prosecution*, § 68.

EXEMPTIONS.

See *Homestead*.

From assessment for public improvements, see *Municipal Corporations*, § 434.

From liability for loss of or injury to live stock, see *Carriers*, § 218.

From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.
From taxation, see Taxation, § 231.

EX PARTE PROCEEDINGS.

Habeas corpus, see Habeas Corpus.

EXPERTS.

See Reference, § 25.

EXPERT TESTIMONY.

See Criminal Law, § 478; Evidence, §§ 505, 539½, 545, 553, 558.

EXPRESS MESSENGERS.

As passengers, see Carriers, § 241.

EXPRESS TRUSTS.

See Trusts, §§ 17, 18.

EXPROPRIATION.

See Eminent Domain.

EXTENSION.

Of time for presentation, allowance, and filing of bills of exceptions, see Criminal Law § 1092; Exceptions, Bill of, § 40.
Of time in judicial proceedings in general, review of discretion, see Appeal and Error, § 956.

EXTRADITION.

Return to writ of habeas corpus to procure discharge, see Habeas Corpus, § 76.

EXTRINSIC EVIDENCE.

In general, see Evidence, §§ 390-452.

FACT.

Evidence of matters of fact or conclusions, see Evidence, § 471.
Judicial notice of facts, see Evidence, §§ 20, 32.
Presumptions as to continuance of fact, see Evidence, § 67.
Questions of law and fact, province of court and jury, see Criminal Law, § 736; Trial, §§ 134-145.

FACTORIZING PROCESS.

See Garnishment.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(B) Actions.

Best and secondary evidence, see Evidence, § 181.

§ 20. In an action for false imprisonment, the court did not err in excluding all of plaintiff's evidence as to the charge against him, where he failed to introduce the affidavit and warrant on which the prosecution was based.—*Engle v. Patterson* (Ala.) 397.

§ 23. In an action against a corporation for false imprisonment, certain evidence held admissible as bearing on the question whether the

deputy sheriff arresting plaintiff was acting as defendant's agent.—*Abingdon Mills v. Grogan* (Ala.) 596.

FALSE PRETENSES.

Forgery, see Forgery.

FALSE REPRESENTATIONS.

See Fraud.

Affecting validity of deed, see Deeds, § 70.

Affecting validity of sale, see Vendor and Purchaser, § 33.

FALSE SWEARING.

See Perjury.

FALSIFYING.

Instruments in general, see Forgery.

FAMILY.

See Husband and Wife; Parent and Child.
Homestead, see Homestead.

FAMILY MEETING.

To determine custody of children on divorce of parents, see Divorce, § 301.

FARMS.

Farming on shares, see Landlord and Tenant, § 323.

FATHER.

See Parent and Child.

FAULT.

See Negligence.

FEES.

License fees in general, see Licenses, § 32.

Of witnesses, see Witnesses, § 32.

FELLOW SERVANTS.

See Master and Servant, §§ 159, 198, 216, 271, 279.

FEME COVERT.

See Husband and Wife.

FENCES.

Animals running at large, see Animals, § 50.

FERRIES.

II. REGULATION AND OPERATION.

§ 33. In an action to recover for the death of plaintiff's mother in attempting to board a ferry boat, evidence held to show decedent guilty of contributory negligence.—*Williams v. Union Ferry Co.* (La.) 678.

FIDEI COMMISSUM.

See Perpetuities, § 4; Trusts.

FIDUCIARY RELATIONS.

See Brokers; Partnership; Principal and Agent; Trusts.

Between corporations and their officers or agents, see Corporations, §§ 308, 320.

FIERI FACIAS.

See Execution.

FILING.

Proposed case or statement on appeal, see Appeal and Error, § 565.
Record on appeal or writ of error, see Appeal and Error, §§ 627, 628.

FILIUS NULLIUS.

See Bastards.

FINAL ACCOUNTS.

Of executors and administrators, see Executors and Administrators, §§ 464, 509.

FINDING LOST GOODS.

Rewards for recovery of lost property, see Rewards.

FINDINGS.

Contrary to law or evidence, ground for new trial, see New Trial, §§ 71, 76.
Review in appellate court, see Appeal and Error, §§ 704, 1009, 1017, 1020; Criminal Law, § 1158.

FIRE INSURANCE.

See Insurance.

FIRE INSURANCE PATROL.

As charitable associations, see Charities, § 45.

FIRES.

Civil liability for injuries from fires caused by operation of railroad, see Railroads, §§ 469-485.

FISCAL MANAGEMENT.

Of counties, see Counties, §§ 152-178.
Of municipal corporations, see Municipal Corporations, §§ 918-1000.
Of school districts, see Schools and School Districts, § 103.

FISH.

Restraining criminal proceedings, see Injunctions, § 105.

FIXTURES.

§ 21. An engine, placed on a concrete foundation and attached thereto by steel bolts, *held* not changed from a chattel to realty.—Boone v. Mendenhall Lumber Co. (Miss.) 584.

FLATS.

Ownership and control, see Public Lands, §§ 58, 61.

FLIGHT.

Of accused as evidence of guilt, see Criminal Law, § 351.

FLOWAGE.

See Waters and Water Courses, §§ 171, 178.

FOOD.

Poisons, see Poisons.

§ 14. Certain possession of milk below the standard *held* not "possession for sale" within the city ordinance making such possession of milk adulterated or below the legal standard punishable by fine or imprisonment.—City of New Orleans v. Villere (La.) 682.

FORCED SALE.

See Judicial Sales.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

Removal of cause from justice's court to court of record, see Justices of the Peace, § 75.
Trespass, see Trespass.

I. CIVIL LIABILITY.

§ 4. In the amendment added in 1879 (Acts 1878-79, p. 49) to Code 1907, § 4262, "peaceable entry" *held* to mean an intrusion though peaceable on plaintiff's prior actual possession.—Self v. Comer (Ala.) 336.

§ 9. One cannot invoke the remedy of unlawful entry and detainer unless he has been deprived of the possession of the land sought to be recovered by it.—Robinson v. Boggan (Miss.) 705.

§ 17. Under Code 1906, § 5039, the remedy of unlawful entry and detainer must be invoked within a year after the deprivation of the possession of the land sought to be recovered.—Robinson v. Boggan (Miss.) 705.

FORECLOSURE.

Of mechanics' liens, see Mechanics' Liens, §§ 268, 304.
Of mortgages, see Mortgages, §§ 338, 380, 468.

FOREIGN ATTACHMENT.

See Garnishment.

FOREIGN CORPORATIONS.

See Corporations, § 672.

FOREIGN LANGUAGE.

Sufficiency of publication of notice in paper printed in foreign language, see Newspapers, § 3.

FOREIGN WILLS.

Operation and effect of foreign probate or judgment, see Wills, § 434.

FOREMAN.

Of grand jury, signature to indictment, see Indictment and Information, § 33.

FORFEITURES.

Construction of contracts, see Contracts, § 226.
Jurisdiction and relief in equity, see Equity, § 24.
Of insurance, estoppel or waiver affecting right, see Insurance, §§ 375-388.
Relief against forfeitures under contracts, see Contracts, § 321.
Seizures for enforcement of forfeitures, see Searches and Seizures.

FORGERY.

Aider of indictment by verdict, see Indictment and Information, § 202.
Payment of forged paper by bank, see Banks and Banking, § 148.
Repugnancy in indictment, see Indictment and Information, § 73.

§ 7. A trade check in the form of a promissory note payable in merchandise *held* a note.

and subject of forgery, since the enactment of Acts 1908, No. 228.—*State v. White* (La.) 238.

§ 16. The forgery of an acceptance of service and waiver of citation of defendant to a petition for divorce was fraudulently uttered, when it was filed as a public record and use made of it in obtaining a divorce.—*State v. Stringfellow* (La.) 1002.

§ 31. An indictment for forging a public document held not defective because failing to allege that accused was an attorney at law, in view of Rev. St. § 833.—*State v. Stringfellow* (La.) 1002.

§ 31. In a prosecution for forging an acceptance of service and waiver of citation in divorce, failure of the indictment to name the instrument upon which such acceptance and waiver were forged as a petition held not to render the indictment insufficient.—*State v. Stringfellow* (La.) 1002.

§ 31. Where the indictment for forging a public record clearly describes the instrument, it is not fatal that it omits to call it a public record.—*State v. Stringfellow* (La.) 1002.

FORMER ADJUDICATION.

Operation and effect in general, see Judgment, §§ 668-747.

FORMER JEOPARDY.

Bar to prosecution, see Criminal Law, § 200.

FORMS OF ACTION.

See Action, § 30; Assumpsit, Action of; Detinue; Ejectment; Forcible Entry and Detainer, §§ 4-17; Replevin; Trespass, §§ 47, 68; Trover and Conversion.

FORNICATION.

See Miscegenation; Seduction.

FOURTEENTH AMENDMENT.

See Constitutional Law, §§ 206, 212, 247, 278, 297.

FRANCHISES.

Grants by municipal corporations, right to use street for purposes other than highway, see Municipal Corporations, § 682.

Sale of property of decedent under order of court, see Executors and Administrators, § 329.

§ 1. A franchise is a special privilege conferred by governmental authority to do something that cannot be done of common right, and is an incorporeal hereditament.—*Leonard v. Baylen Street Wharf Co.* (Fla.) 718.

§ 3. Private rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation.—*Leonard v. Baylen Street Wharf Co.* (Fla.) 718.

§ 3. The character and extent of the right granted in the use of a franchise depend upon the terms of the grant, the nature of the franchise, and the purpose designed to be accomplished.—*Leonard v. Baylen Street Wharf Co.* (Fla.) 718.

§ 11. When a particular use of a franchise ceases by nonuse, forfeiture, limitation, or otherwise, the further use may be granted or permitted to others.—*Leonard v. Baylen Street Wharf Co.* (Fla.) 718.

FRATERNAL ASSOCIATIONS.

See Insurance, §§ 693, 793.

FRAUD.

Conveyances and transactions fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Offenses involving fraud, see Embezzlement; Forgery.

Parol or extrinsic evidence to show fraud, see Evidence, § 434.

By particular classes of persons, or persons in particular relations.

Applicants for insurance, see Insurance, §§ 281, 282.

Passengers, see Carriers, § 239.

Vendors of land, see Vendor and Purchaser, § 33.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Deeds, § 70; Insurance, §§ 281, 282; Judgment, § 511.

Contracts for transportation, see Carriers, § 239.

Payment of forged or altered paper by bank, see Banks and Banking, § 148.

Sales, see Vendor and Purchaser, § 33.

Particular remedies.

Collateral attack on judgment, see Judgment, § 511.

Vacation of decree on accounting by administrator, see Executors and Administrators, § 509.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 3. Acts constituting actionable fraud, stated.—*Gewin v. Shields* (Ala.) 887.

§ 6. One loaning money to a purchaser held not entitled to sue the vendor to recover the same on the ground of fraud.—*Murphree v. Clisby* (Ala.) 907.

§ 13. A party asserting facts cannot complain that the other took him at his word.—*Shahan v. Brown* (Ala.) 737.

§ 22. Where statements are made of facts, which could be assumed to be within the knowledge of the person making them, the person to whom they are made has a right to rely upon them, and in the absence of knowledge of his own which would arouse suspicion he is not bound to make inquiries or examine for himself.—*Shahan v. Brown* (Ala.) 737.

II. ACTIONS.

(E) Trial, Judgment, and Review.

§ 64. Under the evidence in a suit for fraudulently inducing plaintiff to purchase defendant's salary, held, that the act of March 9, 1901 (Loc. Laws 1900-01, p. 2685), regulating the business of money brokers, had no application, and that the court erred in giving an affirmative charge for defendant.—*Max J. Winkler Brokerage Co. v. Darby* (Ala.) 23.

III. CRIMINAL RESPONSIBILITY.

See Embezzlement; Forgery.

FRAUDS, STATUTE OF.

Validity of oral trusts, see Trusts, §§ 17, 18.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.

§ 33. An assignor of a note to a creditor, if not in payment of a debt to him, held a good consideration for his promise to pay the assignor's debt to a third person.—*Byrd v. Ilickman* (Ala.) 426.

§ 83. An agreement of a third person, for a consideration moving from a debtor or for a detriment suffered by a debtor, to pay the debt to the creditor, *held* not within the statute of frauds.—Byrd v. Hickman (Ala.) 426.

VII. SALES OF GOODS.

(B) Acceptance of Part of Goods.

§ 89. A common carrier *held* not an agent authorized to accept and receipt for goods for the buyer so as to take the case out of the statute of frauds.—United Hardware-Furniture Co. v. Blue (Fla.) 364.

§ 89. To bring a contract for sale of goods within the exception of Gen. St. 1906, § 2518, making contracts for sale of goods void unless the buyer shall accept the goods, etc., *held*, that an act of the buyer signified an intent to accept as a performance of the contract as required.—United Hardware-Furniture Co. v. Blue (Fla.) 364.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 106. Letter *held* insufficient for indefiniteness to constitute a memorandum of a contract within the statute of frauds.—Ocala Cooperaage Co. v. Florida Cooperaage Co. (Fla.) 13.

§ 115. The entry in the seller's account book is not a memorandum signed by the party to be charged within the meaning of Gen. St. 1906, § 2518.—United Hardware-Furniture Co. v. Blue (Fla.) 364.

FRAUDULENT CONVEYANCES.

By partner, see Partnership, § 183.

I. TRANSFERS AND TRANSACTIONS INVALID.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§ 66. Conveyance of a lot to defendant's wife pending mechanic's lien proceedings against defendant and the contractor, *held* a fraud upon complainant's rights under a lien subsequently adjudged.—Washington v. Arnold (Ala.) 463.

§ 69. Where an alleged fraudulent conveyance, assailed by a surety, was executed before the surety's obligation, the surety was a subsequent creditor bound to prove actual fraud.—Smith v. Pitts (Ala.) 402.

§ 69. Subsequent creditors, in order to attack a fraudulent conveyance, must show actual fraud.—Smith v. Pitts (Ala.) 402.

§ 69. Where a conveyance by a debtor is infected by actual fraud with an anticipatory intent to defraud subsequent creditors, the conveyance is voidable.—Smith v. Pitts (Ala.) 402.

(E) Consideration.

§ 87. Under Civ. Code, arts. 1986, 2658, money paid to a bank by virtue of an assignment given to the bank by a debtor *held* not subject to a revocatory action.—Cox v. First Nat. Bank of Lake Charles (La.) 227.

§ 87. A payment of money to a bank by virtue of a sale of credit *held* to operate as an extinguishment of a debt due before four months before the bankruptcy of the debtor, and hence not a preference within Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314).—Cox v. First Nat. Bank of Lake Charles (La.) 227.

(I) Retention of Possession or Apparent Title by Grantor.

§ 142. Where a deed of trust does not in express terms provide for the continuance in busi-

ness of the grantors, selling and replenishing stock in the usual course of doing, it is not void on its face.—Newton Oil & Mfg. Co. v. Carr (Miss.) 353.

§ 142. A deed of trust, under which mortgagors continued to sell out and replenish stock of goods mortgaged, *held* fraudulent and void as to creditors.—Newton Oil & Mfg. Co. v. Carr (Miss.) 353.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

§ 218. Equity has jurisdiction of a surety's bill to set aside alleged fraudulent conveyances by the principal debtor.—Smith v. Pitts (Ala.) 402.

§ 218. A surety, to set aside alleged fraudulent conveyances by the principal debtor and to subject the land to the surety's reimbursement, must have paid the original debt before suit brought.—Smith v. Pitts (Ala.) 402.

§ 218. Payment of a debt by a surety, in order to entitle him to sue the debtor to set aside fraudulent conveyances for the surety's reimbursement, may be affected by the delivery to the creditor of anything which is accepted in discharge of the debt.—Smith v. Pitts (Ala.) 402.

§ 218. A surety is a "creditor" of the principal debtor from the inception of the contingent liability, and will be protected against fraudulent conveyances by his principal pending such liability.—Smith v. Pitts (Ala.) 402.

(C) Right of Action to Set Aside Transfer, and Defenses.

§ 239. Complainant *held* to have no adequate legal remedy, so that equity will grant relief by setting a fraudulent conveyance aside.—Washington v. Arnold (Ala.) 463.

(D) Jurisdiction, Limitations, and Laches.

Commencement of adverse possession by fraudulent grantee, see Adverse Possession, § 42.

(F) Pleading.

§ 263. Allegations of fraud in a suit to set aside a conveyance as a fraud upon complainant's rights *held* sufficient.—Washington v. Arnold (Ala.) 463.

§ 263. A bill to set aside an alleged conveyance as fraudulent, failing to aver that the grantee knew of or participated in the fraud, is defective.—Martinez v. Meyers (Ala.) 592.

§ 266. In a suit by a surety to set aside certain alleged fraudulent conveyances, a plea of homestead by the debtor's widow as to the property conveyed to her *held* sufficient.—Smith v. Pitts (Ala.) 402.

(G) Evidence.

§ 271. The burden is on a person attacking a fraudulent conveyance to show actual fraud.—Smith v. Pitts (Ala.) 402.

§ 295. Evidence *held* to require a finding that a surety, in a suit by him to set aside alleged fraudulent conveyances by the principal debtor, did not pay the debt before suit brought, and therefore could not maintain the suit.—Smith v. Pitts (Ala.) 402.

FREIGHT.

Carriage of goods, see Carriers, §§ 39-188.

Carriage of live stock, see Carriers, §§ 205, 229.

FREIGHT TRAINS.

Fare required as to passengers, see Carriers, § 280.

FRIGHT.

Frightening animals on street, see Municipal Corporations, § 705.

FRIVOLOUS APPEAL.

Damages and penalties, see Costs, § 260.

FUNDS.

Public funds, see Counties, §§ 152-178; Municipal Corporations, §§ 918-1000.

FUTURE ESTATES.

Restrictions against perpetuities, see Perpetuities, § 4.

GAMING.**III. CRIMINAL RESPONSIBILITY.**

Concurrent exercise of power by state and municipality to prohibit gambling houses, see Municipal Corporations, § 592.

GARNISHMENT.

See Attachment.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 108. A lien under garnishment *held* subordinate to an assignment.—*Canterbury & Gilder v. Marengo Abstract Co. (Ala.)* 888.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 144. A garnishee's answer should clearly admit liability before being held at variance with an express denial therein.—*Hattiesburg Trust & Banking Co. v. Hood (Miss.)* 790.

§ 144. A garnishee's answer *held* not sufficient to require contest as admitting liability.—*Hattiesburg Trust & Banking Co. v. Hood (Miss.)* 790.

§ 148. A garnishee's uncontested answer denying indebtedness is conclusive.—*Hattiesburg Trust & Banking Co. v. Hood (Miss.)* 790.

GIFTS.

Charitable gifts, see Charities.

I. INTER VIVOS.

Acknowledgment of gift of land, see Acknowledgment, § 19.

Advancements, see Descent and Distribution, § 109.

§ 26. A deed of gift of lands *held* void, under Civ. Code, art. 1536.—*Baker v. Baker (La.)* 115.

§ 41. A donor, in an action to annul the donation, may set up different grounds.—*Baker v. Baker (La.)* 115.

§ 41. Where a donation is annulled for non-performance of conditions, the property reverts to the donor, free from all incumbrances created by the donee, under the express provisions of Civ. Code, art. 1568.—*Baker v. Baker (La.)* 115.

§ 41. A donee of land *held* to have no equitable claim for improvements upon annulment of the donation, where the cost is less than the value of timber thereon converted by him.—*Baker v. Baker (La.)* 115.

§ 41. Right of donor to revoke a donation of lands, under Civ. Code, art. 1559, subd. 4, stated.—*Baker v. Baker (La.)* 115.

GOOD FAITH.

Affecting liability for publication of privileged communication, see Libel and Slander, § 50.

Of mortgagee, see Mortgages, § 154.

Of purchaser of goods, see Sales, §§ 234, 235.

Of purchaser of land, see Vendor and Purchaser, §§ 220, 233.

Of purchasers of property of decedent at sale under order of court, see Executors and Administrators, § 388.

Of purchaser of property sold on execution, see Execution, § 272.

GOODS.

See Property.

Mortgage, see Chattel Mortgages.

Sale, see Sales.

GOOD WILL.

Contracts in restraint of trade, see Contracts, § 116.

GOSSIP.

Privileged communications, see Libel and Slander, § 34.

GOVERNMENT.

See States.

Distribution of governmental powers, see Constitutional Law, §§ 50, 70.

GRAND JURY.

See Indictment and Information.

Admissibility of docket in action for malicious prosecution, see Malicious Prosecution, § 61.

§ 8. Objection to the formation of a grand jury *held* allowable in certain cases notwithstanding Code 1907, § 7572.—*Clemmons v. State (Ala.)* 467.

§ 10. Under Local Acts 1907, p. 206, § 29, *held*, that the judge of the Morgan county law and equity court could order the jury commission to draw a special grand jury where one had not been drawn for a regular term notwithstanding Code 1907, § 7257.—*Clemmons v. State (Ala.)* 467.

GRANTS.

See Deeds.

Of public lands, see Public Lands.

Of right to use streets for purposes, other than highway, see Municipal Corporations, § 682.

GRAVEYARDS.

Dedication to public use, see Dedication, § 16.

GUARANTY.

See Principal and Surety.

Application of statute of frauds, see Frauds, Statute of, § 33.

I. REQUISITES AND VALIDITY.

§ 25. Evidence *held* to show that plaintiff sold goods to a third person under an agreement with defendant that the goods should be consigned to defendant and the price charged to his account.—*A. H. Andrews Co. v. Stowers Furniture Co. (Ala.)* 316.

III. DISCHARGE OF GUARANTOR.

§ 50. A guarantor *held* absolved from liability under the contract of guaranty because of breach by the other party.—*A. H. Andrews Co. v. Stowers Furniture Co. (Ala.)* 316.

GUARANTY INSURANCE.

See Insurance, § 512.

GUARDIAN AD LITEM.

In action by or against insane person, see Insane Persons, § 94.

GUARDIAN AND WARD.

See Parent and Child.

Guardian ad litem, see Insane Persons, § 94.
Matters relating to infants and their property irrespective of guardianship, see Infants.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

Presumption of capacity to select guardian, see Infants, § 2.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

Custody and control of child, see Parent and Child, § 2.

HABEAS CORPUS.**I. NATURE AND GROUNDS OF REMEDY.**

§ 27. If an affidavit upon which a criminal prosecution in a court of limited jurisdiction is based does not set forth the facts showing jurisdiction, the question may be raised by writ of habeas corpus.—State v. Rose (La.) 165, 167.

§ 30. On habeas corpus by one convicted of crime, petitioner must show that the judgment and sentence were so fatally defective as to be void.—Cofer v. State (Ala.) 934.

§ 34. On habeas corpus to obtain possession of child respondent may show any good reason why relief should be refused.—Ex parte Ryan (La.) 573.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 76. A return to a writ of habeas corpus in extradition proceedings, showing a demand for the prisoner, a copy of the indictment or affidavit charging a crime certified as authentic, and a warrant of the Governor authorizing the arrest, held to establish a prima facie case.—Campbell v. State (Ala.) 399.

§ 85. A judgment entry in a criminal case being clothed with jurisdiction in facie, and its due authentication not being denied, it was, on the hearing of a writ of habeas corpus, to be taken as conclusively showing the true history of the proceedings in the trial court.—Cofer v. State (Ala.) 934.

§ 85. Dismissal of writ of habeas corpus brought by father to obtain custody of child held proper under the evidence.—Ex parte Ryan (La.) 573.

§ 93. Under Code 1906, § 2409, a decree held to fix the right of the custody of minor wards in the guardian.—Herdon v. Bonner (Miss.) 513.

§ 99. Welfare of child will be considered on application for writ of habeas corpus by father to recover possession of the child.—Ex parte Ryan (La.) 573.

§ 99. Relator having brought habeas corpus to recover custody of minor child, the court, on consideration of all the issues, will determine whether a proper case has been shown according to its interposition.—Ex parte Ryan (La.) 573.

HABITATION.

See Domicile.

HANDWRITING.

Appointment of experts by court, see Reference, § 25.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1026, 1068.

In criminal prosecutions, see Criminal Law, §§ 1162, 1177; Homicide, §§ 338, 340.

HAWKERS AND PEDDLERS.

Power of courts to determine amount of license tax, see Constitutional Law, § 68.
Special laws regulating and licensing, see Statutes, § 81.

§ 2. Act No. 49 of 1904, regulating and licensing hawkers and peddlers, held repealed, in so far as it excepted persons selling eggs and poultry, by Act No. 295 of 1906, amending and re-enacting the former act.—Flournoy v. Walker (La.) 673.

§ 3. Any one who peddles is a "peddler" within Act No. 295 of 1906, irrespective of what he buys and sells.—Flournoy v. Walker (La.) 673.

HEALTH.

Regulation of manufacture, sale, and use of articles of food or drink, see Food.

Regulation of manufacture, sale, and use of poisons, see Poisons.

Regulation of practice of medicine, see Physicians and Surgeons.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§ 7. Under Code 1906, § 2509, it is the duty of the board of supervisors to fix the salary of a county health officer in advance of his appointment; but, in the event that it fails to do so, it may fix his salary at a later date.—Adams County v. Aikman (Miss.) 513.

§ 7. Where a health officer's salary had been \$50 per month, and after his reappointment it was reduced to \$25 per month by the board of supervisors, in a suit for salary he could only recover the amount fixed by the board; his remedy, if dissatisfied with the allowance, being an appeal from the order fixing the salary.—Adams County v. Aikman (Miss.) 513.

II. REGULATIONS AND OFFENSES.

Regulation of manufacture, sale, and use of articles of food or drink, see Food.

Regulation of manufacture, sale, and use of poisons, see Poisons.

Regulation of practice of medicine, see Physicians and Surgeons.

HEARING.

On demurrer in equity, see Equity, § 241.
On demurrer to evidence, see Trial, § 156.

HEARSAY EVIDENCE.

See Criminal Law, §§ 419-421; Evidence, §§ 317, 324.

HEAT.

Duty of carrier to heat coaches, see Carriers, § 290.

Injuries to passengers from failure to heat cars, see Carriers, §§ 317, 337.

HEIRS.

See. Descent and Distribution.

Bill for sale of real estate to pay debts, see Executors and Administrators, § 328.

Joinder with administrator in bill to sell lands, see Executors and Administrators, § 335.

Necessity of filing notice of adverse possession, see Adverse Possession, § 32.

Rights as to homestead, see Homestead, §§ 136, 150.

HIGHWAYS.

Crossing by railroads, see Railroads, §§ 303-351.

Dedication of land for highway, see Dedication. Roads established by public authority for accommodation of private persons, see Private Roads.

Streets in cities, see Municipal Corporations, §§ 647-706.

Subjects and titles of acts relating to highways, see Statutes, § 123.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

Dedication, see Dedication.

(B) Establishment by Statute or Statutory Proceedings.

Private roads, see Private Roads, § 2.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

Local laws, see Statutes, § 76.

§ 122. Acts 1903, p. 414, § 8, in so far as it assumed to authorize road districts less in area than a county to impose a tax on property in the district of not more than 1 per cent. for the constructing and maintaining of roads and bridges, was in violation of Const. 1901, § 215.—*Adams v. Southern Ry. Co. (Ala.)* 439.

§ 151. Under Code 1906, §§ 4423, 4424, a justice of the peace held without jurisdiction to try a person whose name was not contained in a road overseer's report of delinquent road hands.—*Bishop v. State (Miss.)* 690.

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

On streets, see Municipal Corporations, § 602.

§ 153. The unlawful obstruction of a highway is a public nuisance that may be redressed by proceedings at the instance of the authorities.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

§ 155. No private action will lie for the obstruction of a highway, unless plaintiff has suffered injuries peculiar to himself.—*Walls v. C. D. Smith & Co. (Ala.)* 320.

§ 155. If an unlawful obstruction in a highway merely interferes with the right of passage common to all, relief must be had through the public authorities.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

§ 159. One whose property rights are specially injured by an unlawful obstruction in a public highway may seek the aid of equity when his legal remedy is inadequate.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

§ 159. Sufficiency of pleading stated in proceedings by an individual to enjoin an obstruction to a public highway.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

§ 160. Complaint in an action for damages for obstructing a highway held demurrable.—*Walls v. C. D. Smith & Co. (Ala.)* 320.

§ 160. Where the entire claim in an action for damages for the obstruction of a highway is

for damages peculiar to plaintiff, and no recoverable damages are averred in the complaint, the existence of nominal or general damages will not be presumed from the mere wrongful act alleged.—*Walls v. C. D. Smith & Co. (Ala.)* 320.

(B) Use of Highway and Law of the Road.

Animals running at large, see Animals, § 50.

Use of street as highway, see Municipal Corporations, §§ 703-706.

(C) Injuries from Defects or Obstructions.

Accidents at railroad crossings, see Railroads, §§ 303-351.

In streets, see Municipal Corporations, §§ 755-822.

HINDERING.

Creditors, by fraudulent transfers in general, see Fraudulent Conveyances.

HIRING.

Of animals in general, see Animals, § 27.

Of premises, see Landlord and Tenant.

HOLIDAYS.

See Sunday.

Effect of service of citation on Saturday half holiday to interrupt prescription, see Limitation of Actions, § 122.

§ 5. A verdict may be lawfully recorded on a legal holiday.—*State v. Varnado (La.)* 1006.

HOME.

See Domicile.

HOMESTEAD.

Dower or rights of widow in real property of deceased husband, see Dower.

I. NATURE, ACQUISITION, AND EXTENT.

(D) Property Constituting Homestead.

§ 70. Separate tracts of land cultivated for the common support of a family held to constitute a homestead.—*Thacker v. Morris (Ala.)* 73.

(E) Liabilities Enforceable Against Homestead.

§ 108. Where firm property and the homestead of one of the partners was mortgaged for a firm debt, the owner of the homestead could not compel the creditor to proceed against the firm property in exoneration of the homestead.—*Bramlett v. Kyle (Ala.)* 926.

II. TRANSFER OR INCUMBRANCE.

§ 119. A deed of the homestead signed by the husband and wife is absolutely void, where the separate acknowledgment of the wife does not comply with the statutory requirements.—*Gilbert v. Pinkston (Ala.)* 442.

§ 123. A deed of a homestead void because of the insufficiency of the acknowledgment of the wife cannot be made effective by any acknowledgment of the wife subsequent to the death of the husband.—*Gilbert v. Pinkston (Ala.)* 442.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 136. Where a person entitled to a homestead dies leaving children, the homestead is not subject to testamentary disposition.—*Griffith v. Griffith (Fla.)* 609.

§ 141. Under Code 1886, § 2543, the right of a widow in the homestead of her deceased hus-

band *held* limited to occupation during her life.—*Gilbert v. Pinkston* (Ala.) 442.

§ 143. Under Code 1886, § 1915, the homestead of one who dies leaving a widow and brothers and sisters descends to the brothers and sisters as heirs, and not to the widow.—*Gilbert v. Pinkston* (Ala.) 442.

§ 145. Under Code 1886, §§ 2069-2071 (Acts 1886-87, p. 112), a widow *held* estopped by suing to foreclose a vendor's lien from claiming the land because of a defective transfer by herself and husband, but the heirs of decedent *held* not estopped.—*Thacker v. Morris* (Ala.) 73.

§ 145. Under Code 1886, § 2543, the right of a widow in the homestead of her deceased husband *held* terminated by abandonment.—*Gilbert v. Pinkston* (Ala.) 442.

§ 146. Under Code 1886, § 2543, the right of a widow in the homestead of her deceased husband *held* terminated by attempting to convey it.—*Gilbert v. Pinkston* (Ala.) 442.

§ 146. Under Code 1886, § 2100, where an intestate left a widow, but no minor children, *held* that, if his lands were worth more than \$2,000, a life estate would vest in the widow; and, it not appearing that she was dead, the heirs at law could not maintain ejectment against the widow's grantee.—*Dickinson v. Champion* (Ala.) 445.

§ 150. Under the exemption statute, where an intestate left a widow, but no minor children, *held* that, if his lands were worth less than \$2,000, they vested absolutely in the widow, without any proceedings to set the same aside as a homestead.—*Dickinson v. Champion* (Ala.) 445.

§ 150. Proceedings in the probate court, setting aside a homestead to the widow, cannot be assailed in a collateral proceeding between the heirs at law and the widow's grantee.—*Dickinson v. Champion* (Ala.) 445.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 167. The execution of an invalid deed to a part of a homestead and putting the purchaser into possession *held* to be an abandonment pro tanto of the homestead.—*Thacker v. Morris* (Ala.) 73.

§ 171. A partner, by mortgaging his homestead to secure a firm debt, waived his homestead exemption.—*Bramlett v. Kyle* (Ala.) 926.

HOMICIDE.

Civil liability for causing death, see Death, §§ 98, 99.

Jurisdiction of juvenile court, see Infants, § 18.

Rewards for arrest, see Rewards, § 8.

II. MURDER.

§ 7. The chief distinction between "murder" and "manslaughter" is deliberation and malice in murder, and the want thereof in manslaughter.—*Guest v. State*, 52 So. 211.

§ 17. The fact that accused intended to kill third persons, instead of accused, *held* not to mitigate his guilt of murder as defined by Code 1907, § 7084.—*Gallant v. State* (Ala.) 739.

§ 17. A killing by mistake of one not intended subjects accused to the same liability as if he had slain the person intended.—*Gallant v. State* (Ala.) 739.

III. MANSLAUGHTER.

§ 83. Under Rev. St. §§ 972, 785, there can be no accessory before the fact to manslaughter.—*State v. Kinchen* (La.) 185.

IV. ASSAULT WITH INTENT TO KILL.

§ 100. Where one commits an assault with intent to murder, if the pistol used was given her by another for the purpose of committing the offense, they were conspirators in the commission of it and equally guilty.—*Harmon v. State* (Ala.) 348.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 107. One may not be lawfully slain for a felony already committed.—*State v. Varnado* (La.) 1006.

§ 112. One who intentionally brings about a difficulty by wrongful means cannot avail himself of necessary self-defense before abandoning the conflict and retreating in good faith.—*State v. Varnado* (La.) 1006.

§ 119. Defendant *held* justified in using a deadly weapon to repel attack of person of greatly superior physical strength, though the latter was unarmed.—*Hill v. State* (Miss.) 630.

VI. INDICTMENT AND INFORMATION.

Duplicity in indictment, see Indictment and Information, § 125.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

§ 145. If death of a human being results from the doing of an unlawful act, it is either murder or manslaughter according to the circumstances of the case.—*State v. Irvine* (La.) 587.

§ 151. In a prosecution for homicide, an instruction on the burden of proof on the issue of self-defense *held* proper.—*James v. State* (Ala.) 840.

(B) Admissibility in General.

Res gestæ, see Criminal Law, §§ 363, 365.

§ 156. In a prosecution for homicide, evidence *held* admissible as tending to show malice.—*Crain v. State* (Ala.) 31; *Graves v. Same* (Ala.) 34.

§ 156. In a prosecution for assault with intent to murder, certain evidence *held* admissible to show that the pistol used was loaded with a ball.—*Harmon v. State* (Ala.) 348.

§ 157. In a prosecution for homicide, only the fact, and not the details, of a former difficulty between decedent and accused is admissible.—*Pressley v. State* (Ala.) 337.

§ 157. Where accused by mistake killed decedent when he intended to kill a third person, evidence of accused's ill will towards the third person was admissible.—*Gallant v. State* (Ala.) 739.

§ 157. Certain evidence *held* properly excluded as not *res gestæ*.—*White v. State* (Fla.) 805.

§ 158. In a prosecution for homicide, accused *held* properly required to answer whether in an antecedent interview she had not made a threatening remark to deceased.—*James v. State* (Ala.) 840.

§ 161. On a trial for murder, certain evidence *held* admissible to show accused's criminal purpose and a reckless disregard of life.—*Gallant v. State* (Ala.) 739.

§ 164. In a prosecution for murder where there was no evidence of self-defense, a question whether deceased half an hour before the killing showed any evidence of imbibing of spirituous liquors, *held* properly rejected.—*Harrell v. State* (Ala.) 345.

§ 166. On a trial for murder, certain evidence *held* admissible to tend to identify accused as the guilty party.—*Gallant v. State* (Ala.) 739.

§ 166. In a homicide case, the court properly permitted the jury to consider certain evidence.—*Gallant v. State* (Ala.) 739.

§ 168. In a prosecution for murder, claimed to have been committed by accused and other miners who were on a strike, by dynamiting the mining company's house No. 158, a state's witness, a nonstriking employé, who knew accused, was properly asked whether accused lived in house No. 159, which was next to 158, before he moved off the company's premises.—*Jackson v. State* (Ala.) 835.

§ 174. Certain conduct of accused held admissible to aid the jury in determining the issue of his guilt.—*Gallant v. State* (Ala.) 739.

§ 174. Whether accused came to the scene of the homicide caused by an explosion wrecking the house in which decedent was promptly after knowledge of the event was a circumstance for the jury in determining the issue of guilt.—*Gallant v. State* (Ala.) 739.

§ 174. A witness in a homicide case, who had gone as a deputy sheriff to the tent where accused was when arrested, held properly asked who else was in the tent with accused at the time.—*Jackson v. State* (Ala.) 835.

§ 174. In a prosecution for homicide by dynamiting a mining company's house in which decedent was, evidence held admissible that when accused and others who were charged with conspiring to commit the crime were arrested shortly after the dynamiting, their shoes and pants were wet.—*Jackson v. State* (Ala.) 835.

§ 174. Evidence that, after defendant ran from the scene of the homicide, he called to a companion who was present to come on, is not wholly irrelevant.—*Sims v. State* (Fla.) 198.

§ 178. One on trial for murder may not show where another indicted for the offense stayed on the night of the tragedy, in the absence of an effort to show that the latter committed the crime.—*Gallant v. State* (Ala.) 739.

§ 189. Exclusion of certain testimony as to hostility held error.—*White v. State* (Fla.) 805.

§ 190. Statements by and conduct of decedent held not to amount to threats or illustrate his conduct at the time of the homicide so as to be made admissible in evidence.—*May v. State* (Ala.) 602.

§ 190. An answer to a question in a homicide case as to threats against accused's life held too general, as not specifying the occasions on which the threats were made, so that it was properly excluded.—*May v. State* (Ala.) 602.

§ 190. Certain conduct by decedent held not to involve a threat by lying in wait so as to be admissible in a homicide case.—*May v. State* (Ala.) 602.

§ 190. Evidence of uncommunicated threats held admissible to show who was the aggressor.—*Crumpton v. State* (Ala.) 605.

§ 191. A question held properly excluded in a homicide case as involving a previous difficulty between decedent and accused.—*May v. State* (Ala.) 602.

§ 193. In a prosecution for murder, held, that the court did not err in excluding evidence as to deceased having got a pistol the day before he was killed.—*Crumpton v. State* (Ala.) 605.

§ 198. In a prosecution for homicide, evidence of a search made of deceased's body after the killing, and that he had no weapon, held admissible on the issue of self-defense.—*James v. State* (Ala.) 840.

(C) Dying Declarations.

§ 203. Evidence held to constitute a sufficient predicate for the admission of dying declarations.—*Lang v. State* (Ala.) 340.

§ 208. The preliminary proof held sufficient to render a dying declaration admissible.—*Guest v. State* (Miss.) 211.

§ 208. A dying declaration, to be admissible, must have been made under the realization of impending death.—*Guest v. State* (Miss.) 211.

§ 213. A dying declaration, to be admissible, must have been made by one of sane mind.—*Guest v. State* (Miss.) 211.

§ 214. A dying declaration, to be admissible, must be restricted to the homicide.—*Guest v. State* (Miss.) 211.

§ 215. A dying declaration, or a part of it, is not admissible, unless it would be competent if it were the testimony of a living witness.—*Guest v. State* (Miss.) 211.

§ 216. As a preliminary question, the admissibility of a dying declaration is determined by the court.—*Guest v. State* (Miss.) 211.

§ 218. The degree of proof required to establish that declarant realized he was in extremis is such as to exclude all reasonable doubt.—*Guest v. State* (Miss.) 211.

(E) Weight and Sufficiency.

§ 237. Evidence in a murder trial held insufficient to raise an issue of accused's insanity.—*Jones v. State* (Miss.) 791.

VIII. TRIAL.

(B) Questions for Jury.

§ 276. Whether there was any real or apparent necessity for the homicide held for the jury.—*State v. Varnado* (La.) 1006.

§ 281. Whether there was a conspiracy between one charged with assault with intent to murder and another who committed the overt act, held, under the evidence, to be for the jury.—*Harmon v. State* (Ala.) 348.

(C) Instructions.

Undue prominence to particular matters, see *Criminal Law*, § 811.

§ 285. In a trial for manslaughter, an instruction held properly refused as contradictory.—*State v. Irvine* (La.) 567.

§ 286. In a prosecution for murder, a requested charge held properly refused.—*Harrell v. State* (Ala.) 345.

§ 288. In a trial of a railroad employé for manslaughter in running a train on a wrong track, thereby causing the death of others, an instruction held misleading and properly refused.—*State v. Irvine* (La.) 567.

§ 288. In a trial for manslaughter of a railroad employé for criminal negligence in causing a collision, certain instructions held properly refused.—*State v. Irvine* (La.) 567.

§ 288. In a trial for manslaughter of a railroad employé for criminal negligence in causing a collision, an instruction held not prejudicial to defendant.—*State v. Irvine* (La.) 567.

§ 297. In a prosecution for homicide, an instruction held not objectionable as abstract.—*Pressley v. State* (Ala.) 337.

§ 300. In a prosecution for homicide, an instruction on self-defense held objectionable as argumentative and as pretermittting duty to retreat, etc.—*Pressley v. State* (Ala.) 337.

§ 300. Requested charge in a homicide case when the defense was self-defense held properly

refused as ignoring accused's duty to retreat.—*May v. State* (Ala.) 602.

§ 300. In a murder case there was no error in refusing to charge that the state to convict must prove there was no reasonable means of escape for defendant.—*Crumpton v. State* (Ala.) 605.

§ 300. A charge to acquit on the ground of self-defense, without hypothesizing all the elements thereof, was properly refused.—*Crumpton v. State* (Ala.) 605.

§ 300. The court properly refused to charge that, if defendant shot in self-defense as defined by the court, he did not kill deceased voluntarily in the sense used in the Code in defining murder, and the jury should acquit.—*Crumpton v. State* (Ala.) 605.

§ 300. Charges on self-defense held properly refused for failing to hypothesize as a fact defendant's belief that he was in immediate danger of great bodily harm.—*Crumpton v. State* (Ala.) 605.

§ 300. There was no error in refusing charges justifying the homicide on the ground of self-defense where they omitted in the hypothesis defendant's bona fide belief of peril at the time he shot deceased.—*Whitmore v. State* (Ala.) 909.

§ 300. A charge requested on self-defense held misleading.—*Whitmore v. State* (Ala.) 909.

§ 300. A charge held properly modified.—*State v. Varnado* (La.) 1003.

§ 307. An instruction on the effect of defendant's intoxication held properly refused as involved and confusing.—*Lang v. State* (Ala.) 340.

§ 307. An instruction that under the evidence the only offense of which to convict defendant is manslaughter, if he is guilty of any offense, is properly refused, where there is evidence justifying the verdict of murder.—*Sims v. State* (Fla.) 198.

§ 308. It is not error to fail to charge on murder in the third degree when the facts do not call for such a charge.—*Moore v. State* (Fla.) 971.

§ 309. Notwithstanding Rev. St. §§ 972, 785, as to accessories and murder, held defendant, on a prosecution for being an accessory before the fact to a murder, was not entitled to a charge that he might be found guilty of manslaughter.—*State v. Kinchen* (La.) 185.

X. APPEAL AND ERROR.

Discharge on bail pending appeal, see Bail, § 44.

§ 325. In a prosecution for homicide, held that the court would not be put in error for overruling a general objection to a question as to what another arrested with accused said in the latter's presence; the question being capable of bringing out competent evidence, and no motion being made to exclude the answer.—*Jackson v. State* (Ala.) 835.

§ 325. Ruling in a homicide case on the question of whether a sufficient foundation has been laid to introduce evidence of quarrels or threats, determined.—*State v. Tomsa* (La.) 988.

§ 338. It was not reversible error to admit evidence that deceased had been a marshal, and the same is true as to sustaining objection to a question to a witness as to protests against his being made marshal.—*Crumpton v. State* (Ala.) 605.

§ 338. Accused held not prejudiced by a witness' answer to a question as to whether deceased was in the habit of swearing.—*Lowman v. State* (Ala.) 638.

§ 340. The error in an instruction arising from the omission of words in defining man-

slaughter, defined by Code 1906, § 1236, held not prejudicial to accused.—*Guest v. State* (Miss.) 211.

HORSES.

See Animals, § 27.

HOSTILE POSSESSION.

Of occupant of real estate holding adversely, see Adverse Possession, §§ 71-85.

HUMANITARIAN DOCTRINE.

Injury avoidable notwithstanding contributory negligence, see Municipal Corporations, § 705; Railroads, § 390; Street Railroads, § 103.

HUSBAND AND WIFE.

See Divorce; Dower; Marriage.

Right of survivor to exemptions, see Homestead, §§ 136, 150.

V. WIFE'S SEPARATE ESTATE.

Interrogatories on facts and articles in action to recover community property, see Discovery, § 79.

(B) Rights and Liabilities of Husband.

§ 137. Under Const. art. 11, § 1, held, that a mortgage by a husband on crops grown on the wife's separate realty was void.—*Shomaker v. Waters* (Fla.) 586.

(C) Liabilities and Charges.

§ 151. Where the wife has not reserved to herself the administration of her separate estate, she is not bound to contribute to the expenses of the marriage.—*Crochet v. Dugas* (La.) 495.

VII. COMMUNITY PROPERTY.

§ 254. Property purchased in the name of a wife during the existence of the community becomes community property, unless by way of administration or investment of paraphernal property.—*Knoblock & Rainold v. Posey* (La.) 847.

§ 267. Where a married woman purchased community property and mortgaged it for a part of the price, it was subject to the mortgage, though she was not personally liable therefor.—*Knoblock & Rainold v. Posey* (La.) 847.

§ 270. In a suit to foreclose a mortgage on land, the feme covert defendant having filed a general denial held entitled to plead that the debt was a community debt for which she was not liable notwithstanding Code Prac. art. 419.—*Knoblock & Rainold v. Posey* (La.) 847.

§ 270. A married woman in a suit to foreclose a mortgage made by her on community property, defending in the interest of the community, will be regarded as representing it.—*Knoblock & Rainold v. Posey* (La.) 847.

§ 273. Claim of wife to undivided half of certain property of which her husband died possessed, as widow in community, held not established by the evidence.—*Pitts v. Kerley* (La.) 281.

§ 276. The surviving husband in community administering succession of deceased wife cannot demand collation of advances to one child, nor a settlement of accounts between the children as to advances during the life of the wife.—*Succession of Hanna* (La.) 669.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

Alimony in actions for divorce, see Divorce, §§ 215, 249.

Evidence in suit for custody of child, see Parent and Child, § 2.

Limited divorce, see Divorce, §§ 249, 301.

§ 298½. Upon separation from bed and board where there is no community, the husband held not responsible for the income of the separate property of the wife collected and used by him, where it was not administered by her alone, under Civ. Code, arts. 2386, 2396.—*Crochet v. Dugas* (La.) 495.

HYPOTHECATION.

See Chattel Mortgages; Pledges.

Of vessels, see Maritime Liens.

HYPOTHETICAL QUESTIONS.

In examination of expert witnesses, see Evidence, § 553.

IDENTITY.

Of issues or subject-matter of action as affecting conclusiveness of judgment, see Judgment, §§ 713-729.

Of offense under plea of former jeopardy, see Criminal Law, § 200.

Of persons as affecting conclusiveness of former judgment, see Judgment, §§ 668, 702.

IDIOTS.

See Insane Persons.

ILLEGAL IMPRISONMENT.

See False Imprisonment.

ILLEGALITY.

Of contracts, see Contracts, §§ 108, 138.

ILLEGITIMATE CHILDREN.

See Bastards.

IMBECILES.

In general, see Insane Persons.

IMMOVABLES.

In general, see Property.

Conveyances, see Deeds.

Mortgages, see Mortgages.

Sales, see Vendor and Purchaser.

IMMUNITY.

Constitutional guaranties of privileges or immunities of citizens, see Constitutional Law, § 206.

From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.

From taxation, see Taxation, § 231.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, §§ 121, 154.

IMPANELING JURY.

See Jury, § 144.

IMPEACHMENT.

Of certificate of acknowledgment, see Acknowledgment, § 62.

Of witness, see Witnesses, §§ 318, 390.

IMPEDING JUSTICE.

See Obstructing Justice.

IMPLIED AUTHORITY.

Of agent, see Principal and Agent, §§ 99, 150.

IMPLIED CONTRACTS.

See Account Stated; Assumpsit, Action of; Work and Labor.

IMPLIED REPEAL.

Of statute, see Statutes, § 166.

IMPLIED TRUSTS.

See Trusts, §§ 63½-89.

IMPRISONMENT.

See Bail; False Imprisonment.

Release on habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Compensation for improvements on revocation of gift of lands, see Gifts, § 41.

Liens, see Mechanics' Liens.

Public improvements, see Drains; Highways; Levees; Municipal Corporations, §§ 265-586.

Subjects and titles of acts relating to public improvements, see Statutes, § 123.

INADEQUATE DAMAGES.

For wrongful death, see Death, § 98.

INCAPACITY.

In general, see Infants; Insane Persons.

Of witness ground for admission of evidence given at former trial or in other proceeding, see Evidence, § 576.

To make will, see Wills, § 55.

INCLOSURE.

Element of adverse possession, see Adverse Possession, § 19.

INCOMPETENCY.

See Insane Persons.

INCONSISTENCY.

In allegations of indictment or information, see Indictment and Information, § 73.

Of alternative remedies, see Election of Remedies, § 3.

Statements by witnesses inconsistent with testimony as ground for impeachment, see Witnesses, §§ 387, 390.

INCORPORATION.

Of municipalities, see Municipal Corporations, § 1.

INCUMBRANCES.

See Mechanics' Liens; Mortgages.

On exempt property, see Homestead, §§ 119, 123.

INDEBITATUS ASSUMPSIT.

See Assumpsit, Action of.

INDEBTEDNESS.

Charge on married woman's separate property, see Husband and Wife, § 151.

Of counties, see Counties, §§ 152-178.
Of municipal corporations, see Municipal Corporations, § 918.

INDEMNITY.

See Guaranty; Principal and Surety.
To surety by principal, see Principal and Surety, § 182.

INDEMNITY INSURANCE.

See Insurance, § 512.

INDICTMENT AND INFORMATION.

See Grand Jury.
Pleas in abatement, see Criminal Law, § 279.
Preliminary complaint, see Criminal Law, § 211.

For particular offenses.

See Forgery, § 31; Larceny, §§ 30, 40; Obstructing Justice, § 11; Perjury, §§ 22, 25; Seduction, § 37.

For mingling poison with food, drink, or medicine with intent to kill or injure, see Poison, § 9.

Violations of municipal ordinances, see Municipal Corporations, § 639.

III. FORMAL REQUISITES OF INDICTMENT.

§ 33. An indictment, not signed by the foreman of the grand jury, as required by Code 1907, § 7300, is not valid.—Whitley v. State (Ala.) 208.

§ 34. An indictment not indorsed "A true bill," as required by Code 1907, § 7300, is not valid.—Whitley v. State (Ala.) 203.

§ 34. An indictment on which the words "True bill" were not written, followed by the signature of the foreman of the grand jury to that effect, is not a valid indictment.—State v. Wilson (La.) 981.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Description of property stolen, see Larceny, § 30.

Omission of words, see Indictment and Information, § 75.

§ 73. An indictment for forging a public document *held* not repugnant.—State v. Stringfellow (La.) 1002.

§ 75. Omission of word "dollars" in stating value of mortgage stolen *held* not ground for arresting the judgment, where it is otherwise given in the information.—Flowers v. State (Fla.) 11.

§ 75. An indictment for burglary *held* fatally defective for omission to charge that accused "did" feloniously, etc., enter the storehouse in question.—McCearley v. State (Miss.) 796.

§ 120. Where an indictment for larceny contains a sufficient description of the stolen property, an allegation that a better description is unknown is immaterial.—Clark v. State (Fla.) 518.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. Where the statute makes it a crime to do one thing or another, *held*, that an indictment thereunder may in a single count charge defendant with doing both, employing the conjunction "and" where the statute has "or," and it will not be double, and will be established by proof of either thing.—State v. Clark (Miss.) 691.

§ 125. An indictment under Code 1906, § 1331, *held* not demurrable as charging two distinct offenses.—State v. Clark (Miss.) 691.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 139. The court had discretion to refuse to receive a plea in abatement and motion to quash an indictment, not filed until after plea of not guilty.—Rogers v. State (Ala.) 33.

§ 139. A motion to quash criminal proceedings on the ground that defendant was arrested without a warrant, made after defendant had pleaded to the charge, and been tried and convicted, was too late.—Knox v. State (Ala.) 526.

IX. ISSUES, PROOF, AND VARIANCE.

In prosecution for larceny, see Larceny, § 40.

§ 167. Where an indictment for larceny contains an apparently sufficient description of the stolen property, and alleges that a better description is unknown, *held* not error to exclude testimony as to whether the grand jurors in fact knew a better description.—Clark v. State (Fla.) 518.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

Conviction of different offense included in same act as bar to subsequent prosecution, see Criminal Law, § 200.

§ 189. Under an indictment for grand larceny, or for larceny from a storehouse, under Code 1907, § 7324, accused may be convicted of petit larceny.—Phillips v. State (Ala.) 746.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§ 196. Remedy of accused where the description of alleged stolen property in an indictment for larceny is insufficient stated.—Clark v. State (Fla.) 518.

§ 202. A defect in an indictment for forging a public record *held* cured by verdict.—State v. Stringfellow (La.) 1002.

§ 202. An objection that an indictment for forging a public record merely set out the instrument by its tenor would have been good before judgment, but not thereafter.—State v. Stringfellow (La.) 1002.

INDORSEMENT.

Of indictment, see Indictment and Information, § 34.

INDUCEMENT.

In contracts, see Contracts, §§ 57, 75.

INEBRIATES.

See Drunkards.

INFANTS.

See Parent and Child.

Contributory negligence of children in general, see Negligence, § 85.

Infancy as affecting limitation of actions, see Limitation of Actions, § 72.

I. DISABILITIES IN GENERAL.

§ 2. The law presumes that an infant 14 years old has sufficient discretion to select its own guardian, to contract a lawful marriage, and to be capable of malice.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

II. CUSTODY AND PROTECTION.

Custody and support on divorce of parents, see Divorce, §§ 297, 301.
Habeas corpus to determine right to custody, decision of issue, see Habeas Corpus, § 99.

§ 18. Jurisdiction of the juvenile court in the parish of Orleans *held* strictly limited to matters concerning neglected and delinquent children as defined by Act No. 83 of 1908.—*State v. Rose* (La.) 165, 167.

§ 18. Under Bill of Rights, art. 9, Acts 1908, No. 83, relating to offenses committed by juvenile delinquents, *held* not to authorize the trial of an indictment against a child under 17 for murder in such court.—*State v. Howard* (La.) 539.

§ 20. An affidavit, charging accused with permitting children to perform on a stage contrary to Act No. 301 of 1908, *held* not to charge an offense cognizable by the juvenile court having jurisdiction of neglected and delinquent children 17 years of age and under, under Act No. 83 of 1908.—*State v. Rose* (La.) 165, 167.

III. PROPERTY AND CONVEYANCES.

Homestead rights, see Homestead, §§ 138, 150.

§ 30. Where a mother sells property which passed to her and her children, and the deed was not recorded for many years, and the mother was without right to sell, silence of the minors for 10 years *held* not a ratification of the sale.—*Britt v. Caldwell-Norton Lumber Co.* (La.) 251.

VI. CRIMES.

Review as dependent on presentation of evidence in record, see Criminal Law, § 1121.

§ 68. A child under 14, charged with burglary committed prior to the amendment of Code 1907, § 6450, by Acts Sp. Sess. 1909, p. 117, but not brought to trial until after the amendment took effect, *held* not triable as a juvenile delinquent.—*Hampton v. State* (Ala.) 659.

INFERIOR COURTS.

See Courts, § 189.

INFORMATION.

Criminal accusation, see Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

Relief against particular acts or proceedings.
Enforcement of judgment, see Judgment, §§ 407-460.
Exercise of power of sale in mortgage, see Mortgages, § 838.
Judicial proceedings, concurrent and conflicting jurisdiction of state courts, see Courts, § 480.
Obstruction of highway, see Highways, § 159.

I. NATURE AND GROUNDS IN GENERAL.

Application of maxims of equity, see Equity, § 68.

II. SUBJECTS OF PROTECTION AND RELIEF.**(C) Contracts.**

§ 60. Injunctions to enjoin the breach of a contract for services continuous in their nature,

involving special skill, are granted with great caution, even though the legal remedy by damages may be inadequate.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

(H) Criminal Acts, Conspiracies, and Prosecutions.

§ 105. Where relator had no vested or proprietary right to fish with seines in the waters of a parish under a license from the fish and game commissioner, an injunction will not lie to restrain the district attorney and police jury from enforcing a parish ordinance regulating fishing in such waters.—*Louisiana Oyster & Fish Co. v. Police Jury, Parish of Assumption* (La.) 685.

III. ACTIONS FOR INJUNCTIONS.

§ 118. Where dishonest or fraudulent acts are sought to be charged against defendants in a bill for an injunction, the allegations should be clear, positive, specific, and direct.—*Gillespie v. Chapline* (Fla.) 722.

§ 118. Though mere allegation of irreparable injury not sustained by allegations of facts will not ordinarily warrant injunctive relief, equitable relief may be had where the legal remedy is inadequate.—*Brown v. Florida Chautauqua Ass'n* (Fla.) 802.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.**(A) Grounds and Proceedings to Procure.**

§ 143. Essentials of a bill for a temporary restraining order without notice to defendant stated.—*Gillespie v. Chapline* (Fla.) 722.

§ 148. The practice of granting a restraining order and allowing time in which to file an indemnity bond is unauthorized.—*Gillespie v. Chapline* (Fla.) 722.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 172. There is no invariable rule which requires the court of chancery to dissolve an injunction upon the denials of the answer, but the situation of the parties and the consequences of the order must be considered.—*Royal v. Royal* (Ala.) 735.

§ 172. Where all the equities of a bill on which a temporary restraining order was granted are denied by sworn answer, the order should ordinarily be dissolved, as it should be where it clearly appears that the order should not have been granted.—*Gillespie v. Chapline* (Fla.) 722.

INJURIES.

In general, see Damages; Negligence.

INNOCENT PURCHASERS.

Mortgagees, see Mortgages, § 154.

INSANE PERSONS.

Insanity affecting responsibility for crime, see Criminal Law, § 48.
Weight and sufficiency of evidence as to insanity, see Homicide, § 237.

I. DISABILITIES IN GENERAL.

Opinion evidence, see Criminal Law, § 452.

VIII. CRIMES.

Insanity as defense in criminal prosecutions, see Criminal Law, §§ 331, 354, 773.

IX. ACTIONS.

§ 94. In a suit to rescind a sale for non-payment of price, an interdicted person residing

in the state, not represented by a curator, may be cited through a curator ad hoc.—*Adler v. Adler* (La.) 668.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

Of corporations in general, see Corporations, §§ 553-566.

Solvency of vendor affecting right to rescind contract for sale of land, see Vendor and Purchaser, § 108.

INSTRUCTIONS.

By court to jury, see Criminal Law, §§ 756, 763, 764, 769, 814, 829, 830, 841; Trial, §§ 186-296.

By master to servant, see Master and Servant, § 150.

INSTRUMENTS.

Acknowledgment of, see Acknowledgment.

Best and secondary evidence, see Criminal Law, §§ 398, 400; Evidence, §§ 158-183.

Cancellation, see Cancellation of Instruments.

Documentary evidence, see Evidence, §§ 355, 378.

Estoppel by deeds and other instruments, see Estoppel, §§ 25, 32.

Forgery, see Forgery.

Parol or other extrinsic evidence, see Evidence, §§ 390-452.

Reformation, see Reformation of Instruments. Requisites and sufficiency of writing to satisfy statute of frauds, see Frauds, Statute of, §§ 106, 116.

Particular classes of written instruments.

See Assignments for Benefit of Creditors; Bills and Notes; Chattel Mortgages; Indictment and Information; Insurance; Mortgages; Stipulations; Wills.

Checks, see Banks and Banking, § 138.

Contracts in general, construction and operation, see Contracts, §§ 143, 226.

Contracts in general, execution, see Contracts, § 32.

Deeds, see Deeds.

INSULATION.

Of conductors of electricity, see Electricity, § 16.

INSULTING LANGUAGE.

See Disorderly Conduct.

To passenger, liability of carrier for acts of fellow passengers or other third persons, see Carriers, § 284.

INSURABLE INTEREST.

See Insurance, §§ 119, 122.

INSURANCE.

Liability of co-tenants for expenses of insurance, see Tenancy in Common, § 32.

II. INSURANCE COMPANIES.

(A) Stock Companies.

§ 49. Where suit was instituted by the state on the relation of the Attorney General to forfeit the charter of an insurance company, under Acts 1908, No. 124, the court erred in refusing to require delivery of the corporation's property to a liquidator to be appointed by the Governor.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans* (La.) 763.

§ 49. Where, in proceedings to dissolve an insurance company under Acts 1908, No. 124, the court rendered judgment of dissolution but turned over the property to liquidators appointed by the corporation, the state had sufficient interest to entitle it to appeal.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans* (La.) 763.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 73. That the agent of one insurance company has an agreement with the agent of another to share commissions does not constitute each agent the agent of both companies.—*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa.* (La.) 183.

§ 73. An insurance agent receiving a commission from a company which he does not represent for placing the insurance is not thereby its agent.—*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa.* (La.) 183.

(B) Agency for Applicant or Insured.

§ 96. An insurance agent placing insurance with a company which he does not represent, may be the agent of insured.—*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa.* (La.) 183.

IV. INSURABLE INTEREST.

§ 119. Wager policies are not approved, and should be avoided.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

§ 122. When a life policy was assigned to one without an insurable interest, held, that the assignment was valid and the second policy thereupon issued was not a wagering policy.—*Grant v. Independent Order of Sons and Daughters of Jacob* (Miss.) 698.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

Act prescribing law governing contract as denial of privileges or immunities of citizens of United States, see Constitutional Law, § 206.

§ 143. A policy of fire insurance held subject to reformation and enforcement in equity.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

§ 145. While the mere renewal of an insurance policy does not of itself change the terms of the contract, the parties may on renewal change the terms.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 145. Where an insurance agent had authority to issue receipts for renewal premiums for the company, which receipts were on a printed form furnished by it, such agent had authority to modify the contract in the renewal receipt.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

(B) Construction and Operation.

Taxation of loans to policy holders, see Taxation, § 95.

§ 146. Every insurance policy, if doubtful, is construed in favor of the insured.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 177. Employer's liability insurer held liable, in case of injury after expiration of policy, where it had issued binder extending the policy.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

§ 187. Where insured received a life policy, and retained it three or four months, without

objection or making any effort to reject it, he is liable on his note for the initial premium.—*Tapia v. Baggett* (Ala.) 834.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 229. Insurance company must be notified of cancellation of policy by insured to make cancellation effective.—*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa.* (La.) 183.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(B) Matters Relating to Property or Interest Insured.

§ 281. The padding of an inventory of merchandise by false entries will work a forfeiture of the policy, where they cannot be explained on any reasonable theory of honest mistake.—*Alfred Hiller Co. v. Insurance Co. of North America* (La.) 104.

§ 282. "Unconditional and sole ownership" of property, within the meaning of insurance policies, *held* to be in those upon whom the loss insured against would certainly fall as the result of bona fide rights in the insured property.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

§ 282. Essentials of an "unconditional and sole" interest or ownership, within the meaning of the phrase in insurance policies, stated.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

§ 282. Purpose of a provision in insurance policies requiring insured to have the unconditional and sole ownership of property insured, stated.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

§ 282. A certain interest of a purchaser of property *held* the "sole and unconditional ownership," within such phrase as used in insurance policies.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 375. As respects a fire policy issued by agents of an insurance company, *held*, they have power to bind the company as to a vacancy permit, notwithstanding revocation of their agency, unknown to insured.—*Sutherland v. Federal Ins. Co.* (Miss.) 689.

§ 375. Insured *held* required to have actual, and not merely constructive, notice of the revocation of agency of the agents who issued his policy, that may not bind the company by an agreement for a vacancy permit.—*Sutherland v. Federal Ins. Co.* (Miss.) 689.

§ 376. Stipulations that provisions of a policy cannot be waived by any agent, officer, or other representative *held* not to be sustained on theory that it does not prevent the corporation from waiving the stipulations.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

§ 382. Agreement of an agent of an insurance company to renew a vacancy permit *held* binding on the company.—*Sutherland v. Federal Ins. Co.* (Miss.) 689.

§ 383. A stipulation in an employer's liability policy that no claim should be paid by the insured without the written consent of the insurer *held* subject to be waived by parol.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

§ 388. Under the New York standard policy, a forfeiture is not waived by any requirement or act on the part of the insurer relating to the

appraisal of the loss or any examination of the insured.—*Alfred Hiller Co. v. Insurance Co. of North America* (La.) 104.

XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

§ 461. A provision of an accident insurance policy *held* not to relieve the company from liability for injury from a danger to which insured was involuntarily exposed.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 462. Insured's death *held* not to have occurred while violating an ordinance against catching hold of cars, etc.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance.

§ 512. The liability of an insurance company on an employer's liability policy is fixed by the terms of the policy, regardless of its instructions to an attorney as to what settlement he might make with an employe who was injured.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

XIV. NOTICE AND PROOF OF LOSS.

Act relating to proofs of loss as impairing obligation of contracts, see Constitutional Law, § 154.

Act requiring insurance companies to furnish blank proofs of loss as denial of equal protection of law, see Constitutional Law, § 240.

§ 534. Act No. 168 of 1908 *held* not confined to policies issued after its passage.—*Monteleone v. Seaboard Fire & Marine Ins. Co.* (La.) 1032.

§ 556. A local agent of a fire insurance company, with authority to issue policies and collect premiums, *held* authorized to waive required proofs of loss, by repudiating liability on the policy.—*Etna Ins. Co. v. Holmes* (Fla.) 801.

§ 558. A fire insurance company failing to furnish insured with blank proofs of loss on being notified of the loss *held* to have waived the furnishing of such proof by insured, under Act No. 168 of 1908, § 2.—*Monteleone v. Seaboard Fire & Marine Ins. Co.* (La.) 1032.

XV. ADJUSTMENT OF LOSS.

§ 565. An attorney *held* to have acted for a railroad company and not for the insurer in settling a personal injury case, so that insurer was not estopped by his acts as to the amount of the liability.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

XVI. RIGHT TO PROCEEDS.

Evidence of divorce, see Divorce, § 174.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Act imposing penalty for delay in payment as denial of equal protection of law, see Constitutional Law, § 240.

XVIII. ACTIONS ON POLICIES.

Variance between pleading and proof as ground for demurrer, see Pleading, § 193.

§ 608. A policy insuring against death resulting directly from bodily injuries caused by external, violent, and accidental means *held* not the kind of policy contemplated in form 12 of Code, § 5283.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 642. Pleas in a count on an accident insurance policy, alleging certain facts as a full defense to the action, when the policy provided that the existence of such facts should only reduce the amount recoverable, were demurrable.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 651. In an action on an accident insurance policy, testimony that defendant's agent executed a renewal receipt was admissible as tending to show a contract of insurance between the company and the person claimed to have been insured.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 654½. In an action on an accident policy, a receipt showing payment of the original premium was neither irrelevant, incompetent, nor immaterial, showing that the policy had been put into effect, though it was cumulative evidence of that fact after the policy had been introduced without objection.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 668. Stepping from a moving car, irrespective of the speed at which it was moving, is not, as a matter of law, an "obvious danger" within an accident company's policy, relieving the company from liability for death resulting from exposure to an obvious risk.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 668. The credibility and weight of evidence to establish a custom between a railroad company and an insurance company, permitting the railroad to settle claims without giving notice to the insurance company, required by an employer's liability policy, were for the jury.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

§ 668. Whether the written consent of an employer's liability insurer to a settlement by the insured was waived by the insurer was a question for the jury.—*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.* (Miss.) 787.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§ 693. By-laws of a fraternal order can never be held retroactive, when any reasonable construction otherwise is possible.—*Grant v. Independent Order of Sons and Daughters of Jacob* (Miss.) 698.

§ 693. By-laws of a fraternal order held not retroactive, so as to invalidate a prior change of beneficiaries.—*Grant v. Independent Order of Sons and Daughters of Jacob* (Miss.) 698.

(B) Beneficiaries and Benefits.

§ 793. One held estopped to claim the benefits of insurance as against insured's widow.—*Woodson v. Colored Grand Lodge of Knights of Honor of America* (Miss.) 457.

INTEMPERANCE.

See Drunkards.

INTENT.

Evidence of intent in civil actions in general, see Evidence, § 151.

Affecting or element of particular acts, or transactions.

See Fraudulent Conveyances, §§ 66, 69.

Change of domicile, see Domicile, § 4.

Construction of statutes, see Statutes, § 181.

Element of offenses.

See Homicide, §§ 145, 156, 158, 286.

INTERDICTS.

See Insane Persons, § 94.

INTEREST.

See Usury.

On particular classes of liabilities.

For taxes paid by co-tenant, see Tenancy in Common, § 30.

On notary's bond, see Notaries, § 11.

Pecuniary interest in particular subject-matter. Ground of right to review of decision, see Appeal and Error, § 150.

Insurable interest, see Insurance, §§ 119, 122.

Reservation of interest on deposits by treasurer of levee board, see Levees, § 10.

III. TIME AND COMPUTATION.

§ 45. Interest may be allowed in equity upon the amount of money found to be due from defendant to complainant from the date it became payable.—*McMillan v. Warren* (Fla.) 825.

INTERLOCUTORY DECISIONS.

Review, see Appeal and Error, § 874.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 143-172.

INTERMEDDLING.

In suits between others, see Champerty and Maintenance.

INTERMEDIATE COURTS.

Review of decisions, see Appeal and Error, § 1065.

INTERPLEADER.

Claims by third persons to property levied upon, see Attachment, § 308.

INTERPRETATION.

Of language used in alleged libel or slander, see Libel and Slander, § 19.

Of contracts, instruments, or judicial acts and proceedings.

See Dedication, § 60; Mortgages, § 137; Statutes, §§ 181, 241; Stipulations, § 14; Wills, §§ 483, 698.

Assignments for benefit of creditors, see Assignments for Benefit of Creditors, § 184.

Bills of lading, see Carriers, § 51.

Constitutional provisions, see Constitutional Law, § 48.

Contracts in general, see Contracts, §§ 143, 226.

Contracts of insurance, see Insurance, §§ 146, 177.

Contracts of sale, see Sales, §§ 68, 82, 467.

Deeds, see Deeds, §§ 111, 127.

Instructions, see Trial, §§ 285, 296.

Leases, see Landlord and Tenant, §§ 40, 47;

Mines and Minerals, §§ 62, 70.

Parol or extrinsic evidence to aid interpretation of written instruments, see Evidence, § 452.

Warranties, see Sales, § 279.

INTERROGATORIES.

On facts and articles, see Discovery, § 79.

INTERSTATE COMMERCE.

Regulation of transportation by carriers in general, see Carriers, §§ 2-20.

INTERVENERS.

As persons entitled to review, see Appeal and Error, § 149.

INTERVENTION.

In attachment proceedings by claimant of property, see Attachment, § 308.

INTER VIVOS.

Gifts, see Gifts, §§ 26, 41.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Drunkards.

I. POWER TO CONTROL TRAFFIC.

§ 10. Code 1907, § 1251, *held* not to authorize a city to seize and destroy intoxicating liquors held for unlawful purposes.—City of Birmingham v. Stephens & Kerr (Ala.) 590.

§ 10. A city *held* without authority to adopt an ordinance providing for the seizure and destruction of intoxicating liquor held for unlawful purposes, unless specially authorized so to do by the Legislature.—City of Birmingham v. Stephens & Kerr (Ala.) 590.

§ 10. A city, destroying intoxicating liquor under a claim of right to do so because the owner thereof has been convicted of violating the prohibition law, *held* not entitled to justify its act under Code 1907, § 1278.—City of Birmingham v. Stephens & Kerr (Ala.) 590.

§ 10. Under Acts 1908, c. 114, § 1797 and chapter 115, § 1746, and Code 1906, §§ 3329, 3441, an ordinance prohibiting the storage of intoxicating liquor for sale *held* valid.—Hurley v. City of Corinth (Miss.) 695.

III. LOCAL OPTION.

Certiorari to review order annulling proceedings, see Certiorari, § 70.
Presumptions as to performance of duty by election officers, see Evidence, § 83.

§ 25. Act Feb. 12, 1884 (Acts 1884, c. 182), relating to the sale of liquor in the city of Corinth and within five miles of the county courthouse of Alcorn county, *held* repealed by chapters 113, 114, and 115 of the Acts of 1906, so far as it dealt with the sale of liquor.—Hughes v. State (Miss.) 631.

§ 35. In local option elections, the board of county commissioners constitutes the county canvassing board.—Sullivan v. Orange County Com'rs (Fla.) 517.

§ 35. Under Const. art. 5, § 15, clerk of circuit court is clerk of county commissioners and proper custodian of ballots used at local option election.—Sullivan v. Orange County Com'rs (Fla.) 517.

§ 37. The court, in determining the legality of local option election, may consider any legal evidence offered.—Sullivan v. Orange County Com'rs (Fla.) 517.

§ 37. In a local option election contest, the court may examine the original ballots, and its power is not affected by any illegality in the canvassing board or other election officers.—Sullivan v. Orange County Com'rs (Fla.) 517.

§ 37. In a local option election contest, the court may determine, from the original ballots and from the returns and other evidence, whether a legal election was held.—Sullivan v. Orange County Com'rs (Fla.) 517.

§ 37. In local option election contest, that a vote was illegal for nonpayment of poll tax must be established by evidence that the voter was not exempt from such tax.—Sullivan v. Orange County Com'rs (Fla.) 517.

IV. LICENSES AND TAXES.

Right to question corporate power to hold license, see Corporations, § 387.

V. REGULATIONS.

§ 122. Code 1906, § 1746, *held* to prohibit the sale of enumerated liquors and to prohibit the sale of any other drink which if drunk to excess will produce intoxication.—Fuller v. City of Jackson (Miss.) 873.

§ 122. A sale of malt liquor containing a certain percentage of alcohol *held* prohibited by Code 1906, § 1746.—Fuller v. City of Jackson (Miss.) 873.

§ 122. A sale of a drink *held* not prohibited by Code 1906, § 1746.—Fuller v. City of Jackson (Miss.) 873.

VI. OFFENSES.

§ 140. Under Acts 1908, c. 114, § 1797, and chapter 115, § 1746, and Code 1906, §§ 3329, 3441, an ordinance prohibiting the storage of intoxicating liquor for sale *held* violated.—Hurley v. City of Corinth (Miss.) 695.

§ 146. Proof *held* to show a "barter or exchange" within the statute prohibiting a sale, barter, or exchange of intoxicating liquors.—Clark v. State (Ala.) 893.

§ 147. Sales of liquor on orders received from outside the state *held* to be sales within the state, in violation of a statute forbidding such sales.—Hurley v. City of Corinth (Miss.) 695.

§ 167. One aiding another to unlawfully purchase liquor, violates Code 1907, § 7363.—Rayfield v. State (Ala.) 833.

VIII. CRIMINAL PROSECUTIONS.

Review of findings on prohibition against judgment, see Prohibition, § 28.

§ 233. In a prosecution for having in possession intoxicants with intent unlawfully to sell them, certain evidence *held* admissible.—Price v. City of Gulfport (Miss.) 486; Hand v. Same (Miss.) 487.

§ 236. In a prosecution for having in possession intoxicants with intent unlawfully to sell them, under Laws 1908, c. 114, § 1797, evidence *held* sufficient to sustain a conviction in view of Laws 1908, c. 115, § 1747.—Price v. City of Gulfport (Miss.) 486; Hand v. Same (Miss.) 487.

INTOXICATION.

Common or habitual drunkards, see Drunkards.
Effecting credibility of witness, see Witnesses, § 337.

Opinion evidence, see Criminal Law, § 448.

INTRUDERS.

On land, see Forcible Entry and Detainer; Trespass.

INVEIGLEMENT.

Of servant, see Master and Servant, §§ 339, 343.

INVOLUNTARY NONSUIT.

See Dismissal and Nonsuit, § 56.

ISSUES.

Applicability of instructions to issues, see Criminal Law, § 814.

Identity of issues as affecting conclusiveness of judgment, see Judgment, §§ 713-729.

In civil actions, see Pleading, §§ 374, 399.

In criminal prosecutions, see Indictment and Information, § 167.

Instructions ignoring, see Trial, § 253.
Presented for review on appeal, see Appeal and Error, § 169.

ITINERANT VENDERS.

See Hawkers and Peddlers.

JACTITATION.

See Libel and Slander, § 140.

JEOFAILS.

Statute of. see Pleading, § 433.

JEOPARDY.

Former jeopardy as bar to prosecution, see Criminal Law, § 200.

JOINDER.

Of causes of action, see Action, §§ 38, 50.
Of parties in civil actions in general, see Parties, § 25.

JOINT ADVENTURES.

See Partnership.
Conspirators, see Conspiracy.

JOINT OWNERS.

Community property, see Husband and Wife, §§ 254, 276.

JOINT TENANCY.

See Tenancy in Common.
Partition of joint property, see Partition

JOURNALS.

Legislative journals, see States, § 37.

JUDGES.

See Courts; Justices of the Peace.
Judicial powers and functions in general, and delegation thereof, see Constitutional Law, §§ 68, 70.
Remarks and conduct on trial, see Criminal Law, § 655.
Subjects and titles of acts relating to judges, see Statutes, § 124.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of justices of the peace, see Justices of the Peace, §§ 2-6.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 26. Legality of session of aldermen and of appointment of mayor pro tem. *held* not to be examined on appeal from conviction for violation of a municipal ordinance.—*Rosetto v. City of Bay St. Louis* (Miss.) 785.

JUDGMENT.

Curing defective pleading by judgment, see Pleading, § 433.
Practice in equity, see Equity, § 418.
Sales under judgment, order, or decree, see Judicial Sales.

In actions by or against particular classes of persons.

See Executors and Administrators, § 509.

In particular civil actions or proceedings.
See Quietting Title, § 52; Replevin, § 101.
For divorce, see Divorce, § 174.
Mandamus against municipal officers, see Municipal Corporations, § 1037.
To redeem from mortgage sale, see Mortgages, § 621.

In criminal prosecutions.

See Criminal Law, § 995.

Review.

See Appeal and Error; Certiorari; Criminal Law, §§ 1019, 1188; Justices of the Peace, §§ 174, 200.
Judgment on appeal or writ of error, see Appeal and Error, §§ 1105, 1119; Criminal Law, §§ 1182, 1188.
Record for purpose of review, see Appeal and Error, § 529.

I. NATURE AND ESSENTIALS IN GENERAL.

Process to sustain judgment against firm, see Partnership, § 219.
Statutory provisions as to terms of courts, see Courts, § 62.

IV. BY DEFAULT.

Decree in equity pro confesso, see Equity, § 418.

(A) Requisites and Validity

§ 101. Code 1906, § 811, *held* not to apply to proceedings for mandamus to enforce judgment, so as to require judgment to be made an exhibit to the petition as an essential to the validity of default judgment in mandamus proceedings.—*Town of Jonestown v. Ganong* (Miss.) 579.

§ 112. As a rule, a default only admits matters well pleaded.—*Ex parte Allen* (Ala.) 44.

§ 132. That a default was taken on Friday, when the court rules required default dockets to be heard on Saturdays, did not make the default judgment void, where defendant was in default on Friday, but was at most an irregularity.—*Ex parte Allen* (Ala.) 44.

(B) Opening or Setting Aside Default.

§ 143. Error of town officers as to the purpose of suit for mandamus *held* not a sufficient excuse for default to warrant setting it aside.—*Town of Jonestown v. Ganong* (Miss.) 579.

VI. ON TRIAL OF ISSUES.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

Action to cancel assessment, see Taxation, § 500.

VII. ENTRY, RECORD, AND DOCKETING.

Judgment in criminal prosecution, see Criminal Law, § 995.

§ 272. The circuit court has authority to have a judgment entered in vacation after the disposition of a motion for a new trial made and continued in term time.—*Florida Ry. Co. v. Dersey* (Fla.) 963.

§ 282. In country parishes, a judgment rendered orally and noted on the minutes may be read and signed at any time within three days, or later.—*Madere v. Alexandre* (La.) 535, 537.

IX. OPENING OR VACATING.

§ 336. The remedy provided by Code 1907, § 5372, for vacating a judgment obtained by fraud, etc., *held* not to be a continuation of the original suit.—*Evans v. Wilhite* (Ala.) 845.

§ 337. Code 1907, §§ 4142-4145, embodied in chapter 85, art. 7, *held* to refer to motions to set aside judgments for irregularities, and not to include the usual motions for new trial.—*Woodward Iron Co. v. Brown* (Ala.) 829.

X. EQUITABLE RELIEF.

Bill of review in equity, see *Equity*, §§ 442, 446.

(A) Nature of Remedy and Grounds.

Application of maxims of equity, see *Equity*, § 66.

§ 407. The remedy prescribed by Code 1907, § 5372, *held* not exclusive, but that a judgment obtained by fraud may be vacated in equity.—*Evans v. Wilhite* (Ala.) 845.

§ 436. A party seeking relief in a court of equity from a judgment rendered against him must show that he is without fault or neglect in the matter, but he is not required to show that he was not negligent in failing to apply to the court of law for relief under Code 1907, § 5372.—*Evans v. Wilhite* (Ala.) 845.

(B) Jurisdiction and Proceedings.

§ 460. A bill in proceedings to set aside a judgment *held* sufficient to authorize setting aside the judgment and restraining enforcement of execution pending suit.—*Evans v. Wilhite* (Ala.) 845.

XI. COLLATERAL ATTACK.

On appointment of administrator or executor, see *Executors and Administrators*, § 29.

(A) Judgments Impeachable Collaterally.

§ 485. A judgment is not void, if the court legally existed and had jurisdiction of the subject-matter and of the parties.—*Lucy v. Deas* (Fla.) 515.

(B) Grounds.

§ 400. Judgment in rem in attachment *held* not void because the owner was out of the state and had no personal notice of suit.—*Lucy v. Deas* (Fla.) 515.

§ 501. Where court is legally organized, and has jurisdiction of the subject-matter and parties, errors or wrongdoing short of deprivation of opportunity to be heard will not render judgment void.—*Lucy v. Deas* (Fla.) 515.

§ 511. Judgment *held* void in toto for fraud practiced in litigation.—*Lucy v. Deas* (Fla.) 515.

§ 512. The giving of incomplete or false testimony in attachment against the property of a nonresident, and injustice of the claim asserted, do not render the judgment void.—*Lucy v. Deas* (Fla.) 515.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Appointment of executor or administrator, see *Executors and Administrators*, § 29.

(B) Persons Concluded.

§ 668. A judgment establishing a lien on a building and lot for materials in an action against the contractor and defendant *held* to conclusively establish complainant's right to the lien as against defendant.—*Washington v. Arnold* (Ala.) 463.

§ 702. In mandamus to compel a town to pay a judgment which the petitioner had obtained against it, the officers of the town as such are parties, and the clerk thereof is a party, so that the judgment ordered in mandamus operates on him.—*Town of Jonestown v. Ganong* (Miss.) 692.

(C) Matters Concluded.

By denial of opposition to appointment of administrator, see *Executors and Administrators*, § 20.

§ 713. The plea of *res judicata* applies to every objection urged in the second suit which was open to the party within the former one under the pleadings.—*Jones v. Morgan* (Fla.) 140.

§ 713. Prior judgment concludes parties and privies as to every matter offered, or which should have been litigated, in the first suit.—*Jones v. Morgan* (Fla.) 140.

§ 715. The test of the identity of causes of action to determine the question of *res judicata* is the identity of the facts essential to the maintenance of the actions.—*McKinnon v. Johnson* (Fla.) 288.

§ 715. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment.—*McKinnon v. Johnson* (Fla.) 288.

§ 729. Plaintiff, in suit to enjoin seizure of property, cannot withhold grounds which he should have stated, and, when cast, file a new action, alleging such facts.—*Brooks v. Magee* (La.) 551.

(D) Judgments in Particular Classes of Actions and Proceedings.

§ 747. The judgment in a prior ejectment suit *held* in ejectment evidence of title.—*Coulson v. Scott* (Ala.) 436.

§ 747. The facts necessary to be established in ejectment are essentially different from those necessary in proceedings in restitution, so that the judgment in one will not bar the other action.—*McKinnon v. Johnson* (Fla.) 288.

XV. LIEN.

Garnishment lien, see *Garnishment*, § 108.

§ 777. In view of Code 1907, §§ 4091, 4157, *held*, that a judgment was not subject to the lien of a judgment against the judgment creditor recorded in the probate office.—*Canterbury & Gilder v. Marengo Abstract Co.* (Ala.) 388.

§ 787. Under Code 1907, §§ 3383, 4154, a bona fide purchaser from one who purchased from a judgment debtor, but who failed to record his deed, *held* superior to the lien of a judgment, where the last transfer took place after the judgment had been recovered for more than 10 years without execution issuing thereon.—*Richard v. Steiner Bros.* (Ala.) 200.

§ 788. Under Code 1907, § 3383, a prior unrecorded deed *held* void as to a judgment, unless the judgment creditor had notice of such deed.—*Richard v. Steiner Bros.* (Ala.) 200.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

Pendency of *scire facias* as ground for abatement of suit on judgment, see *Abatement and Revival*, § 8.

Pending appeal or other proceeding for review, see *Appeal and Error*, § 492.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

Effect of suspensive appeal on right to compel erasure of judgment, see *Appeal and Error*, § 492.

Satisfaction as ground for motion to recall execution, see *Execution*, § 163.

JUDICIAL DISCRETION.

Amendment of pleadings, see *Pleading*, § 236.

Appointment of receiver, see *Receivers*, § 8.

Continuance, see Criminal Law, § 586.
 Cross-examination of witnesses, see Witnesses, § 267.
 New trial, see Criminal Law, § 911.
 Order of proof, see Criminal Law, §§ 680, 686.
 Reopening case for further evidence, see Criminal Law, § 686; Trial, § 68.
 Review of discretion in civil actions, see Appeal and Error, §§ 955, 970.
 Review of discretion in criminal prosecutions, see Criminal Law, §§ 1151, 1156.

JUDICIAL LEGISLATION.

Encroachment by courts on legislative functions, see Constitutional Law, § 70.

JUDICIAL MORTGAGE.

See Judgment, §§ 777-788.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 20, 32.

JUDICIAL OFFICERS.

See Judges; Justices of the Peace.

JUDICIAL POWER.

See Constitutional Law, §§ 68, 70.

JUDICIAL SALES.

Exemption of real property, see Homestead.
 Of property in possession of receiver, see Receivers, §§ 134, 145.
 Of property of decedent, see Executors and Administrators, §§ 328-388.
 On execution, see Execution, §§ 264-294.
 Tax sales, see Taxation, §§ 679, 689.
 To foreclose mortgages, see Mortgages, §§ 536, 544.

§ 39. A properly advertised and fair sale, in proceedings by a creditor to collect his debt, will not be vacated for mere inadequacy of price.—*Roy v. O'Neill* (Ala.) 946.

JURISDICTION.

Amount or value in controversy, see Appeal and Error, § 50; Justices of the Peace, § 44.
 Necessity that jurisdiction appear of record, see Appeal and Error, § 503.
 Of courts in general, see Courts.
 Review of questions of jurisdiction, see Appeal and Error, § 1166.
 Want of jurisdiction ground for collateral attack on judgment, see Judgment, § 490.
 Want or excess of jurisdiction ground for writ of certiorari, see Certiorari, § 28.
 Want or excess of jurisdiction ground for writ of habeas corpus, see Habeas Corpus, § 27.
 Want or excess of jurisdiction ground for writ of prohibition, see Prohibition, § 10.

Jurisdiction of particular actions or proceedings.
 Criminal prosecutions, see Criminal Law, § 94.
 On bond of treasurer of levee board, see Levees, § 11.
 Preliminary proceedings in criminal prosecutions, see Criminal Law, § 207.

Special jurisdictions and jurisdictions of particular classes of courts.

See Justices of the Peace, §§ 44, 60.
 Appellate jurisdiction, see Courts, § 224.
 Commissioner's court, necessity of showing by record, see Counties, § 53.
 Equity jurisdiction, see Equity, §§ 3-66.
 Juvenile courts, see Infants, § 18.

JURY.

See Grand Jury.

Disqualification of jurors as ground for continuance, see Criminal Law, § 589.
 Grounds for reference instead of jury trial, see Reference, § 25.
 Instructions, see Criminal Law, §§ 756, 763, 764, 769, 814, 829, 830, 841; Trial, §§ 186-296.
 Questions for jury in civil actions, see Trial, §§ 134-171.
 Questions for jury in criminal prosecutions, see Criminal Law, §§ 736, 763, 764.
 Taking case or question from jury at trial, see Criminal Law, § 736; Trial, §§ 134-171.

II. RIGHT TO TRIAL BY JURY.

§ 25. A demand by one charged with a misdemeanor for a jury trial, made after the expiration of the time fixed by law for that purpose, comes too late.—*Red v. State* (Ala.) 885.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

Disqualification of or misconduct affecting as ground for new trial, see Criminal Law, § 823.

§ 47. Absence of juror from the state without intent of changing his citizenship held not necessarily a ground for disqualification.—*State v. Thomas* (La.) 988.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

Harmless error in drawing jury, see Criminal Law, § 1166½.
 Subjects and titles of acts, see Statutes, § 124.

§ 66. Where a court consisted of two judges, a recital that the "court" had proceeded to publicly draw a jury as provided by law, held to be construed to mean that the jury was drawn by the presiding judge.—*Rogers v. State* (Ala.) 33.

§ 67. That the sheriff actively assisted in working up evidence against an accused was not contrary to his official duties, so as to disqualify him from summoning jurors to try the case.—*Jackson v. State* (Ala.) 835.

§ 70. Motion to quash venire in a capital case held improperly refused.—*Davis v. State* (Ala.) 939.

§ 71. Code 1907, § 4635, providing for struck juries, applies only to civil cases.—*Turney v. State* (Ala.) 910.

§ 72. Absence of a jury serving the court in the trial of another case warranted the summoning of talesmen to complete the jury to try accused, under Code 1907, § 7272.—*Turney v. State* (Ala.) 910.

§ 72. Accused is not entitled, as matter of right, to have a jury drawn from the jury box, but the court may order a jury from the county at large when the names in the jury box are exhausted.—*Moore v. State* (Fla.) 971.

§ 72. Members of a venire held not disqualified as jurors.—*Whitehead v. State* (Miss.) 259.

§ 80. Under Code 1907, § 7265, an order that the jurors drawn and those to be "drawn and summoned" for a subsequent week of the term, etc., held erroneous in using the word "summoned."—*Smith v. State* (Ala.) 396.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 83. Under Code 1907, § 7276, subd. 10, where a witness was summoned as a juror, the subsequent discharge of the witness did not render him competent to serve as a juror, as against

the objection of the opposite party.—Lowman v. State (Ala.) 638.

§ 83. That one may be exempt from jury duty does not ipso facto render him subject to challenge for cause.—Colley v. State (Ala.) 832.

§ 83. Certain jurors in a murder case held competent.—State v. Owen (La.) 860.

§ 92. In an action against a city for injuries on a sidewalk, a policeman, who was a city officer, held subject to challenge for implied bias.—City of Birmingham v. Gordon (Ala.) 430.

§ 103. Light impressions or opinions may fairly be supposed to leave the juror's mind open to a fair consideration of the evidence, in view of Code 1906, § 2685.—Whitehead v. State (Miss.) 259.

§ 110. If a juror were subject to challenge for cause on account of exemption from duty, no injury could have resulted, if the objecting party failed to eliminate him by a peremptory challenge, as he could and should have done.—Colley v. State (Ala.) 832.

§ 116. The court held not authorized to quash a venire on the ground that two of the jurors summoned for the week were excused by the court in the absence of accused who did not consent thereto.—Davis v. State (Ala.) 939.

§ 116. Members of a venire held not disqualified as jurors.—Whitehead v. State (Miss.) 259.

§ 117. Motion to quash a venire made before trial is in due time.—Davis v. State (Ala.) 939.

VI. IMPANELING FOR TRIAL AND OATH.

§ 144. Under Code 1907, § 7267, the court held authorized to discard a juror on the ground of a mistake in his name as drawn.—Davis v. State (Ala.) 939.

JUSTICES OF THE PEACE.

Jurisdiction of prosecution for failure to work on roads, see Highways, § 151.

Proceedings on summary trial of criminal offenses or misdemeanors, see Criminal Law, § 260.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 2. Acts 1884-85, p. 402, relating to justices of the peace in the territory embraced in the boundaries of the late city of Mobile, held not repealed by the subsequent Codes, nor affected by Code 1907, §§ 339, 340, 1106, 1107, 4637.—Schulte v. Wilke (Ala.) 526.

§ 6. One purporting to act as a justice of the peace, where under the law there could be no office of justice, held not a de facto justice, and his judgments were void.—Schulte v. Wilke (Ala.) 526.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 44. One cannot split up a single demand, exceeding \$200, and therefore in excess of the jurisdiction of a justice's court as limited by Const. 1890, § 171, into several sums, so as to give jurisdiction to a justice's court.—Vicksburg Waterworks Co. v. Ford (Miss.) 208.

§ 44. An account, after an acquittance of a part thereof, held within the jurisdiction of a justice's court.—Vicksburg Waterworks Co. v. Ford (Miss.) 208.

§ 57. Under Const. 1890, § 165, a justice of the peace was disqualified from hearing a cause to which a corporation of which his first cousin was director and president, as well as a stockholder, was a party.—Nimocks v. McGehee (Miss.) 626.

§ 60. The disqualification of a justice of the peace, under Const. 1890, § 165, because of his relationship to a party, held waived by failure to object pending the action.—Nimocks v. McGehee (Miss.) 626.

IV. PROCEDURE IN CIVIL CASES.

Another action pending as ground for abatement, see Abatement and Revival, § 7.

Hearsay evidence of justice's dockets, see Evidence, § 317.

Stipulations as to dockets, see Stipulations, § 14.

§ 75. Under Code 1907, § 4285, plaintiff on removal of case to circuit court held entitled to try the same as one of forcible entry and detainer, or unlawful detainer, as those remedies existed under section 4262 before the amendment of 1879 (Acts 1878-79, p. 49).—Self v. Comer (Ala.) 336.

§ 75. Code 1907, § 4283, authorizing the removal of suit for forcible entry and detainer, or unlawful detainer, to the circuit court, held to apply only to cases arising under section 4262, including the amendment added in 1879 (Acts 1878-79, p. 49).—Self v. Comer (Ala.) 336.

§ 75. Amendment of 1879 (Acts 1878-79, p. 49), extending remedy of forcible entry and detainer given by Code 1907, § 4262, to cases where there was a peaceable entry, held not to extend to unlawful detainer cases the right of removal to the circuit court granted by section 4282.—Self v. Comer (Ala.) 336.

§ 84. A certain paper in a justice court held not an answer, so as to waive a defect of citation.—Le Blue v. Le Smith (La.) 683.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 174. The circuit court on appeal from a justice's judgment held authorized to strike plaintiff's complaint demanding judgment in excess of \$100 and to permit the filing of a complaint demanding judgment for \$100 with interest.—Brandon v. Progress Distilling Co. (Ala.) 640.

(B) Certiorari.

§ 192. Certiorari held the proper remedy to review and quash void judgments.—Schulte v. Wilke (Ala.) 526.

§ 200. Under Code 1906, § 2353, held, that a garnishee's answer filed in justice court cannot be contested in the circuit court on certiorari.—Hattiesburg Trust & Banking Co. v. Hood (Miss.) 790.

§ 209. Under Code 1906, § 90, held, that on certiorari the circuit court should reverse a judgment against a garnishee and discharge him, where he filed an uncontested answer below denying liability.—Hattiesburg Trust & Banking Co. v. Hood (Miss.) 790.

JUSTIFIABLE HOMICIDE.

See Homicide, §§ 107, 119.

JUSTIFICATION.

Defense to action for libel or slander, see Libel and Slander, §§ 54, 94.

JUVENILE COURTS.

See Infants, § 18.

KNOWLEDGE.

Affecting competency of expert witness, see Evidence, §§ 559½, 545.

Affecting competency of witness in general, see Witnesses, § 37.

Of falsity of representations, see Fraud, § 13.
Opinion evidence founded on special knowledge as to subject-matter, see Criminal Law, § 452.

Affecting or element of particular acts or transactions.

See Fraud, § 18.

Purchase of goods, see Sales, § 235.

Purchase of land, see Vendor and Purchaser, §§ 231, 233.

Termination of authority of insurance agent, see Insurance, § 375.

LABOR.

See Master and Servant; Work and Labor.

Convict labor, see Convicts, § 10.

Liens on logs for labor, see Logs and Logging, § 26.

Liens on real property for work and materials, see Mechanics' Liens.

LACHES.

Affecting particular rights, remedies, or proceedings.

For new trial, see New Trial, § 117.

In equity, see Equity, §§ 67-70.

To establish and enforce trust, see Trusts, § 365.

LADING.

Bill of, see Carriers, §§ 51, 62.

LANDLORD AND TENANT.

Lease of mines and mineral lands, see Mines and Minerals, §§ 62, 70.

II. LEASES AND AGREEMENTS IN GENERAL.

Lease of mines and mineral lands, see Mines and Minerals, §§ 62, 70.

Legality of lease of land between high and low water mark of navigable stream, see Contracts, § 108.

(B) Construction and Operation.

§ 40. Two separate instruments under seal, executed at the same time, one an indenture of lease, the other a defeasance which defeats the lease, must be construed as one contract.—*Escambia Land & Mfg. Co. v. Ferry Pass Inspectors' & Shippers' Ass'n* (Fla.) 715.

III. LANDLORD'S TITLE AND REVERSION.

(B) Estoppel of Tenant.

§ 63. The tenants of land are estopped, before surrendering possession, from asserting an outstanding title which has been granted to them.—*Sayers v. Tallassee Falls Mfg. Co.* (Ala.) 892.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 132. Tenants held not entitled to recover because of certain inconvenience suffered upon repair of premises by landlord.—*Helmas v. Pallet* (La.) 676.

VIII. RENT AND ADVANCES.

Objections to evidence on ground of variance, see Pleading, § 430.

Under mining lease, see Mines and Minerals, § 70.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

Election of remedy, see Election of Remedies, § 3.

X. RENTING ON SHARES.

Mortgage of crop by tenant, see Chattel Mortgages, § 17.

§ 323. Under Code 1907, § 4743, a contract by which a landowner furnishes the land and team and another furnishes the labor to produce a crop on shares held to create the relation of master and servant, and not of landlord and tenant or tenants in common.—*Arrington v. State* (Ala.) 928.

LANDS.

See Property.

Conveyances, see Deeds; Vendor and Purchaser.

Mortgage, see Mortgages.

Public lands, see Public Lands.

LANGUAGE.

Of indictment or information, see Indictment and Information, § 75.

Publication of notice in paper printed in foreign language, see Newspapers, § 3.

LARCENY.

See Embezzlement; Receiving Stolen Goods.

Words imputing larceny as slander, see Libel and Slander, § 7.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

Conviction of offense included in charge, see Indictment and Information, § 189.

Surplusage and unnecessary matter, see Indictment and Information, § 120.

§ 30. A judgment on an information for larceny of a mortgage will not be arrested for failure to allege an acknowledgment which was not necessary to its validity.—*Flowers v. State* (Fla.) 11.

§ 30. Sufficiency of the description of stolen property in an indictment for larceny stated under Bill of Rights, § 11, and Gen. St. 1906, §§ 3961, 3962.—*Clark v. State* (Fla.) 518.

§ 40. Where an allegation in an indictment for larceny that a better description of the property is unknown is material, the point becomes an issue.—*Clark v. State* (Fla.) 518.

§ 40. In a prosecution for larceny, certain proof held sufficient.—*Clark v. State* (Fla.) 518.

(B) Evidence.

§ 43. Certain circumstances held admissible on prosecution for larceny.—*Jackson v. State* (Ala.) 730.

§ 51. On a trial for larceny, evidence of the possession by accused of the goods alleged to have been stolen was inadmissible, where there was not sufficient evidence that the goods had been stolen at all.—*Sanders v. State* (Ala.) 417.

§ 55. Evidence held to justify, if not to require, a finding that the money stolen by accused was the money of the United States.—*Johnson v. State* (Ala.) 652.

§ 55. Evidence held sufficient to sustain conviction of larceny.—*Flowers v. State* (Fla.) 11.

§ 56. On a trial for larceny, the corpus delicti held not proved.—*Sanders v. State* (Ala.) 417.

§ 56. The unexplained possession of property held not to raise the presumption that a larceny has been committed, but there must be additional evidence to establish the corpus delicti.—*Sanders v. State* (Ala.) 417.

§ 64. Explanation of the word "recent" in the rule as to recent possession of stolen goods.—*Jackson v. State* (Ala.) 730.

§ 64. A presumption of guilt does not flow from the unexplained possession of personalty recently stolen, but may be inferred as matter of fact, if warranted by other circumstances.—*Clark v. State* (Fla.) 513.

(C) Trial and Review.

§ 68. Evidence of guilt of larceny *held* sufficient.—*Jackson v. State* (Ala.) 730.

LAST CLEAR CHANCE.

Injury avoidable notwithstanding contributory negligence, see Municipal Corporations, § 705; Railroads, § 390; Street Railroads, § 103.

LATENT AMBIGUITY.

Parol evidence to explain, see Evidence, § 452.

LAW.

Determination of questions of law, instructions to jury, see Trial, § 190.

Due process of law, see Constitutional Law, §§ 278, 297.

Judicial notice of laws, see Evidence, § 32.

Maritime law, see Maritime Liens; Shipping.

Questions of law or fact, province of court and jury, see Criminal Law, § 736; Trial, §§ 134-145.

Statutory law, see Statutes.

LAWYERS.

See Attorney and Client.

LEASE.

See Landlord and Tenant.

Legality of lease of lands between high and low water mark of navigable streams, see Contracts, § 108.

Of mines and mineral lands, see Mines and Minerals, §§ 62, 70.

LEAVE OF COURT.

To amend pleading, see Pleading, §§ 236, 254.

LEGACIES.

See Wills.

Charitable bequests, see Charities.

Payment or delivery in distribution of estate, see Executors and Administrators, § 314.

LEGAL HOLIDAYS.

See Holidays.

LEGAL RESIDENCE.

See Domicile.

LEGISLATION.

In general, see Statutes.

LEGISLATIVE POWER.

See Constitutional Law, §§ 50, 64.

LEGISLATURE.

State Legislature, see States, § 37.

LETTERS.

Libelous communications, see Libel and Slander, § 50½.

LEVEES.

Conveyance of swamp lands, see Public Lands, § 61.

§ 10. Under Laws 1884, c. 168, providing for the creation of the levee board, and fixing the condition of the treasurer's bond, an unauthorized condition of the bond *held* not to invalidate the same.—*Adams v. Williams* (Miss.) 865.

§ 10. Under Act Feb. 28, 1884 (Laws 1884, c. 168) § 6, the interest on moneys deposited by the treasurer of a board of levee commissioners *held* to come into his hands by virtue of his office, so that he and the sureties on his official bond were liable therefor.—*Adams v. Williams* (Miss.) 865.

§ 10. Under Code 1906, § 3463, the bond of the treasurer of a levee board *held* an "official bond."—*Adams v. Williams* (Miss.) 865.

§ 10. Even though the treasurer of a board of commissioners of a levee district is an insurer of public moneys received by him, he is not entitled to retain interest thereon; the same belonging to the state.—*Adams v. Williams* (Miss.) 865.

§ 10. Under Act Feb. 28, 1884 (Laws 1884, c. 168) § 29, that the secretary of a board of levee commissioners on depositing public moneys in a bank, as he was entitled to do, wrongfully contracted to have the interest paid to himself, *held* not to release the surety on his bond.—*Adams v. Williams* (Miss.) 865.

§ 11. A suit in the name of the state to recover lands alleged to have been fraudulently sold by a levee district, created by Act No. 59 of 1880 under power given by Const. art. 239, *held* unauthorized.—*State v. Tensas Delta Land Co.* (La.) 216.

§ 11. Under Const. 1890. § 161, and Code 1906, § 556, the chancery court *held* to have jurisdiction of a suit on the bond of the secretary and treasurer of a board of levee commissioners.—*Adams v. Williams* (Miss.) 865.

§ 11. Under Code 1906, § 4739, the revenue agent *held* the proper party to maintain a suit on the bond of the secretary and treasurer of the board of levee commissioners for a certain district.—*Adams v. Williams* (Miss.) 865.

LEVY.

Of assessment, or tax, see Municipal Corporations, §§ 406-495; Schools and School Districts, § 103.

LEWDNESS.

See Miscegenation, § 1.

LEX LOCI.

Conflicting jurisdiction of courts, see Courts, §§ 475-487.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 4. The fact that one making a slanderous statement knew it was untrue is conclusive evidence of malice.—*Phillips v. Bradshaw* (Ala.) 662.

§ 6. A defamatory publication concerning plaintiff *held* libelous per se.—*Hines v. Shumaker* (Miss.) 705.

§ 7. Words imputing larceny are actionable per se.—*Phillips v. Bradshaw* (Ala.) 662.

§ 19. Language on which a case of slander is based must be accepted as ordinarily interpreted by laymen, and, if to the ordinary appre-

hension it charged larceny, it will not be held to constitute a charge of embezzlement, and so establish a variance for the reason only that as a technical charge of larceny the language was defective, or that a charge of embezzlement would have been more appropriate.—*Phillips v. Bradshaw* (Ala.) 662.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 34. No privilege attaches to mere gossip.—*Phillips v. Bradshaw* (Ala.) 662.

§ 41. In determining whether a communication is privileged, the question is whether it is made in good faith in discharge of some duty, or in the honest prosecution of rights, or protection of interest, on one hand, or inspired by ill will on the other.—*Phillips v. Bradshaw* (Ala.) 662.

§ 41. Communications applied to the protection and care of property held privileged on condition that actual or express malice, as distinguished from malice implied by law when a wrongful act is intentionally done, be not shown.—*Phillips v. Bradshaw* (Ala.) 662.

§ 41. Communications by an employer to his superintendent as to the protection and care of property held not actionable if made without express malice.—*Phillips v. Bradshaw* (Ala.) 662.

§ 50½. A privilege is not defeated by the mere fact that the statement is made in the presence of others than the parties immediately interested, or by the fact that the communications are intemperate.—*Phillips v. Bradshaw* (Ala.) 662.

§ 50½. A defamatory publication concerning plaintiff held not privileged.—*Hines v. Shumaker* (Miss.) 705.

§ 50½. A libelous publication issued on a privileged occasion will not be deemed privileged. If the defamatory matter exceeds the exigency of the occasion.—*Hines v. Shumaker* (Miss.) 705.

§ 51. A publication in a newspaper held not to support an allegation of malice of the newspaper company in an action of libel brought thereon.—*Morasca v. Item Co.* (La.) 565.

III. JUSTIFICATION AND MITIGATION.

§ 54. Code 1907, § 3746, held not to preclude defendant from setting up the truth of words as a special defense.—*Schuler v. Fischer* (Ala.) 390.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 77. Two persons jointly charged with the crime of arson may join in a suit based on the slander.—*Madere v. Alexandre* (La.) 535, 537.

§ 94. Special pleas held not to put in issue the truth of slanderous words, or set up facts going to show plaintiff was a thief, and to be bad as a bar to the right of action.—*Schuler v. Fischer* (Ala.) 390.

§ 100. Facts alleged in special pleas held provable under the general issue.—*Schuler v. Fischer* (Ala.) 390.

(C) Evidence.

§ 101. Unless words imputing a crime are privileged, they are presumed to be false and malicious, and no other evidence of malice is necessary.—*Phillips v. Bradshaw* (Ala.) 662.

§ 103. In a suit for words imputing larceny, plaintiff, in addition to the presumption in his favor, may show his good character and the falsity of the charge as proving malice in fact, and as affecting the measure of recovery.—*Phillips v. Bradshaw* (Ala.) 662.

§ 103. A ruling on evidence in a slander case held not a departure from a previous ruling.—*Phillips v. Bradshaw* (Ala.) 662.

§ 109. If a communication repeating an alleged slander was privileged, it should not be weighed against defendant as showing actual malice in the communication on which suit was based.—*Phillips v. Bradshaw* (Ala.) 662.

(D) Damages.

§ 120. A newspaper company commenting in good faith without malice on facts regarding public health or safety held not liable for punitive damages in a libel action based thereon.—*Morasca v. Item Co.* (La.) 565.

§ 121. In an action for libel, a verdict for \$7,500, which the court cut down to \$3,000, held not excessive.—*Hines v. Shumaker* (Miss.) 705.

(E) Trial, Judgment, and Review.

§ 123. A general charge for plaintiff in a slander case held properly refused.—*Phillips v. Bradshaw* (Ala.) 662.

§ 123. The question whether a communication was in good faith and in discharge of some duty or in honest prosecution of rights or protection of interests, on one hand, or inspired by ill will, on the other, is for the jury.—*Phillips v. Bradshaw* (Ala.) 662.

§ 123. The question of damages, in an action for libel, is peculiarly one for the jury.—*Hines v. Shumaker* (Miss.) 705.

§ 124. The privileged character of a communication held not to have been asserted with proper hypothesis in a charge.—*Phillips v. Bradshaw* (Ala.) 662.

§ 124. The privileged character of communications held to have been asserted with proper hypothesis in a charge.—*Phillips v. Bradshaw* (Ala.) 662.

V. SLANDER OF PROPERTY OR TITLE.

§ 140. The action of jactitation cannot be maintained by an intruder who unlawfully enters on property of which another is in actual possession under claim of title, unless plaintiff has remained in undisturbed possession for a year.—*Matthews v. Slattery* (La.) 238.

LICENSES.

Loss by fire of property of licensee on railroad right of way, see Railroads, § 470.

I. FOR OCCUPATIONS AND PRIVILEGES.

Special or local laws, see Statutes, § 81.

§ 7. Act No. 295 of 1908, licensing hawkers and peddlers, held not unconstitutional for nonuniformity.—*Flournoy v. Walker* (La.) 673.

§ 18. Under Code 1907, § 2361, and subdivisions 26 and 27b, a cotton mill company held not required to pay a license tax under subdivision 27b.—*Chinnabee Cotton Mills v. State* (Ala.) 390.

§ 32. A city, after issuing a license to conduct a packing house business, may lay a further license tax upon the business of dealing in green meats by the packing house.—*City of Birmingham v. Armour Packing Co.* (Ala.) 828.

II. IN RESPECT OF REAL PROPERTY.

Grants by municipalities of rights to use street for purposes other than highway, see Municipal Corporations, § 682.

Injuries to licensees on or about railroads, see Railroads, § 282.

LIENS.

Liens acquired by particular remedies or proceedings.

See Garnishment, § 108.

Judgment, see Judgment, §§ 777-783.

Particular classes of liens.

See Maritime Liens; Mortgages, § 154; Pledges.

On logs and lumber, see Logs and Logging, § 28.

LIFE ESTATES.

See Dower; Remainders.

§ 8. Where a will creating a life estate with a vested and contingent remainder in fee was recorded before five years possession by the life tenant as required by Code 1852, § 1290 (Code 1907, § 3385), no act of the life tenant allowing adverse possession could, in view of section 1305, defeat the interest of the remaindermen.—*Blakey v. Du Bose* (Ala.) 748.

LIFE INSURANCE.

See Insurance.

LIGHTS.

See Electricity.

LIMITATION OF ACTIONS.

See Adverse Possession.

Laches, see Equity, §§ 67-70.

Particular actions or proceedings.

See Forcible Entry and Detainer, § 17.

Action by taxpayer to annul special tax election, see Municipal Corporations, § 1000.

Against remaindermen, see Remainders, § 17.

Appeal or other proceedings for review, see Appeal and Error, §§ 337, 345.

Criminal prosecutions, see Criminal Law, § 154.

For new trial, see New Trial, § 117.

To establish and enforce trust, see Trusts, § 365.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) *Accrual of Right of Action or Defense.*

§ 55. Statement when limitation begins to run against action for the overflowing of lands caused by filling land beside a stream.—*Sloss-Sheffield Steel & Iron Co. v. Mitchell* (Ala.) 69.

§ 56. Limitations will not begin to run against a surety's right to reimbursement until after he has paid the debt.—*Smith v. Pitts* (Ala.) 402.

(C) *Personal Disabilities and Privileges.*

§ 72. An heir who was only 15 years old when the interest of a dowress ceased on her death in 1893, was not barred by the 10-year statute from suing for partition in December, 1907.—*Anglin v. Broadnax* (Miss.) 865.

(H) *Commencement of Action or Other Proceeding.*

§ 122. Prescription is not interrupted by the service of citation on Saturday afternoon, a day of public rest, under Acts 1904, No. 3.—*Rady v. Fire Ins. Patrol of New Orleans* (La.) 491.

§ 127. The addition of a count to a complaint will not be deemed the introduction of a new cause of action, where it refers to the same transaction, property, title, and parties as the original, under Code 1907, § 5367, and hence

is not subject to a plea of the statute of limitations.—*Byrd v. Hickman* (Ala.) 426.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 197. In a petitory action, where damages for cutting trees on the land are claimed, evidence held to show that the trees were taken within one year of the date when the suit was brought, so that a prescription of one year is not maintainable.—*Britt v. Caldwell-Norton Lumber Co. (La.)* 251.

LIMITATION OF LIABILITY.

Of carrier in respect to live stock, see Carriers, § 218.

Of telegraph or telephone company for negligence or default in transmission or delivery of message, see Telegraphs and Telephones, § 54.

LIQUIDATION.

In general, see Assignments for Benefit of Creditors; Bankruptcy.

Of corporations in general, see Corporations, §§ 553-566, 592½, 619.

For insurance companies, see Insurance, § 49.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

Notice of pendency of action to foreclose mechanic's lien, see Mechanics' Liens, § 268.

Pendency of other action ground for abatement, see Abatement and Revival, §§ 4-8.

Pendency of other action ground for stay of proceedings, see Action, § 69.

§ 8. Rights of a mortgagee held not affected under the doctrine of lis pendens by pendency at the time of its execution of an action for a mere money demand against the mortgagor.—*J. L. Knox & Co. v. Parker* (Ala.) 438.

LIVE STOCK.

See Animals.

Carriage of, see Carriers, §§ 205, 229.

LOANS.

Interest on, see Interest.

Taxation, see Taxation, § 95.

Usurious loans, see Usury.

LOCAL ACTIONS.

See Venue, §§ 5, 6.

LOCAL ASSESSMENTS.

See Municipal Corporations, §§ 406-495, 525, 586.

LOCAL LAWS.

See Statutes, §§ 75, 90.

LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 25-37.

LOGS AND LOGGING.

Valuation of timber lands for purpose of taxation, see Taxation, § 348.

§ 3. Contract for the sale of standing timber, providing that it shall become void only on noncompliance with a particular stipulation, cannot be annulled for failure to comply with certain accidental stipulations therein.—*Moore v. O'Bannon & Julien* (La.) 253.

§ 3. Vendor of standing timber cannot seek to annul contract on assignment by vendee for noncompliance with accidental stipulations excluded in the contract as a ground for annulment.—*Moore v. O'Bannon & Julien* (La.) 253.

§ 26. Laborers working in a sawmill had a privilege on the lumber in the mill in which they had worked for payment of their wages, which subsisted for 30 days after maturity of the debt, under Act No. 145 of 1888.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 26. The privilege given by Act No. 33 of 1882 to one furnishing money, supplies or labor to deaden, cut, haul, float, or raft logs or timber held not to extend to the timber cut from them.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

LORD'S DAY.

See Sunday.

LOSS.

Causes of loss within insurance policy, see Insurance, §§ 461, 462.
Of goods by carrier, see Carriers, §§ 107-136.
Of profits as element of damages for breach of contract by purchaser, see Sales, § 384.
Of writing as ground for admission of secondary evidence, see Evidence, § 183.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Annexation to real property, see Fixtures.
Dangerous machinery, liability of master for injuries to servant, see Master and Servant, §§ 101, 129, 208.

MAGISTRATES.

See Justices of the Peace.

MAIL AGENTS.

As passengers, see Carriers, §§ 241, 317, 337, 343.

MAIL CARS.

Duty of carrier to heat mail cars, see Carriers, § 290.

MAINTENANCE.

See Champerty and Maintenance.
Separate maintenance of wife, see Husband and Wife, § 298½.

MALICE.

See Malicious Prosecution, §§ 27, 32.
Element of homicide, see Homicide, §§ 156, 158.
Element of libel or slander, see Libel and Slander, § 51.
Presumption of capacity of minor, see Infants, § 2.

MALICIOUS MISCHIEF.

Malicious injury to animals, see Animals, § 45.

MALICIOUS PROSECUTION.

See False Imprisonment.

Wrongful attachment, without malice, see Attachment, §§ 373, 380.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

§ 12. One injured by a search made under a search warrant issued on oath, which is the product of malice, and not supported by probable cause, held entitled to sue in case.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

II. WANT OF PROBABLE CAUSE.

§ 19. Rule as to probable cause for the issuance of a search warrant to search for stolen property stated.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

§ 20. "Probable cause" defined.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

§ 21. That a prosecution was instituted on the advice of an attorney after a fair statement of facts of the prosecution held a defense to an action for malicious prosecution.—*Abingdon Mills v. Grogan* (Ala.) 596.

III. MALICE.

§ 27. "Malice" defined.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

§ 31. Malice in procuring a search warrant may be inferred from the facts attending the procurement of the warrant.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

§ 32. Malice in procuring a search warrant may be inferred from want of probable cause.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

V. ACTIONS.

Application of instructions to evidence, see Trial, § 252.

Argumentative instructions, see Trial, § 240.
Best and secondary evidence, see Evidence, §§ 181, 183.

Conditional admission of testimony as to reputation, see Trial, § 51.

Declarations of conspirators, see Evidence, § 253.

Instructions invading province of duty, see Trial, § 186.

Opinion evidence, see Evidence, § 471.

§ 47. In an action against a corporation for malicious prosecution in which the corporation was charged with instituting the prosecution, the complaint need not allege it was done through its agents acting within the scope of their authority or the names of such agents.—*Abingdon Mills v. Grogan* (Ala.) 596.

§ 50. A complaint for maliciously and without probable cause procuring the issuance of a search warrant held demurrable for omitting the allegation of malice.—*Gulsby v. Louisville & N. R. Co.* (Ala.) 392.

§ 53. In an action for malicious prosecution, the court did not err in excluding all of plaintiff's evidence as to the charge against him where he failed to introduce the affidavit and warrant on which the prosecution was based.—*Engle v. Patterson* (Ala.) 397.

§ 55. In an action for malicious prosecution and false imprisonment for enticing laborers from defendant's mills, defendant could show under the general issue that, before the deputy sheriff who arrested plaintiff made the affidavit for his arrest, he consulted a reputable practicing attorney and made a full and fair statement of the facts tending to show plaintiff's guilt.—*Abingdon Mills v. Grogan* (Ala.) 596.

§ 56. One suing for the issuance of a search warrant without probable cause, and maliciously, *held* to have the burden of proving malice and want of probable cause.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 58. In an action against a corporation for malicious prosecution, certain evidence *held* admissible as bearing on the question whether the deputy sheriff arresting plaintiff was acting as defendant's agent.—Abingdon Mills v. Grogan (Ala.) 596.

§ 61. In an action for malicious prosecution, the grand jury's docket entry showing no bill was admissible to show the termination of the prosecution.—Abingdon Mills v. Grogan (Ala.) 596.

§ 63. The bad reputation of one suing for the issuance, without probable cause, and maliciously, of a warrant to search his premises for property alleged to have been stolen by him, *held* entitled to consideration on the question of damages, but not on the right of action.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 64. The fact that a search warrant was returned "no property found" *held* to establish *prima facie* that accused did not steal the property.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 64. In an action for malicious prosecution, the numbers of the charges on the grand jury's docket were *prima facie* sufficient to identify the charges under investigation by the grand jury.—Abingdon Mills v. Grogan (Ala.) 596.

§ 68. In an action for issuing a search warrant without probable cause, and maliciously, a charge on exemplary damages *held* properly refused.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 68. Rule as to punitive damages stated.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

§ 71. In an action for the issuance of a search warrant without probable cause, and maliciously, evidence *held* to justify the submission to the jury of the issue of probable cause.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 71. Where the facts are undisputed, probable cause *vel non* is a question of law.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 71. In an action for malicious prosecution, whether defendant made a full and fair statement of the facts to an attorney for instituting the prosecution is a question for the jury; the facts stated to the attorney being detailed.—Abingdon Mills v. Grogan (Ala.) 596.

§ 71. Issues as to good faith in consulting counsel, and probable cause generally, are for the determination of the jury.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

§ 71. In an action for malicious prosecution, the question whether defendant had made a full and fair statement of the facts to counsel was one for the jury.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

§ 72. In an action for the issuance of a search warrant without probable cause, and maliciously, an instruction *held* to properly submit the issue of malice.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 72. In an action for the issuance of a search warrant without probable cause, and maliciously, an instruction *held* to properly submit the issue of probable cause.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 72. In an action for malicious prosecution, an instruction *held* proper.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

§ 72. In an action for malicious prosecution, a requested instruction *held* properly re-

fused.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

MALPRACTICE.

By physician or surgeon, see Physicians and Surgeons, §§ 15, 18.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

§ 4. Mandamus does not lie to review refusal to dismiss a cause, or reinstate a dismissed cause; appeal being the proper remedy.—Ex parte Smith (Ala.) 895.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 112. Under Code 1906, § 3317, mandamus *held* not to be issued to compel levy of tax beyond statutory limit.—Town of Jonestown v. Ganong (Miss.) 579.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

Grounds for setting aside default judgment, see Judgment, § 143.

Judgment against officers in proceedings against city, see Municipal Corporations, § 1037.

Persons concluded by judgment, see Judgment, § 702.

Pleadings to sustain default judgment, see Judgment, § 101.

§ 162. On motion to quash an alternative writ of mandamus, matters stated in the motion or in respondent's brief cannot be considered if not found in the alternative writ.—State v. Atlantic Coast Line R. Co. (Fla.) 4.

§ 164. Overruling of objection to filing of return to alternative mandamus after overruling of exceptions *held* proper.—State ex rel. Martin v. Webster Parish School Board (La.) 553.

§ 172. Under allegations of a petition for mandamus, the court *held* to have no power to order levy of taxes solely for the purpose of paying former judgment.—Town of Jonestown v. Ganong (Miss.) 579.

§ 176. Under Code 1906, § 339, the court in mandamus proceedings *held* authorized to require municipal authorities to issue a warrant to pay a prior judgment, as required by section 3379, such warrant to have priority over other debts.—Town of Jonestown v. Ganong (Miss.) 579.

MANDATE.

See Mandamus.

MARITAL RIGHTS.

See Husband and Wife.

MARITIME LAW.

See Maritime Liens; Shipping.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) Under Maritime Law.

§ 11. The lien and remedy given by Code 1906, §§ 3085-3087, on water craft, *held* not to abrogate common-law lien, carrying right to hold the property till charges are paid.—Kornosky v. Hoyle (Miss.) 481.

MARITIME TORTS.

Liabilities of vessels and owners in general, see Shipping, § 84.

MARRIAGE.

See Divorce; Husband and Wife; Miscegenation.

Presumption of capacity of minor, see Infants, § 2.

§ 37. While plaintiff may have consented to marry defendant from fear, having failed thereafter to protest, he would be held to have consented.—*Boutterie v. Demarest* (La.) 492.

§ 37. Marriage cannot be invalidated on allegation of violence or threats, where plaintiff ratified the marriage by cohabiting with defendant.—*Boutterie v. Demarest* (La.) 492.

§ 40. A marriage solemnized in due form of law is presumed valid; the burden of showing the invalidity of the marriage being upon the person attacking it.—*Sullivan v. Grand Lodge, K. P.* (Miss.) 360.

§ 40. The presumption of the validity of a marriage solemnized according to law is superior to the presumption of life.—*Sullivan v. Grand Lodge, K. P.* (Miss.) 360.

§ 58. A marriage is properly annulled, where consent of complainant was procured by violence or threats.—*Quealy v. Waldron* (La.) 479.

§ 60. Whether the violence or threats employed in inducing a marriage were of such a nature as to inspire a just fear of great bodily harm is a question of fact for the jury.—*Quealy v. Waldron* (La.) 479.

MARRIED WOMEN.

See Husband and Wife.

MARSHALING ASSETS AND SECURITIES.

Of firms and partners, see Partnership, § 183.

MASTER AND SERVANT.

Authority of servant to give warning against trespass, see Trespass, § 81.

Employers liability insurance, see Insurance, §§ 177, 383, 512, 565.

Implied liabilities for services rendered not in performance of duties of employment, see Work and Labor.

Injuries to employes of others carried under contract with carrier, see Carriers, § 241.

Judicial notice of duty of railroad section master, see Evidence, § 20.

I. THE RELATION.

(A) Creation and Existence.

Employment of agents, see Principal and Agent, § 24.

Relation as master and servant or landlord and tenant, see Landlord and Tenant, § 323.

II. SERVICES AND COMPENSATION.

(A) Performance of Services.

Restraining breach of contract, see Injunction, § 60.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Statutory actions for death, see Death, §§ 98, 99.

(A) Nature and Extent in General.

§ 96. A master held not liable for the injury to a servant occasioned by the wrongful act of a

third person.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§ 96. A master held as a matter of law free from actionable negligence causing the death of a servant.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§ 96. A servant employed to operate cars on an incline from the ground to the top of a furnace of an iron manufacturing plant, held not required to anticipate that strangers would meddle with the machinery and attempt to operate a car on the incline.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

(B) Tools, Machinery, Appliances, and Places for Work.

§ 101. Duty of the master to furnish a servant with safe machinery and suitable instrumentalities stated.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§§ 101, 102. That a master has omitted to provide means to avoid injury to a servant held not to make him responsible, in the absence of proof of actionable negligence.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§§ 101, 102. Under employer's liability act (Code 1907, § 3910), that a servant was injured while doing what his contract required him to do, held not to charge liability upon the employer.—*Walton v. Tennessee Coal, Iron & R. Co.* (Ala.) 323.

§§ 101, 102. A master, though not an insurer of the safety of his servant, must use ordinary care to furnish a safe place.—*Hebert v. Kingston Lumber Co.* (La.) 1021.

§ 103. The duty to furnish a safe place to work cannot ordinarily be delegated to fellow servants.—*Alabama & V. Ry. Co. v. Groome* (Miss.) 703.

§ 107. The duties of a master to his servants repairing the ways, works, or machinery of the plant held not the same as the duties he owes to a servant using such ways, works, machinery, etc., after their construction or repair.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§ 107. Under employer's liability act (Code 1907, § 3910, subds. 1, 2), where an employé was injured while repairing a switch, that there was a defect in the switch held not attributable to any breach of defendant's duty at the particular time.—*Walton v. Tennessee Coal, Iron & R. Co.* (Ala.) 323.

§ 116. Under Employer's Liability Act (Code 1907, § 3910) subd. 1, a ladder held a part of the master's plant.—*Grasselli Chemical Co. v. Davis* (Ala.) 85.

§ 128. An employer held not negligent for not having keyed a pulley on a shafting which turned when plaintiff grabbed it to keep from falling while walking across the shafting in the course of his work; the shafting and pulley not having been provided for use in the manner in which they were used by plaintiff.—*Kreye v. Longville Long Leaf Lumber Co.* (La.) 1018.

§ 129. In an action for injuries to an employé in a sawmill, the negligence of a sawyer held the juridical cause of the injury.—*Lee v. Powell Bros. & Sanders Co.* (La.) 214.

(C) Methods of Work, Rules, and Orders.

§ 137. An engineer and conductor of a logging train held negligent, rendering the company liable for injuries to a brakeman resulting therefrom.—*Williams v. W. R. Pickering Lumber Co.* (La.) 167.

§ 141. A railroad superintendent held negligent in not making rules for the safe operation of a switch.—*Williams v. W. R. Pickering Lumber Co.* (La.) 167.

(D) Warning and Instructing Servant.

§ 150. Duty of master to notify servant of defects or risks of which the servant is ignorant stated.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

(E) Fellow Servants.

§ 159. An injury to a servant resulting from the negligence of a fellow servant not within the line of the employment, or within employer's liability act (Code 1896, § 1749 et seq.), does not render the master liable.—Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.

§ 168. A master owes his servant the duty to employ competent and careful fellow servants.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 88.

§ 179. Effect of employer's liability act (Code 1907, §§ 3910-3913), stated.—Boggs v. Alabama Consol. Coal & Iron Co. (Ala.) 878.

§ 180. A servant held engaged in and about the operation of a railway, within the employer's liability act (Code 1907, § 3910), at the time he sustained an injury.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 180. Employer's liability act (Code 1907, §§ 3910-3913), held not to bar recovery for the negligence of defendant's engineer, though the engineer and intestate were not fellow servants.—Boggs v. Alabama Consol. Coal & Iron Co. (Ala.) 878.

§ 180. Employer's liability act (Code 1907, §§ 3910-3913) construed as affecting fellow servants in the employ of a railroad company.—Boggs v. Alabama Consol. Coal & Iron Co. (Ala.) 878.

§ 198. One who is engineer, foreman, and conductor on a logging train held not a fellow servant of the brakeman.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

(F) Risks Assumed by Servant.

§ 203. Where a master has done everything that the law requires him to do to maintain the safety of his servant, he is not liable for any risk which the employment involves.—Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.

§ 208. A servant repairing the ways, works, and machinery of the plant of the master held to assume the risks incident to the work.—Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.

§ 208. The risk relative to furnishing a safe place to work is not ordinarily assumed.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 213. A servant held not entitled to recover for injuries under the rule that a servant selecting an improper and dangerous route assumes the risk of resulting injury.—Kreye v. Longville Long Leaf Lumber Co. (La.) 1018.

§ 216. Assumption of risk by servant under common law, stated.—Boggs v. Alabama Consol. Coal & Iron Co. (Ala.) 878.

§ 216. A brakeman on a train held not to assume the risk of the negligence of the engineer and conductor.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

§ 226. Failure of the master to warn and instruct a young and inexperienced employé held not a danger ordinarily incident to the service.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 226. A brakeman on a train held not a fellow servant of the conductor, who also acted as engineer, and did not assume the risk of his negligence.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

(G) Contributory Negligence of Servant.

Contributory negligence of parents, see Parent and Child, § 7.

§ 228. Under Code 1907, § 3910, a master is not relieved of responsibility for injuries to a servant from defects in the plant, unless the servant has knowledge of the defect or it is obvious to the senses.—Grasselli Chemical Co. v. Davis (Ala.) 85.

§ 229. A servant is bound to use ordinary care for his own protection.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

§ 238. A servant held not negligent in adopting in good faith the more hazardous method of work, and the method pursued was one which prudent persons would adopt, or he was reasonably prudent in adopting it.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

§ 238. A servant held negligent in attempting to cross between beams on a greased shafting extending between the beams.—Kreye v. Longville Long Leaf Lumber Co. (La.) 1018.

§ 240. Certain acts of a switchman held not so obviously dangerous as to be manifestly inconsistent with safe railroad operation.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

§ 240. A brakeman riding on a skeleton car of a logging train was not negligent in failing to guard against a sudden emergency stop of the train.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

§ 240. Where a position occupied by a brakeman on a car would be safe under ordinary circumstances, he is not negligent in assuming such position.—Williams v. W. R. Pickering Lumber Co. (La.) 167.

§ 245. A servant, injured by a machine, held negligent, precluding a recovery.—Lowe Mfg. Co. v. Payne (Ala.) 447.

§ 245. A servant obeying an order of his master or foreman held relieved from the imputation of contributory negligence.—Lee v. Powell Bros. & Sanders Co. (La.) 214.

§ 245. An employé injured while obeying an order of the foreman held not guilty of contributory negligence.—Lee v. Powell Bros. & Sanders Co. (La.) 214.

(H) Actions.

Action by parent for injury to child, see Parent and Child, § 7.

Argumentative instructions, see Trial, § 240.

Documentary evidence, see Evidence, § 355.

Exclusion of evidence as res inter alios acta, see Evidence, § 130.

Grounds for demurrer, see Pleading, § 193.

Hearsay evidence, see Evidence, § 317.

Instructions excluding or ignoring evidence, see Trial, § 253.

Instructions on weight of evidence, see Trial, § 194.

Pleading matters available under general issue, see Pleading, § 136.

Res gestæ, see Evidence, § 128.

§ 256. In an action for injuries to a servant, what the complaint should show stated.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 88.

§ 250. In an action for injuries to a servant, a petition held not objectionable for failure to negative warning or facts raising an inference of assumed risk.—Hebert v. Kingston Lumber Co. (La.) 1021.

§ 258. A count in a complaint for injuries to a servant, framed on subdivision 1, employer's liability act (Code 1907, § 3910), alleging failure to furnish appliances, is insufficient, since it fails to aver any defects within the meaning of the statute.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 88.

§ 262. A plea, in an action for injuries to a servant, setting up contributory negligence, held insufficient.—Grasselli Chemical Co. v. Davis (Ala.) 85.

§ 262. A plea of negligence in an action for injuries to a servant *held* sufficient.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 263. In an action for injuries to a servant, a replication to a plea setting up the defense under Employer's Liability Act, Code 1907, § 3910, *held* sufficient on demurrer.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 264. Where the negligence counted on in the complaint in an action for injury to a servant was the proximate cause of the injury, the fact that other negligence of the master or of a fellow servant concurred in producing the injury did not prevent a recovery.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 264. Where the complaint in an action under the employer's liability act (Code 1896, §§ 1749, 1751) for the death of an employe alleges several defects, all the defects must be proved.—*Tobler v. Pioneer Mining & Mfg. Co.* (Ala.) 86.

§ 265. The maxim "*res ipsa loquitur*" *held* to apply as between master and servant, subject to certain limitations.—*Alabama & V. Ry. Co. v. Groome* (Miss.) 703.

§ 270. In an action for injuries to a servant, an objection to a question as to the position of the ladder from which plaintiff fell *held* properly sustained.—*Grasselli Chemical Co. v. Davis* (Ala.) 35.

§ 270. Evidence that boys had access to a railroad yard, and that mischievous persons had meddled with cars, is inadmissible to show lack of due care of a railroad company, in providing safe appliances.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 270. The usual conduct of employes in the ordinary operation of trains is not wholly inadmissible or irrelevant upon a question of the diligence required in the business.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 271. In an injury action by a servant, certain evidence *held* not to show incompetency of another servant who had made repairs on an engine which caused plaintiff's injury.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 271. In an injury action by a servant, certain evidence *held* properly excluded as incompetent.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 274. In an action for injuries to a servant, evidence of plaintiff as to the condition of certain auxiliaries to be used to prevent such an injury *held* admissible.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 276. In a servant's action for injuries sustained by falling from a shafting while walking thereon from one beam to another, evidence *held* to show that plaintiff slipped from the shafting before he attempted to catch hold of a pulley wheel thereon, which turned and caused him to fall.—*Kreye v. Longville Long Leaf Lumber Co.* (La.) 1018.

§ 278. In a personal injury action by a servant, evidence *held* insufficient to show master's negligence.—*Tennessee Coal, Iron & R. Co. v. Harnes* (Ala.) 827.

§ 278. In action for injuries to servant, caused by alleged defective machinery, evidence *held* to show that it was caused by a latent defect, for which an employer was not responsible.—*Will v. Salmen Brick & Lumber Co.* (La.) 853.

§ 278. A platform over revolving machinery *held* dangerous, and that defendant was negligent in permitting it to remain so.—*Hebert v. Kingston Lumber Co.* (La.) 1021.

§ 279. A single accident *held* not to show a master's neglect in employing a servant or in

failing to acquire knowledge of his incompetency.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

§ 285. Whether the negligence counted on in the complaint in an action for injury to a servant was the proximate cause of the injury *held* for the jury.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 285. Under employer's liability act (Code 1907, § 3910, subds. 1, 2), *held*, under plaintiff's evidence, there was nothing to take the case to the jury.—*Walton v. Tennessee Coal, Iron & R. Co.* (Ala.) 328.

§ 286. In an action for injuries to a brakeman, certain evidence *held* not to authorize an affirmative charge for defendant.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 286. In an action under Employer's Liability Act, Code 1907, § 3910, subd. 1, for injuries to a servant by a defect in the machinery, evidence *held* to require the submission of the issue of negligence to the jury.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 286. Where a case was tried on counts alleging several defects in the ways, works, and machinery of the defendant, and all but one defect was unsupported by evidence, a general affirmative charge on the whole case should have been given.—*Tennessee Coal, Iron & R. Co. v. Harnes* (Ala.) 827.

§ 288. A servant injured by a defective platform over certain machinery *held* not to have assumed the risk as a matter of law.—*Hebert v. Kingston Lumber Co.* (La.) 1021.

§ 289. In an action under Employer's Liability Act, Code 1907, § 3910, subd. 1, for injuries to a servant by a defect in the machinery, evidence *held* to require the submission to the jury of the issue of contributory negligence.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 289. Whether a brakeman, injured by the sudden stopping of a logging train without notice, was negligent in riding in an unsafe position *held* a question for the jury.—*Williams v. W. R. Pickering Lumber Co.* (La.) 167.

§ 291. In an action for injuries to a brakeman, instructions as to liability, where the car causing the injury was placed where it was by persons unknown, *held* properly refused.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 291. A charge, in an action for injuries to a brakeman, failing to hypothesize that the negligence alleged on the part of plaintiff was the proximate cause of the injury, is properly refused.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 293. An instruction, in an action for injuries to a servant, as to the negligence of the servant whose duty it was to make repairs, *held* properly refused.—*Grasselli Chemical Co. v. Davis* (Ala.) 35.

§ 296. In an action for injuries to a servant, an instruction on contributory negligence, which failed to hypothesize that the servant's negligence proximately contributed to the injury, was properly refused.—*Woodward Iron Co. v. Sheehan* (Ala.) 24.

§ 296. In an action for injuries to a brakeman, an instruction on contributory negligence *held* properly refused.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 296. In an action for injuries to a brakeman, an instruction as to his duty to select a safe place to ride *held* properly refused.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 296. An instruction in an action for injuries to a brakeman *held* to place too high a degree of care on the brakeman to look out for obstructions.—*Louisville & N. R. Co. v. Elliott* (Ala.) 28.

§ 296. In an action for injuries to a servant, a charge that an act of the servant was, as a matter of law, negligent, was properly refused, where the evidence showed that the act could be safely done.—Alabama Steel & Wire Co. v. Thompson (Ala.) 75.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Assault on convict, see Convicts, § 10.

(A) Acts or Omissions of Servant.

Injuries to persons on railroad tracks, see Railroads, § 391.

§ 301. One held a servant of an independent contractor.—Woodward Iron Co. v. Brown (Ala.) 829.

§ 302. The master is not responsible in damages for injuries inflicted by his servant, unless the servant be at the time acting within the scope of his employment.—Johnson v. Alabama Fuel & Iron Co. (Ala.) 312.

§ 302. The act of a section master and section hands in setting out a fire on the railroad right of way held one within the scope of their authority, for which the railroad company was liable.—Alabama & V. Ry. Co. v. Baldwin (Miss.) 358.

(C) Actions.

Misjoinder of causes of action, see Action, § 50.

§ 325. The liability of a master for an assault by a servant while acting within the scope of his employment held in case and not in trespass.—Southern Ry. Co. v. Hanby (Ala.) 334.

§ 329. Defendant held not liable for an injury to an employé of an independent contractor.—Woodward Iron Co. v. Brown (Ala.) 829.

§ 332. In an action for trespass and assault by defendant's alleged servant, whether the servant's acts were within the line of his employment and scope of his authority, held for the jury.—Scipio v. Pioneer Mining & Mfg. Co. (Ala.) 43.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

(A) Civil Liability.

§ 339. Defendant insurance company held liable for resulting damages from wrongfully and maliciously inducing plaintiff insurance company's agent to leave its employment and enter their own employment for the purpose of injuring plaintiff's business.—Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co. (Miss.) 454.

(B) Criminal Responsibility.

§ 343. To convict for enticing away a servant or laborer under Code 1907, § 6850, such servant or laborer must have been under contract of employment.—Abingdon Mills v. Grogan (Ala.) 596.

§ 343. Code 1907, § 6849, making it a crime to entice away any servant, etc., held to include cotton mill laborers, notwithstanding section 6850.—Abingdon Mills v. Grogan (Ala.) 596.

MASTERS IN CHANCERY.

See Equity, § 404.

MATERIALITY.

Of evidence, see Criminal Law, § 383.
Of testimony as element of perjury, see Perjury, § 11.

MATERIALS.

Liens on real property for materials furnished, see Mechanics' Liens.

MATURITY.

Of principal, as fixing time from which interest runs, see Interest, § 45.

MAXIMS.

Of equity, see Equity, § 68.

MEASURE OF DAMAGES.

See Damages, §§ 98, 125.

For overflow, see Waters and Water Courses, § 178.

In detinue, see Detinue, § 19.

MECHANICS' LIENS.

Liens for construction and repair of vessels, see Maritime Liens.

III. PROCEEDINGS TO PERFECT.

§ 116. A mechanic's lien is not acquired, unless the requirements of the statute are substantially complied with.—De Soto Nat. Bank v. Arcadia Electric Light, Ice & Telephone Co. (Fla.) 612.

§ 122. Notice by subcontractor of lien held insufficient.—De Soto Nat. Bank v. Arcadia Electric Light, Ice & Telephone Co. (Fla.) 612.

§ 136. Where no lien was claimed on the lot on which a building was erected but on the building only, a statement failing to sufficiently describe the lot was immaterial.—Robinson v. Crotwell Bros. Lumber Co. (Ala.) 733.

§ 137. It is not necessary to the perfecting of a mechanic's lien that the statement set out the nature and extent of the owner's title, nor that the nature and extent of the alleged owner's interest be proved.—Laverne v. Evans Bros. Const. Co. (Ala.) 318.

§ 137. In proceedings to enforce a mechanic's lien against an administrator, the administrator held properly described as owner of the premises.—Laverne v. Evans Bros. Const. Co. (Ala.) 318.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§ 168. Under Code 1907, §§ 4754-4784, a lien attaches from commencement of the building or improvements, subject to be defeated if the claim be not verified and filed within the prescribed time.—Laverne v. Evans Bros. Const. Co. (Ala.) 318.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(B) Bond or Deposit to Prevent or Discharge Lien.

§ 229. A materialman, under Act No. 134 of 1906, who has not filed a sworn statement of his claim and caused it to be recorded, as required by section 1, par. 3 of the act, has no cause of action against the owner.—Louisiana Glass & Mirror Works v. Irwin (La.) 765.

§ 229. Under Act No. 134 of 1906, an owner in default, not exacting bond and surety from the contractor, is not bound personally as under Act No. 180 of 1894, as amended by Act No. 123 of 1896, but only to the same extent as the surety would have been, and the surety is not bound except as to claims duly recorded within the legal delay.—Louisiana Glass & Mirror Works v. Irwin (La.) 765.

VII. ENFORCEMENT.

Against administrator, see Executors and Administrators, § 443.

Conditions precedent to action on common counts, see Work and Labor, § 19.

§ 268. Under Code 1906, § 3058, construed with sections 3148 and 3151, a *lis pendens* notice must be given in mechanic's lien proceedings against realty in order to affect bona fide purchasers thereof for value without actual notice of such proceedings.—*McKenzie v. Fellows* (Miss.) 628.

§ 271. A bill to foreclose a mechanic's lien failing to allege that the material was used in the building *held* demurrable.—*Robinson v. Crotwell Bros. Lumber Co.* (Ala.) 733.

§ 271. A bill to foreclose a materialman's lien *held* demurrable for failure to allege the filing of a statement required by Acts 1900-01, p. 2118, § 2, in the office of the judge of probate within four months after the indebtedness accrued.—*Robinson v. Crotwell Bros. Lumber Co.* (Ala.) 733.

§ 271. A bill claiming a lien on the building, while the notice claimed a lien on the lots, and showing a variance between the notice and the duplicate accounts furnished under Acts 1900-01, p. 2117, *held* fatally defective.—*Robinson v. Crotwell Bros. Lumber Co.* (Ala.) 733.

§ 277. In a suit to foreclose a mechanic's lien, certain variances between the pleading and the proof *held* fatal.—*J. C. McGrew & Sons v. Earnest* (Ala.) 639.

§ 280. In proceedings to enforce a mechanic's lien, certain evidence *held* admissible for certain purposes only, under Code 1907, § 3970.—*Lavergne v. Evans Bros. Const. Co.* (Ala.) 318.

§ 304. Scope of relief of one seeking to enforce a mechanic's lien, stated.—*Lavergne v. Evans Bros. Const. Co.* (Ala.) 318.

MEDICAL EXPERTS.

Testimony, see Evidence, §§ 545, 553.

MEDICAL JURISPRUDENCE.

See Physicians and Surgeons.

MEDICINES.

In general, see Poisons.

MEDIUM OF PAYMENT.

In general, see Payment, § 24.

MEMBERS.

Of corporations, in general, see Corporations, §§ 220-282.

Of firms, see Partnership.

MEMORANDA.

Competency as evidence, see Evidence, § 355. Required by statute of frauds, see Frauds, Statute of, §§ 106, 115.

MENTAL CAPACITY.

See Insane Persons.

Affecting responsibility for crime, see Criminal Law, § 48.

Evidence in criminal prosecutions, see Criminal Law, §§ 331, 354.

Opinion evidence, see Criminal Law, § 452.

To make will, see Wills, § 55.

MENTAL SUFFERING.

Element of damages, evidence, see Damages, § 178.

Element of damages for trespass, see Trespass, § 47.

MERGER.

Of contracts, see Contracts, § 245.

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Transmission and delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 54-69.

MILK.

See Food, § 14.

Regulation as to sale of milk and of substitutes or imitations thereof, see Food.

MILLING PRIVILEGES.

Discrimination by carriers as to lumber in transit, see Carriers, § 13.

Stoppage of lumber in transit, see Carriers, § 11.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§ 62. "A mining contract" construed.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

§ 68. A mining contract *held* to involve an implied obligation upon the lessors to make reasonable effort to find phosphate rock upon the land.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

§ 70. "A mining contract" construed.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

§ 70. Where the purpose of a contract is the mining of phosphate rock, a failure upon proper endeavor to find the rock *held* a good defense in an action for royalties.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

§ 70. In an action for royalties under a mining contract, certain matters *held* matters of defense.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

MINORS.

See Infants.

MISAPPROPRIATION.

See Embezzlement.

MISCEGENATION.

Inheritance by child of woman slave and white man, see Bastards, § 102.

§ 1. An octoroon is not "a person of the negro or black race" within Act No. 87 of 1906, § 1.—*State v. Treadaway* (La.) 500.

MISCONDUCT.

See Contempt.

Of counsel at trial, see Criminal Law, §§ 699, 730.

Of trial judge, see Criminal Law, § 655.

MISDELIVERY.

Of goods by carrier, see Carriers, § 94.

MISJOINDER.

Multifariousness in bill in equity, see Equity, §§ 147-149.

Of causes of action, see Action, §§ 38, 50.

MISREPRESENTATION.

See Fraud.

Affecting validity of contract of sale, see Vendor and Purchaser, § 33.

Affecting validity of deed, see Deeds, § 70.

Affecting validity of insurance policy, see Insurance, §§ 281, 282.

MISTAKE.

Ground for revision of probate decree, see Executors and Administrators, § 509.

In name of juror, see Jury, § 144.

MITIGATION.

Of damages, see Damages, § 62.

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See Miscegenation.

MONEY.

Compensation for use, see Interest.

Deposits, see Banks and Banking, §§ 119-148; Depositories.

Embezzlement, see Embezzlement.

MONEY LENT.

Bill or note given for loan of money, see Bills and Notes.

Interest on loans, see Interest.

Usurious loans, see Usury.

MONOPOLIES.**II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.**

Contracts, in restraint of trade, see Contracts, § 116.

MORTGAGES.

Pendency of action against mortgagor as affecting rights of mortgagee, see Lis Pendens, § 3.

Mortgages by or to particular classes of persons. See Husband and Wife, § 137; Partnership, §§ 161, 183.

Mortgages of particular species of, or estates or interest in, property.

See Homestead, § 171.

Community or separate property, see Husband and Wife, § 287.

Decedent's estate, see Executors and Administrators, § 151.

Personal property in general, see Chattel Mortgages.

Separate property of married women, see Husband and Wife, § 187.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances as Security.**

§ 1. If an instrument is a mortgage when executed, its character does not afterwards change.—Connor v. Connor (Fla.) 727.

§ 32. A deed absolute on its face may by parol be shown to be a mortgage.—Connor v. Connor (Fla.) 727.

§ 82. Where an agreement that a conveyance is an absolute conveyance is inconsistent with the facts, such agreement does not make absolute a conveyance that under Gen. St. 1906, § 2494, may be shown to have been executed to secure the payment of money.—Connor v. Connor (Fla.) 727.

§ 33. An express provision that a contract to reconvey is not to be regarded as evidence that the conveyance was intended as a mortgage held not conclusive, where not consistent with the entire transaction.—Connor v. Connor (Fla.) 727.

(B) Form and Contents of Instruments.

§ 42. An instrument will be held a mortgage whatever its form, if it appears to have been given to secure payment of money.—Connor v. Connor (Fla.) 727.

(C) Execution and Delivery.

Allegation of acknowledgment in indictment for larceny of mortgage, see Larceny, § 30.

III. CONSTRUCTION AND OPERATION.**(C) Property Mortgaged, and Estates of Parties Therein.**

§ 137. A mortgagee acquires only a specific lien on the property described in the mortgage, under Gen. St. 1906, § 2494.—Connor v. Connor (Fla.) 727.

(D) Lien and Priority.

§ 154. Corporation's occupancy of certain land, the title to which was in the name of another, who mortgaged it to defendant, held not notice to mortgagee of the rights of the corporation, if any.—Francis v. Jefferson County Savings Bank (Ala.) 906.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 338. A foreclosure sale will not be enjoined to give the mortgagor the benefit of a set-off of an unliquidated demand against the mortgagee.—Caldwell v. Caldwell (Ala.) 323.

X. FORECLOSURE BY ACTION.**(A) Nature and Form of Remedy.**

§ 380. Nature of mortgagee's interests stated at common law and under the statute.—Connor v. Connor (Fla.) 727.

(B) Right to Foreclose and Defenses.

§ 410. A holder of junior mortgages held entitled to institute foreclosure proceedings and to obtain a receiver, though in possession.—Albritton v. Lott-Blacksher Commission Co. (Ala.) 653.

(G) Injunction and Receiver.

§ 468. Where a mortgagor is insolvent and the property insufficient to pay the mortgage, or the rents are in danger of being wholly lost, a receiver may be appointed to intercept them.—Albritton v. Lott-Blacksher Commission Co. (Ala.) 653.

(J) Sale.

§ 536. Under facts stated, a mortgagee purchasing at his own sale held not a bona fide purchaser.—Gewin v. Shields (Ala.) 887.

§ 544. Where, after the purchaser at foreclosure had been placed in possession, he was ousted under a subsequent judgment in forcible entry and detainer, his right to possession could not be determined on a subsequent writ of assistance.—Leach v. Rosebrook (Ala.) 521.

XI. REDEMPTION.

§ 591. The right of redemption from a mortgage is to satisfy and remove the lien.—Connor v. Connor (Fla.) 727.

§ 614. Under Code 1906, § 3092, the title of a mortgagee is complete, either upon obtaining and holding actual possession after condition broken, or the receipt of the rents for the statutory period, and that possession of the prop-

erty was surrendered by only a part of the mortgagors was immaterial, in absence of fraud.—*Garrett v. Ellis* (Miss.) 451.

§ 621. A mortgagee, in a suit by the mortgagor to redeem, *held* not entitled to complain of the decree awarding redemption.—*McIntosh v. Cooper* (Ala.) 431.

MOTHER.

See Parent and Child.

MOTIONS.

Review of questions of fact, see Appeal and Error, § 1024.

For particular purposes or relief.

See Injunction, §§ 143, 148.

Continuance, see Criminal Law, § 603.

Direction of verdict, see Trial, §§ 169-171.

Dismissal of appeal or writ of error, see Appeal and Error, §§ 797, 801.

New trial, see New Trial, §§ 117-162.

Quashing mandamus, see Mandamus, § 162.

Quashing or setting aside indictment or information, see Indictment and Information, § 139.

Quashing venire, see Jury, §§ 116, 117.

Recall of execution, see Execution, § 163.

Recommitment of report to referee, see Reference, § 101.

Relating to pleadings, see Pleading, §§ 356, 362.

Striking out evidence, see Criminal Law, § 696; Trial, §§ 89, 91.

Vacation or dissolution of injunction, see Injunction, § 172.

MOTIVE.

Evidence of, in civil actions, see Evidence, § 151.

Evidence of, in criminal prosecutions, see Homicide, § 166.

MOTOR VEHICLES.

On streets, liabilities for injuries, see Municipal Corporations, § 705.

MULTIFARIOUSNESS.

In bill in equity, see Equity, §§ 147-149.

MULTIPLICITY OF SUITS.

Avoidance ground of jurisdiction in equity, see Quietting Title, § 5.

MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, §§ 29, 154.

Conclusiveness, as against officers, citizens, or taxpayers, of judgment against municipality, and vice versa, see Judgment, § 702.

Drainage or reclamation districts, see Drains, § 18.

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Mandamus to municipalities and municipal officers, see Mandamus, § 112.

Municipal courts, jurisdiction and procedure in civil actions, see Courts, § 189.

Notice of intention to apply for legislation affecting city, see Statutes, § 87½.

Street railroads, see Street Railroads.

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I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

§ 1. Municipalities are legal entities, established for local governmental purposes.—*Waller v. Osban* (Fla.) 970.

(B) Territorial Extent and Subdivisions. Annexation, Consolidation, and Division.

Quo warranto to test validity of extension of corporate limits, see Quo Warranto, § 8. Special or local laws, see Statutes, §§ 75, 90.

§ 33. Proceedings for the extension of the boundaries of a city under Code 1907, § 1072, *held* not invalid for failure of the order declaring the result of the election to recite that it was entered under the provisions of the article containing such section.—*State v. City of Birmingham* (Ala.) 461.

§ 33. Proceedings to annex territory to a city *held* not invalid because of an alleged variance between the description of the territory in the published notice and in the papers in the case.—*State v. City of Birmingham* (Ala.) 461.

§ 35. Where the territory of a city is added to another city, the original city ceases to exist, and the territory becomes subject to the power of the city to which it is added.—*State v. City of Birmingham* (Ala.) 461.

§ 36. The remedy of a holder of the bonds of a city merged into another city, whose general credit is not equivalent to the security contracted for *held* to consist of an application to the courts.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

Special laws, see Statutes, §§ 80, 90.

Statute operating to destroy municipality as deprivation of property without due process of law, see Constitutional Law, § 278.

§ 44. The charter of a municipal corporation is conferred for political purposes, and the power to alter municipal charters exists without limitation in the state.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

§ 49. The charter of a municipal corporation is conferred for political purposes, and the power to repeal municipal charters exists without limitation in the state.—*City of Ensley v. Simpson* (Ala.) 61; *Robinson v. City of Ensley* (Ala.) 69.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

Delegation to municipalities of power to control traffic in intoxicating liquors, see Intoxicating Liquors, § 10.

§ 57. General rules as to governmental powers of municipalities stated.—*Waller v. Osban* (Fla.) 970.

§ 58. Municipalities act under limited powers, and must find their authority clearly given in the law, and, when so found, they must follow the law.—*Alabama & V. Ry. Co. v. Turner* (Miss.) 261.

§ 60. Under Code 1906, § 3316, the mayor and board of aldermen *held* vested with as complete authority over the property and finances of the city as the Legislature is over the property and finances of the state.—*Montgomery v. State* (Miss.) 357.

§ 63. If in its enforcement a city ordinance is shown to be unreasonable, the law affords a remedy.—*Waller v. Osban* (Fla.) 970.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General. Judicial notice of ordinances, see Evidence, § 32.

§ 105. An ordinance must be duly passed, and must be reasonable, and not in conflict with

any controlling provision or principle of law.—*Waller v. Osban* (Fla.) 970.

V. OFFICERS, AGENTS, AND EMPLOYEES.

Competency of policemen as jurors in action against city, see *Jury*, § 92.

Existence of other remedy as ground for denying quo warranto, see *Quo Warranto*, § 3.

Of counties, see *Counties*, §§ 47, 53.

Mandamus to municipal officers, see *Mandamus*, § 112.

Mayor pro tem as de facto judge, see *Judges*, § 26.

VI. PROPERTY.

Purchase of property at tax sale, see *Taxation*, § 679.

Taxation of municipal property, see *Taxation*, § 183.

VII. CONTRACTS IN GENERAL.

Laws impairing obligation of contracts, see *Constitutional Law*, § 121.

Of counties, see *Counties*, §§ 113, 124.

IX. PUBLIC IMPROVEMENTS.

Subject and title of statute, see *Statutes*, § 123.

(A) Power to Make Improvements or Grant Aid Therefor.

Deprivation of property without due process of law, see *Constitutional Law*, § 290.

§ 265. The commissioners' court is not charged with the duty of laying out and keeping in repair the streets of a city in the county.—*Benton v. State* (Ala.) 842.

(C) Contracts.

§ 336. Award to one other than the lowest bidder for a municipal improvement contract made under Acts 1902, No. 147, § 2, will be set aside.—*Fourmy v. Town of Franklin* (La.) 249.

(D) Damages.

Compensation or damages for property taken under power of eminent domain, see *Eminent Domain*.

§ 392. Under Code 1906, § 3336, a property owner on a street held an "abutting owner," and the city held not entitled to close the street without first making due compensation.—*Alabama & V. Ry. Co. v. Turner* (Miss.) 261.

(E) Assessments for Benefits, and Special Taxes.

Deprivation of property without due process of law, see *Constitutional Law*, § 290.

§ 406. A street is under the dominion and control of the city, and is subject to the rights of the city, to assess abutting owners for its improvement.—*Benton v. State* (Ala.) 842.

§ 407. Acts 1902, No. 147, relating to local assessments for city improvements, held not repugnant to Const. 1893, art. 232, limiting the rate of taxation.—*Fourmy v. Town of Franklin* (La.) 249.

§ 426. The exemption of a courthouse square from taxation does not extend to a special assessment for paving sidewalks levied against all abutting real estate, under Acts 1902, No. 147.—*Town of Franklinton v. Police Jury of Parish of Washington* (La.) 172.

§ 434. A general or statutory exemption of public property from general taxation does not exempt it from special assessments for local improvements.—*City of Huntsville v. County of Madison* (Ala.) 326.

§ 439. County courthouse lots and buildings in a city held not benefited by the improvement of the streets around it, so as to make it assessable therefor.—*City of Huntsville v. County of Madison* (Ala.) 326.

§ 496. Whether a local assessment for street purposes will confer any special benefits, or is necessary, are not judicial questions.—*Fourmy v. Town of Franklin* (La.) 249.

(F) Enforcement of Assessments and Special Taxes.

§ 525. An action by a city held not maintainable to declare and enforce a lien against a county courthouse for the payment of a special assessment for street improvements, under Code 1907, §§ 1359-1420.—*City of Huntsville v. County of Madison* (Ala.) 326.

§ 586. Code 1907, §§ 1398, 1400, authorizing personal judgment and execution against the landowner in proceedings to enforce special assessments for street improvements, held only applicable in cases of an appeal to the Supreme Court.—*City of Huntsville v. County of Madison* (Ala.) 326.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

Power to provide for forfeiture of liquors, see *Intoxicating Liquors*, § 10.

Prohibition against parking of cars on private property, see *Railroads*, § 237.

Regulation of licenses and license taxes, see *Licenses*, §§ 7, 32.

Regulation of traffic in intoxicating liquors, see *Intoxicating Liquors*, § 10.

§ 589. Every act of a municipality should be within the powers expressly or impliedly conferred, based upon a proper classification, reasonable and applicable alike to all under similar conditions, and should not violate any provision or principle of law.—*Waller v. Osban* (Fla.) 970.

§ 592. The Municipal Code (Code 1907, § 1213 et seq.) held not to make state misdemeanors offenses against a municipality.—*Rosenberg v. City of Selma* (Ala.) 742.

§ 592. Under Code 1906, §§ 3329, 3441, city held to have power to pass ordinance making misdemeanors under the laws of the state offenses against the municipality, thereby making violation of Code 1906, § 1203, relating to keeping of gambling houses, an offense against the city.—*Rosetto v. City of Bay St. Louis* (Miss.) 785.

§ 594. Municipal ordinances relating to impounding of cattle running at large held to operate on the cattle, and not on the owner, except as he is affected by the disposition of the cattle.—*Waller v. Osban* (Fla.) 970.

§ 605. An ordinance prohibiting the parking of cars on private property is unconstitutional.—*City of New Orleans v. Lenfant* (La.) 575.

§ 625. An ordinance providing for the impounding of cattle running at large, even though their owners do not reside in the city, is not so unreasonable as to be void on its face.—*Waller v. Osban* (Fla.) 970.

§ 629. Under Acts 1909, c. 6108, city held authorized to provide by ordinance for impounding cattle running at large, even though their owners do not reside in the city.—*Waller v. Osban* (Fla.) 970.

(B) Violations and Enforcement of Regulations.

Prohibition against prosecution, see *Prohibition*, § 9.

Violation of ordinance as cause of death of insured, see *Insurance*, § 462.

§ 639. A complaint by a city by its attorney *held* to fail to charge a violation of a municipal ordinance, in view of Code 1907, § 7353.—*Rosenberg v. City of Selma* (Ala.) 742.

§ 639. A complaint charging a violation of a municipal ordinance alleging the substance of the ordinance, its adoption by the municipality, and a violation by accused *held* sufficient.—*Rosenberg v. City of Selma* (Ala.) 742.

§ 641. A conviction for the violation of a municipal ordinance cannot be supported by a state statute not validly appropriated as a rule in the municipality by the authorities thereof, or so expressly enacted by the state as to render its violation a municipal as distinguished from a state offense.—*Rosenberg v. City of Selma* (Ala.) 742.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

Dedication of property to public or to municipality, see Dedication.

(A) Streets and Other Public Ways.

County roads, see Highways.

Dedication of, see Dedication.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81, 118.

Liability of fire insurance patrol as charitable association for injuries from collision on street, see Charities, § 45.

Obstructions or encroachments on highways in general, see Highways, §§ 153, 160.

Subjects and titles of acts relating to, see Statutes, § 123.

§ 647. When certain territory is incorporated into a city, it is for the city to determine whether the public roads shall or shall not become thoroughfares in the city, and if they so determine the public roads become streets of the city.—*Benton v. State* (Ala.) 842.

§ 663. A telephone company, which cut trees between the sidewalk and street without the consent of the adjacent owner, *held* liable under Code 1906, § 4977.—*Brahan v. Meridian Home Telephone Co.* (Miss.) 485.

§ 671. An individual *held* to have suffered a peculiar and substantial injury from the obstruction of a public highway entitling him to sue for relief.—*Brown v. Florida Chautauqua Ass'n* (Fla.) 802.

§ 682. A city cannot authorize one to damage trees between the street and sidewalk, belonging to adjacent property owners, without making compensation.—*Brahan v. Meridian Home Telephone Co.* (Miss.) 485.

§ 692. An unauthorized obstruction of a public street is a nuisance per se.—*City of New Orleans v. Lenfant* (La.) 575.

§ 703. Where a laundry driver left his team standing on the street curb unattended, *held*, that it was left without a person in charge, within an ordinance punishing such neglect, and that the occasion was not within an exception when a vehicle was being loaded and unloaded.—*Excelsior Steam Laundry Co. v. Lomax* (Ala.) 347.

§ 705. The driver of an automobile which collided with a boy on a street *held*, under the facts, liable under the last chance doctrine, even if there was contributory negligence.—*Burvant v. Wolfe* (La.) 1025.

§ 705. Under the facts as to collision of an automobile with a child on a street, *held* no question of contributory negligence was involved.—*Burvant v. Wolfe* (La.) 1025.

§ 706. Negligence in leaving a team unattended in the street was a question for the jury, when there was some evidence that the

driver took some precaution in the way of securing the horses before he went into a house.—*Excelsior Steam Laundry Co. v. Lomax* (Ala.) 347.

§ 706. The proximate cause of injury claimed to be due to defendant's driver leaving a team unattended in the street was for the jury.—*Excelsior Steam Laundry Co. v. Lomax* (Ala.) 347.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 755. A citizen injured by an obstructed street *held* entitled to recover against the city.—*McCormack v. Robin* (La.) 779.

§ 757. A city *held* liable to a person who suffers an injury on account of its failure to keep its sidewalks in reasonably safe condition.—*City of Birmingham v. Gordon* (Ala.) 430.

§ 777. A block of stone used as a stepping stone over a gutter in a street, but placed within the curb upon paving the street, *held* a nuisance.—*McCormack v. Robin* (La.) 779.

§ 806. Streets and sidewalks are intended for free and constant use, and those who use them may assume that they are safe.—*McCormack v. Robin* (La.) 779.

§ 806. A person injured by falling over an obstruction in a street *held* not guilty of negligence precluding recovery.—*McCormack v. Robin* (La.) 779.

§ 807. In an action for injuries to a traveler on a city sidewalk, plaintiff *held* not negligent merely because she had knowledge of the defect, and with such knowledge walked over the walk.—*City of Birmingham v. Gordon* (Ala.) 430.

§ 808. A city and a paving contractor *held* liable for injury to a citizen falling over a stone removed from the street, and placed on the banquette by the contractor.—*McCormack v. Robin* (La.) 779.

§ 816. A complaint for injuries to a traveler on a city sidewalk *held* not demurrable.—*City of Birmingham v. Gordon* (Ala.) 430.

§ 816. A complaint in an action against a city for injuries to a traveler on a defective street *held* to sufficiently charge that the city had notice of the defect.—*City of Birmingham v. Pool* (Ala.) 937.

§ 818. In an action for injuries to a pedestrian on a defective street, evidence that a telephone was kept in the street commissioner's office and that complaints of defects in streets were received over the telephone *held* admissible, in view of the evidence.—*City of Birmingham v. Pool* (Ala.) 937.

§ 821. In an action for injuries to a traveler on a city sidewalk, plaintiff *held* not negligent as a matter of law because with knowledge of the defect she walked over the walk.—*City of Birmingham v. Gordon* (Ala.) 430.

§ 821. In an action against a city for injuries to a traveler on a defective street, a general charge in favor of the city *held* properly refused.—*City of Birmingham v. Pool* (Ala.) 937.

§ 821. Plaintiff's knowledge of the defective condition of a street did not necessarily preclude his recovery for an injury received therefrom.—*Birdsong v. Town of Mendenhall* (Miss.) 795.

§ 821. In a suit for injuries sustained by reason of a defective street, although plaintiff had knowledge of such defect, evidence *held* sufficient to carry the case to the jury.—*Birdsong v. Town of Mendenhall* (Miss.) 795.

§ 822. In an action against a city for injuries to a traveler on a defective street, an instruction *held* properly refused, because preter-

mitting a duty of the city.—City of Birmingham v. Pool (Ala.) 937.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Of counties, see Counties, §§ 152-178.

(B) Administration in General, Appropriations, Warrants, and Payment.

In counties, see Counties, § 164.

(C) Bonds and Other Securities, and Sinking Funds.

Of counties, see Counties, § 178.

§ 918. Where a special election was as matter of fact held pursuant to Const. 1898, art. 281, bonds may be issued though the election was carried on nominally under article 232, not authorizing such bonds.—Gooch v. Town of Patterson (La.) 555.

§ 918. A certain clerical error in proceedings to authorize a special tax and bonds held capable of being corrected before the bonds were issued.—Gooch v. Town of Patterson (La.) 555.

(D) Taxes and Other Revenue, and Application Thereof.

City depositaries, see Depositaries, §§ 6, 8. Mandamus to compel levy, see Mandamus, §§ 112, 172, 176.

§ 957. Code 1907, §§ 1070-1074, providing for the extension of the boundaries of cities, held not violative of Const. 1901, §§ 215, 216, relating to the rate of taxation in counties and cities.—State v. City of Birmingham (Ala.) 461.

§ 957. Const. 1901, § 216, restricting municipal taxes, held not applicable to property annexed to B. not previously embraced in the corporate limits of another city or town.—State v. City of Birmingham (Ala.) 461.

§ 977. Where a railroad company, to which a special tax had been voted on specified conditions, had forfeited all right to the tax, it could not contest the right of a taxpayer to demand of the city reimbursement of the portion of the tax already paid.—W. K. Henderson Iron Works & Supply Co. v. City of Shreveport (La.) 477.

(E) Rights and Remedies of Taxpayers.

§ 987. A special tax, voted to a railroad company on specified conditions, held properly annulled, at the suit of a taxpayer, for failure of the company to comply with the conditions.—W. K. Henderson Iron Works & Supply Co. v. City of Shreveport (La.) 477.

§ 1000. Act No. 145 of 1902, p. 254, § 18, barring actions to annul special tax elections held under Const. 1898, art. 281, held not unconstitutional.—Gooch v. Town of Patterson (La.) 555.

XV. ACTIONS.

§ 1087. Under Code 1906, §§ 3300, 3931, judgment in mandamus against the mayor and board of aldermen, when the suit was against the town, held not error.—Town of Jonestown v. Ganong (Miss.) 579.

§ 1088. Code 1906, § 3333, held to protect a municipality from the extravagance of its officers, but not to limit the compulsory power of the court to make effective its judgment against a municipality.—Town of Jonestown v. Ganong (Miss.) 602.

MUNICIPAL COURTS.

See Courts, § 189.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 698, 798.

MUTUALITY.

Of remedy by enforcement of specific performance of contracts, see Specific Performance, § 6.

MUTUAL PROMISES.

Consideration for contract, see Contracts, § 57.

NAMES.

In deed, see Deeds, §§ 31, 32.

Necessity of pleading names of employes in charge of train killing animals, see Railroads, § 439.

Of devisees and legatees in will, see Wills, § 529.

NAVIGABLE WATERS.

See Ferries; Shipping.

Nonnavigable waters, see Waters and Water Courses.

II. LANDS UNDER WATER.

Public policy affecting validity of lease between individuals, see Contracts, § 108.

NAVIGATION.

See Ferries; Maritime Liens; Shipping.

NEAR BEER.

Review on prohibition of finding as to intoxicating character of liquor, see Prohibition, § 28.

NEGATIVE EVIDENCE.

Weight and conclusiveness, see Evidence, § 586.

NEGLIGENCE.

Causing death, see Death, §§ 98, 99.

Gross negligence as showing criminal intent, see Criminal Law, § 23.

By particular classes of persons.

See Carriers, §§ 107-136, 280, 321; Municipal Corporations, §§ 755-822; Physicians and Surgeons, §§ 16, 18; Railroads, §§ 113, 282, 297, 303-351, 355, 400, 405, 459, 469, 485; Street Railroads, §§ 81, 118.

Electric light or power companies, see Electricity, § 16.

Employers, see Master and Servant, §§ 96, 296. Employes, liability for injuries to third persons, see Master and Servant, §§ 301, 332.

Fellow servants, see Master and Servant, §§ 159, 198.

Shipowners, see Shipping, § 84.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 54-69.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 113, 282, 297, 303-351, 355-400, 405, 459, 469, 485; Street Railroads, §§ 81, 118; Telegraphs and Telephones, §§ 54-69.

Automobiles, see Municipal Corporations, § 705. Conveyances and other means for transportation of passengers, see Carriers, § 290.

Railroad lands and structures, see Railroads, § 113.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 129.
 Use of street by traveler, see Municipal Corporations, § 705.
 Vessels, see Shipping, § 84.

Injuries to particular species of property.

Animals in operation of railroads, see Railroads, §§ 405, 439.
 Goods shipped, see Carriers, §§ 107-186.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 4. Care required *held* to depend on relation and circumstances of the parties towards each other.—Florida Ry. Co. v. Dorsey (Fla.) 963.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

Electricity, see Electricity, § 16.

§ 16. Where one uses an agency of extraordinary dangerous character, the law requires him to use more than usual care.—Moren v. New Orleans Ry. & Light Co. (La.) 106.

(C) Condition and Use of Land, Buildings, and Other Structures.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 129.

II. PROXIMATE CAUSE OF INJURY.

§ 56. One creating a danger which sooner or later will cause injury *held* responsible for the injury.—Lee v. Powell Bros. & Sanders Co. (La.) 214.

§ 62. Actionable negligence defined.—Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.

III. CONTRIBUTORY NEGLIGENCE.

Of passengers, see Carriers, §§ 333, 343.

Of persons attempting to board ferry boat, see Ferries, § 33.

Of person injured by defects or obstructions in street, see Municipal Corporations, §§ 806, 807.

Of person injured by operation of railroad, see Railroads, § 326.

Of person injured by negligent use of street, see Municipal Corporations, § 705.

Of servants, see Master and Servant, §§ 228, 245, 274, 289, 296.

(A) Persons Injured in General.

Injury to traveler on street, see Municipal Corporations, § 705.

§ 82. In determining the right to recover for personal injuries, the question is whether the damages were caused entirely by defendant's negligence, or whether plaintiff's negligence so contributed to his injury that, except for such negligence, the injury would not have happened.—Southern Ry. Co. v. Harrington (Ala.) 57.

(B) Children and Others Under Disability.

§ 85. An infant may be guilty of contributory negligence.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

(D) Comparative Negligence.

§ 97. Common-law rule of nonliability of negligent defendant when plaintiff is guilty of contributory negligence *held* modified by statute permitting apportionment of damages in such case.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 97. In an action for mere negligent injury, plaintiff, by his negligence having proximately contributed to his own injury, *held* not entitled to recover.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 97. Public policy requires that every one shall exercise reasonable care of his own person and property, and, when his failure to do this concurs with the mere negligence of another to cause the injury, there can be no recovery.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 100. To constitute such contributory negligence as bars recovery, the plaintiff's negligence must have been a portion of the efficient proximate cause of the injury, and defendant's negligence must not have been willful, wanton, or malicious.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 101. Where a person is injured by a locomotive, and both he and the railroad company's agents are at fault, he may recover the damages, to be diminished or increased in proportion to the amount of his default, under Gen. St. 1906, § 3149.—Johnson v. Louisville & N. R. Co. (Fla.) 185.

§ 101. Gen. St. 1906, § 3149, relating to recovery from railroad companies for injuries construed.—Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.

§ 101. Passenger *held* entitled to recover for injuries resulting from sudden jerk while she was alighting, even though she was negligent; the damages being apportioned.—Florida Ry. Co. v. Dorsey (Fla.) 963.

IV. ACTIONS.

Damages, inadequate and excessive, see Damages, §§ 132, 138.

Damages, measure, see Damages, §§ 98, 105.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 119. Where contributory negligence is a defense, it should be pleaded and proved by defendant, unless it appears from the allegations or proof of plaintiff.—Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.

(B) Evidence.

Acts and statements accompanying or connected with transaction as constituting part of res gestæ, see Evidence, §§ 121-128.

Evidence of repairs in action for injuries at railroad crossing, see Railroads, § 347.

Opinion evidence, see Evidence, § 472.

§ 121. The doctrine of *res ipsa loquitur held* available in a case wherein the declaration is for specific acts of negligence, and no count charges negligence generally.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 121. Though proof of the accident makes a *prima facie* case, the burden is on plaintiff throughout the trial, and never shifts when plaintiff makes out such a case.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 121. Rationale and application of the doctrine of *res ipsa loquitur* stated.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 121. The essential import of the doctrine of *res ipsa loquitur* is that, on the facts proved, plaintiff has made out a *prima facie* case without direct proof of negligence.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 121. Where it is manifest the accident would not have happened if due care had been exercised, negligence is presumed as matter of law, and proof of the accident makes a *prima facie* case, which defendant must meet.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

§ 122. An instruction as to the degree of proof necessary to rebut the presumption of plaintiff's immunity from negligence on account of her age *held* erroneous.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

§ 122. The presumption as to capacity of children for contributory negligence at various

ages, stated.—*Birmingham & A. R. Co. v. Mattison* (Ala.) 49.

§ 134. Negligence need not be proved by direct evidence, but may be shown by circumstances.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

(C) Trial, Judgment, and Review.

§ 136. The question of whether a child has capacity so that it may be charged with contributory negligence *held* for the jury or the court, according to the age and development of the child.—*Birmingham & A. R. Co. v. Mattison* (Ala.) 49.

§ 136. When contributory negligence is a question of fact and when a question of law stated.—*Atlantic Coast Line R. Co. v. McCormick* (Fla.) 712.

§ 136. Where it cannot be said as matter of law that plaintiff's negligence in part caused his injury, the question of contributory negligence is for the jury.—*Florida East Coast Ry. Co. v. Lassiter* (Fla.) 975.

§ 136. Whether the accident would have ordinarily happened, had due care been exercised, should generally be left to the jury.—*Alabama & V. Ry. Co. v. Groome* (Miss.) 703.

§ 138. In an action for injury to a servant, wherein the maxim "res ipsa loquitur" applied, an instruction that the burden was on defendant to rebut the presumption of negligence *held* not to be misleading.—*Alabama & V. Ry. Co. v. Groome* (Miss.) 703.

V. CRIMINAL RESPONSIBILITY.

§ 144. Where one is charged with a special duty, the nonperformance of which involves danger to others, the failure to perform the duty is criminal negligence.—*State v. Irvine* (La.) 567.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

County bonds, see Counties, § 178.

County warrants and certificates of indebtedness, see Counties, § 164.

Forgery, see Forgery.

Municipal bonds and other securities, see Municipal Corporations, § 918.

NEGROES.

Liability of carrier for acts of other passengers, see Carriers, § 284.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see Criminal Law, § 945; New Trial, §§ 102, 104.

NEWSPAPERS.

For publication of notice of county bond election, see Counties, § 178.

Publication of libelous articles, see Libel and Slander.

Publication of notice of intention to apply for enactment of special or local law, see Statutes, § 8½.

Publication of notice of receiver's sale, see Receivers, § 134.

Rebates from cost of advertising sale of property in hands of receiver, see Receiver, § 96.

§ 3. A paper printed in a foreign language may not be within a statute requiring the publication of legal notices, where the statute contains nothing to indicate an intention to include such publication.—*Tyler v. Hyde* (Fla.) 968.

NEW TRIAL.

Granted by appellate court, see Appeal and Error, § 1178.

In criminal prosecutions, see Criminal Law, §§ 911, 945.

Necessity of motion for purpose of review, see Appeal and Error, § 304.

Opening or vacating judgment, see Judgment, §§ 336, 337.

Review of discretionary rulings, see Criminal Law, § 1156.

Scope and extent of review on appeal from decision on motion, see Appeal and Error, § 867.

I. NATURE AND SCOPE OF REMEDY.

§ 1. Common-law courts have inherent power to grant a new trial.—*Woodward Iron Co. v. Brown* (Ala.) 829.

II. GROUNDS.

(A) Errors and Irregularities in General.

§ 21. Where no action is taken on an issue tendered by a replication, a new trial should be granted.—*Connor v. Elliott* (Fla.) 729.

(C) Rulings and Instructions at Trial.

§ 39. The court granting a new trial on the ground of errors in rulings cannot be placed in error where any of the rulings are erroneous.—*Woodward Iron Co. v. Brown* (Ala.) 829.

§ 39. The court may in its discretion grant a new trial for the giving of a charge which should not have been given.—*Woodward Iron Co. v. Brown* (Ala.) 829.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 71. The existence of a conflict in the testimony of plaintiff's witnesses presents a question for the jury and does not of itself furnish a ground for interference with the verdict.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

§ 76. A verdict for more than the amount claimed *held* ground for a new trial.—*Tribble v. Crestline Land Co.* (Ala.) 600.

(H) Newly Discovered Evidence.

§ 102. A motion for new trial on the ground of newly discovered evidence *held* properly refused, because of want of diligence.—*Woodward Iron Co. v. Sheehan* (Ala.) 24.

§ 102. A new trial for newly discovered evidence *held* unauthorized for want of diligence.—*W. F. Fitts & Son v. Bryan* (Ala.) 333.

§ 104. Newly discovered evidence as a basis for a new trial *held* not objectionable as cumulative.—*West Virginia Land Co. v. May* (Ala.) 315.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

Effect of motion for new trial on time for taking appeal or other proceeding for review, see Appeal and Error, § 345.

§ 117. While the usage is to render judgment when the verdict is returned, the losing party still has the rest of the term of court to move for new trial.—*Woodward Iron Co. v. Brown* (Ala.) 829.

§ 156. Error in the overruling of a motion for new trial is not available where the motion was not kept alive, but was suffered to be discontinued by failure to have it regularly continued on the docket.—*Alabama Steel & Wire Co. v. Sells* (Ala.) 921.

§ 162. Where an award of damages is excessive in the opinion of the trial judge, he should compel a remittitur or grant a new trial.—*Reems v. New Orleans G. N. R. Co.* (La.) 681.

NEXT FRIEND.

Of insane person, see Insane Persons, § 94.

NEXT OF KIN.

See Descent and Distribution.

NON COMPOS MENTIS.

See Insane Persons.

NONRESIDENCE.

See Absentees; Domicile.

Disqualification of jurors, see Jury, § 47.

Sufficiency of plea in abatement for nonresidence, see Pleading, § 106.

Taxation of nonresidents, liability in general, see Taxation, § 96.

NONSUIT.

Involuntary nonsuit before trial, see Dismissal and Nonsuit, § 56.

NOTARIES.

See Acknowledgment, §§ 8-24.

§ 11. The paraph of a notary is his official signature, and where he paraphs a forged note he acts as a notary, and not as an individual, and one deceived by his paraph has a cause of action against the surety on his bond.—*Harz v. Gowland (La.)* 986.

§ 11. Effect of a notary's paraph stated.—*Harz v. Gowland (La.)* 986.

§ 11. Rate of interest stated in an action on the bond of a notary by the purchaser of a forged note.—*Harz v. Gowland (La.)* 986.

§ 11. Where a notary issues a mortgage note, duly paraphed, that the purchaser had confidence in him personally will not defeat the purchaser's right to recover on the notary's bond.—*Harz v. Gowland (La.)* 986.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Judicial notice, see Evidence, §§ 20, 32.

Publication in official newspapers, see Newspapers.

As affecting particular classes of persons.

Administrator's notice to creditors, see Executors and Administrators, § 226.

Insurance companies, see Insurance, §§ 229, 534-558.

Mortgagees, see Mortgages, § 154.

Purchasers at execution sales, see Execution, § 272.

Purchasers of goods, see Sales, § 235.

Purchasers of land, see Vendor and Purchaser, §§ 231, 233.

As affecting particular rights, duties, and liabilities.

Liability of insurer as affected by notice of loss, see Insurance, §§ 534-558.

Rights and liabilities of bona fide purchasers of personal property, see Sales, § 235.

Rights and liabilities of bona fide purchasers of real property, see Vendor and Purchaser, §§ 231, 233.

Rights of mortgagees as bona fide purchasers, see Mortgages, § 154.

Right to mechanic's lien, see Mechanics' Liens, § 122.

Of particular facts, acts, or proceedings not judicial.

Cancellation of insurance policy, see Insurance, § 229.

Claim of mechanic's lien, see Mechanics' Liens, § 122.

County bond election, see Counties, § 178.

Defects in title of seller of goods, see Sales, § 235.

Defects in title of vendor of land, see Vendor and Purchaser, § 231.

Intention to apply for enactment of statutes, see Statutes, § 84½.

Loss under insurance policy, see Insurance, §§ 534-558.

Proceedings for extension of municipal boundaries, see Municipal Corporations, § 33.

Of particular judicial proceedings.

Appointment of receiver, see Receivers, § 35.

For injunction, see Injunction, § 143.

Mechanic's lien proceeding, see Mechanics' Liens, § 268.

Receiver's sale, see Receivers, § 134.

NUISANCE.

Liability of city for injuries from obstructions, see Municipal Corporations, § 777.

I. PRIVATE NUISANCES.

Parking of cars on private property, see Railroads, § 237.

(A) *Nature of Injury, and Liability Therefor.*

§ 1. "Nuisance per se" and "nuisance in fact," defined.—*City of New Orleans v. Lenfant (La.)* 575.

§ 5. No lawful use by an individual of his own property is a nuisance per se.—*City of New Orleans v. Lenfant (La.)* 575.

II. PUBLIC NUISANCES.

Obstruction or encroachment on highway, see Highways, §§ 153, 160.

Obstruction or encroachment on street, see Municipal Corporations, § 692.

Offenses constituting nuisances, see Disorderly Conduct.

(B) *Rights and Remedies of Private Persons.*

§ 72. Right of individual to sue for injury from a public nuisance stated.—*Brown v. Florida Chautauqua Ass'n (Fla.)* 802.

NUNC PRO TUNC.

Review of discretion as to proceedings, see Appeal and Error, § 956.

OATH.

False swearing, see Perjury.

OBJECTIONS.

In judicial proceedings.

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 195, 242.

Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, §§ 1031, 1045.

To account of receiver, see Receivers, § 202.

To evidence at trial, see Criminal Law, §§ 693, 698; Trial, §§ 76-86.

To indictment or information, see Indictment and Information, §§ 189, 196, 202.

To instructions, see Criminal Law, § 841.

To jurors, see Jury, §§ 83, 117.

To parties, see Parties, § 93.

To pleadings, see Pleading, §§ 409, 433.
To record on appeal or writ of error, see Appeal and Error, § 635.

OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, §§ 121, 154.

OBSCENITY.

Use of indecent language as affecting individuals only, see Disorderly Conduct.

OBSTRUCTING JUSTICE.

§ 11. An indictment *held* not to charge a violation of Code 1906, § 1298, punishing the intimidation of a justice of the peace.—Frith v. State (Miss.) 786.

OBSTRUCTIONS.

Of highways, see Highways, §§ 153, 160.
Of streets, see Municipal Corporations, §§ 692, 755, 822.

OCCUPATION.

License tax on occupations in general, see Licenses, §§ 7, 82.
Regulation by special or local law, see Statutes, § 81.

OFFENSES.

See Criminal Law.

OFFER.

Bids for contracts with municipal corporation, see Municipal Corporations, § 336.
Of proof, see Trial, §§ 45, 46.

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See Judgment, §§ 101-148.

OFFICERS.

Mandamus to public officers, in general, see Mandamus, § 112.
Presumptions as to official proceedings and acts, see Evidence, § 83.
Regulation and conduct of elections in general, see Elections.
Resisting officer, see Obstructing Justice.

Particular classes of officers.

See Judges; Justices of the Peace; Notaries; Receivers; Sheriffs and Constables.
Attorneys, see Attorney and Client.
Bank officers, see Banks and Banking, §§ 109, 114.
Commissioners in equity, see Equity, § 404.
Corporate officers in general, see Corporations, §§ 308, 320.
County board, see Counties, §§ 47, 53.
Health officers, see Health, § 7.
Masters in chancery, see Equity, § 404.
State officers, see States, § 37.
Trustees, see Trusts.
Trustees in bankruptcy, see Bankruptcy, §§ 164-302.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of justices of the peace, see Justices of the Peace, §§ 2-6.
Of receivers, see Receivers, §§ 29-57.
Regulation and conduct of elections, in general, see Elections.

(D) De Facto Officers.

§ 41. One in possession of office under color of title *held* an officer de facto, whose acts cannot be impeached in any proceeding in which he is not a party.—Rosetto v. City of Bay St. Louis (Miss.) 785.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Custody of levee funds by treasurer of levee board, see Levees, § 10.
Of county boards, see Counties, §§ 47, 53.
Of judges, see Judges, § 26.
Of receivers, see Receivers, §§ 81-96.
Of sheriffs or constables, see Sheriffs and Constables, § 88.

IV. LIABILITIES ON OFFICIAL BONDS.

Treasurer of levee board, see Levees, § 10.

§ 126. Under Rev. Code 1880, § 403, now Code 1906, § 3463, that the secretary and treasurer of the board of levee commissioners of a certain district failed to sign his bond as principal *held* not to invalidate the same; the surety having signed the bond and collected the premium thereon.—Adams v. Williams (Miss.) 865.

OPEN ACCOUNTS.

See Account, Action on.

OPENING.

Account of executor or administrator, see Executors and Administrators, § 509.
Judgment, see Judgment, §§ 143, 336, 337.
Judicial sales in general, see Judicial Sales, § 39.
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OPINION EVIDENCE.

See Criminal Law, §§ 448-478; Evidence, §§ 471-558.

OPINIONS.

Formation and expression of opinion as to cause as affecting competency of jurors, see Jury, § 103.

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To appointment of administrator, see Executors and Administrators, § 20.

OPTIONS.

To buy or sell, see Sales, § 24; Vendor and Purchaser, § 18.

ORAL AGREEMENTS.

See Frauds, Statute of.

ORAL TRUSTS.

See Trusts, §§ 17, 18.

ORDER OF PROOF.

At trial, see Criminal Law, §§ 680, 686.

ORDERS.

Orders for payment of money.
See Bills and Notes.
Forgery, see Forgery.

Orders of court.

For recommittal of report to referee, see Reference, § 101.

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Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1019, 1188.

ORDINANCES.

Municipal ordinances, see Municipal Corporations, §§ 105, 589, 641.

ORES.

See Mines and Minerals.

ORGANIC LAW.

See Constitutional Law.

ORIGINAL BILL.

See Equity, §§ 133-149.

OVERFLOW.

Swamp and overflowed lands, see Public Lands, §§ 58, 61.

OWNERSHIP.

Bona fide purchasers from person in possession, see Sales, § 234.

Of property in general, see Property, § 7.

Of property as affecting performance of contract of sale, see Vendor and Purchaser, § 128.

Of property insured, representations, warranties, or conditions, in policy or application therefor, see Insurance, § 282.

Of property, statement in claim of mechanic's lien, see Mechanics' Liens, § 137.

PACKING HOUSES.

License taxes, see Licenses, § 32.

PANEL.

Challenge to jury panel, see Jury, §§ 116, 117. Selection and drawing of jury panel, see Jury, § 66.

Special jury panel, see Jury, § 70.

PAPERS.

See Newspapers.

PARAGRAPHS.

In pleading, see Pleading, § 54.

PARAPHERNAL PROPERTY.

See Husband and Wife, §§ 254, 276.

PARENT AND CHILD.

See Bastards; Infants.

Admissibility of evidence of pecuniary condition of child in action for personal injuries, see Damages, § 171.

Custody of child on divorce of parents, see Divorce, §§ 297, 301.

Habeas corpus to determine right to custody, decision of issues, see Habeas Corpus, § 90.

Inadequate damages for death of child, see Death, § 98.

Rights of surviving children as to homestead, see Homestead, §§ 136, 150.

§ 2. The welfare of the child calling for it, *held*, her custody will be transferred from her father to her grandfather.—Saunders v. Saunders (Ala.) 310.

§ 2. Where an agreement of separation in writing was made between a husband and wife. in a subsequent suit by the wife to obtain possession of their child brought under the Code 1907, §§ 4503, 4504, providing for such custody of the child on voluntary separation, such agreement made out a *prima facie* case of voluntary separation.—Royal v. Royal (Ala.) 735.

§ 2. Certain facts *held* to warrant the chancery court in awarding the custody of a child to the mother pending suit to finally determine the custody.—Royal v. Royal (Ala.) 735.

§ 7. Evidence as to recovery of damages by the child for injury *held* inadmissible in action by the parent for loss from the injury.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 7. The disposition made by sisters of the plaintiff's injured child of their wages *held* immaterial in an action for loss to the parent from the injury.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 7. The matter of settlement of plaintiff's guardianship of his injured child *held* immaterial in an action for plaintiff's loss from the injury.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 7. Consent of parent to his child engaging in a dangerous employment *held* not negligence contributing to her injury from the employer's negligence in not warning and instructing.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 7. The consent of the parent to his child's engaging in a dangerous employment *held* not rendered negligence, approximately contributing to the child's injury from failure of the master to warn and instruct, by nonconsent being alleged in the complaint.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

§ 7. The parent, suing for loss through injury to his child in her employment, *held* required to prove nonconsent to the employment, alleged, though unnecessarily, in the complaint.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

PARI MATERIA.

Construction of statutes in *pari materia*, see Statutes, § 225.

PARISHES.

See Counties.

PAROL AGREEMENTS.

See Frauds, Statute of.

PAROL EVIDENCE.

As to nature of instrument as will, see Wills, § 93.

In civil actions, see Evidence, §§ 390-452.

PARTIES.

As witnesses, cross-examination of, see Witnesses, § 277.

Joinder of causes of action as affected by parties involved, see Action, § 50.

Practice in equity, see Equity, § 94.

Rights and liabilities as to costs, see Costs.

Variance between pleading and proof as to parties, see Pleading, § 392.

In particular actions or proceedings.

Criminal prosecutions, see Criminal Law, § 73.

For conspiracy, see Conspiracy, § 17.

On bond of treasurer of levee board, see Levees, § 11.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.
Persons concluded by judgment in general, see Judgment, §§ 668, 702.

Review as to parties, and parties to proceedings in appellate courts.

Parties entitled to allege error, see Appeal and Error, § 878.

Parties to appeal or writ of error, see Appeal and Error, §§ 322, 836.

Parties to assignment of errors, see Appeal and Error, § 720.

Persons entitled to review, see Appeal and Error, §§ 149, 151.

I. PLAINTIFFS.

(B) Joinder.

In action for slander, see Libel and Slander, § 77.

Proceedings for sale of land of intestate, see Executors and Administrators, § 335.

II. DEFENDANTS.

(B) Joinder.

§ 25. The right to join persons as parties defendant stated.—Davidson v. Frost-Johnson Lumber Co. (La.) 759.

III. NEW PARTIES AND CHANGE OF PARTIES.

Intervention in attachment proceedings by claimant of property, see Attachment, § 308.

IV. DESIGNATION AND DESCRIPTION.

On appeal or writ of error, see Appeal and Error, § 335.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

On appeal or writ of error, see Appeal and Error, § 336.

§ 93. An objection that an amended complaint brought in new parties should be made by motion to strike, and not by demurrer to the amended complaint.—North Italian Colonial Co. v. Janovich-Calafiore Co. (Ala.) 339.

PARTITION.

Creation of co-tenancies and rights and liabilities of co-tenants in general, see Tenancy in Common.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§ 74. Partition cannot be resorted to as a substitute for ejectment, nor for the purpose of testing the legal title.—Griffith v. Griffith (Fla.) 609.

§ 77. One to be entitled to a sale of property for division, in place of partition, *held* required to aver and prove that the property cannot be equitably divided.—Smith v. Hill (Ala.) 949.

§ 77. In a suit for sale for division, *held*, in view of the answer and cross-bill seeking to have respondents' joint interests set aside to them jointly, and the invoking of the rule of owelty under Code 1907, § 5233, that partition, instead of sale, should be granted.—Smith v. Hill (Ala.) 949.

§ 77. The indivisibility of the property may be shown by a comparison of the inventory with the number of the lots into which it would have to be divided.—Jacobs v. Jacobs (La.) 543.

§ 77. In partition, on default of action by those representing minors as to calling a family meeting, the court may order the sale for cash.—Jacobs v. Jacobs (La.) 543.

§ 114. Cost of judgment ordering partition against one who denies right thereto falls on the party cast.—Jacobs v. Jacobs (La.) 543.

PARTNERSHIP.

Competency of witness as to transaction with deceased partner, see Witnesses, § 150.

Liability of stockholders on note executed before incorporation, see Corporations, § 220.

Parol evidence to explain conveyance to firm, see Evidence, § 452.

Qualification of partners as voters at school tax elections, see Schools and School Districts, § 103.

Waiver of homestead by mortgage to secure firm debt, see Homestead, § 171.

I. THE RELATION.

(C) Evidence.

Opinion evidence, see Evidence, § 471.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

Deed to firm in firm name, see Deeds, § 31.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 161. A mortgage signed in the name of a firm by a member thereof *held* to convey all right, title, and interest of such member if he was the sole owner of the property.—J. L. Knox & Co. v. Parker (Ala.) 438.

§ 164. A dormant partner *held* estopped from contesting a mortgage on realty belonging to the partnership made by the active partner.—Taylor v. Cummer Lumber Co. (Fla.) 614.

(C) Application of Assets to Liabilities.

Exhaustion of other property before resort to homestead, see Homestead, § 108.

§ 183. A mortgage of property of a solvent firm to secure a debt of a member *held* not a fraud on firm creditors.—J. L. Knox & Co. v. Parker (Ala.) 438.

(D) Actions by or Against Firms or Partners.

Documentary evidence, see Evidence, § 355.

§ 208. Attachment will not lie against alleged commercial firm or the interest of a nonresident partner where the managing partner is a resident of the state.—Weil Bros. & Bauer v. C. N. Adams & Son (La.) 757.

§ 216. Where an action was brought against two persons, it was not necessary to so describe the defendants as partners in order to admit evidence of their joint liability as the legal result of their association as partners.—Austin v. Beall (Ala.) 657.

§ 217. In an action against one on the theory that he was a member of a firm indebted to plaintiff certain evidence *held* admissible to establish the firm indebtedness.—Brandon v. Progress Distilling Co. (Ala.) 640.

§ 219. Service on one of the alleged members of partnership defendants *held* sufficient to sustain a decree pro confesso against him in case of his failure to answer.—J. C. McGrew & Sons v. Earnest (Ala.) 639.

PART OWNERS.

In general, see Tenancy in Common.

PASSENGERS.

See Carriers, §§ 239, 343.

PASSWAYS.

See Private Roads.

PATROL.

Fire insurance patrol as charitable association, see Charities, § 45.

PAYMENT.

By debtor, as preference, see Bankruptcy, § 164.
By surety as condition precedent to action to set aside fraudulent conveyance, see Fraudulent Conveyances, § 218.

Subrogation on payment, see Subrogation.

Of particular classes of obligations or liabilities.

See Costs, § 277.

Checks, see Banks and Banking, § 138.

Legacies and distributive shares, see Executors and Administrators, § 314.

Purchase money on sale of land, see Vendor and Purchaser, § 176.

Tuition in public schools, see Schools and School Districts, § 159.

I. REQUISITES AND SUFFICIENCY.

§ 1. What constitutes "payment," defined.—Smith v. Pitts (Ala.) 402.

§ 24. Creditor's acceptance of one security in satisfaction of another discharges the debt, but not so as to acceptance of obligations of equal dignity.—Smith v. Pitts (Ala.) 402.

PECUNIARY LOSS.

Element of damages in general, see Damages, § 40.

PEDDLERS.

See Hawkers and Peddlers.

PENALTIES.

Construction and operation of penal statutes in general, see Statutes, § 241.

For particular acts or omissions.

Cutting trees in streets, see Municipal Corporations, § 663.

Frivolous appeal or delay, see Costs, § 260.

Violations of regulations relating to carriers, see Carriers, § 20.

PENDENCY OF ACTION.

See Lis Pendens.

Another action pending as ground for abatement, see Abatement and Revival, §§ 4-8.

Another action pending as ground for stay of proceedings, see Action, § 69.

PENITENTIARIES.

See Convicts.

PEREMPTORY INSTRUCTIONS.

See Trial, §§ 169-171.

PERFORMANCE.

Of legal obligation as consideration for contract, see Contracts, § 75.

Of particular classes of duties or obligations.
Contract in general, see Contracts, §§ 277, 321.

Contract of sale, see Sales, §§ 161-179; Vendor and Purchaser, §§ 123, 176.
Services by broker, see Brokers, § 54.

PERJURY.

Ground for collateral attack on judgment, see Judgment, § 512.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 11. Perjury may be assigned on testimony going to the credit of a material witness.—State v. Smith (La.) 244.

II. PROSECUTION AND PUNISHMENT.

§ 22. An indictment for perjury must allege that the party charged was duly sworn by some one authorized by law to administer oaths.—Bedsale v. State (Fla.) 1.

§ 22. In an indictment for perjury at a trial, it must be alleged that the court had jurisdiction to determine the cause.—Bedsale v. State (Fla.) 1.

§ 23. An indictment for perjury must allege that the party charged was duly sworn.—Bedsale v. State (Fla.) 1.

§ 25. In a prosecution for perjury, information held bad for the reason that the facts alleged did not disclose the materiality of the evidence.—State v. Smith (La.) 244.

§ 25. Information to charge perjury must show the materiality of the false testimony.—State v. Smith (La.) 244.

PERMIT.

Power of insurance agent to issue vacancy permit, see Insurance, § 375.

PERPETUITIES.

§ 4. The transfer of the property of an estate to a corporation held not a prohibited substitution or fidei commissum of which a forced heir receiving his legitime in such stock could complain.—Steege v. Leopold Weil Building & Improvement Co. (La.) 232.

PERSONAL INJURIES.

Causing death, see Death, §§ 98, 99.
Risks and causes of loss within accident insurance policy, see Insurance, §§ 461, 462.

Particular causes or means of injury.

See Assault and Battery; Electricity, § 16.

Acts or omissions of carrier, see Carriers, §§ 280, 321.

Acts or omissions of municipality in general, see Municipal Corporations, §§ 755-822.

Defects in vessels or appliances, see Shipping, § 84.

Defects or obstructions in streets, see Municipal Corporations, §§ 755-822.

Malpractice or negligence of physician or surgeon, see Physicians and Surgeons, §§ 15, 18.

Navigation of vessels, see Shipping, § 84.

Negligence in general, see Negligence.

Negligence in use of street, see Municipal Corporations, § 705.

Operation of railroads, see Railroads, §§ 282, 297, 303-351, 355-400.

Operation of street railroads, see Street Railroads, §§ 81, 118.

Particular classes of persons injured.

Employés, see Master and Servant, §§ 96, 296.
Passengers, see Carriers, §§ 280, 321, 333, 341.
Travelers on streets, see Municipal Corporations, §§ 755-822.

Remedies.

See Damages.

Evidence admissible as part of *res gestæ*, see Evidence, §§ 121-123.

Venue of action against corporation, see Corporations, § 503.

PERSONAL PROPERTY.

See Property.

Annexation to real property, see Fixtures.

Gift, see Gifts.

Mortgage, see Chattel Mortgages.

Offenses involving or affecting, see Embezzlement; Receiving Stolen Goods.

Pledge, see Pledges.

Remedies involving or affecting, see Detinue; Replevin.

Sales, see Sales.

Sales by executors or administrators, see Executors and Administrators, §§ 328-338.

Taxation of, see Taxation.

Wrongful conversion, see Trover and Conversion.

PERSONAL REPRESENTATIVES.

See Executors and Administrators.

PERSONS.

Offenses against the person, see Homicide; Rape; Seduction, §§ 37, 46.

PETITION.

See Pleading.

For allowance of appeal or writ of error, see Appeal and Error, § 361.

PETIT JURY.

See Jury.

PETITORY ACTION.

See Real Actions, § 8.

Joinder with possessory action, see Action, § 52.

PHYSICIANS AND SURGEONS.

Expert testimony, see Evidence, §§ 545, 553.

§ 14. A physician is not required to be infallible in diagnosing a case or treating diseases, so that the fact that a patient's disease was different from what it was diagnosed to be was merely evidence of negligence.—*Hamrick v. Shipp* (Ala.) 932.

§ 15. The throwing of an animal by a veterinary surgeon preparatory to cauterizing a spavin held a part of the treatment, entitling the owner to recover for negligence and unskillfulness in performing it.—*Staples v. Steed* (Ala.) 646.

§ 18. In an action against a physician for damages for negligence in medical treatment, an instruction held to correctly state the ultimate question for the jury's decision.—*Hamrick v. Shipp* (Ala.) 932.

§ 18. That medical treatment was unsuccessful could not of itself justify an inference of unskillfulness or negligence by the physician in an action against him for malpractice.—*Hamrick v. Shipp* (Ala.) 932.

§ 18. In an action against a physician for damages for negligence in treating plaintiff's son, a charge held proper and merely to state that there could be no recovery unless the jury were reasonably satisfied of a lack of skill in treatment.—*Hamrick v. Shipp* (Ala.) 932.

PIPE LINES.

For conveyance of water, see Waters and Water Courses, §§ 201, 203.

PLACE.

For work, duties and liabilities of master as to servants, see Master and Servant, §§ 101, 129. Of trial, see Criminal Law, § 107; Venue.

PLANTS.

Liability of master for injuries from defects in plant, see Master and Servant, § 116.

PLEA.

In civil actions, see Pleading, §§ 80, 136, 409.

In criminal prosecutions, see Criminal Law, § 279.

PLEADING.

Indictment or criminal information or complaint, see Indictment and Information.

Practice in equity, see Equity, §§ 133-313.

To sustain judgment by default, see Judgment, § 101.

Allegations as to particular facts, acts, or transactions.

Contributory negligence of passenger, see Carriers, § 343.

Damages, see Damages, §§ 150, 158.

Fraud in conveyances, see Fraudulent Conveyances, §§ 263, 260.

Negligence of master causing injuries to servant, see Master and Servant, § 258.

In actions by or against particular classes of persons.

See Carriers, §§ 94, 227, 314, 315, 343; Corporations, §§ 518, 672; Executors and Administrators, § 443; Master and Servant, §§ 256, 264, 329; Municipal Corporations, § 816; Parent and Child, § 7; Partnership, § 216; Railroads, §§ 345, 439.

Foreign corporations, see Corporations, § 672.

Insurance companies, see Insurance, § 642.

Telegraph or telephone companies, see Telegraphs and Telephones, § 65.

Trustees in bankruptcy, see Bankruptcy, § 302.

In particular actions or proceedings.

See Garnishment, §§ 144, 148; Habeas Corpus, § 76; Malicious Prosecution, §§ 47, 72; Quiet- ing Title, §§ 35, 52; Real Actions, § 8; Trover and Conversion, § 32.

By parent for injuries to child, see Parent and Child, § 7.

For assault, see Assault and Battery, § 24.

For equitable relief against judgment, see Judgment, § 460.

For failure of carrier to deliver goods, see Carriers, § 94.

For false imprisonment, see False Imprisonment, § 20.

For injunction, see Injunction, § 118.

For injuries at railroad crossings, see Railroads, § 345.

For injuries by servants, see Master and Servant, § 329.

For injuries from accident to trains, see Railroads, § 297.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 816.

For injuries from negligence, see Negligence, § 119.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 65.

For injuries to animals on or near railroad tracks, see Railroads, § 439.

For injuries to hired horses, see Animals, § 27.

For injuries to passengers, see Carriers, §§ 314, 315, 343.

For injuries to servants, see Master and Servant, §§ 256, 264.
 For libel or slander, see Libel and Slander, §§ 94, 100.
 For loss of or injury to live stock in course of transportation, see Carriers, § 227.
 For malicious prosecution, see Malicious Prosecution, §§ 47, 72.
 For obstruction of highway, see Highways, § 160.
 For price or value of goods sold, see Sales, § 354.
 For wrongful attachment, see Attachment, § 373.
 On account, see Account, Action on, § 6.
 On bills or notes, see Bills and Notes, § 464.
 On insurance policies, see Insurance, § 642.
 Petitory actions, see Real Actions, § 8.
 Pleas in criminal prosecutions, see Criminal Law, § 279.
 Preliminary complaint in criminal prosecutions, see Criminal Law, § 211.
 To enforce mechanic's lien, see Mechanics' Liens, §§ 271, 277.
 To enforce specific performance, see Specific Performance, § 114.
 To foreclose mortgage on community property, see Husband and Wife, § 270.
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 263, 266.
Review of decisions and pleading in appellate courts.
 Review of decisions as dependent on prejudicial nature of error, see Appeal and Error, §§ 1040, 1042.
 Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 195.
 Review of decisions as dependent on presentation of question in record, see Appeal and Error, §§ 680, 681.
 Review of decisions involving discretion of court, see Appeal and Error, § 959.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8. A complaint for injuries to a servant *held* to state only a legal conclusion.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.
 § 9. Sufficiency of averments of negligence, stated.—Pace v. Louisville & N. R. Co. (Ala.) 52.
 § 18. A plea in an action for conversion of cotton, alleging a bill of sale by plaintiff of two bales of cotton, *held* bad for indefiniteness and uncertainty in not identifying cotton sold with that carried away.—Jordan v. Emanuel (Ala.) 310.
 § 18. The certainty required in pleading stated, and Code 1907, § 5321, enjoining brevity *held* not to impair the requirement.—Weller & Co. v. Camp (Ala.) 929.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

In equity, see Equity, §§ 133-149.
 Joinder of causes of action, see Action, § 50.
 Single and entire cause of action, see Action, § 38.

In particular actions or proceedings.

See Quietting Title, §§ 35, 52; Trover and Conversion, § 32.
 For injunction, see Injunction, § 118.
 For injuries to hired horses, see Animals, § 27.
 For injuries to servants, see Master and Servant, §§ 256, 264.
 For obstruction of highway, see Highways, § 160.
 On bills or notes, see Bills and Notes, § 464.
 To enforce mechanic's lien, see Mechanics' Liens, § 271.

To enforce specific performance, see Specific Performance, § 114.
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 263.

§ 54. Specific reference from one count to another is not only permissible, but often proper to avoid unnecessary repetition and prolixity.—Mattingly v. Houston (Ala.) 78.

§ 64. If a single count contains several averments, all of which combine to make up the one cause of action, it is a good count; but it requires proof of all to sustain it.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 64. "Duplicity" in a declaration defined.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 64. Several averments in a count *held* not to be disjunctively alleged.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 64. While duplicity in pleading is allowed, it does not authorize the joining of several independent torts, constituting separate causes of action, in one count.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 64. Duplicity in pleading *held* to be allowable in Alabama.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 64. Distinct and independent causes of action in tort cannot be joined in the same count of the complaint.—Southern Ry. Co. v. Hanby (Ala.) 334.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In particular actions or proceedings.

See Garnishment, §§ 144, 148.
 For injuries to servants, see Master and Servant, § 262.
 For libel or slander, see Libel and Slander, §§ 94, 100.
 For price of goods sold, see Sales, § 354.
 Petitory actions, see Real Actions, § 8.
 Return to writ of habeas corpus, see Habeas Corpus, § 76.

(A) Defenses in General.

§ 80. Pleas in bar of the whole action *held* bad, where none of them is an entire answer to more than one count of the complaint.—Jordan v. Emanuel (Ala.) 310.

§ 96. A plea must contain a succinct statement of the facts relied on in bar.—Pace v. Louisville & N. R. Co. (Ala.) 52.

§ 90. "Duplicity" in plea or answer defined.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

(B) Dilatory Pleas and Matter in Abatement.

§ 106. A plea in abatement on the ground that an action was not brought in the county of defendant's residence (Code 1907, § 6110) *held* bad on demurrer.—Staples v. Steed (Ala.) 646.

(C) Traverses or Denials and Admissions.

§ 115. In an action for breach by the buyer of a contract to purchase a soda fountain, the plea "that the allegations of the complaint are untrue" is the proper form of the general issue.—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

(D) Matter in Avoidance.

§ 136. A plea that injury to an employé resulted from dangers ordinarily incident to the service *held* within the general issue, and so superfluous.—Reaves v. Anniston Knitting Mills Co. (Ala.) 142.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

In action on cashier's check, see Banks and Banking, § 228.

§ 165. It is not proper pleading to reply to a plea where a defect is sought to be reached which could have been reached by a demurrer to the plea.—*Broyles v. Central of Georgia Ry. Co.* (Ala.) 81.

§ 173. Replications, which neither denied the facts stated in the pleas, nor confessed and avoided, nor set up matters of estoppel, were insufficient.—*Huson Ice & Machine Works v. Bland & Chambers* (Ala.) 445.

V. DEMURRER OR EXCEPTION.

In equity, see Equity, §§ 210-241.

Review of decisions, see Appeal and Error, §§ 680, 1040.

§ 193. If the case made by the evidence was an action on a policy of accident insurance, instead of on a life insurance policy, as alleged by the complaint, a demurrer was not the proper manner of raising the objection.—*National Life & Accident Ins. Co. v. Lokey* (Ala.) 45.

§ 193. A demurrer to a count in a complaint by a servant for injuries, that it does not state a cause of action under the employer's liability act (Code 1907, § 3910), is insufficient, since defendant cannot dictate under what law plaintiff shall bring his action.—*Sloss-Sheffield Steel & Iron Co. v. Smith* (Ala.) 38.

§ 193. Where a complaint sets forth a valid claim for general or nominal damages, it is not open to demurrer by an addition of a special damage claim, though the special damages are not recoverable; but the remedy is by motion to strike, objections to evidence, or requests for instructions.—*Walls v. C. D. Smith & Co.* (Ala.) 320.

§ 204. Demurrer does not lie to a part of a count or plea except in suits on bonds assigning special breaches.—*Louisville & N. R. Co. v. McCool* (Ala.) 656.

§ 209. A demurrer to a complaint held to make the point of misjoinder of actions and parties.—*Southern Ry. Co. v. Hanby* (Ala.) 334.

§ 214. The truth of a legal conclusion pleaded is never admitted, even when heard on demurrer.—*Sloss-Sheffield Steel & Iron Co. v. Smith* (Ala.) 38.

§ 214. A demurrer to the declaration admits every material allegation thereof, and an affidavit filed by another denying allegations therein cannot affect the legal effect of the facts alleged when considered on demurrer.—*Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co.* (Miss.) 454.

§ 225. After demurrer is sustained, an offer to amend comes too late.—*Godchaux v. Hyde* (La.) 269.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Effect of amendment on limitation of actions, see Limitation of Actions, § 127.

Review of decisions, see Appeal and Error, §§ 195, 681, 959, 1041.

§ 236. Trial courts are vested with discretion in allowing amendments to pleadings.—*Morgan v. Eaton* (Fla.) 305.

§ 248. An amended petition held to state a new cause of action.—*Mercantile Fire & Marine Ins. Co. v. Cumberland Telephone & Telegraph Co.* (La.) 851.

§ 249. Amended counts held changed into counts in assumpsit.—*Alabama Great Southern R. Co. v. Norris* (Ala.) 891.

§ 254. An objection that an amended complaint set up a new cause of action should not be made by demurrer.—*North Italian Colonial Co. v. Janovich-Calafiore Co.* (Ala.) 339.

VII. SIGNATURE AND VERIFICATION.

In equity, see Equity, § 313.

XI. MOTIONS.

Review of decisions, see Appeal and Error, § 1042.

§ 356. An objection that an amended complaint set up a new cause of action, should be made by motion to strike.—*North Italian Colonial Co. v. Janovich-Calafiore Co.* (Ala.) 339.

§ 362. Where a complaint sets forth a valid claim for general or nominal damages, it is not open to demurrer by an addition of a special damage claim, though the special damages are not recoverable, but the remedy is by motion to strike, objections to evidence, or requests for instructions.—*Walls v. C. D. Smith & Co.* (Ala.) 320.

XII. ISSUES, PROOF, AND VARIANCE.

In pleading damages in general, see Damages, § 158.

In particular actions or proceedings.

By parent for injuries to child, see Parent and Child, § 7.

Criminal prosecutions, see Indictment and Information, § 167.

For failure of carrier to deliver goods, see Carriers, § 94.

For injuries at railroad crossings, see Railroads, § 345.

For injuries from negligence, see Negligence, § 119.

For injuries to passengers, see Carriers, § 315.

For injuries to servants, see Master and Servant, § 264.

For libel or slander, see Libel and Slander, § 100.

For malicious prosecution, see Malicious Prosecution, § 55.

To enforce mechanic's lien, see Mechanics' Liens, § 277.

§ 374. Where a single count contains several distinct averments, each presenting a substantial cause of action, proof of either cause will authorize a recovery.—*Southern Ry. Co. v. Lee* (Ala.) 648.

§ 381. Where plaintiff seeks to recover certain land on the possession of one title, she cannot introduce another as the basis of her right.—*Britt v. Caldwell-Norton Lumber Co.* (La.) 251.

§ 389. Exact correspondence of allegation and proof is not required; it sufficing that one substantially corresponds with the other.—*Southern Ry. Co. v. Lee* (Ala.) 648.

§ 392. Where a suit on a contract is joint, and the proof shows that only one defendant is liable, it is a fatal variance, and judgment cannot be rendered against one alone, unless the other is discharged on some personal defense.—*Smythe v. Dothan Foundry & Machine Co.* (Ala.) 398.

§ 392. Where it was alleged that a contract was made with plaintiff by the defendants, and the proof showed that the contract was made by a partnership of which defendants were members, there was no variance.—*Austin v. Beall* (Ala.) 657.

§ 399. If there is an entire lack of proof as to any material averment of the complaint, the general charge should be given for defendant.—*Southern Ry. Co. v. Lee* (Ala.) 648.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VER- DICT OR JUDGMENT.

Defects in indictment and information, see Indictment and Information, §§ 196, 202.
Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 195.

§ 409. In an action against a telegraph company, defendant *held* entitled to the affirmative charge.—*Western Union Telegraph Co. v. Albertville Canning Co. (Ala.)* 885.

§ 428. Where a complaint sets forth a valid claim for general or nominal damages, it is not open to demurrer by an addition of a special damage claim, though the special damages are not recoverable; but the remedy is by motion to strike, objections to evidence or requests for instructions.—*Walls v. C. D. Smith & Co. (Ala.)* 320.

§ 430. Question of variance between the terms of a written lease sued on under counts in the declaration cannot be raised by objection to evidence, but should be presented by demurrer to the declaration.—*Savage v. Ross (Fla.)* 16.

§ 433. A party *held* entitled to judgment on a fact proved though not alleged in the complaint to which a demurrer was not interposed.—*Kramer v. Compton (Ala.)* 351.

PLEDGES.

See Chattel Mortgages.

Right of appeal in action for redemption, see Appeal and Error, § 150.

§ 5. Property to be pledged must exist at the time of pledge.—*In re Pleasant Hill Lumber Co. (La.)* 1010.

§ 11. Under Civ. Code, arts. 3152, 3162, *held*, that there was no pledge of lumber as to third persons, where the pledgee did not acquire actual possession.—*In re Pleasant Hill Lumber Co. (La.)* 1010.

POISONS.

Dismissal of appeal in prosecution for illegal sale of cocaine, see Criminal Law, § 260.

Duplicity in indictment for mingling of poison with whisky, see Indictment and Information, § 125.

§ 9. It is unnecessary for an indictment under Code 1906, § 1331, to charge to whom the poison belonged, nor the food, drink, or medicine with which it is mingled, nor that it was in possession of the person for whom it was intended, nor that he was about to or intended to drink the same.—*State v. Clark (Miss.)* 691.

POLICE POWER.

Of municipality, see Municipal Corporations, §§ 580-641.

Of state, see Constitutional Law, § 81.

Particular subjects of regulation, see Carriers, § 2; Intoxicating Liquors, § 10; Sunday.

POLICY.

Of insurance, see Insurance.

POLITICAL RIGHTS.

Suffrage, see Elections.

POLLING PLACES.

See Elections, § 201.

POPULAR VOTE.

Adoption of stock laws, see Animals, § 50.

Submission of issuance of drainage bonds, see Drains, § 18.

To determine issuance of county bonds, see Counties, § 178.

POSSESSION.

See Adverse Possession.

Bona fide purchasers from person in possession, see Sales, § 234.

Declarations by person in possession or control of property as to possession, see Evidence, § 273.

Of adulterated milk for sale, see Food, § 14.

Of defendant in action for recovery of possession, see Ejectment, § 19.

Of demised premises, see Landlord and Tenant, § 132.

Of personal property, remedies for recovery, see Detinue; Replevin.

Of pledged property, see Pledges, § 11.

Of property, statement in claim of mechanic's lien, see Mechanics' Liens, § 137.

Of real property, remedies for recovery, see Ejectment; Forcible Entry and Detainer, §§ 4-17.

Prior possession, element of right of action, see Forcible Entry and Detainer, § 9.

Retention by grantor, element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 142.

Right of possession, element of right of action, see Trover and Conversion, § 16.

To support action to quiet title, see Quietening Title, § 12.

POSSESSORY ACTION.

Joinder with petitory action, see Action, § 52.

POSSESSORY WARRANT.

Actions for recovery of personalty founded on right of possession, see Replevin.

Actions for recovery of personalty founded on right of property, see Detinue.

POSTAL CLERKS.

As passengers, see Carriers, §§ 241, 317, 337, 343.

POSTPONEMENT.

Continuance of criminal prosecutions, see Criminal Law, §§ 575, 603.

POWERS.

Of attorney, see Principal and Agent.

Of sale in mortgage, see Mortgages, § 333.

PRACTICE.

Rules by court, see Courts, § 79.

In particular civil actions or proceedings.

See Account, Action on; Assumpsit, Action of; Attachment, § 308; Bankruptcy; Certiorari, §§ 40, 70; Detinue; Ejectment, §§ 90, 95, 106; Execution; Forcible Entry and Detainer, §§ 4-17; Garnishment, §§ 144, 148; Habeas Corpus, §§ 76, 99; Injunction, §§ 118, 143-172; Mandamus, §§ 160, 172; Partition, §§ 74, 114; Prohibition, § 28; Quietening Title, §§ 35, 52; Real Actions, § 8; Replevin; Trespas, §§ 47, 68; Trover and Conversion, §§ 16-46; Work and Labor, §§ 19, 28.

Accounting by receiver, see Receivers, §§ 200, 202.

Appointment of executor or administrator, see Executors and Administrators, § 20.

Appointment of receiver, see Receivers, §§ 20-57.

Assessment of damages, see Damages, § 216.

- Between shareholders and officers or agents of corporation, see Corporations, § 320.
- By or against assignee or assignors, see Assignments, § 137.
- By or against banks in general, see Banks and Banking, § 228.
- By or against corporations in general, see Corporations, §§ 503-518.
- By or against executors or administrators, see Executors and Administrators, § 443.
- By or against firms or partners, see Partnership, §§ 216, 219.
- By or against foreign corporations, see Corporations, § 672.
- By or against insane persons, see Insane Persons, § 94.
- By or against municipal corporations, see Municipal Corporations, §§ 1037, 1038.
- By or against remaindermen, see Remainders, § 17.
- By or against states, see States, § 191.
- By or against trustees in bankruptcy, see Bankruptcy, § 302.
- By owners of property wrongfully taken for public use, see Eminent Domain, §§ 268, 284.
- For assault and battery, see Assault and Battery, §§ 19, 24.
- For breach of contract of sale, see Sales, §§ 382-388, 418.
- For causing death, see Death, §§ 98, 99.
- For conspiracy, see Conspiracy, § 17.
- For contempt, see Contempt, §§ 37, 66.
- For divorce, see Divorce, §§ 124, 174.
- For equitable relief against judgment, see Judgment, § 460.
- For failure of carrier to deliver or for misdelivery of goods, see Carriers, § 94.
- For false imprisonment, see False Imprisonment, §§ 20, 23.
- For fraud, see Fraud, § 64.
- For injuries at railroad crossings, see Railroads, §§ 345-351.
- For injuries by servants, see Master and Servant, §§ 325, 332.
- For injuries from accidents to trains, see Railroads, § 297.
- For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 816-822.
- For injuries from fires caused by operation of railroad, see Railroads, §§ 480-485.
- For injuries from negligence in general, see Negligence, §§ 119-138.
- For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 65, 69.
- For injuries from negligent use of street, see Municipal Corporations, § 708.
- For injuries to animals on or near railroad tracks, see Railroads, § 439.
- For injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.
- For injuries to passengers, see Carriers, §§ 314, 321, 343.
- For injuries to persons on or near railroad tracks, see Railroads, §§ 396-400.
- For injuries to persons on or near street railroad tracks, see Street Railroads, § 118.
- For injuries to servants, see Master and Servant, §§ 256, 296.
- For judgment by default, see Judgment, §§ 101-143.
- For libel or slander, see Libel and Slander, §§ 77, 100-109, 120, 121, 123, 124.
- For loss of or injury to goods, see Carriers, §§ 132, 136.
- For loss of or injury to live stock, see Carriers, §§ 227, 229.
- For loss of services of child, see Parent and Child, § 7.
- For malicious prosecution, see Malicious Prosecution, §§ 47, 72.
- For new trial, see New Trial, §§ 117-162.
- For obstruction of or encroachment on highways, see Highways, § 160.
- For purchase money on sale of goods, see Sales, §§ 340-364.
- For separate maintenance, see Husband and Wife, § 298½.
- For wrongful attachment, see Attachment, §§ 373, 380.
- On bail bonds or undertakings, see Bail, § 94.
- On bills or notes, see Bills and Notes, §§ 404-523.
- Probate proceedings and actions relating to wills or probate, see Wills, § 420.
- Scire facias to enforce bail bond, see Bail, § 94.
- Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, §§ 36-56.
- To annul marriage, see Marriage, §§ 58, 60.
- To cancel written instrument, see Cancellation of Instruments, § 32.
- To correct or set aside assessment or for reassessment, see Taxation, § 500.
- To enforce assessment for public improvement, see Municipal Corporations, §§ 525, 586.
- To enforce dissolution of corporation, see Corporations, §§ 612, 614.
- To enforce liability of stockholders, see Corporations, § 262.
- To enforce mechanic's lien, see Mechanics' Liens, §§ 268, 304.
- To enforce specific performance, see Specific Performance, §§ 108, 114.
- To enforce taxes, see Taxation, §§ 572, 679, 689.
- To establish and determine claims to property attached, see Attachment, § 308.
- To establish and enforce trust, see Trusts, § 365.
- To establish private roads, see Private Roads, § 2.
- To foreclose mortgage, see Mortgages, §§ 380, 468.
- To redeem from mortgage sale, see Mortgages, §§ 614, 621.
- To reform written instrument, see Reformation of Instruments, § 45.
- To sell property of decedent, see Executors and Administrators, §§ 332, 335.
- To set aside fraudulent conveyance, see Fraudulent Conveyances, §§ 218-295.
- Particular proceedings in actions.*
- See Abatement and Revival; Damages, §§ 150, 216; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; New Trial; Parties; Pleading; Reference; Stipulations; Trial; Venue.
- Appointment of guardian ad litem or next friend, see Insane Persons, § 94.
- Demurrer to evidence, see Trial, § 156.
- Directing verdict, see Trial, §§ 169-171.
- Examination of witnesses, see Witnesses, §§ 236, 290.
- Instructions to jury, see Trial, §§ 186-296.
- Notice of pendency of action, see Lis Pendens.
- Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, §§ 36-56.
- Transfer of causes from one state court to another, see Courts, §§ 485, 487.
- Particular remedies in or incident to actions.*
- See Attachment; Discovery; Garnishment; Injunction; Receivers; Sequestration.
- Stay of proceedings, see Action, § 69.
- Procedure in criminal prosecutions.*
- See Bail, §§ 43-94; Criminal Law; Grand Jury; Indictment and Information; Jury.
- Habeas corpus proceedings, see Habeas Corpus.
- Search warrant, see Searches and Seizures.
- Procedure in exercise of special or limited jurisdiction.*
- Bankruptcy, see Bankruptcy.
- Equity, see Equity.
- Justices' courts in civil cases, see Justices of the Peace, §§ 75, 84.
- Probate and administration, see Executors and Administrators, §§ 20, 314, 332, 335, 509.

Procedure in or by particular courts or tribunals.
See Courts; Justices of the Peace, §§ 174, 200.
Courts of appellate jurisdiction in particular states, see Courts, § 224.
Municipal courts, see Courts, § 189.

Procedure on review.

See Appeal and Error; Certiorari, §§ 40, 70;
Criminal Law, §§ 1019, 1188; Exceptions,
Bill of; New Trial.

PRAYER.

For instructions, see Criminal Law, §§ 829, 830;
Trial, §§ 256, 261.
For relief in petitory action, see Real Actions,
§ 8.

PREDICATE.

For impeachment of witnesses, see Witnesses, § 388.

PRE-EXISTING LIABILITY.

As consideration for conveyance or other transfer, sufficiency as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 87.

PREFERENCES.

By carrier, see Carriers, § 13.
By debtor prior to bankruptcy proceedings, see Bankruptcy, §§ 164, 165.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1026, 1068.
Ground for reversal in criminal cases, see Criminal Law, §§ 1162, 1177.

PRELIMINARY EVIDENCE.

Proof of execution, and authentication of documents offered in evidence, see Evidence, § 378.

PRELIMINARY INJUNCTION.

See Injunction, §§ 143-172.

PREMATURE APPEAL.

See Appeal and Error, § 337.

PREMEDITATION.

Element of murder, see Homicide, §§ 156, 158, 286.

PREMIUMS.

Insurance premiums, see Insurance, § 187.

PREROGATIVE WRITS.

See Certiorari; Habeas Corpus; Mandamus; Prohibition; Quo Warranto.

PRESCRIPTION.

See Limitation of Actions.

PRESENTATION.

Of claims against estate of decedent, see Executors and Administrators, § 226.

PRESS.

See Newspapers.

PRESUMPTIONS.

In civil actions, see Evidence, §§ 67-83.
Of capacity of minor, see Infants, § 2.

On appeal or writ of error in civil actions, see Appeal and Error, §§ 900, 938, 1031.
On appeal or writ of error in criminal prosecutions, see Criminal Law, § 1144.

PRETENSE.

See Fraud.

PREVENTIVE RELIEF.

See Injunction.

PRICE.

Of goods sold, see Sales, §§ 340-364.

PRINCIPAL AND ACCESSORY.

See Criminal Law, § 73; Homicide, §§ 83, 281.

PRINCIPAL AND AGENT.

See Master and Servant.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Banks and Banking, §§ 108, 114; Brokers; Insurance, §§ 73, 94, 375, 376, 556.

Agency of partner for firm, see Partnership, §§ 161, 164.

Corporate agents, see Corporations, §§ 308, 320, 423-432.

I. THE RELATION.

(A) Creation and Existence.

§ 24. Evidence in trespass held sufficient to go to the jury on the question of the persons committing the trespass being representatives of defendant.—Home Telephone Co. v. Robertson (Ala.) 655.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Corporate officers and agents, see Corporations, §§ 308, 320.

(A) Execution of Agency.

§ 70. One employed to act as agent for another in a transaction requiring his judgment or personal influence cannot also act as agent for another without the principal's consent.—Burnham City Lumber Co. v. Rannie (Fla.) 617.

(B) Compensation and Lien of Agent.

Brokers, see Brokers, §§ 54-67.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Authority to give warning against trespass, see Trespass, § 81.

Brokers, see Brokers, § 96.

Liability of master for injuries to third persons by acts or omissions of servants or independent contractors, see Master and Servant, §§ 301, 332.

(A) Powers of Agent.

Authority of agents of corporations in general, see Corporations, §§ 423-432.

Authority of attorney, see Attorney and Client, § 88.

Insurance agents, see Insurance, §§ 375, 376.

§ 99. A principal is liable for the acts of his agent done within the scope of his apparent authority.—Kramer v. Compton (Ala.) 351.

§ 99. The acts of an agent, performed within the scope of his authority, held binding upon the principal.—Aetna Ins. Co. v. Holmes (Fla.) 801.

(C) **Unauthorized and Wrongful Acts.**
Of insurance agents, see Insurance, § 375.

§ 150. A principal *held* not liable for the act of his agent, which is not within the usual scope of the actual or apparent authority of the agent.—*White v. Lee* (Miss.) 206.

(D) **Ratification.**

Of acts of corporate officers and agents, see Banks and Banking, § 114; Corporations, § 426.

PRINCIPAL AND SURETY.

See Guaranty.

Right of action by surety to set aside fraudulent conveyance, see Fraudulent Conveyances, § 218.

Sureties on bail bond, see Bail.

Sureties on officers' bonds, see Officers, § 126.

III. DISCHARGE OF SURETY.

On bond of treasurer of levee board, see Levees, § 10.

V. RIGHTS AND REMEDIES OF SURETY.

Commencement of adverse possession by fraudulent grantee of principal, see Adverse Possession, § 42.

(B) **As to Principal.**

Accrual of cause of action, see Limitation of Actions, § 56.

Action by surety to set aside fraudulent conveyance, see Fraudulent Conveyances, § 218.

Evidence in action to set aside fraudulent conveyance, see Fraudulent Conveyances, § 205.

Pleading in action to set aside fraudulent conveyance, see Fraudulent Conveyances, § 206.

§ 182. A surety's right to reimbursement is limited to the value of the interest and costs with which he has parted in satisfaction of the debt.—*Smith v. Pitts* (Ala.) 402.

PRIOR ADJUDICATION.

Operation and effect in general, see Judgment, §§ 668-747.

PRIORITIES.

Between judgments and other liens or claims, see Judgment, §§ 787, 788.

Of claims against property in hands of receiver, see Receivers, §§ 153-162.

Of mortgages, see Mortgages, § 154.

PRISONS.

See Convicts; False Imprisonment.

PRIVATE NUISANCE.

See Nuisance, §§ 1, 5.

PRIVATE ROADS.

§ 2. On trial de novo in the circuit court on appeal on the question of compensation in proceedings to establish a private road, *held*, that a requested charge that the jury should not consider any assessment of compensation heretofore made in the commissioners' court should have been given.—*Ballard v. Cook* (Ala.) 147.

§ 2. Code 1907, § 5776, does not authorize an appeal from acts of commissioners' court in establishing a private road.—*Ballard v. Cook* (Ala.) 147.

PRIVILEGE.

Franchises in general, see Franchises.

Grants of privileges by municipal corporations, right to use street for purpose other than highway, see Municipal Corporations, § 682.
License tax on privileges, see Licenses, §§ 7, 32.
On logs or lumber, see Logs and Logging, § 26.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 41, 51.

PRIVITY.

With party to action, conclusiveness of adjudication, see Judgment, §§ 668, 702.

PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, §§ 19, 21.

PROBATE.

Of will, see Wills, § 420.

PROBATE COURTS.

See Courts, § 475.

PROCEDURE.

See cross-references under Practice.

PROCEEDS.

Of collection by bank, rights and liabilities, see Banks and Banking, § 165.

PROCESS.

Want of or defects in process or notice as ground for collateral attack on judgment, see Judgment, § 490.

In actions against particular classes of persons, see Corporations, § 507.

In particular actions or proceedings.

Criminal prosecutions, see Criminal Law, §§ 217, 218.

Particular forms of writs or other process.

See Certiorari; Execution; Garnishment; Habeas Corpus; Mandamus; Prohibition; Quo Warranto; Replevin; Sequestration.

II. SERVICE.

In actions against corporations in general, see Corporations, § 507.

(E) **Return and Proof of Service.**

In execution proceedings, see Execution, § 333.

IV. ABUSE OF PROCESS.

False imprisonment, see False Imprisonment.

Malicious prosecution, see Malicious Prosecution.

Wrongful attachment, see Attachment, §§ 373, 380.

PRO CONFESSO.

Decree in equity, see Equity, § 418.

PROFANITY.

Profane swearing as disorderly conduct, see Disorderly Conduct.

PROFITS.

Loss, element of damage in general, see Damages, § 40.

Loss as element of damages for breach of contract of sale, see Sales, § 384.

Receiver of rents and profits in action to foreclose mortgage, see Mortgages, § 468.

Right of carrier for special services, see Carriers, § 188.

PROHIBITION.

Against proceedings in other courts, concurrent and conflicting jurisdiction of state courts, see Courts, § 480.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

Prohibitory injunction, see Injunction.

I. NATURE AND GROUNDS.

§ 9. Prohibition may be resorted to, to prevent vexatious prosecution under a void ordinance, but not to prevent prosecutions under a valid ordinance.—*Hurley v. City of Corinth* (Miss.) 695.

§ 10. Trial court held divested of jurisdiction upon a suspensive appeal by the state in proceedings to forfeit a corporate charter, so that prohibition would lie to restrain further proceedings.—*State ex rel. Guion v. People's Fire Ins. Co. of New Orleans* (La.) 120.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 28. A finding of the trial judge on a trial for selling spirituous liquors in violation of Rev. St. § 910, held not reviewable in the Supreme Court on prohibition.—*State v. Le Blanc* (La.) 114.

PROMISE.

See Contracts.

To answer for debt, default, or miscarriage of another, see Frauds, Statute of, § 33.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Criminal Law, §§ 331-570; Discovery; Evidence; Witnesses.

Burden of proof in general, see Evidence, § 90. Of loss under insurance policy, see Insurance, §§ 534-558.

Order of proof, see Criminal Law, §§ 680, 686; Trial, §§ 62, 68.

Pleading and proof, see Indictment and Information, § 167; Pleading, §§ 374, 399.

Reception of evidence at trial of civil actions in general, see Trial, §§ 45-105.

Reception of evidence at trial of criminal causes in general, see Criminal Law, §§ 673, 686.

PROPERTY.

Affected by judgment lien, see Judgment, § 777. Assets of estate of decedent, see Executors and Administrators, § 39.

Constitutional guaranty of right of property, see Constitutional Law, §§ 278, 297.

Description in deed, see Deeds, § 111.

Exemptions, see Homestead, § 70.

Subject of assessment for municipal improvements in general, see Municipal Corporations, § 426.

Subject of execution, see Execution, § 37.

Subject of sale under order of court, see Executors and Administrators, § 320.

Of particular classes of persons.

See Partnership, § 183; Railroads, § 72.

Infants, see Infants, § 30.

Married women, see Husband and Wife, §§ 137, 151.

Particular estates or interests.

See Dower; Remainders.

Community and separate property, see Husband and Wife, §§ 254, 276.

Married woman's separate property, see Husband and Wife, §§ 137, 151.

Particular species of property.

See Animals; Fixtures; Franchises; Mines and Minerals; Waters and Water Courses.

Corporate stock, see Corporations, §§ 151, 155.

Logs and lumber, see Logs and Logging.

Railroad right of way, see Railroads, § 72.

Remedies involving or affecting property.

See Attachment; Detinue; Ejectment; Execution; Forcible Entry and Detainer, §§ 4-17; Fraudulent Conveyances; Garnishment; Judicial Sales; Lis Pendens; Partition; Quieting Title; Real Actions; Replevin; Searches and Seizures; Sequestration; Specific Performance; Trespass, §§ 47, 68; Trover and Conversion, §§ 16-40.

Bankruptcy proceedings, see Bankruptcy.

Condemnation proceedings, see Eminent Domain, §§ 268, 284.

Enforcement of mechanics' liens, see Mechanics' Liens.

Establishment of claim to attached property, see Attachment, § 308.

Foreclosure of mortgages, see Mortgages, §§ 338, 390, 468.

Injuries to property, damages, see Damages, §§ 105, 138.

Redemption from mortgage sale, see Mortgages, §§ 614, 621.

Settling aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 218-295.

Transfers and other matters affecting title.

See Adverse Possession; Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Descent and Distribution; Gifts; Mortgages; Partition; Pledges.

Dedication to public use, see Dedication.

Sale, see Sales; Vendor and Purchaser.

Sale of property of decedent, see Executors and Administrators, §§ 328-358.

Taking for public use, see Eminent Domain.

Offenses against or involving property.

See Forgery; Larceny; Nuisance; Receiving Stolen Goods; Trespass, §§ 81, 88.

Embezzlement, see Embezzlement.

Injuring or killing animals, see Animals, § 45.

Sale by possessor, see Sales, § 234.

Slander of property, see Libel and Slander, § 140.

§ 4. While, in an action for trespass and for the statutory penalty for cutting trees, ownership or title to land may be inquired into, such is not true as to purely personal actions, such as trover, detinue, assumpsit, replevin, etc.—*Aldrich Mining Co. v. Pearce* (Ala.) 911.

§ 5. When any part of the freehold, such as coal, minerals, sand, gravel, crops or fixtures, etc., are severed from the freehold, they become personalty, and an action of trover, detinue, or other personal action may be brought to recover the property as a chattel, or for damages for the conversion.—*Aldrich Mining Co. v. Pearce* (Ala.) 911.

§ 7. There is and must be title to all things real or personal, if once subjected to ownership, as in absence of a taker, on decease of the owner, property escheats to the state.—*Southern Hardware & Supply Co. v. Lester* (Ala.) 328.

§ 7. Title may be of several kinds, among them, absolute, conditional, equitable, and legal.—*Southern Hardware & Supply Co. v. Lester* (Ala.) 328.

§ 8. Certain matters held not a ratification of a deed.—*Coulson v. Scott* (Ala.) 436.

PROPOSALS.

Bids for contracts with municipal corporations, see Municipal Corporations, § 336.

PROTECTION.

Equal protection of the laws, see Constitution-
al Law, §§ 212, 247.
Of infants, see Infants, §§ 18, 20.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 736, 763, 704; Trial, §§
134-171, 186-199.

PROVISIONAL REMEDIES.

See Attachment; Bail; Garnishment; Injunc-
tion; Receivers; Sequestration.
Review of decisions, see Appeal and Error, §§
955, 1024.

PROXIMATE CAUSE.

Of injury in general, see Negligence, §§ 56,
62, 82.
Of injury to servant, see Master and Servant,
§§ 96, 129.

PUBLICATION.

In official newspapers, see Newspapers.
Of intention to apply for legislation, see Stat-
utes, § 8½.
Of notice of county bond election, see Coun-
ties, § 178.
Of notice of receiver's sale, see Receivers, §
134.

PUBLIC CORPORATIONS.

See Counties; Municipal Corporations.
Drainage and reclamation districts, see Drains,
§ 18.
Levee districts, see Levees, §§ 10, 11.

PUBLIC DEBT.

See Counties, §§ 152-178; Municipal Corpora-
tions, §§ 918-1000.

PUBLIC DOMAIN.

See Public Lands.

PUBLIC FRANCHISES.

See Franchises.

PUBLIC FUNDS.

See Counties, §§ 152-178; Municipal Cor-
porations, §§ 918-1000.

PUBLIC GRANTS.

See Franchises; Public Lands.

PUBLIC HEALTH.

See Health.

PUBLIC HIGHWAYS.

See Highways.

PUBLIC HOLIDAYS.

See Holidays.

PUBLIC IMPROVEMENTS.

See Drains; Highways; Levees; Municipal
Corporations, §§ 265-586.
Subjects and titles of acts relating to public
works, see Statutes, § 123.

PUBLIC LANDS.**II. SURVEY AND DISPOSAL OF LANDS
OF UNITED STATES.****(F) Swamp and Overflowed Lands.**

§ 58. The swamp land acts of Congress of
1849 and 1850 (9 Stat. 352, c. 87; 9 Stat. 519,
c. 84) convey grants of land in present, and as
soon as the land inured to the state government
as swamp land the title referred back to the
dates of the original grants under such acts.—
Hartigan v. Weaver (La.) 674.

§ 61. Act No. 215 of 1908, providing for the
sale of all lands owned by the state or any of
the levee boards at public auction, does not
affect a prior contract made by the levee board.
—Hartigan v. Weaver (La.) 674.

§ 61. The president of the levee board having
conveyances from the state recorded in the re-
corder's office, the board has authority to sell
the property and execute contracts therefor.—
Hartigan v. Weaver (La.) 674.

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QUIETING TITLE.

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I. RIGHT OF ACTION AND DEFENSES.

§ 1. The actions provided for by the Code of Practice and by Act No. 38 of 1908 afford ample remedy for the trial of rights to the ownership

or possession of land under any circumstances.—*Davidson v. McDonald* (La.) 758.

§ 5. Where the proper action to recover certain land is an action in ejectment, the mere fact that all the defendants cannot be joined in one action, and that a multiplicity of suits would thereby result, will not give equity jurisdiction.—*Sayers v. Tallassee Falls Mfg. Co.* (Ala.) 892.

§ 12. Act No. 38 of 1908 construed, and held not to authorize suit to establish title to land where possession is alleged.—*Davidson v. McDonald* (La.) 758.

§ 13. A bill in equity alleging that defendant claims certain land, and is in possession thereof, and that plaintiff is the owner in fee, and praying for the enforcement of his rights, held properly dismissed; the remedy at law being adequate.—*Sayers v. Tallassee Falls Mfg. Co.* (Ala.) 892.

§ 23. To maintain a bill under the statute to quiet title, complainant must have peaceable possession of the land, actual or constructive.—*Brown v. Powers* (Ala.) 647.

II. PROCEEDINGS AND RELIEF.

Apportionment of costs, see Costs, § 61.

§ 35. To maintain a bill to quiet title, it is necessary to aver and prove that at the time of the institution of the suit complainant's possession was peaceable and under claim of ownership.—*Kinney v. Steiner Bros.* (Ala.) 593.

§ 44. A defendant in a suit to remove a cloud on title held to have the burden of showing his title to the property.—*Gilbert v. Pinkston* (Ala.) 442.

§ 44. In a suit to quiet title, evidence held to show that defendant had possession when the bill was filed, and that complainant's acts were a mere device to get possession in order to file the bill.—*Kinney v. Steiner Bros.* (Ala.) 593.

§ 44. In an action to quiet title in which defendant claimed under a purchase upon foreclosure of a trust deed, followed by entry and collection of rents, evidence held to show that defendant entered as mortgagee after condition broken, and took actual possession, and received the rents and profits for more than 20 years before the action was begun.—*Garrett v. Ellis* (Miss.) 451.

§ 44. Defendants in suit to quiet title held to have established title to the land involved.—*Hammond v. Cowart* (Miss.) 451.

§ 52. Where a survey was not for the purpose of providing evidence under Code 1907, § 6023, the action of the chancellor in ordering a survey after decree, without notice to complainant, in a suit to quiet title, held not error.—*Brown v. Powers* (Ala.) 647.

QUO WARRANTO.**I. NATURE AND GROUNDS.**

§ 3. Under Code 1907, § 5453, quo warranto held not to lie against legal officers of a municipal corporation because they assume to exercise corporate powers beyond the territorial limits of the municipality, but the remedy is by injunction.—*City of North Birmingham v. State* (Ala.) 202.

§ 8. Code 1907, § 5450, held not to justify quo warranto to test the validity of the extension of the corporate limits of the municipality.—*City of North Birmingham v. State* (Ala.) 202.

RAILROAD COMMISSIONER.

Regulation of charges of carrier, see Carriers, § 12.

RAILROADS.

See Street Railroads.

As employers, see Master and Servant.
Carriage of goods and passengers, see Carriers.
Judicial notice of duties of section master, see Evidence, § 20.
Liability for injuries from fires set by section-men, see Master and Servant, § 302.
Regulations depriving of property without due process of law, see Constitutional Law, § 297.
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I. CONTROL AND REGULATION IN GENERAL.

Control and regulation of common carriers, see Carriers, §§ 2-20.
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Regulations depriving of property without due process of law, see Constitutional Law, § 297.
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§ 5. Scope of state's right to control and regulate railroads, stated.—Atlantic Coast Line R. Co. v. Coachman (Fla.) 377.

III. PUBLIC AID.

Right of railroad company to contest right of taxpayer to recover taxes paid, see Municipal Corporations, § 977.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.
Remedies of owners of property taken by railroad company, see Eminent Domain, § 268.

§ 72. Where a railroad takes land with obligation to fence and drain it, the right to enforce obligation passes with the title.—Taylor v. New Orleans Terminal Co. (La.) 562.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 113. A railway company held not liable to a shipper for damage to his shipping facilities caused by fencing a right of way; Code 1906, § 4965, being inapplicable.—Yazoo & M. V. R. Co. v. Adams (Miss.) 794.

X. OPERATION.

Carriage of passengers, see Carriers, §§ 239, 343.
Criminal responsibility for homicide, see Homicide, §§ 285, 288.
Injuries to employés, see Master and Servant, §§ 96, 296.

(B) Statutory, Municipal, and Official Regulations.

Denial of equal protection of laws, see Constitutional Law, § 241.
Deprivation of property without due process of law, see Constitutional Law, § 297.

§ 237. "Parking" defined.—City of New Orleans v. Lenfant (La.) 575.

§ 237. The parking of cars on private property held not to constitute a nuisance.—City of New Orleans v. Lenfant (La.) 575.

(D) Injuries to Licensees or Trespassers in General.

§ 282. Where injury is established by the running of a locomotive, the burden is upon the railroad company to show that its agents exercised reasonable care to prevent the injury, under Gen. St. 1906, § 3148.—Johnson v. Louisville & N. R. Co. (Fla.) 195.

§ 282. In an action against a railroad company for injuries, a directed verdict for defendant held improper.—Johnson v. Louisville & N. R. Co. (Fla.) 195.

(E) Accidents to Trains.

§ 207. In an action for death of a railroad engineer in a collision at a crossing, the questions of negligence, contributory negligence, and willfulness held for the jury.—Southern Ry. Co. v. Stollenwerck (Ala.) 204.

§ 297. A complaint for the death of a railroad engineer in collision with a train of another company at a crossing held not to charge joint negligence of the employés of the colliding train.—Southern Ry. Co. v. Stollenwerck (Ala.) 204.

(F) Accidents at Crossings.

§ 303. A railroad, constructing its road across a public highway, must put and keep the approaches and crossing in proper repair for the use of the traveling public.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

§ 326. A traveler held not guilty of contributory negligence in crossing a railroad crossing without first stopping and examining the condition of the crossing.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

§ 345. In an action against a railroad for injuries received at a public crossing, evidence as to the negligence of the flagman held admissible under the pleadings.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

§ 345. In an action against a railroad for damages resulting from a defective crossing, certain evidence held inadmissible under the pleadings, raising the issue of contributory negligence.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

§ 347. A city ordinance providing for the keeping of a watchman at a railroad crossing is admissible in an action for injuries received at that crossing.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

§ 347. In an action against a railroad for damages resulting from a defective railroad crossing, evidence that the crossing had been repaired by the railroad two or three days after the accident was inadmissible.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

§ 350. Whether a traveler on a public highway was negligent in attempting to cross a defective railroad crossing with a well-drilling outfit, or in the manner of driving the outfit over the crossing, held for the jury.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

§ 351. In an action against a railroad for damages to a well-drilling outfit, caused by a defective railroad crossing, an instruction held properly refused, as requiring too high a degree of care on the part of plaintiff.—Nashville, C. & St. L. Ry. v. Ragan (Ala.) 522.

(G) Injuries to Persons on or near Tracks.

Injuries to persons on or near street railroad tracks, see Street Railroads, §§ 81, 118.

§ 355. A person walking on a railroad track is a trespasser, unless it is where the track runs along a highway or public street, which the public have an equal right to use.—Birmingham Southern R. Co. v. Fox (Ala.) 889.

§ 358. A child on a railroad track held more than a mere licensee, so that the railroad was liable for mere negligence in the operation of its trains.—Young v. Southern Ry. Co. (Miss.) 19.

§ 390. Operatives of a railroad train having denied all knowledge of the presence of deceased on track, a recovery for his death could not be had on the theory of last clear chance.—Carlisle v. Alabama Great Southern R. Co. (Ala.) 341.

§ 390. Servants of a railroad company are bound to exercise reasonable care to prevent injury to a trespasser.—*Southern R. Co. v. Pittman* (Miss.) 207.

§ 391. If the engineer, conductor, or other agents in charge of a train are informed of the custom of the public to use a certain part of the roadbed, and with such knowledge, they wantonly or willfully injure a person, the railroad company would be liable, notwithstanding the person injured was a trespasser.—*Birmingham Southern R. Co. v. Fox* (Ala.) 889.

§ 396. In an action for death of a pedestrian on a railroad track, evidence held insufficient to warrant an inference that the operatives of the train saw deceased on the track, or that he ever was on the track in front of the engine.—*Carlisle v. Alabama Great Southern R. Co.* (Ala.) 341.

§ 396. In an action against a railroad company for the death of a pedestrian on the track, evidence held insufficient to justify an inference of willful injury.—*Carlisle v. Alabama Great Southern R. Co.* (Ala.) 341.

§ 396. Where, in an action for death by a railroad train, plaintiff alleged both negligence and willfulness, the burden was on the railroad company under Code 1907, § 5476, to disprove the specific negligence charge, but was on plaintiff to establish a cause of action for willfulness.—*Carlisle v. Alabama Great Southern R. Co.* (Ala.) 341.

§ 397. In an action against a railroad company for the death of plaintiff's intestate by being struck by one of defendant's engines, held, that evidence as to the custom of the public to use the roadbed was admissible on the issue of the wanton or willful negligence of defendant's agent.—*Birmingham Southern R. Co. v. Fox* (Ala.) 889.

§ 397. In an action against a railroad company for the death of plaintiff's intestate by being struck by one of defendant's engines, held, that evidence as to the condition of the track was admissible.—*Birmingham Southern R. Co. v. Fox* (Ala.) 889.

§ 400. Whether an engineer exercised reasonable care to avoid injuring a person on a high trestle after discovering his peril held for the jury.—*Southern R. Co. v. Pittman* (Miss.) 207.

(H) Injuries to Animals on or near Tracks.

§ 405. That plaintiff's dog was a trespasser on defendant's railroad track at the time of the passing of one of defendant's trains did not preclude a recovery for his death.—*Louisville & N. R. Co. v. Zeigler* (Ala.) 599.

§ 439. In an action against a railroad company for negligently killing plaintiff's dog, the complaint need not name the employes of defendant in charge of the train by which the killing was done.—*Louisville & N. R. Co. v. Zeigler* (Ala.) 599.

(I) Fires.

Assumption by judge as to facts in instructions, see Trial, § 191.

Liability for fires set by employes, see Master and Servant, § 302.

§ 469. Where property is placed on a railroad right of way under a contract by which the owner releases the railroad company from liability for damage to the property by fire, the company is not liable for negligently destroying it by fire.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

§ 469. An agreement between defendant railroad company and another, by which the latter was to save defendant harmless from damage by the destruction of a seedhouse erected on defendant's right of way by such other, held not

to prevent plaintiff from recovering against defendant for the destruction of seed stored therein with such other's consent.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

§ 470. The liability of a railroad company for the negligent destruction by fire of property on its right of way when the property owner is a trespasser, and when he is a licensee, stated.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

§ 480. Where communication of fire from defendant's locomotive is shown, the burden is on defendant to exclude negligent construction, equipment, and operation.—*Miller-Brent Lumber Co. v. Douglas* (Ala.) 414.

§ 480. Where fire is communicated to property by a locomotive, the burden is on defendant to show absence of negligence.—*Miller-Brent Lumber Co. v. Douglas* (Ala.) 414.

§ 481. In an action against a railroad company for the destruction by fire of cotton seed stored in a building on defendant's right of way, certain evidence held admissible as tending to show that the fire was negligently started by defendant's agents, and that they were negligent in failing to extinguish it.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

§ 484. In an action for the destruction of property by fire from a locomotive, evidence held insufficient to justify submission to the jury of the question whether the fire was caused by sparks from the locomotive.—*Miller-Brent Lumber Co. v. Douglas* (Ala.) 414.

§ 484. In an action for damages caused by a fire set out on a railroad right of way by a section master and section hands, evidence held sufficient to go to the jury on the question of proximate cause of the injury.—*Alabama & V. Ry. Co. v. Baldwin* (Miss.) 358.

§ 485. A requested charge held properly refused as tending to mislead the jury.—*Alabama Great Southern R. Co. v. Demoville* (Ala.) 406.

RAPE.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 48. In a rape case, testimony of statements to the witness by prosecutrix as to the details of the ravishment held not admissible.—*Gaines v. State* (Ala.) 643.

RATE.

Of municipal taxation, see Municipal Corporations, § 407.

Transportation rates, see Carriers, §§ 12, 13, 188.

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Of acts of particular classes of persons.

See Infants, § 30.

Officers and agents of banks, see Banks and Banking, § 114.

Of particular acts, contracts, or transactions.

See Marriage, § 37.

Contracts of county officers, see Counties, § 124.

Deed of homestead, see Homestead, § 123.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer. §§ 4-17.

Joinder of petitory and possessory actions, see Action, § 52.

§ 8. Evidence held to show that the action is petitory, and a failure to pray for specific

decree is cured by prayer for general relief.—*Haas v. Irion* (La.) 149.

§ 8. An allegation of the answer in a petitory action that plaintiff's title is invalid, without stating any ground of invalidity, is too vague to be available.—*Dumont v. Barrett* (La.) 248.

REAL ESTATE AGENTS.

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Annexation of chattels to real property, see Fixtures.

Assets of estate of decedent, see Executors and Administrators, §§ 39, 129, 151.

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Description in deed, see Deeds, § 111.

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Remedies involving or affecting, see Ejectment;

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Sales by executors or administrators, see Executors and Administrators, §§ 328-338.

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REASONABLE DOUBT.

Instructions as to reasonable doubt, see Criminal Law, § 789.

REBATES.

From cost of advertising sale of property in hands of receiver, see Receivers, § 96.

From freight charges, see Carriers, § 13.

REBUTTAL.

Admission in rebuttal of evidence proper in chief, see Trial, § 62.

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RECEIPTS.

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RECEIVERS.

In actions to foreclose mortgages, see Mortgages, § 468.

Of corporations in general, see Corporations, §§ 553-560.

Review of decisions in receivership proceedings, see Appeal and Error, § 955.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

§ 5. The chancellor, prior to the filing of a bill in vacation, has no jurisdiction to appoint a receiver.—*Howell & Howell v. Harris, Cortner & Co.* (Ala.) 935.

§ 8. The appointment of a receiver is a matter of sound judicial discretion.—*Albritton v. Lott-Blacksher Commission Co.* (Ala.) 653.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Review of decisions, see Appeal and Error, § 955.

§ 29. A bill for a receiver should be filed with the register of the chancery district in which the defendants or a material defendant resides, under Code, § 3003.—*Howell & Howell v. Harris, Cortner & Co.* (Ala.) 935.

§ 29. On the filing of a bill for a receiver with the register, he may act alone in appointing a receiver.—*Howell & Howell v. Harris, Cortner & Co.* (Ala.) 935.

§ 35. A receiver may be appointed without notice in cases of great emergency.—*Albritton v. Lott-Blacksher Commission Co.* (Ala.) 653.

§ 57. Mere failure to appear and contest the appointment of a receiver does not preclude the party from asserting the invalidity of the appointment.—*Albritton v. Lott-Blacksher Commission Co.* (Ala.) 653.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(A) Administration in General.

§ 81. Right of a receiver to represent both the creditors and the debtor stated.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 93. Method of charging certain expenses of a receivership stated.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 96. Amount of charge by an auctioneer for making advertisements, stated.—*Friedrichs v. Friedrichs, Young & Taney* (La.) 996.

(D) Sale and Conveyance or Redelivery of Property.

§ 134. An auctioneer directed by the court to sell property of a corporation in the hands of a receiver is not authorized to advertise the sale in more than two newspapers.—*Friedrichs v. Friedrichs, Young & Taney* (La.) 996.

§ 145. Where all the property of an insolvent was sold in a lump by a receiver, a claim of privilege on open accounts included in the sale cannot be enforced, where there has been no separate appraisal.—*Smith v. D. A. Self & Co., Limited* (La.) 543.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 153. In settling a receivership of a lumber company, taxes should be apportioned between the movables and immovables, but the realty will not be charged with insurance premiums on lumber.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 154. Method of paying fees of attorney for receiver stated.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 158. A claim for feed delivered to a corporation before it was placed in the hands of a receiver held not entitled to preference on the ground that the feed was for animals used by the corporation in its business.—*A. H. George Co. v. Pigford* (Miss.) 796.

§ 162. Right of a bookkeeper and clerk of a receivership to a privilege for payment of his wages under Civ. Code, art. 3252, par. 5, and article 3260, stated.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

VII. ACCOUNTING AND COMPENSATION.

§ 200. The commissions of a receiver, must be prorated among the several interests.—*In re Pleasant Hill Lumber Co.* (La.) 1010.

§ 202. A contention that the receiver should be charged with property of the receivership sold to him through an interposed person should

be pleaded in the court a quo.—In re Pleasant Hill Lumber Co. (La.) 1010.

RECEIVING STOLEN GOODS.

§ 2. To constitute the offense of receiving stolen goods, the goods must first have been stolen.—*Sanders v. State* (Ala.) 417.

RECEPTION.

Of evidence at trial, see Criminal Law, §§ 673, 686; Trial, §§ 45-105.

RECLAMATION.

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RECOMMITTAL.

Of report on reference, see Reference, § 101.

RECORDS.

Deed, record or delivery for record as delivery of deed, see Deeds, § 59.

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Records as evidence, and evidence relating to matters of record.

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REDEMPTION.

From execution sale, see Execution, § 294.

From mortgage sale, see Mortgages, §§ 591, 621.

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To master or commissioner in equity, see Equity, § 404.

I. NATURE, GROUNDS, AND ORDER OF REFERENCE.

§ 25. When three persons claim to be the holder of a genuine mortgage note that is the subject of the suit, the court may ex proprio motu, under Code Prac. art. 442, employ a handwriting expert to assist him in determining which is the genuine note.—*Christina v. Cusimano* (La.) 157.

III. REPORT AND FINDINGS.

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§ 101. Matter respecting sale of land for distribution held properly re-referred.—*Roy v. O'Neill* (Ala.) 946.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§ 2. The right to the reformation of an instrument is not absolute, but depends on an equitable showing.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

II. PROCEEDINGS AND RELIEF.

§ 45. In a suit to reform a deed, so as to include certain land alleged to have been omitted by mistake, evidence held to require a decree granting the relief.—*McDaniel v. Inzer* (Miss.) 359.

REFORMATORIES.

See Convicts.

REGISTRATION.

Of voters, see Elections, § 115.

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From arrest, see Bail.

From liability as guarantor, see Guaranty, § 50.

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On fraudulent representation as element of fraud, see Fraud, § 22.

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Duties and liabilities of life tenants as to remaindermen, see Life Estates.

Vested or contingent, construction of will, see Wills, § 634.

§ 17. Limitations held not to begin to run against remaindermen until the death of the life tenant.—*Blakeney v. Du Bose* (Ala.) 746.

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Of cause by appellate court, see Appeal and Error, § 1106.

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Of limitations in deed, will, or declaration of trust, see Perpetuities.

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Under mining leases, see Mines and Minerals, § 70.

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For further evidence, see Criminal Law, § 686; Trial, § 68.

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Evidence of repairs in action for injuries at railroad crossing, see Railroads, § 347.

Of streets and bridges, subject and title of statute, see Statutes, § 123.

Of streets and other public ways, duty of municipality, see Municipal Corporations, § 757.

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Of municipal charter, see Municipal Corporations, § 49.

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Of questions to witnesses on direct examination, see Witnesses, § 245.

REPLEVIN.

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I. RIGHT OF ACTION AND DEFENSES.

§ 5. Where judgment on which execution was levied is void, the execution defendant may maintain replevin for the goods seized.—*Nimocks v. McGehee* (Miss.) 626.

II. JURISDICTION, VENUE, AND PARTIES.

Estoppel by execution of bond to deny possession, see Estoppel, § 32.

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§ 72. Under the express terms of Code 1906, § 4221, in replevin, the levying officer's valuation is prima facie evidence of the property's value.—*Wilburn v. Cologero* (Miss.) 794.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 101. A default judgment for plaintiff in replevin, without ascertaining the value of the property by writ of inquiry, is improper.—*Wilburn v. Cologero* (Miss.) 794.

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In pleading, see Pleading, §§ 165, 173.

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For instructions, see Criminal Law, §§ 829, 830; Trial, §§ 256, 261.

For instructions, necessity for purposes of review, see Appeal and Error, § 216.

RESALE.

Of lands by state or municipality after purchase at tax sale, see Taxation, § 679.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.

Of contract, see Contracts, § 261.

Of contract of sale, see Sales, §§ 116-119; Vendor and Purchaser, §§ 105, 108.

Of gift, see Gifts, § 41.

Of insurance policy, see Insurance, § 229.

RES GESTÆ.

In civil actions, see Evidence, §§ 121-128.

In criminal prosecutions, see Criminal Law, §§ 363, 365.

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See Domicile.

Nonresidence ground for plea in abatement, see Pleading, § 106.

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See Wills, § 588.

RES INTER ALIOS ACTA.

Exclusion as evidence, see Evidence, § 130.

RES IPSA LOQUITUR.

Negligence in general, see Negligence, § 121.

RES JUDICATA.

See Judgment, §§ 668-747.

Denial of opposition to appointment of administrator, see Executors and Administrators, § 20.

Former decision as law of the case, see Appeal and Error, § 1098.

RESOLUTIONS.

For extension of city limits, see Municipal Corporations, § 33.

RESPONDEAT SUPERIOR.

See Master and Servant, §§ 301, 332; Principal and Agent, § 150.

RESTRAINT OF TRADE.

Contracts in restraint of trade, see Contracts, § 116.

RESTRICTIONS.

On creation of perpetuities, see Perpetuities.

RESULTING TRUSTS.

See Trusts, §§ 63½-89.

RETENTION.

Of possession or apparent title by grantor as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 142.

RETROACTIVE LAWS.

By-laws of insurance association, see Insurance, § 693.

RETURN.

Of writ of execution, see Execution, § 333.

To writ of habeas corpus, see Habeas Corpus, § 76.

REVENUE.

See Taxation.

REVERSAL.

Of judgment or order in civil actions, see Appeal and Error, §§ 1166, 1178.

Of judgment or order in criminal prosecutions, see Criminal Law, § 1188.

REVERSIONS.

Landlord's reversion, see Landlord and Tenant, § 63.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1019, 1188; Habeas Corpus.

Bill in equity, see Equity, §§ 442, 446.

Of assessment of taxes, see Taxation, §§ 459, 500.

Of judgment of justice of the peace, see Justices of the Peace, §§ 174, 200.

REVOCATION.

See Cancellation of Instruments.

Of gift, see Gifts, § 41.

REWARDS.

§ 8. Under the express terms of Code 1906, § 1459, to earn a reward for arresting a mur-

derer, the arrest must be made while the murderer is fleeing or attempting to flee.—Wilkinson County v. Jones (Miss.) 453.

RIGHT OF WAY.

For railroads, in general, see Railroads, § 72.

RISKS.

Assumed by servant, see Master and Servant, §§ 203, 226, 288.

Within insurance policy, see Insurance, §§ 461, 462.

ROADS.

See Highways; Private Roads; Street Railroads.

In cities, see Municipal Corporations, §§ 647-706.

ROLLS.

Judgment roll, see Judgment, § 282.

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Under mining leases, see Mines and Minerals, § 70.

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Of corporations or associations, see Carriers, § 284.

Of master governing work of servant, see Master and Servant, § 141.

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See Courts, § 79.

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See Sunday.

SALARIES.

Liability for fraud in procuring purchase of salary, see Fraud, § 64.

SALARY.

Of corporate officers and agents, see Corporations, § 308.

SALES.

As preferences by debtor, see Bankruptcy, §§ 164, 165.

Exercise of power of sale in mortgage, see Mortgages, § 338.

Knowledge of witness affecting competency to testify as to sale, see Witnesses, § 37.

Retention of possession or apparent title by seller as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 142.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Sales by or to particular classes of persons.

See Executors and Administrators, §§ 328-388; Hawkers and Peddlers; Receivers, §§ 134, 145.

Insolvent debtors, see Bankruptcy, §§ 164, 165.

Sales of particular species of, or estates or interests in, property.

See Bills and Notes, §§ 324, 326; Intoxicating Liquors.

Community or separate property, see Husband and Wife, § 267.

Decedent's property, see Executors and Administrators, §§ 328-388.

Mortgaged property, see Mortgages, §§ 338, 536, 544.

Real property in general, see Vendor and Purchaser.

Standing timber, see Logs and Logging, § 3.
Swamp lands, see Public Lands, § 61.

Sales on judicial or other proceedings.

See Execution, §§ 264-294.

By executors or administrators, see Executors and Administrators, §§ 328-388.

By receivers, see Receivers, §§ 134, 145.

Foreclosure of mortgages, see Mortgages, § 536, 544.

Tax sales, see Taxation, §§ 679, 689.

I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds in general, see Frauds, Statute of, § 89.

Best and secondary evidence of sale, see Evidence, § 153.

§ 1. A bill of sale of cotton *held* void for uncertainty.—Jordan v. Emanuel (Ala.) 310.

§ 24. A "sale and return" is a sale with the right of the buyer to return the goods at his option within a reasonable time.—William Frantz & Co. v. Fink (La.) 131.

§ 52. Evidence *held* insufficient to show agreement by lessor to pay lessee a certain sum for fertilizer alleged to have been bought.—Yerger v. Murdoch (La.) 1028.

II. CONSTRUCTION OF CONTRACT.

§ 68. A contract for sale of oil *held* to require deliveries to be made in iron, and not in wood.—Standard Oil Co. v. Weeks (Ala.) 443.

§ 82. Terms of payment on contract of sale of soda fountain *held* to be shown by words written on printed form, and not affected by statement of shipping line and shipping address.—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

§ 116. While a party may in his contract to purchase make a valid agreement not to countermand the order, a rescission because of a breach by the other party *held* not a "countermand."—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

§ 116. A buyer of the merchantable output of a sawmill for a specified period *held* not entitled to terminate the contract on the ground of past failures that have been acquiesced in.—Barnette Sawmill Co. v. Ft. Harrison Lumber Co. (La.) 222.

§ 117. A seller's mere failure to deliver a showcase with jewelry the very moment or day or hour the jewelry was delivered *held* not sufficient to warrant rescission. In the absence of a provision or stipulation to that effect.—McAllister-Coman Co. v. Mathews (Ala.) 416.

§ 117. Shipment of sellers, with instructions to hold the goods at destination till payment of price, *held* a violation of the contract giving buyer right to rescind, and on such rescission releasing him from all liability thereunder.—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

§ 119. Where ice plant offered by sellers was different from that which they contracted to deliver, buyers *held* entitled to rescind and refuse to accept the plant.—Huson Ice & Machine Works v. Bland & Chambers (Ala.) 445.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

To satisfy statute of frauds, see Frauds, Statute of, § 89.

§ 161. Principle that delivery to carrier is a delivery to the purchaser *held* not to apply in case of special contract as to place of delivery.—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

§ 161. Delivery to a carrier of goods not properly prepared for shipment *held* not a delivery to the buyer.—Butterworth & Lowe v. Cathcart (Ala.) 896.

§ 166. Liability of buyer stated, where delivery was not in accord with the contract.—Standard Oil Co. v. Weeks (Ala.) 443.

§ 166. Where an ice plant shipped by a seller was not that sold, the buyers were under no duty to accept it, even if it were of a better quality.—Huson Ice & Machine Works v. Bland & Chambers (Ala.) 445.

§ 175. A seller contracting to sell the output of a sawmill for a specified period *held* entitled to recover damages for the buyer's breach.—Barnette Sawmill Co. v. Ft. Harrison Lumber Co. (La.) 222.

§ 175. A seller of the output of a sawmill for a specified period *held* not required to saw and deliver lumber after the buyer had directed him to cease sawing and delivering.—Barnette Sawmill Co. v. Ft. Harrison Lumber Co. (La.) 222.

§ 176. In an action for price of car loads of hay sold, facts *held* to show that the purchaser could not defend on the ground of delay in transportation.—St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co. (Ala.) 904.

§ 176. A buyer of the merchantable output of a sawmill for a specified period *held* entitled to insist on the seller performing the work in the future.—Barnette Sawmill Co. v. Ft. Harrison Lumber Co. (La.) 222.

§ 179. Liability of buyer stated, where delivery was not in accord with the contract, but was accepted.—Standard Oil Co. v. Weeks (Ala.) 443.

V. OPERATION AND EFFECT.

Delivery of liquors to carrier as delivery to consignee, see Intoxicating Liquors, § 147.

(A) Transfer of Title as Between Parties.

§ 201. When title to personal property sold passes stated.—St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co. (Ala.) 904.

§ 205. A transaction *held* to be a "sale and return," passing title to the buyer with a condition subsequent.—William Frantz & Co. v. Fink (La.) 131.

(B) Rights and Liabilities of Seller as to Third Persons.

§ 221. One buying chattels from one who had bought them from a former owner, leaving an indebtedness for the price, acquires title as against the original owner.—Kern v. Cox (Ala.) 401.

(C) Rights and Liabilities of Buyer as to Third Persons.

§ 228. Where an owner of cattle sold them to one who paid the price, a subsequent sale by the owner to a third person did not pass title to him.—Sanford v. Wiley (Ala.) 339.

(D) Bona Fide Purchasers.

§ 234. The mere possession of movable property is not such indicium of ownership as will enable the possessor to convey a good title as against the true owner.—William Frantz & Co. v. Fink (La.) 131.

§ 235. A transaction *held* to be a "sale and return," passing title to the buyer with a condition subsequent, so that the seller was only entitled to recover a portion of the goods transferred to a third person with notice that the condition had been violated.—William Frantz & Co. v. Fink (La.) 131.

VI. WARRANTIES.

§ 279. Where a contract for the sale of lumber stipulated for "count and inspection guaranteed" at point of destination, the written report of "count and inspection" made at destination was not admissible to show the true character, amount, and quality of lumber.—*Austin v. Beall* (Ala.) 637.

VII. REMEDIES OF SELLER.**(E) Actions for Price or Value.**

§ 340. On breach of an agreement to deliver hay, whether the action should be for breach or for the purchase price considered.—*St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.* (Ala.) 904.

§ 354. In an action for the price of goods sold, a plea *held* sufficient.—*A. H. Andrews Co. v. Stowers Furniture Co.* (Ala.) 316.

§ 354. A plea in assumpsit for jewelry sold *held* insufficient.—*McAllister-Coman Co. v. Mathews* (Ala.) 416.

§ 358. In an action against defendant for goods sold to a third person, certain evidence *held* inadmissible.—*Kramer v. Compton* (Ala.) 351.

§ 364. In an action for the price of goods sold, a request to charge *held* properly refused as premitting plaintiff's alleged negligence in preparing the goods for shipment.—*Butterworth & Lowe v. Cathcart* (Ala.) 896.

(F) Actions for Damages.

§ 382. In an action for breach of contract by buyers, testimony of one of the buyers as to terms attached to bill of lading *held* properly admitted.—*Robert M. Green & Sons v. Lineville Drug Co.* (Ala.) 433.

§ 384. A seller contracting to sell the output of a sawmill for a specified period *held* entitled to recover loss of profits.—*Barnette Sawmill Co. v. Ft. Harrison Lumber Co.* (La.) 222.

§ 388. In an action for buyers' breach of contract, requested instructions *held* properly refused.—*Robert M. Green & Sons v. Lineville Drug Co.* (Ala.) 433.

§ 388. In an action for refusal of buyers to accept soda fountain, requested instructions *held* properly refused.—*Robert M. Green & Sons v. Lineville Drug Co.* (Ala.) 433.

VIII. REMEDIES OF BUYER.**(C) Actions for Breach of Contract.**

§ 418. Where a contract contemplated the delivery of lumber "f. o. b. cars" at the place of shipment, and not at the point of destination, the freight charge on the car was outside the contract and could not have been within the contemplation of the parties as an element of damages for breach of the contract.—*Austin v. Beall* (Ala.) 637.

§ 418. Statement of liability of one who, having sold goods f. o. b., shipped them over a line other than that directed by the buyer.—*Malaga Packing Co. v. Threefoot Bros. & Co.* (Miss.) 209.

(D) Actions and Counterclaims for Breach of Warranty.

Common counts for breach of implied warranty, see Assumpsit, Action of, § 5.
Liability as warrantor on transfer of note, see Bills and Notes, § 324.

IX. CONDITIONAL SALES.

§ 467. Nature of interests of buyer and seller under a certain conditional sale of personality, stated.—*Phenix Ins. Co. v. Hilliard* (Fla.) 799.

SALOONS.

See Intoxicating Liquors.

SATISFACTION.

See Payment.

SATURDAY.

Effect of service of citation on Saturday half holiday to interrupt prescription, see Limitation of Actions, § 122.

SAWMILLS.

Privilege of laborers on lumber, see Logs and Logging, § 26.

SCHOOLS AND SCHOOL DISTRICTS.**II. PUBLIC SCHOOLS.**

Implied repeal of statute for apportionment of funds, see Statutes, § 157.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 29. Code 1906, § 4530, interpreted in the light of sections 4510, 4533, and 4534, *held* not to authorize the creation of a separate school district out of unincorporated territory, unless it is wholly within one county.—*Jones County v. Grisson* (Miss.) 629.

(E) District Debt, Securities, and Taxation.

§ 103. To entitle widows to vote at a special tax election held under Const. art. 232, as owners of community property, their rights must clearly appear by judgment or order of court.—*Smith v. Parish Board of School Directors* (La.) 122.

§ 103. Individual members of a partnership *held* entitled to vote upon the firm's assessment in a special tax election held under Const. art. 232.—*Smith v. Parish Board of School Directors* (La.) 122.

§ 103. A person appearing as owner of property on the assessment rolls, but who had sold it when an election was held under Const. art. 232, *held* not entitled to vote thereat.—*Smith v. Parish Board of School Directors* (La.) 122.

§ 103. A special tax election under Const. art. 232, *held* not to be set aside because the commissioner of election received votes without proper evidence, where such votes were legal.—*Smith v. Board of School Directors* (La.) 122.

§ 103. A person contesting the result of an election held under Const. art. 232, on specific grounds, *held* limited to those grounds.—*Smith v. Board of School Directors* (La.) 122.

(H) Pupils, and Conduct and Discipline of Schools.

§ 159. A rule requiring public school pupils to pay an attendance fee *held* reasonable, making noncompliance therewith ground for excluding the pupil.—*Bryant v. Whisenant* (Ala.) 525.

§ 159. Right of public school authorities to exact attendance fees stated.—*Bryant v. Whisenant* (Ala.) 525.

SCIENTER.

Knowledge of falsity of representations, see Fraud, § 13.

SCIRE FACIAS.

To enforce bail bond, see Bail, § 94.

SEARCHES AND SEIZURES.

Liability for malicious prosecution in procuring search warrant, see Malicious Prosecution, §§ 12, 19, 31, 32, 50, 56, 64, 68, 71, 72.

§ 5. Under Code 1907, § 7770, *held* that, the magistrate had no jurisdiction to determine title to money taken on a search warrant, unless it is established that it was stolen or embezzled.—Southern Hardware & Supply Co. v. Lester (Ala.) 328.

§ 7. Const. 1901, § 5, *held* declaratory of the common-law right of the citizen not to be searched or seized without probable cause.—Gulshy v. Louisville & N. R. Co. (Ala.) 392.

SECONDARY EVIDENCE.

See Criminal Law, §§ 398, 400; Evidence, §§ 158-183.

SECTIONMEN.

Judicial notice of railroad section master, see Evidence, § 20.
Liability of railroad company for fires set by sectionmen, see Master and Servant, § 302.

SECURITIES.

Public securities, see Counties, § 178; Municipal Corporations, § 918.

SECURITY.

See Bail; Chattel Mortgages; Mortgages; Principal and Surety.
Collateral security in general, see Pledges.

SEDUCTION.**II. CRIMINAL RESPONSIBILITY.**

§ 37. In a prosecution for seduction of a female under 18, failure of the indictment to allege that she was "then and there" of previous chaste character *held* not a fatal defect.—Terry v. State (Miss.) 483.

§ 40. In a prosecution for seduction, evidence that the prosecutrix did or did not make immediate complaint is not admissible.—Tucker v. State (Ala.) 464.

§ 46. Testimony of prosecutrix in a prosecution for seduction must be corroborated, to sustain a conviction.—Terry v. State (Miss.) 483.

SEIZURE.

See Searches and Seizures.

SELF-DEFENSE.

Defense to prosecution for homicide, see Homicide, §§ 112, 119, 189, 193, 276, 300.

SENTENCE.

See Criminal Law, § 905.

SEPARATE ESTATE.

Of husband or wife, distinguished from community property, see Husband and Wife, §§ 254, 276.
Of married woman, see Husband and Wife, §§ 137, 151.

SEPARATE MAINTENANCE.

See Husband and Wife, § 298½.

SEPARATION.

Of husband and wife, see Divorce; Husband and Wife, § 298½.

SEQUESTRATION.

§ 5. A plaintiff, claiming the ownership and possession of chattels, may maintain sequestration on proof that defendant denies plaintiff's ownership, coupled with defendant's present opportunity to dispose of the chattels.—Adeline Sugar Factory Co. v. Theriot (La.) 667.

SERVANTS.

See Master and Servant.

SERVICE.

Of proposed case or statement on appeal, see Appeal and Error, § 565.

SERVICES.

See Master and Servant; Work and Labor.
Liens on logs for services rendered, see Logs and Logging, § 26.
Liens on real property for services rendered, see Mechanics' Liens.
Of broker, sufficiency to entitle to compensation, see Brokers, § 54.
Of child, see Parent and Child, § 7.
Restraining breach of contract for personal services, see Injunction, § 60.

SETTING ASIDE.

Account of executor or administrator, see Executors and Administrators, § 509.
Certiorari, see Certiorari, § 60.
Execution, see Execution, § 163.
Indictment or information, see Indictment and Information, § 139.
Judgment, see Judgment, §§ 143, 336, 337.
Judicial sales in general, see Judicial Sales, § 39.
Sale of property of decedent, see Executors and Administrators, §§ 379, 382.
Tax deed, sale, or certificate, see Taxation, § 689.
Verdict, see New Trial.

SETTLEMENT.

See Account Stated; Payment.
Of accounts of executors or administrators, see Executors and Administrators, §§ 464, 509.
Of administration of community property on death of husband or wife, see Husband and Wife, § 276.
Of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, §§ 30-42.

SEXUAL INTERCOURSE.

See Rape; Seduction.

SHARES.

Of corporate stock, see Corporations, §§ 151, 155.
Renting on shares, see Landlord and Tenant, § 323.

SHERIFFS AND CONSTABLES.**III. POWERS, DUTIES, AND LIABILITIES.**

Claim by third person in detinue against sheriff, see Detinue, § 16.

§ 88. Where a sheriff or constable seeking to levy an attachment finds personal property in

the possession of the defendant in attachment, he is entitled, in the absence of notice to the contrary, to presume that the person in possession is the owner of the property.—*Mattingly v. Houston* (Ala.) 78.

SHIPPING.

See *Ferries*; *Maritime Liens*.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

§ 84. In an action for injuries to a servant, held that he was injured by the negligence of an employé of defendant.—*Kelly v. Peters* (La.) 540.

§ 84. In an action for injuries to a servant employed in unloading a vessel, evidence held to sustain a verdict for plaintiff.—*Taylor v. United Fruit Co.* (La.) 770.

SIDEWALKS.

Injuries from defects or obstructions, see *Municipal Corporations*, §§ 755-822.

SIGNATURES.

Forgery, see *Forgery*.

To indictment, see *Indictment and Information*, § 33.

To judgment, see *Judgment*, § 282.

To memorandum of contract within statute of frauds, see *Frauds*, *Statute of*, § 115.

SILENCE.

As admission, see *Criminal Law*, § 407.

SIMULATION.

Conveyances and transactions in fraud of creditors, see *Fraudulent Conveyances*.

SLANDER.

See *Libel and Slander*.

SLAVES.

Inheritance by child of woman slave and white man, see *Bastards*, § 102.

SOCIETIES.

Charitable societies, see *Charities*, § 45.

SOLICITORS.

See *Attorney and Client*.

SOLVENCY.

Of vendor affecting vendee's right to rescind, see *Vendor and Purchaser*, § 108.

SPECIAL DEMURRER.

See *Pleading*, §§ 209, 225.

SPECIAL LAWS.

See *Statutes*, §§ 75, 90.

SPECIAL PROCEEDINGS.

See *Certiorari*; *Habeas Corpus*; *Mandamus*; *Prohibition*; *Quo Warranto*.

SPECIAL VENIRE.

See *Jury*, § 70.

SPECIFICATION OF ERRORS.

In assignment of errors, see *Appeal and Error*, § 731.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 4. A suit by a vendor for specific performance of a contract for sale of land cannot be defeated on the ground that there is a remedy at law.—*Morgan v. Eaton* (Fla.) 305.

§ 6. Remedy by specific performance held mutual as between vendor and purchaser.—*Morgan v. Eaton* (Fla.) 305.

§ 14. Defendant's contract with complainant held not capable of being specifically enforced where to do so would necessarily compel a third person to allow complainant to perform such third person's contract with defendant.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

II. CONTRACTS ENFORCEABLE.

§ 66. A vendor may sue for specific performance of the contract, though he seeks merely to enforce payment of a specific sum of money.—*Morgan v. Eaton* (Fla.) 305.

§ 73. Equity will not specifically enforce a contract for personal services which are material or mechanical, and not peculiar or individual.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 73. Where a contract is for special or extraordinary personal services or personal services purely intellectual and individual, equity will grant an injunction in aid of specific performance.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 73. Equity will not specifically enforce a contract for personal services requiring skill, judgment, and discretion, but will leave the parties to their action at law for damages.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 73. A contract held not capable of being specifically enforced on the ground that it was for personal services.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 75. Equity will only decree specific performance when it can dispose of the subject-matter by a decree capable of present enforcement, and cannot award specific performance of a continuous duty extending over a series of years, leaving the party to his legal remedy.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 76. A contract to pay money cannot be specifically enforced.—*McGaw v. O'Beirne* (La.) 775.

IV. PROCEEDINGS AND RELIEF.

Venue in general, see *Venue*, § 5.

§ 108. Where the decree of specific performance cannot be enforced, an injunction will not be granted; complainant being left to his legal remedy.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 114. A bill for specific performance was defective where it did not allege that complainants paid the amounts, and furnished the security for deferred payments agreed to be paid and furnished in the contract sought to be enforced within the time and in the manner provided therein.—*Roquemore & Hall v. Mitchell Bros.* (Ala.) 423.

§ 114. A bill for specific performance which merely alleges generally complainants' offer to perform, but does not allege an offer to perform as provided in the contract, is insufficient.

—Roquemore & Hall v. Mitchell Bros. (Ala.) 423.

§ 114. Great accuracy of averment is required in bills for specific performance.—Roquemore & Hall v. Mitchell Bros. (Ala.) 423.

SPEED.

Of horses and vehicles on streets, see Municipal Corporations, § 705.

SPIRITUOUS LIQUORS.

Regulation of manufacture and sale, see Intoxicating Liquors.

STALE DEMANDS.

Laches in general, see Equity, §§ 67-70.

STATE BANKS.

See Banks and Banking, §§ 109-226.

STATEMENT.

Admissions, see Evidence, §§ 217, 253.
By accused or other persons as part of res gestæ, see Criminal Law, §§ 363, 365.
By parties or other persons as part of res gestæ, see Evidence, §§ 121-128.
By witness inconsistent with testimony, see Witnesses, §§ 387, 390.
Declarations, see Criminal Law, § 427; Evidence, § 273.
Hearsay, see Evidence, § 817.
Of case or facts for purpose of review, see Appeal and Error, § 565.
Of loss under insurance policy, see Insurance, §§ 534-558.
Of mechanic's lien, see Mechanics' Liens, §§ 116, 137.
Of plaintiff's demand, see Pleading, §§ 54, 64.

STATES.

Concurrent and conflicting exercise of police powers by state and municipality, see Municipal Corporations, § 592.
Courts, see Courts.
Judgment against, conclusiveness as against officers, citizens, or taxpayers, and vice versa, see Judgment, § 702.
Legislative power, see Constitutional Law, §§ 50, 64.

II. GOVERNMENT AND OFFICERS.

Mandamus to state boards or officers, see Mandamus, § 112.

§ 37. A member of the Legislature spreading on its journal his protest, as authorized by Const. 1901, § 55, held not to destroy the conclusive effect of the legislative journal.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Grant of swamp lands to state, see Public Lands, §§ 58-61.
Purchase of property at tax sale, see Taxation, § 679.

VI. ACTIONS.

To annul sale of land of levee districts, see Levees, § 11.

§ 191. A suit to obviate the effect of an illegal act of an officer as such is not a suit against the state.—Croom v. Pennington & Evans (Fla.) 957.

STATIONS.

Railroad stations, see Carriers, § 247.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.
Constitutionality in general, see Constitutional Law.

Laws denying due process of law, see Constitutional Law, §§ 278-297.
Laws denying the equal protection of the laws, see Constitutional Law, §§ 212-247.
Laws granting privileges or immunities, see Constitutional Law, § 206.
Laws impairing obligation of contracts, see Constitutional Law, §§ 121, 154.
Municipal ordinances, see Municipal Corporations, § 105.
Statute of frauds, see Frauds, Statute of.
Statute of limitations, see Limitation of Actions.
Violation of law as to separation of white and colored passengers affecting liability of carrier, see Carriers, § 284.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 8½. An affidavit of the publication of a notice of intention to apply for the passage of a local law held sufficient within Const. 1901, § 106.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

§ 8½. An affidavit of publication of notice to apply for the passage of a local law held to show that the publication was had at a time not unreasonably remote from the introduction of the bill.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

§ 8½. Statutes relating to charters of municipal corporations having not less than 2,500 inhabitants may be passed without publication of intention to apply for such legislation, under Const. art. 48, subd. 12, and article 50.—Mulhaupt v. City of Shreveport (La.) 1023.

§ 13. Act Feb. 26, 1907 (Loc. Acts 1907, p. 238), held passed in violation of Const. 1901, § 62.—Graves v. State (Ala.) 34.

§ 28. Under Const. 1901, §§ 68, 125, the failure to submit to the Governor for his approval a resolution asking for a return of bill submitted to the Governor to enable the Legislature to correct errors therein held not to affect the validity of the bill.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 75. A special statute for the extension of a city's limits, not amending the general law on the subject, held not violative of Const. art. 49.—Mulhaupt v. City of Shreveport (La.) 1023.

§ 76. The local act (Loc. Acts 1907, p. 684), providing for the levy of taxes for public roads, etc., held in violation of Const. 1901, § 105, owing to the previous existence of Gen. Acts 1903, pp. 307, 414, making the same provision.—McWhorter v. Lowndes County (Ala.) 750.

§ 80. Const. 1901, § 229, *held* to apply only to private business corporations.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

§ 81. Act No. 295 of 1908, regulating and licensing hawkers and peddlers, was an amendment of Act No. 49 of 1904, which was an amendment of General License Law (Act No. 171 of 1898) § 12, and was therefore not objectionable as a special law.—Flournoy v. Walker (La.) 673.

§ 86. The General Assembly can by special statute carve misdemeanors out of facts declared by law to be felonies.—State v. Wall (La.) 556.

§ 90. Const. 1901, § 104, subds. 5, 18, *held* not to prohibit a special act, the effect of which is to destroy an incorporated municipality.—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

§ 90. Act Aug. 20, 1909 (Loc. Laws Sp. Sess. 1909, p. 392), *held* not in conflict with Const. 1901, § 105, notwithstanding the general statute (Municipal Code; Act Aug. 13, 1907 [Acts 1907, p. 604]).—City of Ensley v. Simpson (Ala.) 61; Robinson v. City of Ensley (Ala.) 69.

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§ 679. The state acquires no right under an illegal tax certificate, issued to it by its officers.—Croom v. Pennington & Evans (Fla.) 957.

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§ 30. One having an undivided interest in real estate who buys the entire property at a tax sale is entitled to 10 per cent. interest on the price bid by him on the property.—*Interstate Land Co. v. Doyle* (La.) 991.

§ 32. Where one having an undivided interest in real estate employed a third person to collect the rents, the co-owners claiming the moneys collected by the third person should pay a reasonable amount due for collection.—*Interstate Land Co. v. Doyle* (La.) 991.

§ 32. An owner of an undivided interest in real estate, who insures the property in his own name, *held* not entitled to the premium paid on the distribution of the proceeds of the property on a sale for partition.—*Interstate Land Co. v. Doyle* (La.) 991.

§ 37. Where one having an undivided interest in real estate had in his hands funds belonging to the co-owners, he must when paying taxes apply such funds pro tanto to the payment of the co-owners' taxes.—*Interstate Land Co. v. Doyle* (La.) 991.

III. RIGHTS AND LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS.

§ 55. A tenant in common may recover the whole estate from a stranger in possession.—*Blakeney v. Du Bose* (Ala.) 746.

TENDER.

Of performance of conditions of gift, see Gifts, § 41.

TERM.

Of court, see Courts, § 62.

TERMINATION.

Of homestead, see Homestead, §§ 167, 171.
Of marriage relation, see Marriage, §§ 58, 60.
Of relation of carrier and passenger, see Carriers, § 247.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY.

See Wills, § 55.

TESTIMONY.

See Evidence; Witnesses.

THEATERS AND SHOWS.

Contracts for theatrical performances, see Contracts, § 278.

THEFT.

See Embezzlement; Larceny; Receiving Stolen Goods.

THREATS.

Compliance by servant with threats as affecting contributory negligence, see Master and Servant, § 245.

Evidence of, in prosecutions for homicide, see Homicide, § 190.
Ground for annulment of marriage, see Marriage, § 58.

TIMBER.

See Logs and Logging.

Valuation of timber lands for purpose of taxation, see Taxation, § 348.

TIME.

Computation of period of limitation, see Limitation of Actions, §§ 55, 197.

Of accrual of right of action within statute of limitations, see Limitation of Actions, §§ 55, 56.

For particular acts in or incidental to judicial proceedings.

Appeal or other proceeding for review, see Appeal and Error, §§ 337, 345; Certiorari, § 40.
Demand for jury trial, see Jury, § 25.

Entry of judgment, see Judgment, § 272.

Filing bond for injunction, see Injunction, § 148.

Motion or application for new trial, see New Trial, § 117.

Motion or application to dismiss appeal or writ of error, see Appeal and Error, § 797.

Motion to quash venire, see Jury, § 117.

Objection at trial to reserve ground of review, see Appeal and Error, § 230.

Objection to evidence, see Criminal Law, § 693; Trial, § 76.

Presentation, allowance, and filing of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, §§ 36-42.

Reinstatement after dismissal in city court, see Courts, § 189.

Return of execution sale, see Execution, § 333.

Review of discretion as to extension of time, see Appeal and Error, § 950.

Separate trial of codefendants, see Criminal Law, § 622.

Signing judgment, see Judgment, § 282.

For particular acts not judicial.

Payment for goods sold, see Sales, § 82.

Payment of interest, see Interest, § 45.

Performance of contract in general, see Contracts, § 213.

§ 9. Where a death occurred June 25, 1905, citation served June 25, 1906, before midnight will interrupt prescription.—*Rady v. Fire Ins. Patrol of New Orleans* (La.) 491.

§ 10. A suspensive appeal taken within 10 days, excluding Sundays, as required by Code Prac. art. 575, will not be dismissed.—*Helmas v. Pallet* (La.) 676.

TITLE.

See Property.

By adverse possession, see Adverse Possession, § 106.

Color of title, see Adverse Possession, §§ 71-85.

Declarations by person in possession or control of property as to title, see Evidence, § 273.

Determination of title to property seized under search warrant, see Searches and Seizures, § 5.

Evidence admissible under pleading, see Pleading, § 381.

Of buyer of goods as to third persons, see Sales, § 228.

Of lessor, see Landlord and Tenant, § 63.

Of purchaser at execution sale, see Execution, §§ 264, 272.

Of purchaser at sale of property of decedent, see Executors and Administrators, § 388.

Of seller as against third persons, see Sales, § 221.

Of vendor, sufficiency to support contract of sale, see Vendor and Purchaser, § 128.
 Removal of cloud, see Quieting Title.
 Retention of apparent title by grantor as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 142.
 Slander of title, see Libel and Slander, § 140.
 Tax titles, see Taxation, §§ 730, 788.
 To property insured, representations, warranties, or conditions in policy or application therefor, see Insurance, § 282.

Particular matters affecting title.

See Adverse Possession; Dedication; Deeds; Descent and Distribution; Mortgages.
 Sale of personal property in general, see Sales.
 Sale of real property in general, see Vendor and Purchaser.

Particular species of property or rights.

See Bills and Notes, § 523.
 Fee of street, see Municipal Corporations, § 663.
 Personal property in general, see Sales, §§ 201, 205.
 Real property in general, see Vendor and Purchaser.

Title necessary to maintain particular actions.

See Real Actions; Trover and Conversion, § 16.

Titles of particular acts or proceedings.

See Statutes, §§ 118, 124.

TOOLS.

Liability of master for injuries to servant from defects in or failure to furnish tools, see Master and Servant, §§ 101, 129.

TORTS.

Liabilities of particular classes of persons.

See Carriers, §§ 107-136, 280, 321; Corporations, § 492; Municipal Corporations, §§ 755-822; Railroads, §§ 113, 282, 297, 303-351, 355-400, 405, 439, 469-485; Street Railroads, §§ 81, 118.

Agents, see Principal and Agent, § 150.
 Banks, see Banks and Banking, § 148.
 Chauffeurs, see Municipal Corporations, § 705.
 Electric light or power companies, see Electricity, § 16.

Employers, for injuries to employees, see Master and Servant, §§ 96, 299.

Employers, for injuries to third persons, see Master and Servant, §§ 301, 332.

Shipowners, see Shipping, § 84.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 54-69.

Liabilities respecting particular species of property or instrumentalities.

See Electricity, § 16; Railroads, §§ 113, 282, 297, 303-351, 355-400, 405, 439, 469-485; Street Railroads, §§ 81, 118; Telegraphs and Telephones, §§ 54-69.

Automobiles, see Municipal Corporations, § 705.
 Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 755-822.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 129.
 Vessels, see Shipping, § 84.

Particular torts.

See Assault and Battery, §§ 19, 24; Conspiracy, § 17; False Imprisonment, §§ 20, 23; Forcible Entry and Detainer, §§ 4-17; Fraud; Libel and Slander; Malicious Prosecution; Nuisance; Trespass.

Causing death, see Death, §§ 98, 99.

Injuries by servants, see Master and Servant, §§ 301, 332.

Injuries from construction or maintenance of railroad, see Railroads, § 113.

Injuries from flowage of lands, see Waters and Water Courses, § 171.

Injuries from negligence, see Negligence.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 54-69.

Injuries from negligent or wrongful use of street, see Municipal Corporations, §§ 705, 706.

Injuries from operation of railroads, see Railroads, §§ 282, 297, 303-351, 355-400, 405, 439, 469-485.

Injuries from operation of street railroads, see Street Railroads, §§ 81, 118.

Injuries incident to production or use of electricity, see Electricity, § 16.

Injuries to passengers, see Carriers, §§ 280, 321.

Injuries to servants, see Master and Servant, §§ 96, 299.

Interference with relation of master and servant, see Master and Servant, §§ 339, 343.

Loss of or injury to goods by carrier, see Carriers, §§ 107-136.

Maritime torts, see Shipping, § 84.

Payment by bank of forged or altered check, see Banks and Banking, § 148.

Wrongful attachment, see Attachment, §§ 373, 380.

Wrongful conversion, see Trover and Conversion.

Remedies for torts.

See Damages; Trespass, §§ 47, 68; Trover and Conversion, §§ 16-46.

Limitation of actions, see Limitation of Actions, § 55.

TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, §§ 29, 154.

Highways, see Highways.

II. GOVERNMENT AND OFFICERS.

Constables, see Sheriffs and Constables.

Mandamus to town boards or officers, see Mandamus, § 112.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Taxes for highway purposes, see Highways, §§ 122, 151.

TRADE.

See Hawkers and Peddlers.

Contracts in restraint of trade, see Contracts, § 116.

Regulation of trade as denial of equal protection of laws, see Constitutional Law, § 240.

TRADE CHECKS.

As subject of forgery, see Forgery, § 7.

TRAINS.

See Carriers; Railroads.

TRANSFER OF CAUSES.

From one state court to another, see Courts, §§ 485, 487.

TRANSFERS.

See Assignments; Deeds; Sales; Vendor and Purchaser.

As preferences by debtor, see Bankruptcy, §§ 164, 165.

By insolvent debtor, see Bankruptcy, §§ 164, 165.
 Of bills and notes, see Bills and Notes, §§ 280-326.
 Of exempt property, see Homestead, §§ 119, 123.
 Of mortgages or debts secured thereby, see Chattel Mortgages, § 211.
 Of personal property as security, see Chattel Mortgages.
 Of real property as security, see Mortgages.
 Of title as between parties to sale, see Sales, §§ 201, 205.

TRANSITORY ACTIONS.

See Venue, §§ 5, 6.

TRANSMISSION.

Of record on appeal or other proceeding for review, see Appeal and Error, §§ 627, 628.
 Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 54-69.

TRANSPORTATION.

Of animals, see Carriers, §§ 205, 229.
 Of goods, see Carriers, §§ 2-20, 39-188.
 Of passengers, see Carriers, §§ 239, 343.

TRAVELERS.

On streets in general, see Municipal Corporations, §§ 703-706.
 On streets, injuries from defects or obstructions, see Municipal Corporations, §§ 755-822.

TRAVERSE.

In pleading in general, see Pleading, § 115.

TREASURERS.

Of levee boards, see Levees, § 10.

TREES.

See Logs and Logging.
 In streets, title and rights of abutting owners, see Municipal Corporations, § 603.
 Power of city to authorize telephone company to damage or destroy trees in streets, see Municipal Corporations, § 682.

TRESPASS.

See False Imprisonment.
 Form of action against master for assault by servant, see Master and Servant, § 325.
 Injuries by fire to property of trespassers on railroad right of way, see Railroads, § 470.
 Injuries to trespassers, see Railroads, §§ 355-400.
 Riding on pass issued to others, as rendering passenger a trespasser, see Carriers, § 239.
 To the person, see Assault and Battery.

II. ACTIONS.

(D) Damages.

§ 47. Mental suffering established as the proximate and natural consequence of a trespass to property committed with circumstances of insult or contumely is a proper element of the damages.—*Mattingly v. Houston* (Ala.) 78.

(E) Trial, Judgment, and Review.

§ 68. In an action for trespass to property, a charge *held* properly refused.—*Mattingly v. Houston* (Ala.) 78.

III. CRIMINAL RESPONSIBILITY.

§ 81. Rider on a plantation *held* not shown to have authority to warn trespassers, so as to sustain a conviction for trespass after warning by him.—*Arrington v. State* (Ala.) 928.

§ 88. Assertion by accused to the occupant of certain land, in a prosecution for trespass after warning, that he intended to get the land back, *held* admissible.—*Arrington v. State* (Ala.) 928.

§ 88. Evidence *held* admissible to show that accused was on the land in question after warning.—*Arrington v. State* (Ala.) 928.

TRESPASS TO TRY TITLE.

See Ejectment; Forcible Entry and Detainer; Real Actions.

TRIAL.

Of right of property levied on, see Attachment, § 308.

Trial *de novo* on appeal, see Justices of the Peace, § 174.

Trial *de novo* on appeal in proceedings to establish private roads, see Private Roads, § 2. Witnesses, see Witnesses.

Proceedings incident to trials.

See New Trial; Reference.

Assessment of damages, see Damages, § 216.

Competency of and challenge to jurors, see Jury, §§ 83, 117.

Examination of witnesses, see Witnesses, §§ 236, 290.

Impanelling jury, see Jury, § 144.

Place of trial, see Venue.

Qualifications of jurors and exemptions, see Jury, § 47.

Right to trial by jury, see Jury, § 25.

Rules of court, see Courts, § 79.

Summoning, attendance, discharge, and compensation of jury, see Jury, §§ 66, 80.

Trial of actions by or against particular classes of persons.

See Carriers, §§ 136, 320, 321; Master and Servant, §§ 285, 297, 332; Physicians and Surgeons, § 18; Railroads, §§ 350, 351, 400, 484, 485; Street Railroads, § 118.

Insurance companies, see Insurance, § 668.

Trial of particular civil actions or proceedings.

See Ejectment, § 106; Libel and Slander, §§ 123, 124; Malicious Prosecution, §§ 71, 72; Mandamus, § 172; Trespass, § 68.

For breach of contract of sale, see Sales, § 388.

For fraud, see Fraud, § 64.

For injuries at railroad crossings, see Railroads, §§ 350, 351.

For injuries by servants, see Master and Servant, § 332.

For injuries from accident to trains, see Railroads, § 297.

For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 821, 822.

For injuries from fires caused by operation of railroads, see Railroads, §§ 484, 485.

For injuries from negligence, see Negligence, §§ 136, 138.

For injuries to licensees on railroad property, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 320, 321.

For injuries to persons on or near railroad tracks, see Railroads, § 400.

For loss of or injury to goods in course of transportation, see Carriers, § 136.

For negligence of physician, see Physicians and Surgeons, § 18.

For negligent or wrongful use of street, see Municipal Corporations, § 706.
For price or value of goods sold, see Sales, § 364.
For wrongful attachment, see Attachment, § 380.
To annul marriage, see Marriage, § 60.
To establish private roads, see Private Roads, § 2.

Trial of criminal prosecutions.

See Criminal Law, §§ 260, 622-841; Homicide, §§ 203, 218; Larceny, § 68.
Violations of municipal ordinances, see Municipal Corporations, § 641.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

In criminal prosecutions, see Criminal Law, § 622.

II. DOCKETS, LISTS, AND CALENDARS.

Transfer of causes from one state court to another, see Courts, §§ 485, 487.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

In criminal prosecutions, see Criminal Law, § 655.

IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 236, 290.
In criminal prosecutions, see Criminal Law, §§ 673, 686.
Presumptions on appeal or writ of error, see Appeal and Error, § 926.
Review of rulings as dependent on taking of exception in lower court, see Appeal and Error, § 260.
Review of rulings involving discretion of lower court, see Appeal and Error, § 970.

(A) Introduction, Offer, and Admission of Evidence in General.

Appointment of experts, see Reference, § 25.

§ 45. Before a party can complain of the court's action in proceeding to judgment, notwithstanding his offer to introduce further testimony, he must have disclosed what that testimony was.—United Hardware-Furniture Co. v. Blue (Fla.) 364.

§ 46. The disallowance of a question to a witness *held* not error.—Sibley & Sibley v. Smith (Ala.) 27.

§ 46. Until a party propounding a question to a witness affording itself no intimation of the relevancy of the expected answer shows that such answer would be relevant, the court cannot be put in error for excluding it.—Weller & Co. v. Camp (Ala.) 929.

§ 51. In an action for the issuance, without probable cause and with malice, of a search warrant, evidence of bad repute of plaintiff *held* admissible, subject to be excluded on proper motion.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 54. In ejectment, it was not error to limit the deeds offered by defendant to color of title, instead of muniment of title.—Owen v. Moxom (Ala.) 527.

§ 55. Where testimony offered has been theretofore admitted and afterwards properly stricken, it was not error to refuse to allow a repetition of it.—United Hardware-Furniture Co. v. Blue (Fla.) 364.

(B) Order of Proof, Rebuttal, and Re-opening Case.

In criminal prosecutions, see Criminal Law, §§ 680, 686.

Proof of facts preliminary to introduction of secondary evidence, see Evidence, §§ 181, 183.

§ 62. Plaintiff examining defendant as under cross-examination under Acts 1908, No. 126, *held* entitled thereafter to introduce testimony in rebuttal.—Pratt v. McCoy (La.) 151.

§ 68. It was error, after argument and without consent of parties, to admit letters which had not been identified, and submit them to a handwriting expert.—Christina v. Cusimano (La.) 157.

(C) Objections, Motions to Strike Out, and Exceptions.

In criminal prosecutions, see Criminal Law, §§ 693, 698.

Necessity of taking exception for purpose of review, see Appeal and Error, § 260.

Objections to evidence on ground of insufficiency of pleading, see Pleading, § 428.

Objections to evidence on ground of variance, see Pleading, § 430.

§ 76. Failure to object to the admission of evidence until after it has been offered and admitted waives every objection thereto, except that it was illegal.—National Life & Accident Ins. Co. v. Lokey (Ala.) 45.

§ 76. An objection to testimony *held* too late.—Sloss-Sheffield Steel & Iron Co. v. O'Neal (Ala.) 953.

§ 85. Overruling a general objection to evidence, part of which was competent, *held* not error.—Coulson v. Scott (Ala.) 436.

§ 85. Where an objection to the admission of evidence did not separate that which was admissible from that which was not admissible, there was no error in admitting all of the testimony.—Hamrick v. Shipp (Ala.) 932.

§ 86. Where evidence is admissible for a certain purpose only, it is the duty of the objecting party to request that it be so limited, and the trial court does not err in admitting it if admissible for any purpose.—Birmingham & A. R. Co. v. Mattison (Ala.) 49.

§ 86. A general objection to testimony *held* insufficient, where the testimony is admissible for any purpose, and where the objection is overruled, but otherwise where the objection is sustained.—Kern v. Cox (Ala.) 401.

§ 86. The trial court cannot be put in error for admitting evidence relevant for certain purposes, where the objection attempted to keep it out entirely.—Owen v. Moxom (Ala.) 527.

§ 89. A motion to strike testimony is available only when the testimony admitted is inadmissible, irrelevant, and immaterial.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

§ 91. Motion to strike out testimony *held* too late to make its refusal erroneous.—Kramer v. Compton (Ala.) 351.

§ 105. The court *held* authorized in its discretion to exclude illegal evidence at any time.—Kramer v. Compton (Ala.) 351.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

In criminal prosecutions, see Criminal Law, §§ 699, 730.

§ 121. Comment of counsel *held* not required to be excluded by the court.—Robert M. Green & Sons v. Lineville Drug Co. (Ala.) 433.

VI. TAKING CASE OR QUESTION FROM JURY.

In criminal prosecutions, see Criminal Law, §§ 736, 763, 764.

(A) Questions of Law or of Fact in General.

As to particular facts, issues, or subjects.
 Assumption of risk by servant injured, see Master and Servant, § 288.
 Contributory negligence of servant injured, see Master and Servant, § 289.
 Exposure to obvious risk by insured, see Insurance, § 668.
 Fraud, see Fraud, § 64.
 Negligence of carrier of goods, see Carriers, § 136.
 Negligence of master causing injury to servant, see Master and Servant, § 286.

In particular civil actions or proceedings.
 See Ejectment, § 106; Libel and Slander, § 123; Malicious Prosecution, § 71.
 For fraud, see Fraud, § 64.
 For injuries at railroad crossings, see Railroads, § 350.
 For injuries by servants, see Master and Servant, § 332.
 For injuries from defects or obstructions in street, see Municipal Corporations, § 821.
 For injuries from fires caused by operation of railroads, see Railroads, § 484.
 For injuries from negligence, see Negligence, § 136.
 For injuries to passengers, see Carriers, § 320.
 For injuries to persons on or near railroad tracks, see Railroads, § 400.
 For injuries to servants, see Master and Servant, §§ 286, 289.
 For loss of or injury to goods in course of transportation, see Carriers, § 136.
 For negligent or wrongful use of street, see Municipal Corporations, § 706.
 On insurance policies, see Insurance, § 668.
 To annul marriage, see Marriage, § 90.

§ 184. It is the exclusive province of the court to determine all questions of law arising in the case.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 139. When the facts are undisputed, and the evidence, with all the inferences which may be drawn therefrom, does not establish the action, the court must, on request, so instruct the jury.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 139. The affirmative charge should not be given when the evidence is conflicting as to any material question necessary for a verdict.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 139. Where a plea was not supported by evidence as to all its material averments, a general affirmative charge for defendants as to such plea was error.—*Ryall v. Pearson Bros. (Ala.) 333.*

§ 139. Where there was sufficient evidence on every count to carry all material questions to the jury, defendant's request for the general affirmative charge was properly refused.—*Alabama Great Southern R. Co. v. Demoville (Ala.) 406.*

§ 139. Where, in an action, the evidence was insufficient to support a verdict for plaintiff as to a certain count in the complaint, the court properly refused to give a general affirmative charge for defendant as to that count.—*Birmingham Southern R. Co. v. Fox (Ala.) 889.*

§ 139. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue, a verdict should not be directed.—*Johnson v. Louisville & N. R. Co. (Fla.) 195.*

§ 139. A verdict should not be directed, unless the evidence is such that no view which the jury may lawfully take of it favorable to the other party will be sustained.—*Johnson v. Louisville & N. R. Co. (Fla.) 195.*

§ 141. Material facts being undisputed, issue thereon becomes one of law for the court.—*Weller & Co. v. Camp (Ala.) 929.*

§ 143. Where the evidence on the material issues was in conflict, the affirmative charge was correctly refused.—*Woodward Iron Co. v. Sheehan (Ala.) 24.*

§ 143. Where there is any evidence tending to prove a fact, however slight, the court cannot withdraw the issue from the jury.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 143. In unlawful detainer, where there is a conflict in the evidence as to whether plaintiff had ever been in possession of the land prior to the time defendant went into possession, it was error to give the general charge for the plaintiff.—*Gilchrist v. Atchison (Ala.) 955.*

§ 143. Where the evidence is conflicting, it is not error to refuse an affirmative charge.—*Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.*

§ 145. Charges requesting a finding for defendant on the different counts of the complaint are improper, unless defendant is entitled to a verdict under the entire complaint.—*City of Birmingham v. Pool (Ala.) 937.*

(B) Demurrer to Evidence.

§ 156. An investigation of the facts in dispute, and the reconciliation of conflicting testimony cannot be had on a demurrer to evidence.—*Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.*

§ 156. In passing upon a demurrer to evidence, only the evidence as stated in the demurrer can be considered.—*Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.*

§ 156. A demurrer to evidence held to admit the truth of testimony as stated in the demurrer, with conclusions of fact fairly to be drawn therefrom.—*Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.*

(C) Dismissal or Nonsuit.

Scope and extent of review on appeal from decision on motion for dismissal or nonsuit, see Appeal and Error, § 866.

(D) Direction of Verdict.

§ 169. Where plaintiff's evidence does not tend to prove a cause of action, the court may refuse to hear evidence of defendant, and, if properly requested, it may direct a verdict against plaintiff.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 169. Where the evidence affirmatively disproved one or more material averments of every count of the complaint, the general affirmative charge for defendant should be given.—*Tobler v. Pioneer Mining & Mfg. Co. (Ala.) 86.*

§ 169. Right to a directed verdict, under Gen. St. 1906, § 1496, stated.—*Johnson v. Louisville & N. R. Co. (Fla.) 195.*

§ 170. A general affirmative charge is proper, if plaintiff was entitled to it upon either count of the complaint.—*National Life & Accident Ins. Co. v. Lokey (Ala.) 45.*

§ 171. The power of the court to direct a verdict should be cautiously exercised.—*Johnson v. Louisville & N. R. Co. (Fla.) 195.*

VII. INSTRUCTIONS TO JURY.

Erroneous instructions or failure to instruct, ground for new trial, see New Trial, § 39.

In criminal prosecutions, see Criminal Law, §§ 769, 814, 829, 830, 841.

Presumptions on appeal or writ of error, see Appeal and Error, § 928.

Review as dependent on prejudicial nature of error, see Appeal and Error, §§ 1064, 1068.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 216.

As to particular issues or subjects.

See Adverse Possession, § 116.

Contributory negligence of servant injured, see Master and Servant, § 296.

Damages, see Damages, § 216.

Negligence of master causing injuries to servant, see Master and Servant, § 293.

In particular civil actions or proceedings.

See Libel and Slander, § 124; Malicious Prosecution, § 72; Trespass, § 68.

Assessment of damages, see Damages, § 216.

For injuries at railroad crossings, see Railroads, § 351.

For injuries by servant, see Master and Servant, § 332.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 822.

For injuries from fires caused by operation of railroads, see Railroads, § 485.

For injuries from negligence, see Negligence, § 138.

For injuries to passengers, see Carriers, § 321.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 113.

For injuries to servants, see Master and Servant, §§ 291-296.

For malpractice by physician, see Physicians and Surgeons, § 18.

For price or value of goods sold, see Sales, § 364.

To establish private roads, see Private Roads, § 2.

(A) Province of Court and Jury in General.

In criminal prosecutions, see Criminal Law, §§ 756, 763, 764.

§ 186. Requested charges in an action for false imprisonment *held* properly refused as invading the province of the jury.—Abingdon Mills v. Grogan (Ala.) 596.

§ 188. A charge forbidding the jury to infer legitimate and reasonable facts from facts in evidence is properly refused.—Alabama Great Southern R. Co. v. Demoville (Ala.) 406.

§ 191. In an action for injuries to a servant, an instruction *held* properly refused, because assuming to declare common knowledge as to a matter of which there could be no common knowledge.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 191. A requested charge that a certain act was not negligence *held* to invade the province of the jury, and properly refused.—Alabama Great Southern R. Co. v. Demoville (Ala.) 406.

§ 191. In action for injuries to passenger, instruction *held* not to assume the negligence of the defendant, nor to be a charge on the facts.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 192. It is not error to assume in charges the existence of a fact shown by uncontroverted testimony.—Atlantic Coast Line R. Co. v. McCormick (Fla.) 712.

§ 194. An instruction in an action for injuries to a servant *held* properly refused, because invading the province of the jury.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 194. An instruction that there is no evidence of a fact set forth therein is properly refused.—City of Birmingham v. Pool (Ala.) 937.

§ 199. In ejectment, a part of the oral charge *held* not erroneous, as submitting a question of law to the jury.—Owen v. Moxom (Ala.) 527.

(B) Necessity and Subject-Matter.

§ 219. A requested instruction as to overflows from "extraordinary floods" *held* misleading, in the absence of definition of the term.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

(C) Form, Requisites, and Sufficiency.

§ 240. An instruction *held* properly refused, as argumentative.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 240. In an action for the issuing, without probable cause and with malice, of a search warrant, an instruction *held* argumentative.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 241. It is not error for the court to charge the language of a statute applicable to the case.—Florida Ry. Co. v. Dorsey (Fla.) 963.

§ 244. An instruction *held* properly refused, because giving undue prominence to a part of the evidence.—Kern v. Cox (Ala.) 401.

§ 246. Where, under the facts, a charge asserting a correct principle is misleading, an explanatory charge may be given.—Kramer v. Compton (Ala.) 351.

(D) Applicability to Pleadings and Evidence.

§ 252. In a passenger's action for illness caused by a railroad company's failure to heat the car, where there was no evidence that plaintiff's injuries were caused by insufficient clothing, a charge directing a verdict for defendant if they were so caused was properly refused.—Southern Ry. Co. v. Harrington (Ala.) 57.

§ 252. In an action for the issuing, without probable cause and with malice, of a search warrant, an instruction as to the capacity in which the person acted who procured the warrant *held* erroneous.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 252. A charge not supported by evidence should be refused.—Phillips v. Bradshaw (Ala.) 662.

§ 252. There is no error in refusing an instruction which is not applicable to the facts of the case.—Alabama & V. Ry. Co. v. Baldwin (Miss.) 358.

§ 253. An instruction *held* properly refused, because premitting an hypothesis that a disputed fact was material.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 253. In an action for injuries to a servant, an instruction *held* properly refused, because ignoring the evidence.—Woodward Iron Co. v. Sheehan (Ala.) 24.

§ 253. A charge predicated a verdict for defendant on a portion of the evidence alone is bad.—Sloss-Sheffield Steel & Iron Co. v. Smith (Ala.) 38.

§ 253. An instruction *held* properly refused as based on part of the evidence only.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

§ 253. Instructions which ignore phases of the evidence on which plaintiff may be entitled to recover, independent of the facts hypothesized, are properly refused.—Alabama Steel & Wire Co. v. Thompson (Ala.) 75.

§ 253. In an action for injuries to a servant defended on the ground of contributory negligence, a charge *held* erroneous.—Alabama Steel & Wire Co. v. Thompson (Ala.) 75.

§ 253. An instruction for defendant generally, on a finding of contributory negligence, was properly refused, where there was an issue of wantonness for the jury.—Southern Ry. Co. v. Stollenwerck (Ala.) 204.

§ 253. A request for a finding for defendant, in the absence of proof of wantonness, *held* objectionable as ignoring a count on sim-

ple negligence.—Southern Ry. Co. v. Stollenwerck (Ala.) 204.

§ 253. An instruction which ignores the effect of evidence, or which omits the consideration of evidence tending to prove a fact, is properly refused.—Gulsby v. Louisville & N. R. Co. (Ala.) 392.

§ 253. Charges ignoring a defense set up by special pleas, which there was evidence tending to prove, were properly refused.—Huson Ice & Machine Works v. Bland & Chambers (Ala.) 445.

§ 253. A charge which requires a finding for defendant on one count is improper where there are several counts based on different acts of negligence.—Woodward Iron Co. v. Brown (Ala.) 829.

§ 253. A request to charge may deal with only one phase of the case, provided it does not make the whole case turn on that phase and adequately states the phase dealt with.—Butterworth & Lowe v. Cathcart (Ala.) 896.

(B) Requests or Prayers.

In criminal prosecutions, see Criminal Law, §§ 829, 830.

Review of failure to give instructions as dependent on request in lower court, see Appeal and Error, § 216.

§ 256. A charge being abstractly correct, *held* plaintiff's duty, if he deemed it misleading, to ask an explanatory charge.—Pace v. Louisville & N. R. Co. (Ala.) 52.

§ 256. An instruction not being erroneous, *held*, any tendency of it to mislead, as to a matter not covered, required a request for an explanatory charge.—Jordan v. Emanuel (Ala.) 810.

§ 256. In an action against a physician for damages caused by negligent treatment of plaintiff's son, *held*, that plaintiff should have requested a further charge on the ground of defendant's liability on apprehended prejudice from the charge given.—Hamrick v. Shipp (Ala.) 932.

§ 256. A charge in an action against a physician for negligence in treating plaintiff's son, that defendant was only required to exercise that degree of skill usually employed by physicians, was not affirmative error; there being no request for an amplification on his liability.—Hamrick v. Shipp (Ala.) 932.

§ 256. Where a party believes charges given by the court are insufficient, it should submit additional instructions.—Pensacola Electric Co. v. Bissett (Fla.) 367.

§ 261. It is not error to refuse a charge that is not entirely correct, particularly when its substance is given in another instruction.—Florida Ry. Co. v. Dorsey (Fla.) 963.

(F) Objections and Exceptions.

In criminal prosecutions, see Criminal Law, § 841.

Necessity of objection or request for purpose of review, see Appeal and Error, § 216.

(G) Construction and Operation.

§ 295. Where the charges, as a whole, are free from error, an error in an isolated paragraph will not be ground for reversal unless clearly prejudicial.—Pensacola Electric Co. v. Bissett (Fla.) 367.

§ 296. An instruction, correct so far as it goes, may be cured by subsequent instructions containing the required qualifications.—Pensacola Electric Co. v. Bissett (Fla.) 367.

§ 296. Where a party complaining of charges given by the court submits additional instructions, which cure the defects in the originals,

such defects are not ground for reversal.—Pensacola Electric Co. v. Bissett (Fla.) 367.

§ 296. Charges not technically accurate are not ground for reversal where correct charges are given on the point.—Florida East Coast Ry. Co. v. Lassiter (Fla.) 975.

§ 296. Error in an instruction, in not limiting to specific acts of negligence charged the burden of meeting a prima facie case, *held* cured by another instruction.—Alabama & V. Ry. Co. v. Groome (Miss.) 703.

IX. VERDICT.

Review of objections to verdict or findings, see Appeal and Error, §§ 704, 731.

Review of sufficiency of evidence, see Appeal and Error, §§ 1001, 1005.

Setting aside verdict, see New Trial.

Verdict contrary to law or evidence ground for new trial, see New Trial, §§ 71, 76.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Error in instructions cured by verdict or judgment, see Appeal and Error, § 1063.

Error waived in appellate court, see Appeal and Error, § 1079.

Review in appellate court as dependent on prejudicial nature of error, see Appeal and Error, §§ 1028, 1063.

Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, §§ 69, 304.

TRIAL DE NOVO.

On appeal, see Justices of the Peace, § 174.

On appeal in proceedings to establish private roads, see Private Roads, § 2.

TRIAL OF RIGHT OF PROPERTY.

See Attachment, § 308.

TRIBUNALS.

See Courts.

TROVER AND CONVERSION.

See Embezzlement; Larceny.

Conversion by hirer of horses, see Animals, § 27.

Conversion of animals, see Animals, § 27.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 16. The owner of the freehold cannot maintain a personal or transitory action to recover a part of the freehold, or damages for conversion thereof, which has been converted into personality by a severance from the freehold, if at the time of the severance he has not actual or constructive possession of the land.—Aldrich Mining Co. v. Pearce (Ala.) 911.

§ 16. In trover for the conversion of a chattel, rendered such by severance from the freehold, a possession which is merely transitory, for the purpose of making the trespass or severing a part of the freehold, is not sufficient to defeat a recovery by the owner of the freehold who has either actual or constructive possession of the land.—Aldrich Mining Co. v. Pearce (Ala.) 911.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

Certainty in pleading, see Pleading, § 18.

§ 32. In trover, where two counts showed a single trespass, and one a single conversion alleged to have been the act of the defendants, the

wrong complained of was charged as the joint act of the defendants.—*Mattingly v. Houston* (Ala.) 78.

(D) Damages.

§ 46. The measure of damages in trover, stated.—*Mattingly v. Houston* (Ala.) 78.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTEES.

See Trusts.

TRUSTS.

Charitable trusts, see Charities.

Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

Creation and construction of particular devises and bequests, see Wills, § 688.

Particular fiduciary relations, see Brokers; Executors and Administrators; Principal and Agent.

Trust deeds, see Chattel Mortgages; Mortgages.

Trustees for purpose of winding up corporation, see Corporations, § 619.

I. CREATION, EXISTENCE, AND VALIDITY.

Restrictions on creation of perpetuities, see Perpetuities.

(A) Express Trusts.

§§ 17, 18. Under Code 1907, § 3412, a bill held to show an effort to enforce a trust under a parol agreement which under the statute is unenforceable.—*Tillman v. Kifer* (Ala.) 309.

(B) Resulting Trusts.

§ 63½. Testimony held to fail to establish a resulting trust and to show a parol trust in violation of law.—*Hughes v. Letcher* (Ala.) 914.

§ 63½. Verbal agreement that title should be held on the terms that the law implies held not to interfere with implied trust from payment of price by one and taking of title by another.—*Murrell v. Peterson* (Fla.) 726.

§ 63¾. The mere fact that to omit to declare a resulting trust a decedent will be open to the imputation of having made an unnatural disposition of his property is not sufficient to require the establishment of such trust.—*Holt v. Johnson* (Ala.) 323.

§ 63¾. Bill of complaint seeking to enforce an implied or constructive trust as to the ultimate ownership of lands will lie, though there be an express agreement as to the preliminary use of the land.—*Murrell v. Peterson* (Fla.) 726.

§ 89. In an action against the heirs of a decedent to establish a resulting trust, based on the ground that funds belonging to the estate went into the property purchased by decedent in her own name, evidence held insufficient to establish such trust.—*Holt v. Johnson* (Ala.) 323.

§ 89. While a resulting trust must be proved with great clearness and certainty, such degree of proof is not required as to the existence of conditions of a resulting trust, and for that purpose the satisfaction of the mind of the prior of the facts will suffice.—*Holt v. Johnson* (Ala.) 323.

§ 89. In order to establish a resulting trust, the evidence must be strong and unequivocal, and of such character as to disclose the exact

rights and relations of the parties.—*Holt v. Johnson* (Ala.) 323.

II. CONSTRUCTION AND OPERATION.

Charitable trusts, see Charities, § 45.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 160. A trust will not be permitted to fail for lack of the trustee.—*Blakeney v. Du Bose* (Ala.) 746.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 865. The equity of respondents in a suit to quiet title held not enforceable, whether complainant and his predecessors in bona fide claim of title were in actual possession in whole or in part.—*Butt v. McAlpine* (Ala.) 420.

§ 865. Laches in asserting a resulting trust held to give rise to a conclusive presumption that it was extinguished.—*Butt v. McAlpine* (Ala.) 420.

§ 365. If recitals in an assignment for creditors do not negative the creation of a resulting trust in the surplus or in the unconverted corpus, the law created an implied trust in the nature of a mere equity as to which the doctrine of laches would apply.—*Butt v. McAlpine* (Ala.) 420.

§ 365. Suit to enforce a resulting trust held barred by laches.—*Hughes v. Letcher* (Ala.) 914.

TUITION.

See Schools and School Districts, § 159.

ULTRA VIRES.

Effect of ultra vires acts and contracts of corporations in general, see Corporations, § 387. Effect of ultra vires acts and contracts of counties, see Counties, § 124.

UNCOMMUNICATED THREATS.

Admissibility of evidence in prosecution for homicide, see Homicide, § 190.

UNDERTAKINGS.

See Bail.

UNDERWRITERS.

See Insurance.

UNIFORMITY.

Constitutional requirement as to equality and uniformity of taxation, see Taxation, § 45.

UNITED STATES.

Constitutional guaranties as to privileges and immunities of citizens of the United States, see Constitutional Law, § 208. Public lands, see Public Lands, §§ 58, 61.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

UNREASONABLE SEARCHES AND SEIZURES.

See Searches and Seizures, § 7.

USURY.**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 32. The difference between the cash and credit price on a sale of goods may be put into the form of interest on a note given for the price without violating the usury law.—*Davidson v. Davis* (Fla.) 139.

§ 49. A note providing for interest on principal and overdue interest held not usurious.—*Merchants' & Planters' Bank v. Caston* (Miss.) 633.

VACANCY.

Power of insurance agent to issue vacancy permit, see Insurance, § 375.

VACATION.

Of particular acts, instruments, or proceedings.
See Execution, § 163.

Account of executor or administrator, see Executors and Administrators, § 509.

Dismissal of appeal, see Criminal Law, § 260.

Judgment after trial of issues in general, see Judgment, §§ 336, 337.

Judgment by default, see Judgment, § 143.

Sale of property of decedent, see Executors and Administrators, §§ 379, 382.

Sale under judgment, order, or decree of court in general, see Judicial Sales, § 39.

Verdict, see New Trial.

Proceedings during vacation of courts.

Appointment of receiver, see Receivers, § 5.

VALUATION.

Of property for purpose of taxation, see Taxation, § 348.

Of property replevied, see Replevin, § 72.

VALUE.

Limits of jurisdiction, see Appeal and Error, § 50; Justices of the Peace, § 44.

Of property as measure of damages for conversion, see Trover and Conversion, § 46.

Repetition of questions to witnesses, see Witnesses, § 245.

VARIANCE.

Between pleading and proof in civil actions, see Pleading, §§ 388, 390.

VENDOR AND PURCHASER.

Compensation of broker procuring conveyance, see Brokers, §§ 54-67.

Priorities between judgments and conveyances, see Judgment, §§ 787, 788.

Specific performance of contract, see Specific Performance.

Validity of sales as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Sales by or to particular classes of persons.

See Executors and Administrators, §§ 137, 148, 328-388; Receivers, §§ 134, 145.

Mortgagees or trustees under power in mortgage, see Mortgages, § 338.

Sales of particular species of, or estates or interests in, property.

See Homestead, §§ 119, 123, 167.

Land held adversely, see Champerty and Maintenance, § 7.

Mortgaged property, see Mortgages, §§ 338, 536, 544.

Personal property in general, see Sales.

Property of decedent, see Executors and Administrators, §§ 328-388.

Standing timber, see Logs and Logging, § 3.

Swamp lands, see Public Lands, § 61.

Sales on judicial or other proceedings.

See Execution, §§ 264-294.

By executors or administrators, see Executors and Administrators, §§ 328-388.

By receivers, see Receivers, §§ 134, 145.

Foreclosure of mortgages, see Mortgages, §§ 536, 544.

Tax sales, see Taxation, §§ 679-680.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 18. Where one cultivates a plantation with an option of buying at the end of the year, and voluntarily abandons the option, he cannot recover damages from the failure of the owner to make a title.—*Darragh v. Vicknair* (La.) 264.

§ 33. Fraud alone is, in equity, sufficient to avoid a sale of land.—*Shahan v. Brown* (Ala.) 737.

§ 33. In a suit to rescind a sale of land for misrepresentations by the vendor, where the representation was of a material fact which influenced the transaction it was of no consequence that it may have been made in good faith.—*Shahan v. Brown* (Ala.) 737.

§ 44. In a suit to rescind a sale of land, evidence held to sustain a decree for plaintiff.—*Shahan v. Brown* (Ala.) 737.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(B) Rescission by Vendor.**

Action against insane person, see Insane Persons, § 94.

§ 105. Where a sale is judicially dissolved for nonpayment of price, the property returns to the vendor free from all charges against the purchaser.—*Adler v. Adler* (La.) 608.

(C) Rescission by Purchaser.

§ 108. Misrepresentations of a material and controlling fact being charged, the solvency of the vendor is of no consequence as affecting the vendee's right of rescission.—*Shahan v. Brown* (Ala.) 737.

IV. PERFORMANCE OF CONTRACT.**(A) Title and Estate of Vendor.**

§ 128. Where it appears that parties had in view merely such a conveyance of land as would pass all the title which the vendor had, whether defective or not, that is all the purchaser can insist upon.—*Morgan v. Eaton* (Fla.) 305.

(D) Payment of Purchase Money.

§ 176. The right of action by a purchaser for shortage of land held a right to sue for a diminution of the price, under Civ. Code, art. 2494, and not for a supplement of area.—*Gladstone Realty Co. v. Currie* (La.) 237.

§ 176. A shortage in quantity of land sold held less than one-twentieth of quantity represented, defeating a recovery for diminution of the price, under Civ. Code, art. 2494.—*Gladstone Realty Co. v. Currie* (La.) 237.

V. RIGHTS AND LIABILITIES OF PARTIES.

Purchasers at execution sales, see Execution, §§ 264, 272.

Purchasers at sales of property of decedent, see Executors and Administrators, § 388.

Purchasers at sales on foreclosure of mortgages, see Mortgages, § 544.

Purchasers at tax sales, see Taxation, §§ 730, 734.

(C) Bona Fide Purchasers.

Mortgagees as bona fide purchasers, see Mortgages, § 154.

Of property of decedent at sale under order of court, see Executors and Administrators, § 388.

Of property sold on execution, see Execution, § 272.

§ 220. If a deed is void, a subsequent innocent purchaser is not protected; but, if it is merely voidable, he is protected.—Bardin v. Grace (Ala.) 425.

§ 231. Gen. St. 1906, § 2210, subsec. 2a, relating to mechanics' liens, construed as to operation against purchasers of the property.—Axtell v. Smedley & Rodgers Hardware Co. (Fla.) 710.

§ 233. Bona fide purchaser from a grantee under an authentic act purporting to be a sale with a right of redemption, where no exercise of the right of redemption is shown, will be protected against the apparent vendor.—Jolivet v. Chaves (La.) 99.

VENUE.

Of actions by or against corporations in general, see Corporations, § 503.

Of criminal prosecutions, see Criminal Law, § 107.

I. NATURE OR SUBJECT OF ACTION.

Place of contract, see Contracts, § 145.

§ 5. A suit to enforce specific performance of an agreement to convey land need not be brought in the county where the land lies.—Morgan v. Eaton (Fla.) 305.

§ 6. An action by a widow in community to recover expenses of the decedent paid by her as against the heir should be brought in the court of defendant's residence.—Succession of Bourdette (La.) 497.

VERDICT.

Aider by, see Pleading, § 433.

Contrary to law or evidence, ground for new trial, see New Trial, §§ 71, 76.

Receiving on holiday, see Holidays, § 5.

Review in civil cases, see Appeal and Error, §§ 704, 1001, 1005.

Review in criminal cases, see Criminal Law, § 1158.

Setting aside, see New Trial.

VERIFICATION.

Of pleading, see Equity, § 313.

VESSELS.

See Maritime Liens; Shipping.
Ferryboats, see Ferries.

VESTED REMAINDERS.

Construction of wills, see Wills, § 634.

VETERINARIANS.

See Physicians and Surgeons, § 15.

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See Municipal Corporations.

VOLUNTARY ASSIGNMENTS.

See Assignments for Benefit of Creditors.

VOTERS.

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WAITING ROOMS.

See Carriers, § 247.

WAIVER.

See Estoppel.

Errors waived in appellate court, see Appeal and Error, § 1079.

Of objections to particular acts, instruments, or proceedings.

See Indictment and Information, §§ 196, 202.

Default or delay in delivering goods sold, see Sales, § 176.

Insurance policies, see Insurance, §§ 375-388.

Notice and proof of loss under insurance policy, see Insurance, §§ 556, 558.

Pleadings, see Pleading, §§ 409, 423.

Of rights or remedies.

Challenge to jurors, see Jury, § 110.

Forfeiture of insurance policy, see Insurance, §§ 375-388.

Homestead rights, see Homestead, § 171.

Requirement of notice and proof of loss under insurance policy, see Insurance, §§ 556, 558.

To redeem from execution sale, see Execution, § 294.

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Precautions against injuries to servants, see Master and Servant, § 150.

WARRANT.

Preliminary warrant in criminal prosecution, see Criminal Law, §§ 217, 218.

WARRANTY.

By transferror of note, see Bills and Notes, § 324.

On sale of goods, see Sales, § 279.

WATERS AND WATER COURSES.

See Drains; Levees.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

Application of general statute of limitations to action for injuries from flowage, see Limitation of Actions, § 55.

Instructions ignoring evidence in action for injuries from flowage, see Trial, § 253.

§ 171. Defendant held liable for the flooding of plaintiff's land from filling in defendant's lowlands beside a stream.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

§ 171. The right in case of city and village lots to obstruct the flow of water onto low land from high land held not to apply to running streams, but only to drainage of surface water.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

§ 171. One overflowing lands of another by filling lowland beside a stream held liable though not owning the filled lands.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

§ 178. Statement of measure of damages for overflowing lands.—Sloss-Sheffield Steel & Iron Co. v. Mitchell (Ala.) 69.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 201. A waterworks contract with a consumer to furnish water at a specified price as long as she used the premises as a dwelling held not uncertain as to term.—Brown v. Birmingham Waterworks Co. (Ala.) 915.

§ 201. A flat water rate provided by a water company's franchise contract *held* not to authorize the extravagant use of water by the consumer.—*Brown v. Birmingham Waterworks Co.* (Ala.) 915.

§ 203. A contract by a municipal waterworks company to furnish water at less than the maximum rate *held* subject to the implied provision that the charge shall not be greater than the maximum provided nor greater than a reasonable charge.—*Brown v. Birmingham Waterworks Co.* (Ala.) 915.

§ 203. A waterworks contract with a consumer *held* based on a sufficient consideration.—*Brown v. Birmingham Waterworks Co.* (Ala.) 915.

§ 203. The Birmingham Waterworks Company under its franchise may charge a consumer less than the maximum rate, so long as the discrimination does not infringe on the rights of other consumers.—*Brown v. Birmingham Waterworks Co.* (Ala.) 915.

WAYS.

Private roads, see Private Roads.

Public ways, see Highways; Municipal Corporations, §§ 647-706.

WEAPONS.

Possession or use by person killed or assaulted, admissibility of evidence, see Homicide, § 193.

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Rights as to community property, see Husband and Wife, § 273.

Rights as to homestead, see Homestead, §§ 136, 150.

WIFE.

See Husband and Wife.

WILLS.

See Descent and Distribution; Executors and Administrators.

Charitable bequests and devises, see Charities. Validity, construction, and execution of trusts in general, see Trusts.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

Restrictions on creation of perpetuities, see Perpetuities.

II. TESTAMENTARY CAPACITY.

§ 55. Evidence *held* insufficient to show mental incapacity.—*Succession of Schmidt* (La.) 160.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 93. Whether a writing was intended as a will may be shown by parol evidence, alone or in connection with the writing.—*Prather v. Prather* (Miss.) 449.

(B) Form and Contents of Instruments.

§ 96. A letter *held* to constitute a will.—*Prather v. Prather* (Miss.) 449.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(M) Operation and Effect.

§ 420. Under Code 1852, § 1322, the recording of a will creating a trust is notice of its terms.—*Blakeney v. Du Bose* (Ala.) 746.

VI. CONSTRUCTION.

(A) General Rules.

§ 483. A will *held* to speak only from the death of testator, and must be construed as to that time.—*Blakeney v. Du Bose* (Ala.) 746.

(B) Designation of devisees and Legatees and Their Respective Shares.

§ 529. A will construed, and *held*, that certain beneficiaries share equally in testator's estate.—*Blakeney v. Du Bose* (Ala.) 746.

(D) Description of Property.

§ 561. A description of land in a will *held* absolutely void.—*Wilson v. Wilson* (Miss.) 353.

§ 578. Under Code 1852, §§ 1591, 1592, 1604 (Code 1907, §§ 6154, 6155, 6165), after-acquired property *held* to pass under testator's will.—*Blakeney v. Du Bose* (Ala.) 746.

§ 588. An express devise of all the real estate of testator to his grandchildren after the death of life tenants is not a devise to the grandchildren as residuary legatees.—*Blakeney v. Du Bose* (Ala.) 746.

(F) Vested or Contingent Estates and Interests.

§ 634. A will construed, and *held* to create a vested remainder in grandchildren of testator living at his death and a contingent remainder operating under Code 1852, § 1801, as an executory devise, in favor of grandchildren born after testator's death.—*Blakeney v. Du Bose* (Ala.) 746.

(H) Estates in Trust and Powers.

Creation, existence, and validity of trusts in general, see Trusts, §§ 17, 18.

Restrictions on creation of perpetuities, see Perpetuities.

§ 688. A will construed, and *held* that a trustee was not necessary to support the estates in remainder.—*Blakeney v. Du Bose* (Ala.) 746.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

Payment of legacies and distribution of estate, see Executors and Administrators, § 314.

(C) Advancements, Ademption, Satisfaction, and Lapse.

Advancements to heirs and distributees, see Descent and Distribution, § 109.

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Of electric light or power companies, see Electricity.

WITHDRAWAL.

Of particular counts by trial court, see Trial, § 145.

WITNESSES.

See Evidence; Perjury.

Competency as jurors, see Jury, § 83. Experts, see Criminal Law, § 478; Evidence, §§ 506, 539½, 545, 553, 558. Opinions, see Criminal Law, §§ 448-478; Evidence, §§ 471-558.

Proceedings for contempt in attempting to bribe witness, see Contempt, § 53.

Sufficiency of evidence as dependent on number of witnesses, see Evidence, § 584.

Testimony of accomplices, see Criminal Law, § 508.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

Absence of witness, ground for continuance, see Criminal Law, §§ 594, 597.

Fees as items of costs, see Costs, § 184.

§ 2. The exercise of the right to compulsory process for the attendance of witnesses is subject to legislative regulation that does not impair the right or deny its reasonable exercise for the benefit of accused.—*Moore v. State* (Fla.) 871.

§ 32. A certificate issued by the clerk of the circuit court to a witness *held* prima facie evidence, except where the circuit court retaxes the fees as costs.—*Terry v. Montgomery* (Ala.) 314.

II. COMPETENCY.

Of expert witnesses, see Evidence, §§ 539½, 545.

(A) Capacity and Qualifications in General.

§ 37. One who saw goods sold, and knew that they were sold, could testify to the sale, though he did not sell them himself.—*M. Weinstein & Sons v. Yielding Bros. & Co.* (Ala.) 591.

§ 37. In an action for uncompleted work in wiring a building for electricity, *held*, that there was no error in declining to exclude testimony of a witness as to work done because he was unable, without plan, to give details thereof.—*Baumhauer v. Mobile Electrical Supply Co.* (Ala.) 732.

§ 37. Competency of witness to testify to reputation of another determined.—*Hinson v. State* (Fla.) 194.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 150. Plaintiff *held* incompetent to testify to a transaction or communication between him and a member of a partnership of which defendant is the assignee, under Gen. St. 1906, § 1505.—*Hiller v. Walter Ray & Co.* (Fla.) 623.

III. EXAMINATION.

Of expert witnesses, see Evidence, §§ 553, 558. Review of rulings, see Appeal and Error, § 1048; Criminal Law, § 1170½.

(A) Taking Testimony in General.

§ 236. Asking witness as to his having been before the grand jury in the case on trial, to identify the occurrence as to which he was about to testify with that on which the indictment was based, *held* not error.—*Lollar v. State* (Ala.) 745.

§ 245. Where a witness testified that he had no knowledge of the value of dogs, the court did not err in sustaining an objection to questions as to whether the dog was worth \$5 or \$10.—*Louisville & N. R. Co. v. Zeigler* (Ala.) 599.

(B) Cross-Examination and Re-Examination.

Of expert witnesses, see Evidence, § 558.

§ 267. The scope of cross-examination to test the sincerity, memory, etc., of a witness, is largely within the discretion of the trial court.—*Crain v. State* (Ala.) 31; *Graves v. Same* (Ala.) 34.

§ 268. A witness as to reputation should not be cross-examined by the other party until he has been turned over at the close of his examination in chief.—*Hinson v. State* (Fla.) 194.

§ 277. In a prosecution for murder *held* not error to allow certain questions asked accused on cross-examination.—*Harrell v. State* (Ala.) 845.

§ 287. Where the defense on cross-examination showed part of a conversation, *held*, that the state on rebuttal could show the rest of it.—*Clemmons v. State* (Ala.) 467.

§ 287. In a prosecution for homicide, it was not error to permit the state to ask a witness on redirect examination why he went to defendant's wife to get a statement, nor in overruling an objection to the witness' answer, as showing the witness' interest in getting the statement.—*Lowman v. State* (Ala.) 638.

§ 287. In a homicide case, a question *held* proper on re-direct examination for the purpose of bringing out the whole of the conversation, a part of which accused brought out.—*Jackson v. State* (Ala.) 835.

§ 290. The court may in its discretion refuse to permit a redirect examination on a subject previously gone over and not called for by the cross-examination.—*Alabama Steel & Wire Co. v. Thompson* (Ala.) 75.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

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(A) In General.

§ 318. Testimony as to the reputation of a witness for truth and veracity is inadmissible, where no effort has been made to impeach him.—*Brewer v. Mullins* (Miss.) 257.

§ 324. Under Code 1907, §§ 4053, 4056, party securing a deposition is not obliged to offer it in evidence, and merely showing it to the witness to refresh his memory is not introducing it in evidence, so as to make deponent the party's witness and preclude impeaching him.—*Grasselli Chemical Co. v. Davis* (Ala.) 35.

§ 326. Defendant *held* to have right to impeach the state's impeaching witness who testified for the first time on rebuttal.—*State v. Kinchen* (La.) 185.

§ 331½. A certain question asked a witness *held* competent to discredit his testimony.—*Pace v. Louisville & N. R. Co.* (Ala.) 52.

(B) Character and Conduct of Witness.

§ 337. Proof that accused was intoxicated when he made statements ascribed to him by the evidence of the state was admissible as bearing on his credibility as a witness in his denial of the statements.—*Gallant v. State* (Ala.) 739.

§ 361. In a prosecution for the wrongful sale of spirituous liquors, *held* that, certain testimony being an attempt to impeach a witness, evidence of his good character could then be introduced.—*Tilley v. State* (Ala.) 732.

§ 362. On trial of two jointly indicted, the impeachment of one testifying affects his evidence as to both.—*Flowers v. State* (Fla.) 11.

(D) Inconsistent Statements by Witness.

§ 387. Cross-examination of plaintiff as to whether he had testified differently on a former occasion *held* proper.—*Grasselli Chemical Co. v. Davis* (Ala.) 35.

§ 388. Manner of impeaching a witness by proof of contradictory statements defined.—*McDaniel v. State* (Ala.) 400.

§ 389. The exclusion of a statement that a state's witness had said what she admitted saying *held* not erroneous.—*McDaniel v. State* (Ala.) 400.

§ 390. In a prosecution for assault with intent to murder, certain evidence *held* admissible to contradict a witness alleged to have been accused's co-conspirator.—*Harmon v. State* (Ala.) 348.

(E) Contradiction and Corroboration of Witness.

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